APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15008

D.C. Docket No. 2:10-cv-00143-WBH

[Filed August 31, 2017]

DONNIE CLEVELAND LANCE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 31, 2017)

Before WILLIAM PRYOR, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Donnie Cleveland Lance, a Georgia prisoner convicted and sentenced to death for the murders of his ex-wife and her boyfriend, appeals the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. Lance contends that we should vacate his sentence on the grounds that his trial counsel provided ineffective assistance when he failed to introduce mitigating mental health testimony and character evidence during the penalty phase of Lance's trial and when counsel failed to obtain funds to hire expert witnesses. We disagree. The Supreme Court of Georgia reasonably concluded that Lance did not suffer prejudice when counsel failed to introduce mental health testimony. Counsel also made a strategic decision not to introduce character evidence during the penalty phase that we decline to second guess. And the Supreme Court of Georgia reasonably concluded that counsel's failure to obtain funds to hire expert witnesses did not prejudice Lance. We affirm.

I. BACKGROUND

We divide this background in three parts. We first recount the facts of the crime. We then summarize the preparation for, and disposition of, Lance's trial, sentencing, and direct appeal. We conclude with a summary of the state and federal habeas proceedings.

A. The Crime

Donnie Cleveland Lance murdered his ex-wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr., in the early morning of November 9, 1997, at Butch Wood's home. *Lance v. State* ("*Lance I*"), 560 S.E.2d 663, 669–70 (Ga. 2002). The Supreme Court

of Georgia described the events surrounding the murders as follows:

> Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. Lance arrived at Butch Wood's home, kicked in the front door, shot Butch Wood on the front and the back of his body with a shotgun, and then beat Joy Lance to death by repeatedly striking her in the face with the butt of the shotgun, which broke into pieces during the attack. Joy Lance's face was rendered utterly unrecognizable. Later that morning, Lance told his friend, Joe Moore, that Joy Lance (whom Lance referred to in a derogatory manner) would not be coming to clean Lance's house that day; that Butch Wood's father could not "buy him out of Hell"; and that both Joy Lance and Butch Wood were dead. Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance bragged to the inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall."

Hall v. Lance ("*Lance II*"), 687 S.E.2d 809, 811 (Ga. 2010).

Lance had long abused Joy. *Id.* In the past, he had kidnapped her, and he had beaten "her with his fist, a belt, and a handgun." *Id.* He had strangled her, electrocuted "her with a car battery," and threatened "her with a flammable liquid, handguns, and a chainsaw." *Id.* "He had repeatedly threatened to kill

her himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood." *Id.* In 1993, Lance, accompanied by Joe Moore, "kicked in the door of Butch Wood's home . . . armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore." *Id.*

B. Trial, Conviction, Sentence, and Direct Appeal

Lance hired J. Richardson Brannon to represent him at trial. An experienced criminal attorney, Brannon had tried around 160 criminal cases to verdict before Lance hired him. Three paralegals and a crime-scene investigator named Andy Pennington assisted Brannon in his preparation for trial. Lance and his family initially paid Brannon $50,000 to represent him, but after the exhaustion of that initial sum, the court declared Lance indigent and retained Brannon as court-appointed counsel.

Brannon then filed a motion for funds to hire expert witnesses, which he amended three times. The original motion and the first two amendments, filed in late 1998, requested funds to hire experts and a private investigator but did not specify the kinds of experts needed, their names, the fees they charged, or any other information. At a pre-trial hearing, Brannon requested funds to hire an expert on jury selection, a private investigator, a DNA serologist, a forensic pathologist, a ballistics expert, a criminologist, and an expert on shoe print analysis. He requested the jury expert by name and gave the court information about the hourly expenses of the requested private investigator, DNA serologist, and the forensic pathologist. Brannon stated that, of all the experts he

requested, a forensic pathologist was "imperative" to establish "time of death" and "manner of death." A month after the hearing, Brannon filed a third amendment to the motion for funds to hire expert witnesses. This amendment proffered the names, credentials, and fees of the experts requested.

The trial court initially denied the request for funds to hire experts, but reversed course a month before trial and granted $4,000 to hire an investigator. Brannon used these funds to pay Pennington, a private investigator, and did not hire any other experts or present any other expert testimony during the guilt or penalty phases of the trial.

By contrast, the state introduced testimony from six expert witnesses at trial: Terry Cooper, an agent with the Georgia Bureau of Investigation, who testified about the crime scene and the shoe print he removed from the door at Butch Wood's home; David Cochran, the chief crime scene investigator for the Jackson County, Georgia, Sheriff's Department, who testified about investigating the crime; Charles Moss, a fingerprint expert who testified that he was unable to retrieve prints from the shotgun shell casings involved in the crime; Bernadette Davy, a firearms expert, who testified about the shotgun shell casings found at the scene and the kinds of wood used to manufacture the butts of shotguns; Larry Peterson, a microanalyst who testified about the shoeprint found on Butch Wood's door and other evidence found at the crime scene; and Frederick Hellman, an associate medical examiner for the Georgia Bureau of Investigation who testified about the causes of death of Joy Lance and Butch Wood.

Brannon extensively cross-examined each of these expert witnesses, except the fingerprint expert.

The defense theory of the case was innocence. Brannon attempted to establish an alibi defense based on the time of death and Lance's whereabouts on November 8–9. Lance's uncle testified that he was with Lance into the late evening of November 8 and then after midnight on November 9 until 5:00 a.m. Other witnesses corroborated this timeline and testified that Lance behaved normally immediately before and after the time when the murder occurred. Two children who were neighbors of Butch Wood also testified that they heard gunshots and a scream sometime after lunch on November 9, more than twelve hours later than when the crime allegedly occurred.

Pennington, the private investigator hired by Brannon, also testified as an expert crime scene technician. Pennington testified that the ballistics report from the crime scene suggested the possibility that the shooter used weapons in addition to the shotgun. He also testified that the absence of footprints on the stairs leading to the house was suspicious and that the lack of latent fingerprints on the shotgun shells suggested "[a] good burglar" committed the crime.

The jury found Lance guilty of the murders of Joy Lance and Butch Wood, of burglary, and of possession of a firearm during the commission of a crime. *Lance I*, 560 S.E.2d at 669. During the penalty phase of the trial, the state presented testimony from Joy Lance's and Butch Wood's relatives and from David Cochran, a crime scene investigator for the Georgia Bureau of Investigation. Brannon presented no mitigating

evidence during the penalty phase. The jury sentenced Lance to death for the murders. *Id.* at 670.

The Supreme Court of Georgia affirmed Lance's conviction and sentence on direct appeal. *Id.*at 670, 677–79. Lance argued that the trial court erred when it denied Lance's motion for funds to hire expert witnesses. *Id.* at 671. But the Supreme Court of Georgia ruled that "Lance's request for the contested funds was too unspecific, uncertain, and conclusory" to overturn his conviction. *Id.* Lance's conviction became final when the Supreme Court of the United States denied his petition for a writ of certiorari. *Lance v. Georgia*, 537 U.S. 1050 (2002).

C. State and Federal Habeas Proceedings

In May 2003, Lance filed a petition for a writ of habeas corpus in the Butts County Superior Court. The superior court held an evidentiary hearing, at which Lance presented evidence that he received ineffective assistance of counsel because Brannon failed to investigate or present evidence of Lance's mental impairments during the penalty phase of Lance's trial. The Supreme Court of Georgia described the evidence on that issue as follows:

> Lance presented testimony in the habeas court from three experts in neuropsychology. Thomas Hyde, M.D., Ph.D., testified that he administered over 100 neurological tests to Lance. Yet, as his testimony establishes, only one of those tests indicated brain dysfunction. Dr. Hyde concluded that Lance had "significant damage to the frontal and temporal lobes" resulting from multiple blows to the head and

from alcohol abuse. He testified that persons with frontal lobe dysfunction "often decompensate under periods of extreme emotional distress." He also testified that such persons are unlikely to be able to plan and commit murder without leaving evidence but, instead, are more often "involved in crimes of impulse." Dr. Hyde concluded that Lance's mental state might have had an "impact" on Lance's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," but he also acknowledged that other "reasonable" neurologists might disagree with his conclusions in Lance's case. The second of Lance's three experts in neuropsychology, Ricardo Weinstein, Ph.D., commented generally on Lance's "psychosocial history" as follows:

> [I]t's a relatively unusual case in terms of his upbringing, fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family.

However, Dr. Weinstein concluded that Lance, as a result of multiple head injuries, the exposure to toxic fumes, the ingestion of gasoline, and a history of "heavy alcohol use starting at the age of 19," suffered from "generalized and diffuse brain dysfunction" and "clear compromises in the frontal lobe functions." Dr. Weinstein concluded that Lance was not insane or mentally retarded, that he

> understood "that certain behaviors are unacceptable," but that his "brain dysfunction . . . negatively impact[ed] his ability to conform his conduct to the requirements of the law." In particular, Dr. Weinstein concluded that Lance would have difficulty in planning and in impulse control and that the combined effects of Lance's brain dysfunction and his alcohol intoxication on the night of the murders would have rendered "his capacity to think in a logical, well-directed manner . . . equivalent or similar to an individual that suffers from mental retardation." Finally, Lance presented testimony from a third expert, David Pickar, M.D., who concluded that Lance, as a result of multiple head traumas and alcohol abuse, suffered from "impaired intellectual and frontal lobe function" that resulted in impairments of his ability to plan and to control his impulses.

Lance II, 687 S.E.2d at 814–15 (alterations in original).

The state presented the testimony of Dr. Daniel A. Martell, a neuropsychologist, who testified that Lance had an IQ of 79 and suffered from dementia:

> [Martell] concluded that Lance functioned within "a range that's higher than mild mental retardation but lower than average." Dr. Martell added, however, that he had administered an additional test to determine what Lance's IQ had been before any possible brain injuries and that the test showed Lance's earlier IQ to fall within the "exact same ranges" as found by the various experts who testified in the habeas court. Dr. Martell testified that some of Lance's

test results indicated frontal lobe dysfunction, but Dr. Martell further testified as follows:

> His weaknesses with regard to frontal lobe have to do with a tendency to perseverate or repeat himself and mild to moderate impairment in problem-solving abilities in certain contexts like adapting to changing problems but not others like planning an effective strategy for solving a problem. However, his ability to inhibit unwanted or impulsive behaviors appears to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses.

Dr. Martell concluded that Lance's frontal lobe dysfunction would not have prevented him from planning the murders and would not have made him so impulsive that he could not prevent himself from committing the murders. As we noted above, Dr. Martell also stated that Lance's symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems. Dr. Martell summarized his opinion by stating, "In my opinion, [Lance's diagnosis is] not significant to the crime."

Lance II, 687 S.E.2d at 815 (second alteration in original).

In addition, Lance presented evidence that Brannon rendered ineffective assistance when Brannon failed to

introduce mitigating character evidence during the penalty phase of the trial. Friends and family testified that Lance was a loving father, that his children loved him, and that he had a good character. But Brannon testified that he chose not to introduce this evidence because to do so would have allowed the state to cross-examine the character witnesses about aggravating character evidence.

Lance also presented evidence that Brannon rendered ineffective assistance during the guilt phase of the trial because Brannon's request for funds to hire expert witnesses was deficient and the failure to present this expert testimony prejudiced Lance. Brannon explained that experts "were needed in this case, particularly since it's a death penalty case." But he also testified that his motions for funds to hire expert witnesses were sufficiently detailed for the trial court to grant them. Although Lance's habeas counsel acknowledged that Brannon "made a request repeatedly for expert assistance in the case and pointed out the specific categories that [Brannon] thought experts were critical to," he argued that these motions were "vague and entirely unspecific."

The superior court granted Lance's petition in part and vacated his death sentence on the ground that Lance had received ineffective assistance of counsel during the penalty phase of his trial. The superior court found that Brannon's failure to investigate and introduce evidence of Lance's mental health history was unreasonable. The superior court also found that, had Brannon introduced evidence of Lance's mental health history, "such an investigation . . . would have

provided significant mitigating evidence for the jury to consider."

The Supreme Court of Georgia reversed and reinstated Lance's death sentence. *Lance II*, 687 S.E.2d at 811–12. Although the Supreme Court of Georgia agreed with the superior court that Brannon's failure to investigate Lance's mental health history was deficient performance, it disagreed that Lance suffered prejudice. *Id.* at 812. The Supreme Court of Georgia explained that even if Brannon had investigated Lance's mental health background, Brannon would not have sought "a psychological evaluation of Lance," because such an investigation would have revealed only mild mental impairment. *Id.* at 813. In addition, the court reasoned that "the trial court [would not] have abused its discretion[] if it had been asked by trial counsel for funds for a psychological evaluation of Lance, [but] determin[ed] that this information failed to show that the assistance of a psychologist was critical to Lance's defense." *Id.* (citation omitted).

In the alternative, the Supreme Court of Georgia held that even if Lance had presented the expert testimony that he presented during his habeas proceedings, there was not a reasonable probability that the testimony would have changed the outcome of the trial. The court explained that the evidence established only mild mental impairments, and "[a]gainst this somewhat mitigating evidence, the jury would have weighed Lance's long history of horrific abuse against Joy Lance," the horrific nature of the crime, and evidence about Lance's statements and demeanor after the crime, such as his declaration that Butch Wood was in "Hell" and "his boast to an inmate

that 'he hit Joy so hard that one of her eyeballs stuck to the wall.'" *Id.* at 815–16.

The Supreme Court of Georgia also denied Lance's claim that his trial counsel rendered ineffective assistance in his application for funds for forensic experts. *Id.* at 816. The court explained that his trial counsel was not deficient even though the court had described the motions on direct appeal as conclusory. *Id.* In the alternative, the court ruled that Brannon's failure to request funds for several expert witnesses did not prejudice Lance. *Id.* at 817. Lance argued that his trial counsel should have obtained three additional experts: (1) "an expert to testify that the repeated blows to Joy Lance's face with the butt of the shotgun likely would have resulted in the perpetrator being spattered with blood and brain matter"; (2) "an expert to testify that there were no shoe prints at the crime scene other than the one on the front door"; and (3) "an expert in polygraph science to testify that the results of the polygraph examination taken by Joe Moore were 'inconclusive.'" *Id.* (footnote omitted). But according to the Supreme Court of Georgia, the absence of this testimony did not prejudice Lance. Testimony regarding "spattered . . . blood and brain matter" was unnecessary because it would "have been obvious to the jury" and consistent with the evidence that showed Lance "had initially walked away from the crime scene rather than driving away in his automobile." *Id.* The absence of expert testimony about shoe prints "was not a matter that was subject to varying scientific opinions." *Id.* And, the absence of expert testimony regarding Joe Moore's polygraph did not prejudice Lance because "Moore's volunteered [polygraph]

testimony was ruled inadmissible, and the jury was instructed to disregard it." *Id.* (citation omitted).

Lance then filed a federal petition for a writ of habeas corpus, which the district court denied. The district court granted Lance a certificate of appealability about whether his trial counsel was ineffective in "preparing for and presenting [Lance's] case in mitigation during the penalty phase of his trial." Lance appealed and filed a motion to expand his certificate. We granted it on one issue: whether Brannon "rendered ineffective assistance when he failed to properly request funds for an investigator and expert witnesses."

II. STANDARD OF REVIEW

"We review *de novo* the denial of a petition for a writ of habeas corpus." *Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009, 1016 (11th Cir. 2015). The Antiterrorism and Effective Death Penalty Act of 1996 imposes a "highly deferential standard for evaluating state-court rulings" that "demands that state-court decisions be given the benefit of the doubt." *Rutherford v. Crosby*, 385 F.3d 1300, 1306–07 (11th Cir. 2004) (citations omitted). We will not disturb the decision of the state court unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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); *accord McClain v. Hall*, 552 F.3d 1245, 1250 (11th Cir. 2008).

III. DISCUSSION

Lance argues that he is entitled to relief because Brannon rendered ineffective assistance of counsel and the decision of the Supreme Court of Georgia that Brannon did not do so was unreasonable, but we disagree. "It is by now hornbook law that to succeed on a Sixth Amendment ineffective-assistance claim, a petitioner must show that: (1) 'counsel's representation fell below an objective standard of reasonableness,' and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). "To establish deficient performance, the petitioner must show that his attorney 'made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (alteration adopted) (citation omitted). "On the issue of prejudice, . . . a reasonable probability of a different result means 'a probability sufficient to undermine confidence in the outcome.'" *Id.* (citation omitted). "When a petitioner challenges his conviction, 'the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (citation omitted). "When a capital petitioner challenges his death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Id.* (citation omitted). "The standards created by *Strickland* and [section] 2254(d) are both highly deferential, and when the two apply in

tandem, review is doubly so." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations and internal quotation marks omitted).

We divide our discussion in three parts. First, we explain that the Supreme Court of Georgia reasonably determined that Lance did not suffer prejudice when Brannon failed to present mental health testimony in the penalty phase. Second, we explain that Brannon made a strategic decision not to introduce mitigating character evidence. Third, we explain that Brannon's failure to obtain funds to hire expert witnesses was not prejudicial.

A. Inadequate Mental Health Investigation and Testimony

Although the parties dispute whether the Supreme Court of Georgia reasonably determined that Brannon's failure to investigate and present expert mental health testimony during the penalty phase of the trial was deficient performance, we need not decide this question. We need only decide that the determination of the Supreme Court of Georgia that this deficiency did not affect the outcome of the case was reasonable.

Lance argues that, had Brannon performed a reasonable investigation, Brannon would have discovered "red flags" in Lance's background that would have led him to introduce mitigating evidence during the penalty phase of the trial. According to Lance, "a basic investigation would have revealed" that Lance was shot in the head, that Lance "had been hospitalized for mental health treatment" for depression, and that Lance abused alcohol. Lance argues that discovery of this evidence "necessarily

would have led [Brannon] to [request] a comprehensive mental health investigation." Such an investigation would have led in turn to the introduction of the expert testimony of doctors, such as Weinstein, Pickar, and Hyde, that Lance suffered from "borderline retardation," dementia, and frontal lobe dysfunction, which impaired Lance's ability to control his behavior. Lance contends that, in the light of this evidence, it was unreasonable for the Supreme Court of Georgia to conclude that Lance did not suffer prejudice.

The Supreme Court of Georgia made two alternative holdings on prejudice, and we conclude that its second holding was not unreasonable. The Supreme Court of Georgia held that even if Brannon had introduced the mental health testimony presented at the state habeas hearing, that evidence would not have changed the outcome of the case. *Lance II*, 687 S.E.2d at 815. The court explained that the evidence presented on habeas review "showed merely that Lance functioned, when sober, in the lower range of normal intelligence"; had memory issues; suffered from mild depression; was "somewhat impulsive"; and had some trouble problem solving. *Id.*

This conclusion was not unreasonable because much of the evidence that Lance introduced in the superior court of his mental impairments was not necessarily mitigating. We have often acknowledged that juries may infer that a defendant's alcohol abuse or impulsive behavior that is triggered by organic brain damage is aggravating. *See Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1329 (11th Cir. 2013) (en banc) ("We have held too that evidence of substance abuse 'can do as much or more harm than good in the eyes of the jury.'" (citation

omitted)); *Rhode v. Hall*, 582 F.3d 1273, 1285–86 (11th Cir. 2009) ("Counsel reasonably believed that the jury would see Rhode's impulsive behavior, which more than one expert believed was triggered by his organic brain damage, as aggravating."). And although Lance insists that the Supreme Court of Georgia erred because it "*never even mentioned the word 'dementia'* in its decision," the Georgia Supreme Court did acknowledge "new evidence of subtle neurological impairments." *Lance II*, 687 S.E.2d at 816. This characterization of the evidence was not objectively unreasonable.

Indeed, "[o]ur analysis of the prejudice prong . . . must also take into account the aggravating circumstance's associated with [Lance]'s case . . . ." *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998). "At the end of the day, we are required to 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Boyd v. Allen*, 592 F.3d 1274, 1301 (11th Cir. 2010) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). In *Boyd*, for example, we explained that although trial counsel's investigation overlooked mitigating evidence of childhood abuse that "undeniably would have been relevant to Boyd's mitigation case," we determined "that the evidence of abuse would not ultimately have affected weighing the aggravators and the mitigators." *Id*. at 1299. The petitioner in *Boyd* had participated in a gruesome double murder that culminated in Boyd and his accomplice beating and shooting the victims. *Id.* at 1279–81. Boyd later "bragged about the killings and about how cold blooded he was." *Id*. at 1284. In the light of these circumstances, "we conclude[d] that the totality of mitigating evidence . . . pales when compared

to the brutal nature and extent of the aggravating evidence." *Id*. at 1302. As in *Boyd*, the aggravating factors of Lance's crime are substantial. He had a long history of abusing Joy Lance, he beat her during the crime until her face was "utterly unrecognizable," he made derogatory statements about her and Butch Wood, and Lance showed little remorse after the crime. *Lance II*, 687 S.E.2d at 811. And Lance's new mitigating evidence fails to convince us that the Georgia Supreme Court unreasonably determined that Lance was not prejudiced by his defense counsel's performance.

Lance urges us to follow a trio of decisions—*Rompilla v. Beard*, 545 U.S. 374 (2005), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 558 U.S. 30 (2009)—but each decision involved undiscovered evidence that is substantially more mitigating than the evidence Lance introduced on state habeas review. Had trial counsel in *Rompilla* performed an adequate investigation, he would have discovered that the defendant was raised in a "slum environment," suffered from schizophrenia, and had a third-grade level of cognition. *Rompilla*, 545 U.S. at 390–91. Moreover, the Supreme Court was not bound by the same deferential standard of review that we are. *Id.* at 390 (conducting a *de novo* review). Nor is the mitigating evidence here like the evidence uncovered in *Williams*. Unlike the evidence that Lance argues Brannon would have uncovered, had Williams' trial counsel performed an adequate investigation, he "would have uncovered extensive records graphically describing Williams' nightmarish childhood." *Williams*, 529 U.S. at 395. And in *Porter*, an adequate investigation would have revealed the defendant's

heroic military service, "his struggles to regain normality upon his return from war," a childhood of abuse, and a brain abnormality. *Porter*, 558 U.S. at 41.

Lance erroneously contends that the Supreme Court of Georgia applied an incorrect prejudice standard, because, according to Lance, it asked "whether the sentencing jury 'might' have considered the mitigating evidence and nonetheless imposed the death penalty," when the correct inquiry is "whether the mitigating evidence might have caused the jury to impose a life sentence in lieu of the death penalty." But this latter standard *was* the standard that the Supreme Court of Georgia applied; it asked whether, "in reasonable probability [the mitigating evidence would] have changed the outcome of the sentencing phase if it had been presented at Lance's trial." *Lance II*, 687 S.E.2d at 816.

Lance also argues that the Supreme Court of Georgia improperly "brushed aside" the factual findings of the superior court, but we disagree. The Supreme Court of Georgia accepted the factual findings of the superior court, but determined the legal question of prejudice *de novo*, *id.* at 812, 815, which Georgia law requires. *Humphrey v. Morrow*, 717 S.E.2d 168, 172 (Ga. 2011). The Supreme Court of Georgia reasonably concluded that Lance did not suffer prejudice when Brannon failed to introduce mental health testimony.

B. Mitigating Character Evidence

Lance next argues that Brannon rendered ineffective assistance when Brannon failed to introduce mitigating character evidence during the penalty phase of the trial. Although this claim appears to be

procedurally defaulted because the Supreme Court of Georgia held that it was abandoned, *Lance II*, 687 S.E.2d at 819, neither party addresses this preliminary question, so we deny Lance's claim on its merits. *Valle v. Sec'y for Dep't of Corr.*, 459 F.3d 1206, 1213 (11th Cir. 2006) ("Here, it is unnecessary to address the issue of the procedural bar, because even assuming the claim is preserved, Valle is not entitled to habeas relief . . . ."). Lance argues that, had Brannon investigated Lance's background, Brannon would have introduced character evidence that painted Lance as a "quiet, peaceful man," who was "normally a kind, dependable, and compassionate person." Brannon "also could have identified witnesses to testify that [Lance] loved his son and daughter dearly, and they loved him in return." Lance argues that Brannon's failure to do so constituted ineffective assistance. We disagree.

The decision not to introduce mitigating character evidence was a reasonable strategic decision. Brannon testified that he chose not to introduce mitigating character evidence because it would have opened the door to the introduction of aggravating character evidence. We have repeatedly held that this kind of decision—to call or not call certain witnesses—is the "epitome of a strategic decision . . . that we will seldom, if ever, second guess," *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995); *accord Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016); *Conklin v. Schofield*, 366 F.3d 1191, 1204 (11th Cir. 2004), and we decline to do so here.

C. Motion to Obtain Funds for Expert Witnesses

Lance argues that Brannon rendered ineffective assistance because the motions for funds to hire expert

witness fell below the standard set by Georgia law and that this deficiency caused Lance to suffer prejudice, but we disagree. Although the Supreme Court of Georgia held that the motions for funds were not deficient, we consider only its holding that the motions did not cause prejudice.

Lance argues that, had Brannon obtained funds to hire expert witnesses, he would have presented the testimony of a forensic pathologist, a crime scene expert, a polygraph expert, and a fingerprint expert. He contends that there is a reasonable probability that this additional testimony would have changed the outcome of the case. A forensic pathologist, according to Lance, would have "uncovered . . .the lack of physical evidence" in the case, testified to inconsistencies in Agent Cooper's testimony on the times of death, and explained that it could have been "'virtually impossible for the person administering the blows [to Joy Lance] to escape from the scene with little or no blood on her/him.'" A crime scene expert, according to Lance, would have testified that the Jackson County Sheriff's Office "failed to look for footprints, tire marks, or other evidence on the ground around Wood's home." A polygraph expert, according to Lance, would have discredited the testimony of Joe Moore, who took a polygraph test and implicated Lance in the murders. And a fingerprint expert, according to Lance, would "have testified that [Lance's] fingerprints were never found in or around the crime scene."

The Supreme Court of Georgia held that this additional testimony would not have changed the outcome of the trial. *Lance II*, 687 S.E.2d at 816–17.The court explained "there is, even now, no

substantial dispute among the experts regarding the time of death but, instead, that there is merely a dispute over the manner in which the time of death was established." *Id.* at 816. The court reasoned that the lack of blood spatter would "have been obvious to the jury," and it was also "consistent with Lance having disposed of any bloody clothes at the same time he obviously disposed of his distinctive shoes." *Id.* at 817. In addition, "the absence of shoe prints was not a matter that was subject to varying scientific opinions." *Id.* A polygraph expert was unnecessary, according to the Supreme Court of Georgia, because "Moore's volunteered testimony was ruled inadmissible, and the jury was instructed to disregard it." *Id.* (citation omitted). Finally, the court explained that the lack of fingerprint evidence was a "matter of common sense," not varying scientific opinions. *Id.*

The decision of the Supreme Court of Georgia was not an unreasonable application of federal law. The court weighed the new evidence presented by Lance during state habeas proceedings and concluded that the new evidence would not have changed the outcome of Lance's trial. *Lance II*, 687 S.E.2d at 816–17. This analysis is the analysis *Strickland* commands. The state habeas court compared the "totality of the evidence before the . . . jury" with the new evidence presented by Lance and concluded that the new evidence had "an isolated, trivial effect" on the whole "evidentiary picture." *Strickland*, 466 U.S. at 695. There was little testimony introduced that went beyond ruminations about common sense facts, and no testimony that fundamentally undermined the state's case. As the district court correctly explained, Lance's claim amounts to a "quibble[]" with the conclusion of

the Supreme Court of Georgia, not that the conclusion was truly unreasonable. None of the evidence presented by Lance would have had a "pervasive effect on the inferences" drawn by the jury. *Strickland*, 466 U.S. at 695–96.

IV. CONCLUSION

We **AFFIRM** the denial of Lance's petition for a writ of habeas corpus.

MARTIN, Circuit Judge, concurring in the judgment:

Counsel's performance at the penalty phase of Donnie Lance's capital murder trial was unquestionably deficient. Trial counsel conducted no investigation into Mr. Lance's background or mental health. And at trial, counsel offered nothing in mitigation. As a result, the jurors that decided whether Mr. Lance should live or die never learned any facts that gave them a reason not to sentence him to death. The jury never heard that Mr. Lance had suffered from repeated head trauma, including the time he was shot in the head, and was braindamaged as a result. Neither did the jury learn of his dementia or his borderline intellectual functioning. Because the jury did not know of Mr. Lance's mental impairments, it could not "accurately gauge his moral culpability." Porter v. McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 454 (2009). Had the jury heard the mitigating evidence uncovered during postconviction proceedings, there is, in my view, a "reasonable probability that at least one juror would have struck a different balance" between the aggravating and mitigating factors. Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543 (2003).

Our death penalty jurisprudence is premised on the idea that only those most deserving should receive the ultimate punishment. See Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991 (1976). That being the case, the "primary purpose" of the penalty phase of a capital trial is to ensure that the sentence is individualized "by focusing on the particularized characteristics of the defendant." Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002) (quotation omitted and alteration adopted). This process doesn't work,

however, when counsel fails to perform a constitutionally adequate mitigation investigation, thereby denying the defendant the opportunity to make the case that he should live. I respectfully disagree with the Georgia Supreme Court's conclusion that Mr. Lance failed to show prejudice here. The habeas court disagreed with this conclusion as well, and so found that Mr. Lance was entitled to relief on his ineffective assistance claim and vacated his death sentences.

However, it is not the job of this Court to decide the merits of Mr. Lance's ineffective assistance claim in the first instance. Rather, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, allows a federal court to grant relief to a state prisoner challenging his conviction or sentence only if the state court's decision involves an unreasonable application of the law or is based on an unreasonable determination of the facts. Id. § 2254(d). Despite my belief that the Georgia Supreme Court got this wrong, I acknowledge that fairminded judges can disagree. See Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." (quotation omitted)). For that reason, I concur with the majority's holding that Mr. Lance is not entitled to federal habeas relief on his claims.

APPENDIX B

AO 72A
(Rev.8/82)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

CIVIL ACTION NO. 2:10-CV-0143-WBH

**DEATH PENALTY
HABEAS CORPUS
28 U.S.C. § 2254**

[Filed December 22, 2015]

DONNIE CLEVELAND LANCE,
Petitioner,

v.

STEPHEN UPTON,
Respondent.

ORDER

Petitioner, a prisoner currently under a sentence of death by the State of Georgia, has pending before this Court a habeas corpus action brought pursuant to 28 U.S.C. § 2254. Petitioner and Respondent have filed their final briefs, and the matter is now ripe for consideration of Petitioner's claims.

I. Background

On June 23, 1999, Petitioner was convicted in Jackson County Superior Court of murdering his wife Sabrina "Joy" Lance and Dwight "Butch" Wood, Jr., and of burglary and possession of a firearm during the commission of a crime. Petitioner suspected that Joy was having an affair with Butch. On November 9, 1997, he went to Butch's home armed with a shotgun suspecting that he would find them together. In affirming Petitioner's convictions and sentences, the Georgia Supreme Court described the evidence presented at the guilt phase of Petitioner's trial as follows:

> The bodies of the victims were discovered in Butch Wood's home on November 9, 1997. Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 1/2 EE Sears "Diehard" work shoes. Joy's father testified he told [Petitioner] Joy was not at home when [Petitioner] had telephoned him looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw [Petitioner]'s car leave [Petitioner]'s driveway near midnight. When questioned by an investigating officer, [Petitioner] denied owning Diehard work shoes; however, a search of [Petitioner]'s shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's

door, testimony by Sears personnel showed that [Petitioner] had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of [Petitioner]'s shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in [Petitioner]'s shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited [Petitioner] at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, [Petitioner] told Moore that "the bitch" would not be coming to clean his house that day. [Petitioner] stated regarding Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." [Petitioner] also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for [Petitioner], but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of [Petitioner]'s jail mates who stated [Petitioner] had discussed his commission of the murders.

The State also presented evidence that [Petitioner] had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the

> firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that [Petitioner] had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that [Petitioner] had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that [Petitioner] once inquired how much it would cost to "do away with" Joy and Butch.
>
> Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and [Petitioner] in 1993. The invasion was prompted in part by [Petitioner]'s belief that Butch was romantically involved with Joy. In the 1993 incident, [Petitioner] kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.

Lance v. State, 560 S.E.2d 663, 670 (Ga. 2002).

After Petitioner's appeal, the United States Supreme Court denied his petition for a writ of certiorari, Lance v. Georgia, 537 U.S. 1050 (2002), and his petition for rehearing, Lance v. Georgia, 537 U.S. 1179 (2003). Petitioner filed a petition for a writ of habeas corpus in Butts County Superior Court, which court granted relief regarding Petitioner's sentence only on April 28, 2009. That court concluded that Petitioner had received ineffective assistance of counsel during the penalty phase of the trial because counsel failed to investigate Petitioner's background and mental health and present a mitigation case. The Georgia Supreme Court, however, reversed and

reinstated Petitioner's death sentence based on reasoning that is discussed below. Hall v. Lance, 687 S.E.2d 809 (Ga. 2010). Petitioner then instituted the instant action.

In the order of November 21, 2013, [Doc. 33], this Court denied relief as to Petitioner's Claims 21, 22, 23, and 25 (as enumerated in that order) because they failed to state a cognizable claim for relief under § 2254. This Court further denied relief as to Petitioner's Claims 5, 6a, a portion of 6c (related to Venireperson Queen), 7a, 7c, 11, 13, a portion of 14 (related to the peremptory strikes against female jurors), 15, 19, portion of 23 (related to the arbitrariness of the imposition of the death penalty in Georgia), and 26 because those claims are procedurally defaulted before this Court and Petitioner did not establish cause and prejudice to overcome the default.

Also, in the same order, this Court instructed Petitioner that his final brief must contain all claims, issues and questions that he wants to raise, and that if a claim is not in the final brief, this Court will not consider it. [Id. at 20]. Petitioner did not discuss the following claims in his brief: 2, 3,[1] the surviving

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[1] Regarding Petitioner's Claim 2, his assertion that the trial court erred in refusing to appoint co-counsel, Petitioner addressed that claim only in his introductory discussion, and he states that he raised the lack of co-counsel as an example and cause of ineffective assistance.

Also, according to Petitioner, he never intended to raise what this Court called Claim 3 as a separate claim. Rather, Petitioner intended that the claim, which this Court read as asserting error based on the trial court's refusal to provide sufficient funds for

portions of 6c, 7a and 7c-e,[2] and the surviving portions of 14. Accordingly, this Court deems Petitioner to have abandoned those claims.

II. Discussion and Analysis of Petitioner's Remaining Claims

A. Habeas Corpus Standard of Review

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This power is limited, however, because § 2254(d) mandates deference to claims that have been "adjudicated on the merits in State court proceedings." Under § 2254(d), a habeas corpus application

> shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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experts and an investigator, be a part of his Claim 1a, relating to trial counsel's failure to obtain funds to hire experts.

[2] Regarding Claims 7d and 7e, those claims mirror Petitioner's Claim 9.

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential" demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (citing Visciotti, 537 U.S. at 25. Petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 102-03. In Pinholster, the Supreme Court further noted

> that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

Id.; see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (State court decisions are measured against Supreme Court precedent at "the time the state court [rendered] its decision.").

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406 (2000). If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). An application of federal law is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington, 562 U.S. at 102 (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015).

This Court's review of Petitioner's claims is further limited under § 2254(e)(1) by a presumption of correctness that applies to the factual findings made by state trial and appellate courts. Petitioner may rebut this presumption only by presenting clear and convincing evidence to the contrary.

B. Discussion of Petitioner's Claims

Claim 1a: Petitioner has Failed to Establish that Trial Counsel was Ineffective for Failing to Obtain Funds to Hire Expert Witnesses

In his Claim 1, Petitioner asserts that he was deprived of his right to the effective assistance of trial counsel. The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Furthermore, "[s]trategic decisions will amount to ineffective assistance only if so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987).

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must

show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In his Claim 1a, Petitioner claims that his trial counsel was ineffective in failing to properly request funds for expert witnesses. At his trial, Petitioner was represented by J. Richardson Brannon. Brannon was initially retained, but after Petitioner's family ran out of funds to pay him, he was appointed by the court. After his appointment, Brannon sought to have co-counsel appointed, but the trial court refused the request. The trial court also denied Petitioner's motions to provide funds for experts who could counter the State's evidence regarding the boot print on Butch Jones' door, the time of victims' deaths, and the evidence regarding the shotgun casings. The trial court further refused to provide funds for a psychologist. A month before the trial, the judge did provide $4,000.00 for an investigator.

The trial court held that it denied Petitioner's motions for funds to hire experts because those motions were deficient in that they lacked the detail necessary for the court to assess the need for expert assistance. Petitioner asserts that expert testimony was crucial to his defense and that his trial counsel was constitutionally ineffective in failing to properly move for funds to pay those experts.

Petitioner's current experts have provided testimony that he claims would have made a difference at trial. Petitioner's forensic pathology expert testified that the state's forensic witness made mistakes and

was inconsistent in his testimony regarding the time of death. Petitioner's forensic expert also points out that the killer, in severely beating Joy Lance, would have gotten a significant amount of blood spatter on him, but investigators did not find bloody clothing in their search of Petitioner's car, shop and home.

Another of Petitioner's experts testified that (1) while the state highlighted the footprint on the front door of Butch Wood's home, there was no evidence of footprints or tire markings around the home, despite the fact that the moist ground should have shown such markings, (2) there is no way to determine when the footprint on the door was made, and (3) the crime scene indicated that there could have been more than one perpetrator.

Petitioner additionally contends that a polygraph expert could have provided important testimony. Following the murders, Joe Moore told investigators that Petitioner had made incriminating statements. The investigators gave Moore a polygraph test, but GBI records indicate that Moore had smoked marijuana, taken Valium and consumed beer in the twenty-four hours preceding the test. A polygraph expert could have testified that Moore's consumption of mind-altering substances prior to taking the test seriously degraded the test's reliability. However, this Court notes that testimony regarding the polygraph test had to be excluded by the trial judge, and, after Moore mentioned having taken a polygraph test during his trial testimony, the judge told the jury to disregard it.

Petitioner also contends that a fingerprint expert was necessary. According to Petitioner, "[s]uch an expert could have testified to the fact that Petitioner's

fingerprints were never found in or around the crime scene."

In his direct appeal. Petitioner claimed that the trial court erred in failing to provide funds for expert witnesses. In affirming Petitioner's convictions and sentences, the Georgia Supreme Court concluded that Petitioner's "request for the contested funds was too unspecific, uncertain, and conclusory to support a finding that the trial court abused its discretion in concluding that the requested funds were not necessary to a fair trial." Lance, 560 S.E.2d at 671. In affirming the state habeas corpus trial court's ruling on this claim, the Georgia Supreme Court changed its mind. After correctly identifying the Strickland standard discussed above, the court stated as follows:

> On direct appeal, this Court rejected a claim that the trial court had abused its discretion in denying [Petitioner]'s request for additional funds for expert assistance, concluding that "[Petitioner]'s request for the contested funds [had been] too unspecific, uncertain, and conclusory" to require the granting of additional funds. Although this Court's comments, on the surface, might suggest that trial counsel necessarily performed deficiently in making his request, upon closer examination we conclude that he did not. Instead, we conclude that trial counsel's request for funds appeared weak simply because there was no compelling reason for those funds to be granted.
>
> [Petitioner] complains that trial counsel failed to obtain expert assistance in order to show the time of the victims' deaths. Our review of the

record reveals that there is, even now, no substantial dispute among the experts regarding the time of death but, instead, that there is merely a dispute over the manner in which the time of death was established. [Petitioner] argues that his trial counsel should have obtained an expert to testify that the repeated blows to Joy Lance's face with the butt of the shotgun likely would have resulted in the perpetrator being spattered with blood and brain matter, which would then have likely left stains in any automobile used immediately afterward. However, not only would this fact have been obvious to the jury, it furthermore would have been consistent with [Petitioner] having disposed of any bloody clothes at the same time he obviously disposed of his distinctive shoes and would have been consistent with the testimony from a State witness indicating that [Petitioner] said he had initially walked away from the crime scene rather than driving away in his automobile.[3] [Petitioner] argues that his trial counsel should have obtained an expert to testify that there were no shoe prints at the crime scene other than the one on the front door and that scientific testing could not establish the time when the shoe print on the door was made. However, the absence of shoe prints was not a matter that was subject to varying scientific

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[3] See also state trial court habeas corpus order, [Doc. 20-18], at 48 (describing how trial counsel used the absence of evidence of blood on his clothing and in his car, to argue that the State had not proven that Petitioner was the perpetrator).

> opinions, and the time at which the print was left on the door was a matter of common sense given the fact that the door had obviously been kicked in during the murders and the fact that the shoe print matched shoes that [Petitioner] wore. Similarly, it was a matter of common sense and not subject to varying scientific opinions that it was possible that the murders could have been committed by more than one person and that the identity of the perpetrator could not be determined by fingerprint evidence because no identifiable fingerprints had been discovered. Finally, [Petitioner] complains that his trial counsel failed to obtain an expert in polygraph science to testify that the results of the polygraph examination taken by Joe Moore were "inconclusive" in response to the testimony volunteered by Joe Moore indicating that he had passed his polygraph test. However, Moore's volunteered testimony was ruled inadmissible, and the jury was instructed to disregard it.
>
> Because, as we have briefly outlined above, none of the expert testimony that [Petitioner] contends his trial counsel should have obtained was crucial to his defense, we hold as a matter of law both that trial counsel did not perform deficiently in the manner in which he sought funds for that testimony and that [Petitioner] did not suffer prejudice by trial counsel's failure to obtain funds for that testimony.

Hall, 687 S.E.2d at 816-17 (citations and footnote omitted).

In this Court's opinion, the state court's various rationales for discounting Petitioner's claims regarding experts better demonstrates a lack of prejudice rather than a lack of ineffectiveness. Nonetheless, the state court effectively established why Petitioner's ineffective assistance of counsel claim fails. Petitioner quibbles with the court's conclusions, but he has failed to demonstrate that the court reached an unreasonable result. Indeed, this Court has reviewed the testimony of Petitioner's current experts and fully agrees with the state court that none of Petitioner's proposed expert testimony undermines this Court's confidence in the outcome of Petitioner's trial. As such, this Court is bound by that result under § 2254(d), and Petitioner is not entitled to relief with respect to his ineffectiveness claim that trial counsel was ineffective for failing to obtain funds for expert testimony.

Claim 1b: Petitioner has Failed to Establish a Claim of Ineffective Assistance Regarding Trial Counsel's Failure to Prepare for the Penalty Phase

Petitioner next claims that his trial counsel was ineffective in failing to prepare for and present evidence during the penalty phase of his trial. The record does, in fact, indicate that trial counsel basically did nothing to prepare for the penalty phase mainly because the trial court had refused to appoint co-counsel. As a result, trial counsel was overworked merely preparing for the guilt/innocence phase of the trial and he did not have time to prepare for the penalty phase. Trial counsel also testified that he did not want to discuss possible penalty phase evidence with Petitioner or Petitioner's family because they would have lost confidence in him. [Doc. 11-22 at 45].

This Court agrees with the Georgia Supreme Court, see Hall, 687 S.E.2d at 812, that counsel's failure to perform any investigation in preparation for the penalty phase of the trial constitutes constitutionally ineffective assistance of counsel under Wiggins v. Smith, 539 U.S. 510, 523 (2003). This Court further agrees, however, with the state court's conclusion that there is no reasonable probability that the outcome would have been different if his trial counsel had properly prepared for the sentencing phase of the trial.

Petitioner claims that by failing to investigate mitigating evidence, trial counsel missed a "wealth" of such evidence. According to Petitioner, he had a history of repeated head injuries from racing cars and of alcohol abuse. At the state habeas corpus hearing, Petitioner presented psychological/psychiatric/medical testimony from witnesses that had evaluated Petitioner. For example, one testified that Petitioner "suffers from neuropsychiatric deficits related to serious head trauma" because of the head injuries he has incurred and that this "dysfunction has significant implications for Petitioner's behavior at the time of the murders," namely that he would have difficulty controlling his impulses. [Doc. 12-4 at 99]. Another expert noted that Petitioner suffers from "profoundly impaired" judgment, complex decision making, and executive functioning skills, [Doc. 12-5 at 52], which "manifests in impaired social judgment, impulsivity, inability to appropriately interpret feedback from the environment, impaired judgment, and inability to adequately reprocess and change course when faced with evolving facts." [Id. at 67].

Also in the state habeas corpus proceeding, Petitioner presented evidence of his close and loving relationship with his children, of his kind and compassionate nature, and of his ready willingness to provide help to others, none of which evidence was presented to the jury during the penalty phase of his trial.

With respect to the mental health evidence that Petitioner claims that his lawyer could have discovered and should have presented to the jury, the Georgia Supreme Court ruled that, even if trial counsel had engaged in an adequate investigation into mitigation evidence, he would not have been able to convince the trial judge to provide funds for the in-depth mental health assessment required to diagnose the deficiencies identified during the state habeas corpus proceeding. According to that court:

> First, we conclude that there is no reasonable probability that the information available to trial counsel through a reasonable initial investigation into [Petitioner]'s mental health background would have led the trial court to grant funds for the type of in-depth and extensive mental health evaluation upon which [Petitioner] now largely relies. If trial counsel had properly interviewed lay witnesses, he would have discovered the following allegations about [Petitioner]'s past: [Petitioner] had been in a number of automobile crashes, including some that might have resulted in brief unconsciousness and one that was caused by his fleeing from the police while drunk; [Petitioner] had once been exposed to toxic fumes while

cleaning the inside of an oil tank; [Petitioner] had once ingested some gasoline as a child and had temporarily stopped breathing; [Petitioner] had a long history of abusing alcohol; and [Petitioner] had once suffered a shot to the head, which did not penetrate his skull, which led to his being hospitalized followed by his leaving the hospital against medical advice, and which resulted in recurring headaches. Trial counsel also could have obtained records from Georgia Regional Hospital, but those records would have informed trial counsel merely that [Petitioner] was having difficulty adjusting to his divorce, that he was depressed, that his depression was associated with his facing kidnapping and aggravated assault charges for an alleged attack on his ex-wife, and that he abused alcohol.

We find it doubtful that this information would have led reasonable counsel to seek a psychological evaluation of [Petitioner], particularly given the reasonableness of trial counsel's stated desire to prioritize his requests for funds for various experts. Nor would the trial court have abused its discretion, if it had been asked by trial counsel for funds for a psychological evaluation of [Petitioner], by determining that this information failed to show that the assistance of a psychologist was critical to [Petitioner]'s defense. This is particularly true because [Petitioner] had already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than [Petitioner]'s alcohol abuse and his failure to adjust to his divorce. Finally, even if the trial

court had exercised its discretion to order a psychological examination, we find that it would have been extremely appropriate and thus highly likely that the trial court would have first ordered a general psychological screening rather than the extensive neuropsychological examination that [Petitioner] has undergone during his habeas proceedings. The probable result of such a general psychological examination is suggested by the absence of any reference to neuropsychological difficulties in the records from [Petitioner]'s psychological evaluation at Georgia Regional Hospital (as discussed above) and by the habeas testimony from the Warden's neuropsychologist, asserting that a typical court-ordered psychological examination might not have shown any cause for a more detailed neuropsychological examination "because of the relatively mild nature" of [Petitioner]'s mental neurological deficits. Accordingly, we conclude that it is unlikely that the trial court would have been informed through a general psychological examination of any possibly significant neurological deficits and, more importantly, that it is unlikely that the trial court would have exercised its discretion, in the face of such mild symptoms, to order a full neuropsychological examination. Given the multiple levels of unlikelihood at issue here-that reasonable counsel would seek an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full

> neuropsychological examination-we conclude that there is no reasonable probability that a reasonable investigation of [Petitioner]'s background by counsel would have led to his having access to the type of specialized neuropsychological testimony that [Petitioner] has presented in the habeas court.
>
> We do note the significant likelihood that a general psychological examination would have included an assessment of [Petitioner]'s intelligence. However, none of the experts has diagnosed [Petitioner] as falling within the generally-accepted definition of mental retardation. Upon our review of all of the evidence presented at trial and shown in the habeas court to have been available to trial counsel, we conclude that evidence of [Petitioner]'s moderate slowness would not have had a significant effect on the jury's sentencing phase deliberations, particularly in light of the evidence showing that [Petitioner] functioned normally in society apart from his criminal behavior. We also conclude that this evidence of moderate slowness would have had essentially no effect on the jury's guilt/innocence phase deliberations.

Hall, 687 S.E.2d at 813-14 (citations omitted).

The Georgia Supreme Court further concluded in the alternative that, if Petitioner's mental health evidence were to have been admitted at his trial, Petitioner would nonetheless be unable to establish that his trial counsel's ineffectiveness prejudiced him:

Above, we have analyzed the prejudice portion of [Petitioner]'s ineffective assistance of counsel claim in light of our conclusion that there is no reasonable probability that trial counsel, if he had adequately investigated [Petitioner]'s background, ultimately would have obtained an extensive neuropsychological examination like the one [Petitioner] has relied upon in the habeas court. We now turn to our alternative analysis of prejudice, which begins with the assumption that trial counsel would have obtained such a specialized examination.

[Petitioner] presented testimony in the habeas court from three experts in neuropsychology. Thomas Hyde, M.D., Ph.D., testified that he administered over 100 neurological tests to [Petitioner]. Yet, as his testimony establishes, only one of those tests indicated brain dysfunction. Dr. Hyde concluded that [Petitioner] had "significant damage to the frontal and temporal lobes" resulting from multiple blows to the head and from alcohol abuse. He testified that persons with frontal lobe dysfunction "often decompensate under periods of extreme emotional distress." He also testified that such persons are unlikely to be able to plan and commit murder without leaving evidence but, instead, are more often "involved in crimes of impulse." Dr. Hyde concluded that [Petitioner]'s mental state might have had an "impact" on [Petitioner]'s "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," but he also acknowledged that other "reasonable"

neurologists might disagree with his conclusions in [Petitioner]'s case. The second of [Petitioner]'s three experts in neuropsychology, Ricardo Weinstein, Ph.D., commented generally on [Petitioner]'s "psychosocial history" as follows:

> [I]t's a relatively unusual case in terms of his upbringing, fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family.

However, Dr. Weinstein concluded that [Petitioner], as a result of multiple head injuries, the exposure to toxic fumes, the ingestion of gasoline, and a history of "heavy alcohol use starting at the age of 19," suffered from "generalized and diffuse brain dysfunction" and "clear compromises in the frontal lobe functions." Dr. Weinstein concluded that [Petitioner] was not insane or mentally retarded, that he understood "that certain behaviors are unacceptable," but that his "brain dysfunction . . . negatively impact[ed] his ability to conform his conduct to the requirements of the law." In particular, Dr. Weinstein concluded that [Petitioner] would have difficulty in planning and in impulse control and that the combined effects of [Petitioner]'s brain dysfunction and his alcohol intoxication on the night of the murders would have rendered "his capacity to think in a logical, well-directed manner . . . equivalent or similar to an individual that suffers from mental retardation." Finally, [Petitioner] presented

testimony from a third expert, David Pickar, M.D., who concluded that [Petitioner], as a result of multiple head traumas and alcohol abuse, suffered from "impaired intellectual and frontal lobe function" that resulted in impairments of his ability to plan and to control his impulses.

The Warden presented expert testimony from one neuropsychologist, Daniel A. Martell, Ph.D. Dr. Martell's findings regarding [Petitioner]'s IQ were consistent with those of [Petitioner]'s experts, and he concluded that [Petitioner] functioned within "a range that's higher than mild mental retardation but lower than average." Dr. Martell added, however, that he had administered an additional test to determine what [Petitioner]'s IQ had been before any possible brain injuries and that the test showed [Petitioner]'s earlier IQ to fall within the "exact same ranges" as found by the various experts who testified in the habeas court. Dr. Martell testified that some of [Petitioner]'s test results indicated frontal lobe dysfunction, but Dr. Martell further testified as follows:

> His weaknesses with regard to frontal lobe have to do with a tendency to perseverate or repeat himself and mild to moderate impairment in problem-solving abilities in certain contexts like adapting to changing problems but not others like planning an effective strategy for solving a problem. However, his ability to inhibit unwanted or impulsive behaviors appears

> to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses.

Dr. Martell concluded that [Petitioner]'s frontal lobe dysfunction would not have prevented him from planning the murders and would not have made him so impulsive that he could not prevent himself from committing the murders. As we noted above, Dr. Martell also stated that [Petitioner]'s symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems. Dr. Martell summarized his opinion by stating, "In my opinion, [[Petitioner]'s diagnosis is] not significant to the crime."

The habeas court considered the mental health evidence summarized above and concluded that presentation of that evidence at trial in reasonable probability would have changed the outcome of the sentencing phase. We conclude as a matter of law that the habeas court erred by reaching this conclusion regarding prejudice. We agree with [Petitioner]'s argument that trial counsel could have presented mental health evidence without abandoning his sentencing phase strategy of showing residual doubt because the mental health evidence was not directly inconsistent with that theory and might have enhanced it slightly, e.g., by indicating that, due to [Petitioner]'s mental condition, it

might have been more difficult for him to have carried out the murders without leaving more evidence than was actually discovered during the investigation of the crimes. However, assuming trial counsel would have chosen to present the mental health evidence, even the most favorable aspects of that evidence showed merely that [Petitioner] functioned, when sober, in the lower range of normal intelligence; that he had some memory problems; that he suffered some depression related to his inability to accept his divorce; that he had some difficulty in planning and problem solving; that he might have been somewhat impulsive; and that his functional intelligence, unsurprisingly, became more impaired when he was drunk. Against this somewhat mitigating evidence, the jury would have weighed [Petitioner]'s long history of horrific abuse against Joy Lance, including multiple threats to kill her and at least one previous attempt to murder Butch Wood in a manner that was very similar to the manner in which he eventually succeeded in murdering him and Joy Lance. The jury also would have weighed the new evidence against the evidence about the night of the murders, which showed that [Petitioner] armed himself with a shotgun, traveled to the home where the victims were staying, kicked in the door, and systematically murdered them. Finally, the jury would have weighed the new evidence against the evidence about [Petitioner]'s demeanor and conduct after the murder, including the derogatory manner in which he referred to Joy Lance, his statement that Butch Wood was in "Hell," his lament to an

inmate that he had acted foolishly by calling Joy Lance's father shortly before committing the murders, and his boast to an inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall." Given [Petitioner]'s long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward, we conclude that the new evidence of [Petitioner]'s subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if it had been presented at [Petitioner]'s trial.

We also conclude, contrary to [Petitioner]'s arguments in his cross-appeal, that the new evidence of subtle neurological impairments would not have significantly affected the jury's deliberations during the guilt/innocence phase. Given the weakness of the new mental health evidence and the overwhelming evidence of the intentional and deliberate nature of [Petitioner]'s crimes, we conclude that it is essentially beyond possibility that the jury would have failed to convict [Petitioner] of the murders. We further conclude that it would have been highly unlikely that the new mental health evidence would have led the jury to render a verdict of guilty but mentally ill, which would not foreclose a death sentence in any event.

Hall v. Lance, 286 Ga. 365, 370-73, 687 S.E.2d 809, 814-16 (2010).

As noted in the above discussion of the application of § 2254(d), Petitioner bears the burden of demonstrating that the state court's conclusion was unreasonable such that no fairminded jurist would agree with the state court's decision. In his introductory remarks, Petitioner attempts to cast the Georgia Supreme Court's reversal of the lower court as substituting "its own reading of the record for that of the state habeas court that actually heard the evidence." However, the higher court did not make credibility determinations of witnesses or their testimony. Rather, the court took the hearing testimony at face value and made a legal determination that the evidence was not sufficient to establish prejudice.

Petitioner further contends that the potential mitigating evidence that he presented at the state habeas corpus hearing was sufficient to influence the jury's appraisal of Petitioner's culpability, and that the Georgia Supreme Court reversed the trial court because the "case involved a brutal murder and allegations that the Petitioner had engaged in prior, horrific acts toward one of the victims." [Doc. 34 at 86]. However, having reviewed the record in light of Petitioner's arguments, this Court concludes that reasonable jurists could disagree about whether Petitioner was prejudiced by his counsel's failure to present the rather equivocal evidence that he presented at the state habeas corpus hearing.

This Court points out that in killing his wife, Petitioner bludgeoned her head so badly that she was

unrecognizable. This was after he had terrorized her for years.[4] In death penalty cases where the actions of the defendant are exceptionally brutal, a line of Eleventh Circuit cases has found that "the aggravating circumstances of the crime outweigh any prejudice caused when a lawyer fails to present mitigating evidence." Grayson v. Thompson, 257 F.3d 1194, 1228 (11th Cir. 2001) (quotations and citations omitted). Moreover, this Court agrees with Respondent's argument that evidence of Petitioner's purported mental deficiencies are just as likely to be off-putting to the jury. The fact that Petitioner had trouble planning and acted impulsively because he was an alcoholic who got into physical confrontations and car wrecks is not strong mitigating evidence and may have helped convince jurors that Petitioner should be permanently removed from society.

In further response to Petitioner's arguments, this Court strongly disagrees with Petitioner's claim that the evidence that he presented in the state habeas corpus hearing is "similar" to the evidence overlooked by trial counsel in Williams v. Taylor, 529 U.S. 362 (2000). In that case, the Supreme Court concluded that Terry Williams' counsel was ineffective, and that Williams was prejudiced, because counsel had failed to present any evidence regarding Williams' horrific childhood. Williams' parents were severe alcoholics who were often so drunk that they were incapable of

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[4] During Petitioner's state habeas corpus hearing, the district attorney who prosecuted Petitioner detailed the many times that Petitioner threatened, beat, cut, bit, bound, shot at, and kidnapped his wife. [Doc. 11-25 at 94-101]. The description is quite chilling and lasts for eight pages of transcript testimony.

caring for the children. When social workers arrived at the Williams home on one occasion, conditions were not habitable, including human feces in several places on the floor. The social workers had to remove the children because, among other reasons, the children were drunk from consuming moonshine. Williams' parents were each charged with five counts of criminal neglect. Acquaintances of the family testified (1) that Williams' father would strip Williams naked, tie him to a bed post and whip him about the back and face with a belt, and (2) that Williams' parents engaged in repeated fist fights that terrorized the children. Petitioner has not presented comparable evidence, while, in fact, one of Petitioner's experts testified regarding Petitioner's "fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family." Lance, 687 S.E.2d at 814.

With respect to evidence relating to Petitioner's close and loving relationship with his children, his kind and compassionate nature, and his ready willingness to provide help to others, Petitioner presented this evidence in his state habeas corpus proceeding, claiming that this evidence would have altered the outcome of his sentencing hearing. The state habeas corpus court discussed the claim as follows:

> During the evidentiary hearing before this Court, trial counsel testified that he spoke with Petitioner's children. Trial counsel testified that he reviewed the affidavit of Stephanie Lance, and that the affidavit was consistent with what he learned from talking to Stephanie. However, trial counsel testified that he did not present the

testimony of Petitioner's children due to the emotional trauma it would cause them and because they lacked any "superior piece of testimony."

With regard to the testimony of Petitioner's other family members and friends, trial counsel stated that he chose not to present their testimony because he did not want them to be subjected to a cross-examination by the State regarding the prior difficulties between Petitioner and Joy Lance, which trial counsel felt would have been harmful to the Petitioner.

The Court notes that trial counsel stated to the jury during his closing arguments that Petitioner had children who loved him. He argued that if they sentenced Petitioner to death, then Petitioner's two children would not have a mother or father. Trial counsel asked the jury to "think about this long and hard before you decide to eliminate somebody. Think about Jessie and Stephanie." Counsel argued that it was a "powerful thing, to take somebody's life. It will affect you forever."

The Court concludes that trial counsel was not deficient in not presenting the Petitioner's children and family members to testify as to Petitioner's relationship and love for his children. Further, the Court finds that Petitioner has failed to show that he was prejudiced by trial counsel's decision in this regard.

. . .

Trial counsel was not unreasonable in not calling character witnesses to testify during the sentencing phase of trial.

. . .

Further, trial counsel was not unreasonable in not calling these lay witnesses to testify on Petitioner's behalf as counsel clearly stated his concern about putting up witnesses that would be cross-examined by the State regarding prior difficulties between Petitioner and Joy Lance. Informed strategy decisions by experienced counsel, such as this decision by [trial counsel], are the type of actions which Strickland prohibits being "second guessed" by reviewing courts.

Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden which is Petitioner's to bear, is and is supposed to be a heavy one. And, we are not interested in grading lawyers performances; we are interested in whether the adversarial process at trial worked adequately.

As such, the Court finds that trial counsel cannot be deemed deficient in making the strategic decision under the facts of this case not to present these character witnesses during the sentencing phase of trial and that Petitioner was not prejudiced by trial counsel's tactical decision.

[Doc. 20-18 at 67-70 (citations and quotations omitted)].

In attempting to establish that the state court's decision was unreasonable under § 2254(d), Petitioner cites to cases where courts have concluded that a lawyer in a death penalty case was ineffective for failing to present certain mitigating evidence and argues that "[b]y failing to consider this evidence and to find a reasonable probability that one juror's mind could have been swayed from the death penalty, the Georgia Supreme Court unreasonably applied clearly established federal law." [Doc. 34 at 97]. However, the state court's decision was that trial counsel opted not to present this evidence for a reasonable strategic reason – he did not want the witnesses cross-examined about Petitioner's explosive history with his wife. This Court is not at all convinced that no reasonable lawyer would have made the same decision. Given the evidence in the record about Petitioner's relationship with his wife – particularly the violence and death threats – this Court can only agree that trial counsel's decision not to present this testimony was at least reasonable.

In summary, this Court concludes that Petitioner has failed to meet his burden of demonstrating that the state courts' rulings on his ineffective assistance claims were unreasonable under § 2254(d), and he is thus not entitled to relief with respect to his Claim 1b.

Claim 4: Petitioner Cannot Demonstrate an Entitlement to Habeas Corpus Relief with Respect to his Claim that his Sentence is Disproportionate

In his Claim 4, Petitioner argues that his death sentence is disproportionate when compared to the sentences received by criminal defendants whose crimes were comparable. Petitioner further argues that the Georgia Supreme Court failed in its statutorily-mandated proportionality review by failing to consider cases in which the defendant received a sentence other than death. Petitioner also indicates that the fact that his conviction was based almost entirely on circumstantial evidence somehow strengthens this argument.

A great deal has been written about proportionality review as implemented by the Georgia Supreme Court, and this Court will not reprise those discussions here. What matters is that Petitioner is Petitioner, and he is not Andrew Tyrone Miller or Rodney McWhorter or any of the other men discussed by Petitioner who murdered their wives or girlfriends and received prison rather than death sentences. In order to obtain a death sentence under the Georgia death penalty statute, the state has the burden of establishing guilt of malice murder as well as aggravating factors beyond a reasonable doubt.[5] That was obviously done in this

[5] In response to Petitioner's repeated assertion that his conviction should be called into question because only circumstantial evidence supported that conviction, this Court notes that "[c]ircumstantial evidence can be and frequently is more than sufficient to establish guilt beyond a reasonable doubt. The test for evaluating circumstantial evidence is the same as in evaluating direct evidence." United States v. Henderson, 693 F.2d 1028, 1030 (11th

case, and it was then up to the jurors to determine the appropriate sentence. Put another way, there is no allegation that the state courts involved deviated from the procedural requirements of Georgia's death penalty statute, and that statute has been given close scrutiny by both the Supreme Court and the Eleventh Circuit. This Court is thus in no position to hold that the manner in which those procedural requirements resulted in Petitioner's death sentence somehow violated the Constitution.

On the topic of the proportionality review required by the Georgia death penalty statute, such review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," McCleskey v. Kemp, 481 U.S. 279, 306 (1986) (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate, Collins v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted). The fact that proportionality review is not required by the Constitution necessarily renders unavailing Petitioner's claim that the Georgia Supreme Court improperly carried out its proportionality review in Petitioner's case. See Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as

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Cir. 1982); see also United States v. Register, 182 F.3d 820, 830 (11th Cir. 1999) (citing United States v. Sureff, 15 F.3d 225, 229 (2d Cir.1994) for the proposition that "[c]ircumstantial evidence is . . . not a disfavored form of proof" (alteration in original)).

here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons.").

Claim 6b: Petitioner Fails to State a Claim Under §2254 Regarding Biased Jurors

In his claim 6b, Petitioner claims that certain members of his venire panel were biased for various reasons and should have been struck by the trial judge. Specifically, Petitioner points to panel members Braswell, Casey, and Dial as having indicated during voir dire that they were predisposed to sentence a murderer to death, panel member Witcher for being related to someone involved in the case, and panel member Queen[6] for being skeptical of the presumption of innocence. None of those five, however, served on Petitioner's jury. Under Georgia law, death penalty defendants are entitled to 42 qualified jurors, and the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal. Lively v. State, 421 S.E.2d 528 (Ga. 1992). Conversely, under federal constitutional law, if a biased panel member does not serve on the jury, Petitioner cannot have been prejudiced by the trial court's refusal to strike that individual for cause even though Petitioner was required to use his peremptory strikes to avoid having that panel member serve. "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," the

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[6] This Court has already determined that Petitioner's claims related to venireperson Queen are procedurally defaulted. [Doc. 33 at 14].

Supreme Court has held that the criminal defendant "has not been deprived of any . . . constitutional right." United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" demonstrates "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." Id. at 316; see also Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (rejecting "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury").

Even if one of the five panel members had made it onto the jury, the Georgia Supreme Court concluded that "the trial court did not abuse its discretion by finding [those panel members] qualified," Lance, 560 S.E.2d at 672, and Petitioner has entirely failed to attempt to demonstrate why that court's conclusion was unreasonable under § 2254(d).

Claims 7b and 9 (part): Petitioner has Failed to Demonstrate that he is Entitled to Relief with Respect to his Claim that Prosecutors Presented False Testimony and Evidence or that Prosecutors Withheld the Fact of a Deal with Frankie Shields

Petitioner's Claim 7b and and a part of his Claim 9 are related to the same witness from Petitioner's murder trial, and this Court will thus discuss the claims together. Frankie Shields was detained with Petitioner at the Jackson County Jail. Shields testified at Petitioner's trial. In his testimony Shields stated that, *inter alia*, Petitioner told him (1) that he – Petitioner – used force to enter Butch Wood's home, (2) that when he entered, Wood started running, and he shot Wood in the back, (3) that he beat Joy Lance

"real bad" and then shot her, and (4) that he had lost control of himself and did not realize how bad it was until it was over. [Doc. 9-2 at 31-32]. Petitioner now contends that Shields fabricated his testimony and that prosecutors failed to disclose that they had a deal with him.

After the trial, Sheilds wrote a letter to a newspaper contending that the state had reneged on some promises made in exchange for his testimony. He later testified on remand before the trial court that what he said in the letter was false. He then testified at the state habeas corpus hearing that his trial court testimony was false. [Docs. 11-24, 11-25]. In his appeal, Petitioner raised the issue of the purported deal that Shields had 32 claimed that prosecutors had made and the fact that the deal was not disclosed to Petitioner. The Georgia Supreme Court ruled as follows:

> Upon Lance's motion, this Court remanded this case for an evidentiary hearing regarding a letter written to a newspaper by Frankie Shields, one of the State's witnesses at trial. In the letter, Shields claimed the State had reneged on a promise, made in exchange for his testimony against appellant, to move him to a prison closer to his home. Shields's testimony at the hearing held on remand indicated he lied in his letter to the newspaper. That evidence authorized the trial court to find that no deal had been offered to or made with Shields by the State and, accordingly, the conclusion that Lance's claim of alleged suppression of exculpatory evidence must fail.

Lance, 560 S.E.2d at 678.

In response to Petitioner's state habeas corpus claim that the state knowingly presented false testimony at his trial, the Georgia Supreme Court stated:

> [Petitioner] claims that the State knowingly presented false testimony from a witness at trial, Frankie Shields. At trial, Shields denied that his testimony was part of a deal with the State. While [Petitioner]'s original direct appeal was pending, this Court was informed that Shields had written a letter to a newspaper claiming that there had in fact been a deal. This Court struck the original direct appeal from its docket and remanded the case for an evidentiary hearing in the trial court on the matter. At that hearing, Shields testified that there had been no deal, and this Court held on appeal from that hearing that the evidence authorized the trial court to find that no deal had been offered to or made with Shields by the State. In the habeas court, [Petitioner] once again claimed that the State had made a deal for Shields's trial testimony. At the evidentiary hearing in the habeas court, Shields again admitted that he had spoken with [Petitioner] in the jail and that [Petitioner] had drawn a map of the area where the murders occurred, but Shields claimed that he had testified falsely in the trial court about [Petitioner]'s confession to him and about there being no deal with the State for his testimony. The habeas court found
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> [Petitioner]'s claim to be barred; however, in an apparent abundance of caution, the habeas court

> also made the reasonable finding of fact that [Petitioner], in light of all of the evidence presented, had failed to prove that Shields's trial testimony was actually false. Similarly, we pretermit whether the evidence [Petitioner] presented in the habeas court constitutes the type of new alleged facts that could ever warrant setting aside the procedural bar to his claim, and we hold that his claim is meritless because Shields's trial testimony was not actually false.

Hall, 687 S.E.2d at 818.

In weighing Petitioner's claims related to Shields, it is important to note that they are based entirely upon the unsupported testimony of a witness who has repeatedly proven himself to be unreliable. In the Eleventh Circuit, recantations of prior testimony are viewed with "extreme suspicion." United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988). This is especially so where, as here, the recantation stands "alone, uncorroborated, and unsupported." Summers v. Dretke, 431 F.3d 861, 872 (5th Cir. 2005). Sheilds testified at Petitioner's trial that there was no deal with prosecutors. Then he claimed there was a deal. Then he claimed that there was no deal. Then he claimed there was a deal. "[W]hen a witness recants the recantation and then recants the re-recantation, a Trial Judge neither needs nor must credit him." Maize v. Wainwright, 421 F.2d 151, 152 (5th Cir. 1969).

As he has produced nothing in way of reliable evidence to establish either that prosecutors knowingly presented false testimony or that prosecutors failed to disclose a deal that they had with Shields, this Court

concludes that Petitioner's Claim 7b and that portion of Claim 9 related to Shields must fail.

Claim 8: Petitioner's Claim that he Did Not Kill, Attempt to Kill or Intend to Kill Provides no Basis for Relief

It is difficult to determine how to interpret Petitioner's Claim 8. In that claim he asserts that he did not kill, attempt to kill or intend that deadly force be used and cites to a line of cases that stands for the proposition that the death penalty is inappropriate for an accomplice who does not himself kill, attempt to kill or intend that lethal force be used. However, as is pointed out by Respondent, Petitioner does not assert that he was a mere aider/abettor in his victims' murders, and nothing in the record would tend to support that claim.

To the degree that Petitioner intends that his Claim 8 be viewed as a claim that he is actually innocent, this Court first points out that claims of actual innocence do not state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. Herrera v. Collins, 506 U.S. 390, 400 (1993). Further, aside from the discredited Shields testimony discussed above, Petitioner provides no support for such a claim. Finally, the Georgia Supreme Court held that the evidence was sufficient to for the jury to find beyond a reasonable doubt that Petitioner was guilty, Lance, 560 S.E.2d at 670, and Petitioner has not even attempted to establish that the state court's conclusion was unreasonable under § 2254(d). For all of these reasons or for any of them, this Court concludes that Petitioner is not entitled to relief based on his Claim 8.

Claim 9: Petitioner has not Established that the Prosecution Suppressed Material Exculpatory Evidence

As to the remainder of Claim 9 – the part not related to Frankie Shields – Joe Moore, a friend of Petitioner's, also testified regarding inculpatory statements that Petitioner made. Petitioner claims that, at some point before the trial, Moore met with lead investigator David Cochran and the state did not inform trial counsel of the meeting. Petitioner further claims that the custodian of the records of the Jackson County Sheriff's Department was not asked to check the department's electronic records, which were, according to Petitioner, "essential to a complete response and disclosure to [his] discovery and information requests." [Doc. 34 at 115].

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court enunciated the now well-established principle that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." However, in order to demonstrate a Brady violation, Petitioner must show that the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, . . . and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). Petitioner has made no such showing. In the case of Joe Moore, it can be generally presumed that investigators and prosecutors meet with their witnesses before the trial. That such a meeting took place does not mean that the witness was improperly coached or motivated by offers of assistance. Indeed, granting habeas corpus

relief based on Petitioner's claims surrounding Moore would require this Court to presume a nefarious intent on the part of prosecutors when the correct "presumption, well established by tradition and experience, [is] that prosecutors have fully discharged their official duties." Strickler, 527 U.S. at 286.

Turning to the claim that prosecutors never provided Petitioner's counsel with the results of an electronic records search, Petitioner makes no mention of what such a search would have uncovered. As a result, this Court is unable to find that exculpatory evidence was withheld.

Claim 10: Evidence of Unadjudicated Bad Acts Introduced at Petitioner's Trial did not Deprive Petitioner of a Constitutional Right

In Claim 10, Petitioner argues that his trial was rendered unfair because the trial court permitted prosecutors to present evidence of Petitioner's prior unadjudicated bad acts. Evidence regarding numerous such incidents were admitted, but Petitioner briefly mentions only the evidence presented by one witness who described several acts of violence by Petitioner toward his former wife and murder victim, Joy Lance. This Court notes that there was also evidence admitted regarding threats and acts of violence directed at the other murder victim, Butch Wood. [See Doc. 11-25 at 94-101].

On appeal, the Georgia Supreme Court rejected this claim, holding that evidence regarding the prior incidents were properly admitted as similar transactions and noting that

> [e]vidence of the defendant's prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.

Lance, 560 S.E.2d at 674 (citation omitted).

Petitioner cannot show that the state court's result "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." § 2254(d); see Link v. Tucker, 870 F. Supp. 2d 1309, 1329 (N.D. Fla. 2012) (citing numerous cases for the proposition that there is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence).

Moreover, this Court points out that the trial court's decision to permit this evidence was based on state law. On federal habeas corpus review, this Court reviews state court evidentiary rulings on a petition for habeas corpus to determine only whether the error was of such magnitude as to deny petitioner his right to a fair trial. Jacobs v. Singletary, 952 F.2d 1282, 1296 (11th Cir. 1992). In order for erroneously-admitted evidence to violate the Constitution, that evidence must have been a "'crucial, critical, highly significant factor' in [Petitioner's] conviction." Williams v. Kemp, 846 F.2d

1276, 1281 (11th Cir. 1988) (quoting Jameson v. Wainwright, 719 F.2d 1125, 1126-27 (11th Cir. 1983)).

As has been noted, the evidence that Petitioner here complains of relates to the many times that he terrorized his wife and threatened to kill her if she left him as well as the times that he threatened to also kill Butch Wood. That evidence demonstrated Petitioner's bent of mind and his motive for murdering his wife and her lover, it was clearly related to Petitioner's guilt, and it was not presented solely to paint Petitioner as a bad person. As such, this Court cannot conclude that the admission of this evidence rendered his trial fundamentally unfair.

Claim 12: The Trial Court's Admission of Victim Impact Testimony did not Violate Petitioner's Rights

In Claim 12, Petitioner asserts that the trial court erred in permitting the state to present "victim impact" testimony during the sentencing phase. In rejecting this claim, the Georgia Supreme Court held:

> O.C.G.A. § 17-10-1.2, which authorizes the presentation of certain victim impact testimony, is not unconstitutional. Livingston v. State, 264 Ga. 402, 444 S.E.2d 748 (1994). Appellant has not demonstrated how the victim impact testimony presented at the sentencing phase of his trial exceeded the limits set in Turner v. State, 268 Ga. 213, 214-15, 486 S.E.2d 839 (1997). Although the testimony was not read from written statements previously scrutinized outside the jury's presence by the trial court and counsel as this Court recommended in Turner, there is nothing in the record indicating that

> this omission resulted in the admission of unlawfully prejudicial testimony and/or courtroom demeanor that the recommended procedure was designed to avoid.

Lance, 560 S.E.2d at 677.

In asserting that the victim impact evidence admitted during the sentencing phase of his trial violated his constitutional rights, Petitioner cites to Booth v. Maryland, 482 U.S. 496 (1987), where the Supreme Court indeed held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are per se inadmissible at a capital sentencing hearing. Petitioner fails to mention, however, that in a later Supreme Court case, Payne v. Tennessee, 501 U.S. 808 (1991), the Court specifically overruled Booth and held that the Eighth Amendment erects no per se bar to the admission of victim impact evidence and prosecutorial argument on that subject. The state may legitimately conclude that evidence about a victim and the impact of a murder on the victim's family is relevant to a jury's decision as to whether to impose the death penalty, in the same manner as other relevant evidence. Id. at 827.

This Court has reviewed the testimony that Petitioner claims violated his constitutional rights, and there is nothing particularly troubling about that evidence in the context of a capital trial. One of the central purposes of the sentencing phase of a death penalty trial is to provide the jury an opportunity to determine the magnitude of the defendant's crimes, and evidence tending to show that Joy Lance was a good person and a good mother and that her family was

affected by what Petitioner did to her is proper for the jury to consider.

Claims 16 and 17: Petitioner has Failed to Demonstrate that the Sentencing Phase Jury Instructions Were Improper

In his Claims 16 and 17, Petitioner asserts that the jury instructions given at the close of the penalty phase of his trial were improper, but his arguments in support of this claim are not at all compelling and deserve little in response. In his Claim 16, he points out that the instructions repeatedly refer to the "jury" as a group rather than as individuals and that such reference "failed to make clear that each juror, individually, was required to consider and balance mitigating with aggravating circumstances." [Doc. 34 at 124-25]. Petitioner further claims that the trial court failed to inform the jury that, if they deadlocked, it would result in a life sentence and failed to define or explain the concept of "mitigating circumstances" so that the jury did not understand what the term meant. In his Claim 17, Petitioner argues that the trial court's failure to instruct the jury that unanimity was not required to impose a life sentence violated his rights.

The state habeas court denied these claims, finding that after a review of the sentencing instructions in their entirety, Petitioner had failed to show that the trial court erred in defining mitigating circumstances or that it erred in not instructing the jury that unanimity was not required to impose a life sentence; that court also pointed out that the jury instructions in Petitioner's case were all previously found constitutional by the Georgia Supreme Court. [Doc. 20-18 at 71-72]. As Petitioner has entirely failed to argue

that the state court's conclusion is not entitled to § 2254(d) deference, Plaintiff is not entitled to relief in this Court. Moreover, this Court has reviewed the jury charge and concludes that, when read in its entirety, it did not violate Petitioner's constitutional rights.

Claim 18: Georgia's Statutory Aggravating Circumstances are not Unconstitutionally Vague and Arbitrary

In Claim 18, Petitioner very briefly and without explaining his reasoning contends that the two statutory aggravating circumstances set forth in the Georgia Code that the jury found are unconstitutionally vague. Petitioner also rather obliquely contends that the statutory aggravating factors used against a death penalty defendant must be included in the indictment under Ring v. Arizona, 536 U.S. 584 (2002). Respondent argues that some portions of this claim are procedurally barred before this Court, but one of those portions is a claim – regarding the verdict form – that Petitioner does not discuss in his final brief.

Instead of attempting to unravel this claim's confusing procedural pedigree, this Court will first point out that Ring, which the Court issued after Petitioner's direct appeal, announced a new procedural rule that does not apply retroactively. Schriro v. Summerlin, 542 U.S. 348, 358 (2004). Accordingly, to the degree that Ring would require that the statutory aggravating factors appear in the indictment, it is inapplicable in this case.

As to vagueness, the aggravating circumstances presented to, and found by, Petitioner's jury are set forth in O.C.G.A. § 17-10-30(b)(2) and (b)(7):

> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
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> . . .
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

As noted, Petitioner's claim that the aggravating circumstances are vague is entirely conclusory. Without knowing what to look for, this Court has reviewed the foregoing language and concludes it is not vague. According to the Supreme Court, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Both of the subject circumstances meet that requirement.

Claim 20: Cumulative Error Analysis Does not Apply

Petitioner's Claim 20 is a cumulative error claim, asserting that his trial and sentencing were fraught

with procedural and substantive errors which, when viewed together, cannot be deemed harmless as they deprived Petitioner of a fundamentally fair trial. Petitioner does not adequately address this claim in his final brief, but this Court will nonetheless consider the issue.

"The cumulative error analysis' purpose is to address the possibility that '[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" United States v. Mendoza, Case No. 05-2054, 2007 WL 1575985, at *18 (10th Cir. June 1, 2007) (quoting United States v. Rosario Fuentez, 231 F.3d 700, 709 (10th Cir. 2000)). However, in order for this Court to perform a cumulative error analysis, there first must be errors to analyze, and, having exhaustively reviewed Petitioner's claims, this Court has not identified error — harmless or otherwise — and Petitioner is therefore not entitled to relief as to his Claim 20.

Claim 24: Petitioner's Lethal Injection Claim is not Ripe

Claims raising challenges to lethal injection procedures should be brought under § 1983 rather than in a habeas proceeding. Tompkins v. Secretary, Dept. of Corrections, 557 F.3d 1257, 1261 (11th Cir. 2009). This is especially relevant in light of the well-documented problems that states, including Georgia, have encountered obtaining the drugs necessary for lethal injections and the changes that Georgia has made in its lethal injection protocol. See generally, Bill Rankin, et al., Death Penalty, Atl. J. Const., Feb. 17, 2014 at A1 (discussing the increasing reluctance of

drug manufacturers and compounding pharmacies to supply drugs for executions); DeYoung v. Owens, 646 F.3d 1319, 1323 (11th Cir. 2011). It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court. This Court also points out that bringing this claim under § 1983 would likely work to Petitioner's substantial advantage because he will be able to conduct discovery without leave of court, and he will be more likely to have a hearing. Accordingly, Petitioner's challenge to Georgia's lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

Conclusion

For the reasons discussed, this Court concludes that Petitioner has failed to establish that he is entitled to habeas corpus relief under 28 U.S.C. § 2254 except that Petitioner's Claim 24 is denied without prejudice to his raising that claim in a 42 U.S.C. § 1983 action after his death warrant has been issued. Accordingly, it is hereby **ORDERED** that the instant petition is **DENIED**, and the Clerk is **DIRECTED** to enter judgment in favor of Respondent as to all claims and close this action.

IT IS SO ORDERED, this 21st day of December, 2015.

/s/Willis B. Hunt
WILLIS B. HUNT, JR.
Judge, U. S. District Court

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-15008-P

[Filed October 31, 2017]

DONNIE CLEVELAND LANCE,	)
	)
Petitioner - Appellant,	)
	)
versus	)
	)
WARDEN, GEORGIA DIAGNOSTIC PRISON,	)
	)
	)
Respondent - Appellee.	)
	)

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, MARTIN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/William Pryor
UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

S09A1536, S09X1538

[Decided January 25, 2010]

HALL)
)
v.)
)
LANCE;)
)
and vice versa.)
)

HUNSTEIN, Chief Justice.

A jury convicted Donnie Cleveland Lance of two counts of murder and of related crimes in connection with the deaths of his ex-wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr. The jury sentenced Lance to death for each of the murders, and this Court affirmed his convictions and sentences unanimously. Lance v. State, 275 Ga. 11 (560 SE2d 663) (2002). Lance filed a petition for a writ of habeas corpus on May 29, 2003, and he amended the petition on August 25, 2005. After conducting an evidentiary hearing, the habeas court granted the petition with respect to Lance's death sentences and denied the petition with respect to his convictions. The Warden has appealed in Case Number S09A1536, and Lance has cross-appealed in Case Number S09X1538. In the

Warden's appeal, we reverse and reinstate Lance's death sentences. In Lance's cross-appeal, we affirm.

I. Factual Background

The evidence at trial showed that Lance had a long history of abusing Joy Lance both before and after they divorced, including kidnapping her, beating her with his fist, a belt, and a handgun, strangling her, electrocuting her with a car battery, and threatening her with a flammable liquid, handguns, and a chainsaw. He had repeatedly threatened to kill her himself, and he had once inquired of a relative about what it might cost to hire someone to kill her and Butch Wood. Lance kicked in the door of Butch Wood's home in 1993 armed with a shotgun, loaded a shell into the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore, Lance's friend who was accompanying Lance that night.

Shortly before midnight on November 8, 1997, Lance called Joy Lance's father, asked to speak to her, and learned that she was not at home. Shortly afterward, a passing police officer noticed Lance's automobile leaving his driveway. Lance arrived at Butch Wood's home, kicked in the front door, shot Butch Wood on the front and the back of his body with a shotgun, and then beat Joy Lance to death by repeatedly striking her in the face with the butt of the shotgun, which broke into pieces during the attack. Joy Lance's face was rendered utterly unrecognizable. Later that morning, Lance told his friend, Joe Moore, that Joy Lance (whom Lance referred to in a derogatory manner) would not be coming to clean Lance's house that day; that Butch Wood's father could

not "buy him out of Hell"; and that both Joy Lance and Butch Wood were dead. Lance later told a fellow inmate that he "felt stupid" that he had called Joy Lance's father before the murders, and Lance bragged to the inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall."

II. Alleged Ineffective Assistance of Counsel

Lance argued in the habeas court that his trial counsel rendered ineffective assistance in various ways during both the guilt/innocence phase and the sentencing phase. An ineffective assistance of counsel claim must show that counsel rendered constitutionally-deficient performance and that actual prejudice of constitutional proportions resulted. Strickland v. Washington, 466 U. S. 668, 687 (III) (104 SC 2052, 80 LE2d 674) (1984); Smith v. Francis, 253 Ga. 782 (1) (325 SE2d 362) (1985). The constitutional standard for attorney performance is determined with reference to "prevailing professional norms." Strickland, supra at 688 (III) (A). See also Hall v. McPherson, 284 Ga. 219 (2) (663 SE2d 659) (2008) (noting relevance of published professional guidelines in assessing what might have been reasonable in a particular case). A review of an attorney's performance "includes a context-dependent consideration" of counsel's decisions that sets aside the "'distorting effects of hindsight.'" Wiggins v. Smith, 539 U. S. 510, 523 (II) (A) (123 SC 2527, 156 LE2d 471) (2003). To show sufficient prejudice to succeed on an ineffective assistance of counsel claim, a petitioner must demonstrate that

> there is a reasonable probability (i.e., a probability sufficient to undermine confidence in

> the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different [Cit.].

Smith v. Francis, supra at 783 (1). We accept the habeas court's findings of fact unless they are clearly erroneous, but we apply the facts to the law de novo. Lajara v. State, 263 Ga. 438 (3) (435 SE2d 600) (1993). Because an ineffective assistance of counsel claim must show both deficient attorney performance and prejudice, the claim can be denied solely on the absence of sufficient prejudice. Id. For the reasons set forth below, we conclude as a matter of law that the absence of the deficiencies in Lance's trial counsel's performance would not in reasonable probability have resulted in a different outcome in either phase of Lance's trial. See Schofield v. Holsey, 281 Ga. 809, 812, n.1 (642 SE2d 56) (2007) (holding that the combined effect of trial counsel's deficiencies should be considered in weighing prejudice). Accordingly, we reverse the habeas court's judgment insofar as it granted a new sentencing trial based on trial counsel's ineffectiveness, and we affirm the habeas court's judgment insofar as it denied relief regarding the guilt/innocence phase based on trial counsel's ineffectiveness.

A. Mental Health Evidence

The habeas court concluded that trial counsel performed deficiently in failing to prepare for Lance's trial by investigating Lance's background. We agree. The record is clear that, while trial counsel met repeatedly with Lance and with various members of his family, trial counsel failed to question them on issues related to potential mitigating evidence other than

those issues related to residual doubt as to Lance's guilt. Trial counsel testified in the habeas court that Lance claimed that he was innocent, that his family members believed that he was innocent, and that trial counsel did not want to alienate them by asking questions related to what could be presented at trial in the event that Lance were convicted. Trial counsel explained that he had hoped to obtain the assistance of co-counsel so that co-counsel could discuss the sentencing phase with them. However, we hold that trial counsel performed well below basic professional standards by choosing not to discuss issues other than guilt and innocence with Lance and his family even after the request for co-counsel was denied. The Warden argues that trial counsel did not perform deficiently because counsel's strategy of relying on jurors' residual doubt in the sentencing phase was reasonable. See Head v. Ferrell, 274 Ga. 399, 405 (V) (A) (554 SE2d 155) (2001) (reliance on residual doubt can be a reasonable strategy in the sentencing phase). However, trial counsel's performance in selecting a strategy must be regarded as deficient because that strategic choice was made without trial counsel's first conducting a reasonable investigation. See Wiggins, supra, 539 U. S. at 521-523 (II) (A); Strickland, supra, 466 U. S. at 690-691 (III) (A). See also Porter v. McCollum, U.S. (II) (130 SC 447, 452-453, LE2d) (2009). The question then before us is whether trial counsel's deficient performance in failing to adequately investigate issues beyond guilt and innocence, when considered together with any other deficiencies in trial counsel's performance at trial, in reasonable probability changed the outcome of Lance's trial. We hold as a matter of law that it did not.

The habeas court concluded that there would have been a reasonable probability of a different outcome in the sentencing phase of Lance's trial if trial counsel had prepared properly for the sentencing phase, because that preparation would have led counsel to discover and use mental health evidence. We disagree with this conclusion for two independent and individually-sufficient reasons, which are discussed below. We also disagree with Lance's contention in his cross-appeal that an adequate investigation of mental health evidence would have led to a reasonable probability of a different outcome in the guilt/innocence phase.

1. Mental Health Evidence Likely Available

First, we conclude that there is no reasonable probability that the information available to trial counsel through a reasonable initial investigation into Lance's mental health background would have led the trial court to grant funds for the type of in-depth and extensive mental health evaluation upon which Lance now largely relies. If trial counsel had properly interviewed lay witnesses, he would have discovered the following allegations about Lance's past: Lance had been in a number of automobile crashes, including some that might have resulted in brief unconsciousness and one that was caused by his fleeing from the police while drunk; Lance had once been exposed to toxic fumes while cleaning the inside of an oil tank; Lance had once ingested some gasoline as a child and had temporarily stopped breathing; Lance had a long history of abusing alcohol; and Lance had once suffered a shot to the head, which did not penetrate his skull, which led to his being hospitalized followed by his

leaving the hospital against medical advice, and which resulted in recurring headaches. Trial counsel also could have obtained records from Georgia Regional Hospital, but those records would have informed trial counsel merely that Lance was having difficulty adjusting to his divorce, that he was depressed, that his depression was associated with his facing kidnapping and aggravated assault charges for an alleged attack on his ex-wife, and that he abused alcohol.

We find it doubtful that this information would have led reasonable counsel to seek a psychological evaluation of Lance, particularly given the reasonableness of trial counsel's stated desire to prioritize his requests for funds for various experts. Nor would the trial court have abused its discretion, if it had been asked by trial counsel for funds for a psychological evaluation of Lance, by determining that this information failed to show that the assistance of a psychologist was critical to Lance's defense. See Roseboro v. State, 258 Ga. 39 (3) (d) (365 SE2d 115) (1988). This is particularly true because Lance had already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than Lance's alcohol abuse and his failure to adjust to his divorce. Finally, even if the trial court had exercised its discretion to order a psychological examination, we find that it would have been extremely appropriate and thus highly likely that the trial court would have first ordered a general psychological screening rather than the extensive neuropsychological examination that Lance has undergone during his habeas proceedings. The probable result of such a general psychological examination is

suggested by the absence of any reference to neuropsychological difficulties in the records from Lance's psychological evaluation at Georgia Regional Hospital (as discussed above) and by the habeas testimony from the Warden's neuropsychologist, asserting that a typical court-ordered psychological examination might not have shown any cause for a more-detailed neuropsychological examination "because of the relatively mild nature" of Lance's mental neurological deficits. Accordingly, we conclude that it is unlikely that the trial court would have been informed through a general psychological examination of any possibly-significant neurological deficits and, more importantly, that it is unlikely that the trial court would have exercised its discretion, in the face of such mild symptoms, to order a full neuropsychological examination. Given the multiple levels of unlikelihood at issue here – that reasonable counsel would seek an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full neuropsychological examination – we conclude that there is no reasonable probability that a reasonable investigation of Lance's background by counsel would have led to his having access to the type of specialized neuropsychological testimony that Lance has presented in the habeas court.

We do note the significant likelihood that a general psychological examination would have included an assessment of Lance's intelligence. However, none of the experts has diagnosed Lance as falling within the generally-accepted definition of mental retardation. Upon our review of all of the evidence presented at trial

and shown in the habeas court to have been available to trial counsel, we conclude that evidence of Lance's moderate slowness would not have had a significant effect on the jury's sentencing phase deliberations, particularly in light of the evidence showing that Lance functioned normally in society apart from his criminal behavior. We also conclude that this evidence of moderate slowness would have had essentially no effect on the jury's guilt/innocence phase deliberations. Compare OCGA § 17-7-131 (a) (3) and (j) (allowing for guilty but mentally retarded verdicts in the guilt/innocence phase that exempt defendants from the death penalty).

2. Additional Mental Health Evidence Conceivably Available

Above, we have analyzed the prejudice portion of Lance's ineffective assistance of counsel claim in light of our conclusion that there is no reasonable probability that trial counsel, if he had adequately investigated Lance's background, ultimately would have obtained an extensive neuropsychological examination like the one Lance has relied upon in the habeas court. We now turn to our alternative analysis of prejudice, which begins with the assumption that trial counsel would have obtained such a specialized examination.

Lance presented testimony in the habeas court from three experts in neuropsychology. Thomas Hyde, M.D., Ph.D., testified that he administered over 100 neurological tests to Lance. Yet, as his testimony establishes, only one of those tests indicated brain dysfunction. Dr. Hyde concluded that Lance had "significant damage to the frontal and temporal lobes" resulting from multiple blows to the head and from

alcohol abuse. He testified that persons with frontal lobe dysfunction "often decompensate under periods of extreme emotional distress." He also testified that such persons are unlikely to be able to plan and commit murder without leaving evidence but, instead, are more often "involved in crimes of impulse." Dr. Hyde concluded that Lance's mental state might have had an "impact" on Lance's "ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," but he also acknowledged that other "reasonable" neurologists might disagree with his conclusions in Lance's case. The second of Lance's three experts in neuropsychology, Ricardo Weinstein, Ph.D., commented generally on Lance's "psychosocial history" as follows:

> [I]t's a relatively unusual case in terms of his upbringing, fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family.

However, Dr. Weinstein concluded that Lance, as a result of multiple head injuries, the exposure to toxic fumes, the ingestion of gasoline, and a history of "heavy alcohol use starting at the age of 19," suffered from "generalized and diffuse brain dysfunction" and "clear compromises in the frontal lobe functions." Dr. Weinstein concluded that Lance was not insane or mentally retarded, that he understood "that certain behaviors are unacceptable," but that his "brain dysfunction . . . negatively impact[ed] his ability to conform his conduct to the requirements of the law." In particular, Dr. Weinstein concluded that Lance would

have difficulty in planning and in impulse control and that the combined effects of Lance's brain dysfunction and his alcohol intoxication on the night of the murders would have rendered "his capacity to think in a logical, well-directed manner . . . equivalent or similar to an individual that suffers from mental retardation." Finally, Lance presented testimony from a third expert, David Pickar, M.D., who concluded that Lance, as a result of multiple head traumas and alcohol abuse, suffered from "impaired intellectual and frontal lobe function" that resulted in impairments of his ability to plan and to control his impulses.

The Warden presented expert testimony from one[1] neuropsychologist, Daniel A. Martell, Ph.D. Dr. Martell's findings regarding Lance's IQ were consistent with those of Lance's experts, and he concluded that Lance functioned within "a range that's higher than mild mental retardation but lower than average." Dr. Martell added, however, that he had administered an additional test to determine what Lance's IQ had been before any possible brain injuries and that the test showed Lance's earlier IQ to fall within the "exact same ranges" as found by the various experts who testified in the habeas court. Dr. Martell testified that some of Lance's test results indicated frontal lobe dysfunction, but Dr. Martell further testified as follows:

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[1] The Warden also placed in the record a report by David Griesemer, M.D. However, as Lance correctly noted in a written objection, this unsworn statement was inadmissible hearsay that should not have been considered by the habeas court. See Waldrip v. Head, 279 Ga. 826, 828 (II) (A) (620 SE2d 829) (2005). But see OCGA § 9-14-48 (a) (providing that a habeas court "may receive proof by . . . sworn affidavits").

> His weaknesses with regard to frontal lobe have to do with a tendency to perseverate or repeat himself and mild to moderate impairment in problem-solving abilities in certain contexts like adapting to changing problems but not others like planning an effective strategy for solving a problem. However, his ability to inhibit unwanted or impulsive behaviors appears to be relatively intact. And I think that's important in my analysis with regard to the issue of the crime itself because these data do not suggest to me that he is, in fact, impulsive or unable to control his impulses.

Dr. Martell concluded that Lance's frontal lobe dysfunction would not have prevented him from planning the murders and would not have made him so impulsive that he could not prevent himself from committing the murders. As we noted above, Dr. Martell also stated that Lance's symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems. Dr. Martell summarized his opinion by stating, "In my opinion, [Lance's diagnosis is] not significant to the crime."

The habeas court considered the mental health evidence summarized above and concluded that presentation of that evidence at trial in reasonable probability would have changed the outcome of the sentencing phase. We conclude as a matter of law that the habeas court erred by reaching this conclusion regarding prejudice. We agree with Lance's argument that trial counsel could have presented mental health evidence without abandoning his sentencing phase strategy of showing residual doubt because the mental

health evidence was not directly inconsistent with that theory and might have enhanced it slightly, e.g., by indicating that, due to Lance's mental condition, it might have been more difficult for him to have carried out the murders without leaving more evidence than was actually discovered during the investigation of the crimes. However, assuming trial counsel would have chosen to present the mental health evidence, even the most-favorable aspects of that evidence showed merely that Lance functioned, when sober, in the lower range of normal intelligence; that he had some memory problems; that he suffered some depression related to his inability to accept his divorce; that he had some difficulty in planning and problem solving; that he might have been somewhat impulsive; and that his functional intelligence, unsurprisingly, became more impaired when he was drunk. Against this somewhat mitigating evidence, the jury would have weighed Lance's long history of horrific abuse against Joy Lance, including multiple threats to kill her and at least one previous attempt to murder Butch Wood in a manner that was very similar to the manner in which he eventually succeeded in murdering him and Joy Lance. The jury also would have weighed the new evidence against the evidence about the night of the murders, which showed that Lance armed himself with a shotgun, traveled to the home where the victims were staying, kicked in the door, and systematically murdered them. Finally, the jury would have weighed the new evidence against the evidence about Lance's demeanor and conduct after the murder, including the derogatory manner in which he referred to Joy Lance, his statement that Butch Wood was in "Hell," his lament to an inmate that he had acted foolishly by calling Joy Lance's father shortly before committing the

murders, and his boast to an inmate that "he hit Joy so hard that one of her eyeballs stuck to the wall." Given Lance's long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward, we conclude that the new evidence of Lance's subtle neurological impairments, even when considered together with the other mitigating evidence that was or should have been presented at trial, would not in reasonable probability have changed the outcome of the sentencing phase if it had been presented at Lance's trial. Compare Porter v. McCollum, supra, U.S. (III) (130 SC at 453-456).

We also conclude, contrary to Lance's arguments in his cross-appeal, that the new evidence of subtle neurological impairments would not have significantly affected the jury's deliberations during the guilt/innocence phase. Given the weakness of the new mental health evidence and the overwhelming evidence of the intentional and deliberate nature of Lance's crimes, we conclude that it is essentially beyond possibility that the jury would have failed to convict Lance of the murders. We further conclude that it would have been highly unlikely that the new mental health evidence would have led the jury to render a verdict of guilty but mentally ill, which would not foreclose a death sentence in any event. See OCGA § 17-7-131 (a) (2) (defining "[m]entally ill"). See also Lewis v. State, 279 Ga. 756, 764 (12) (620 SE2d 778) (2005) (holding that "the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as the result of such a verdict").

B. Evidence from Forensic Experts

Lance argues that his trial counsel rendered ineffective assistance in the manner in which he sought funds for forensic experts and, alternatively, that the trial court's denial of those funds rendered trial counsel ineffective at trial. We conclude that both of these claims lack merit.

1. Trial Counsel's Alleged Ineffective Assistance in Seeking Funds

We first address Lance's contention that his trial counsel rendered ineffective assistance in the manner in which he sought funds for forensic experts. We conclude that trial counsel did not perform deficiently, and we further conclude that Lance did not suffer significant prejudice to his defense even if trial counsel could be perceived as having performed deficiently.

On direct appeal, this Court rejected a claim that the trial court had abused its discretion in denying Lance's request for additional funds for expert assistance, concluding that "Lance's request for the contested funds [had been] too unspecific, uncertain, and conclusory" to require the granting of additional funds. Lance, supra, 275 Ga. at 13-14 (2). Although this Court's comments, on the surface, might suggest that trial counsel necessarily performed deficiently in making his request, upon closer examination we conclude that he did not. Instead, we conclude that trial counsel's request for funds appeared weak simply because there was no compelling reason for those funds to be granted. See Roseboro, supra, 258 Ga. at 40-41 (3) (c and d) (holding that a request for funds for expert

testimony must show, inter alia, that the testimony is crucial and is subject to varying expert opinions).

Lance complains that trial counsel failed to obtain expert assistance in order to show the time of the victims' deaths. Our review of the record reveals that there is, even now, no substantial dispute among the experts regarding the time of death but, instead, that there is merely a dispute over the manner in which the time of death was established. Lance argues that his trial counsel should have obtained an expert to testify that the repeated blows to Joy Lance's face with the butt of the shotgun likely would have resulted in the perpetrator's being spattered with blood and brain matter, which would then have likely left stains in any automobile used immediately afterward. However, not only would this fact have been obvious to the jury, it furthermore would have been consistent with Lance having disposed of any bloody clothes at the same time he obviously disposed of his distinctive shoes and would have been consistent with the testimony from a State witness indicating that Lance said he had initially walked away from the crime scene rather than driving away in his automobile. Lance argues that his trial counsel should have obtained an expert to testify that there were no shoe prints at the crime scene other than the one on the front door and that scientific testing could not establish the time when the shoe print on the door was made. However, the absence of shoe prints was not a matter that was subject to varying scientific opinions, and the time at which the print was left on the door was a matter of Common sense given the fact that the door had obviously been kicked in during the murders and the fact that the shoe print matched shoes that Lance wore. Similarly, it was a matter of common

sense and not subject to varying scientific opinions that it was possible that the murders could have been committed by more than one person and that the identity of the perpetrator could not be determined by fingerprint evidence because no identifiable fingerprints had been discovered. Finally, Lance complains that his trial counsel failed to obtain an expert in polygraph science to testify that the results of the polygraph examination taken by Joe Moore[2] were "inconclusive" in response to the testimony volunteered by Joe Moore indicating that he had passed his polygraph test. However, Moore's volunteered testimony was ruled inadmissible, and the jury was instructed to disregard it. See Waldrip, supra, 279 Ga. at 830-831 (II) (C) (addressing admissibility of polygraph results in death penalty trials).

Because, as we have briefly outlined above, none of the expert testimony that Lance contends his trial counsel should have obtained was crucial to his defense, we hold as a matter of law both that trial counsel did not perform deficiently in the manner in which he sought funds for that testimony and that Lance did not suffer prejudice by trial counsel's failure to obtain funds for that testimony.

2. Trial Court's Alleged Error

Lance makes the alternative argument that the trial court rendered his trial counsel ineffective by denying his motion for funds for the expert testimony

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[2] Joe Moore was the friend who accompanied Lance during the 1993 attempt to murder Joy Lance and Butch Wood and to whom Lance made incriminating statements after the murders.

discussed above. We reject this claim for two independent reasons. First, as we have discussed above, denial of those funds was not improper and did not result in significant prejudice to Lance's defense. Second, we hold that this claim is barred because it was raised and rejected on direct appeal. See Head v. Hill, 277 Ga. 255 (III) (587 SE2d 613) (2003). Although the focus of Lance's argument on direct appeal regarding experts was on Ake v. Oklahoma, 470 U. S. 68 (105 SC 1087, 84 LE2d 53) (1985), which was decided solely on the basis of due process, Lance's argument on direct appeal also invoked the Sixth Amendment. Raising this additional ground on direct appeal, rather than saving it for when new counsel began representing Lance, was appropriate, because this form of Sixth Amendment claim does not involve the potential conflict of interest inherent where a lawyer accuses himself or herself of having made unprofessional choices. See id. at 87 n.13 (noting, but declining to address, the possibility that a trial court's denial of expert funds might raise Sixth Amendment concerns, in addition to due process concerns, that could be considered on direct appeal); Strickland, supra, 466 U. S. at 686 (noting that there are Sixth Amendment claims regarding governmental interference with the right to counsel that are distinct from claims regarding trial counsel's own deficient performance). Compare Glover v. State, 266 Ga. 183, 183-185 (2) (465 SE2d 659) (1996) (holding that a claim alleging that trial counsel himself or herself acted outside of the bounds of professional competence must be raised at the earliest practicable moment). Having been timely raised, the claim was rejected by this Court. Lance, supra, 275 Ga. 13-14 (2). Thus, it is now barred.

C. Combined Effect of Trial Counsel's Deficiencies

Above, we have commented on the prejudicial effect arising from each of trial counsel's deficiencies that we either have found to exist or have assumed to exist, and we have found each separately not to have been significantly prejudicial. Considering now the combined effect of those deficiencies, we conclude that the absence of those deficiencies would not in reasonable probability have affected the verdict at either phase of Lance's trial. Compare Porter v. McCollum, supra, U.S. (III) (130 SC at 453-456). See also Holsey, supra, 281 Ga. at 812, n.1 (holding that the combined effect of trial counsel's deficiencies should be considered in weighing prejudice).

III. Claims that are Barred as Previously Litigated

Lance argues that the habeas court erred by finding certain claims to be barred by this Court's denial of those same claims on direct appeal. A habeas court should not reconsider issues previously addressed by this Court where there has been no change in the law or the facts since this Court's decision. See Hill, supra, 277 Ga. at 263 (III) (habeas court "properly found claims previously rejected by this Court in Hill's direct appeal to be barred by res judicata"); Bruce v. State, 274 Ga. 432, 434 (2) (553 SE2d 808) (2001) ("Without a change in the facts or the law, a habeas court will not review an issue decided on direct appeal."). But see Hill, supra at 257 (II) (A) (1) (noting that a claim based on new law may only serve as the basis for habeas corpus relief if the new law is of the type that is given retroactive effect). We conclude that Lance has failed to show any new law or new facts that justify the

reconsideration of the claims he raised on direct appeal.

A. Lance claims that the State knowingly presented false testimony from a witness at trial, Frankie Shields. See United States v. Agurs, 427 U. S. 97, 103 (II) (96 SC 2392, 49 LE2d 342) (1976) (a conviction "obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"). At trial, Shields denied that his testimony was part of a deal with the State. While Lance's original direct appeal was pending, this Court was informed that Shields had written a letter to a newspaper claiming that there had in fact been a deal. This Court struck the original direct appeal from its docket and remanded the case for an evidentiary hearing in the trial court on the matter. At that hearing, Shields testified that there had been no deal, and this Court held on appeal from that hearing that the "evidence authorized the trial court to find that no deal had been offered to or made with Shields by the State." Lance, supra, 275 Ga. at 25 (35). In the habeas court, Lance once again claimed that the State had made a deal for Shields's trial testimony. At the evidentiary hearing in the habeas court, Shields again admitted that he had spoken with Lance in the jail and that Lance had drawn a map of the area where the murders occurred, but Shields claimed that he had testified falsely in the trial court about Lance's confession to him and about there being no deal with the State for his testimony. The habeas court found Lance's claim to be barred; however, in an apparent abundance of caution, the habeas court also made the reasonable finding of fact that Lance, in light of all of

the evidence presented, had failed to prove that Shields's trial testimony was actually false. Similarly, we pretermit whether the evidence Lance presented in the habeas court constitutes the type of new alleged facts that could ever warrant setting aside the procedural bar to his claim, and we hold that his claim is meritless because Shields's trial testimony was not actually false.

Similarly, to the extent that Lance can be deemed to have sufficiently raised related claims regarding his intent to commit the murders and the proportionality of his death sentence, we deem those claims also to be meritless, even if they are not barred.

B. Lance claims that the trial court erred by admitting evidence of his prior conduct toward the victims and other persons. Lance has failed to show any new facts or new law that would justify this Court's revisiting its previous holding that this evidence was proper. See Lance, supra, 275 Ga. at 19 (15, 16, and 18). Thus, this claim remains barred.

C. Lance argues in summary terms that the habeas court erred by refusing to grant relief based on other claims that were considered and rejected by this Court on direct appeal. We conclude that Lance's arguments regarding these claims are "so lacking in specific argument" that they should be deemed abandoned. See Supreme Court Rule 22; Hill, supra, 277 Ga. at 269 (VI) (A).

IV. Claims that are Procedurally Defaulted

Lance also argues in summary terms that the habeas court erred by denying various claims because they were barred by procedural default. See Turpin v.

Todd, 268 Ga. 820 (2) (493 SE2d 900) (1997) (addressing procedural default); OCGA § 9-14-48 (d). We conclude that Lance's arguments regarding these claims are "so lacking in specific argument" that they should be deemed abandoned. See Supreme Court Rule 22; Hill, supra, 277 Ga. at 269 (VI) (A).

V. Remaining Claims that are Abandoned

Lance's remaining claims, which are presented as a mere list and which are supported only by an improper attempt to incorporate arguments made in the habeas court rather than in this Court, are likewise deemed abandoned. Id.

Judgment reversed in Case No. S09A1536. Judgment affirmed in Case No. S09X1538. Carley, P.J., Benham, Thompson, Hines and Melton, JJ., and Judge Gregory A. Adams concur. Nahmias, J., disqualified.

APPENDIX E

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

CASE NO: 2003-V-490
HABEAS CORPUS

[Filed April 28, 2009]

DONNIE CLEVELAND LANCE	)
	)
Petitioner,	)
	)
v.	)
	)
HILTON HALL, Warden,	)
Georgia Diagnostic and	)
Classification Prison,	)
	)
Respondent.	)
	)

FINAL ORDER
FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO O.C.G.A. § 9-14-49

This matter comes before this Court on the Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentences of death from his trial in the Superior Court of Jackson County. Having considered the Petitioner's original and amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answers to the

original and amended Petitions, relevant portions of the appellate record, evidence admitted at the hearing on this matter on August 28-30, 2006, the documentary evidence submitted, the arguments of counsel, and the post-hearing briefs, the Court hereby DENIES the petition for writ of habeas corpus as to the convictions and GRANTS the writ of habeas corpus only as to the death sentences imposed and VACATES Petitioner's death sentences. This Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49.

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FINAL ORDER

I. PROCEDURAL HISTORY

On June 23, 1999, Donnie Cleveland Lance (hereinafter referred to as "Petitioner") was convicted in the Superior Court of Jackson County on two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm during the commission of a crime. Following the sentencing phase of trial, the jury returned two sentences of death against Petitioner for the murders of Sabrina Joy Lance and Dwight G. Wood, Jr. (R. 546-547). Petitioner was further sentenced to twenty years for burglary and five years for possession of a firearm during the commission of a crime, all to be served consecutively. The felony murder convictions were vacated by operation of law.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on February 25, 2002. Lance v. State, 275 Ga. 11 (2002). Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on December 2, 2002. Lance v. Georgia, 537 U.S. 1050 (2002).

On May 29, 2003, Petitioner filed the above-styled habeas corpus petition challenging the convictions and sentences entered in the Superior Court of Jackson County, Georgia. A motions hearing was conducted in this case on March 19, 2004. The evidentiary hearing was held on August 28-30, 2006.

II. STATEMENT OF FACTS

The Georgia Supreme Court summarized the facts of Petitioner's case in its opinion on direct appeal as follows:

> The evidence presented at trial showed the following. The bodies of the victims were discovered in Butch Wood's home on November 9, 1997. Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 1/2 EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him looking for Joy at 11 :55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that

matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away

> with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.
>
> Lance v. State, 275 Ga. 11, at 13 (2002).

III. SUMMARY OF PETITIONER'S CLAIMS

The Petition for Writ of Habeas Corpus (as amended) enumerates twenty-nine (29) claims for relief. As is stated in further detail below, the Court finds: **(1)** that some of the claims are procedurally barred due to the fact that they were litigated on direct appeal; **(2)** that some of the claims are procedurally defaulted because Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; **(3)** that some of the claims are non-cognizable; and **(4)** that some of the claims are neither procedurally barred nor defaulted and are, therefore, properly before the Court for habeas review.

ABANDONED CLAIMS

To the extent Petitioner failed to brief his claims for relief or failed to present evidence in support of the claims, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are DENIED.

IV. CLAIMS BARRED BY *RES JUDICATA*

The following claims of the petition were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court in Lance v. State, 275 Ga. 11 (2002). Therefore, this Court is precluded from reviewing such claims under well-settled Georgia Supreme Court precedent. See Elrod v. Ault, 231 Ga. 750 (1974); Gunter v. Hickman, 256 Ga. 315 (1986); Roulain v. Martin, 266 Ga. 353 (1996).

> **The portion of Claim II** wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of competent and independent experts on the issues of time of death (pathologist) and latent footprint analysis (crime scene expert), (see Lance v. State, 275 Ga. at 13-14(2));
>
> **The portion of Claim V** wherein Petitioner alleges that the State engaged in prosecutorial misconduct by failing to disclose material exculpatory information regarding a deal given to Frankie Shields and presenting false testimony[1] from Frankie Shields about possible deals, benefits, proceeds or other inducements they had received, expected to receive or did receive in exchange for such testimony. (see Lance v. State, 275 Ga. at 25-26(35)).

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[1] The Court notes that Shields' testimony in the instant proceeding does not establish that his trial testimony was false. The Georgia Supreme Court credits trial testimony more than post trial recantations. See Norwood v. State, 273 Ga. 352, 353 (2001).

Claim VI, wherein Petitioner alleges that he did not kill, attempt to kill, or intend to kill Joy Lance or Dwight Wood, Jr., (Enmund v. Florida, 458 U.S. 782 (1982), (see Lance v. State, 275 Ga. at 12-13(1));

Claim VIII, wherein Petitioner alleges that the prosecution improperly relied upon evidence of unadjudicated bad acts, (see Lance v. State, 275 Ga. at 19-20(15)(16) and (18));

Claim X, wherein Petitioner alleges that the trial court erroneously permitted the prosecution to introduce improper "victim impact" testimony, (see Lance v. State, 275 Ga. at 24(27));

The portion of Claim XII wherein Petitioner alleges that the prosecution impermissibly struck a disproportionate number of jurors based on racial bias, (see Lance v. State, 275 Ga. at 17(12));

Claim XVII, wherein Petitioner alleges that his death sentences are disproportionate to sentences sought and imposed on others who have committed similar crimes, (see Lance v. State, 275 Ga. at 26-27(40));

Claim XIX, wherein Petitioner alleges that capital punishment is cruel and unusual, (see Lance v. State, 275 Ga. at 26(37));

Claim XX, wherein Petitioner alleges that the trial court erred in refusing to excuse for cause numerous potential jurors (prospective jurors Casey, Dial, Braswell and juror Witcher), who were biased against Petitioner and/or whose

views regarding the death penalty would have substantially impaired their ability to fairly consider a sentence less than death and to fairly consider and give weight and meaning to all proffered mitigating evidence, (see Lance v. State, 275 Ga. at 15-17(8)(9)(11));

Claim XXI, wherein Petitioner alleges that the trial court erred in excusing for cause prospective juror (Mc Cullers) whose views on the death penalty were not extreme enough to warrant exclusion, (see Lance v. State, 275 Ga. at 17(10)); and

Claim XXVII, wherein Petitioner alleges that Georgia's statutory aggravating circumstances as defined and applied are unconstitutionally vague and arbitrary, (see Lance v. State, 275 Ga. at 26(37)).

V. CLAIMS WHICH ARE PROCEDURALLY DEFAULTED

In his petition, Petitioner raises several claims which are procedurally defaulted due to Petitioner's failure to raise the claims on trial and on direct appeal. This Court finds that Petitioner has failed to establish cause[2] and actual prejudice or a miscarriage of justice sufficient to excuse his procedural default of the following claims. See Black v. Hardin, 255 Ga. 239

[2] Petitioner has alleged that to the extent that counsel failed to raise these claims at trial or direct appeal, counsel rendered ineffective assistance of counsel in doing so. Except as set forth in Section VII.A.9 below, these claims of ineffective assistance of counsel are denied.

(1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4)(1988).

The portion of Claim II wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of a mental health expert, a polygraph expert, and a fingerprint expert;

Claim III, wherein Petitioner alleges that his execution would be unconstitutional because he suffers from mental retardation, illnesses, and disabilities;[3]

Claim IV, wherein Petitioner alleges that the jury committed misconduct throughout all phases of trial;

The portion of Claim V wherein the Petitioner alleges that the State engaged in misconduct by not disclosing relevant, material exculpatory files, documents and/or evidence regarding acts of misconduct by members of the jury venire, the actual jurors and/or the alternate jurors;

The portion of Claim V wherein Petitioner alleges that the State made improper arguments to the jury;

Claim VII, wherein Petitioner alleges that the prosecution suppressed material exculpatory

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[3] The Court addresses this claim on the merits in Section VII.B.1 below. See Schoefied v. Holsey, 281 Ga. 809, 816-17 (2007) (holding that the habeas court was correct in considering new claim of mental retardation under the "miscarriage of justice" exception to the rule of procedural default when issue was not raised at trial).

evidence, including but not limited to, evidence of communications and meeting with certain key witnesses who testified against the Petitioner;[4]

Claim IX, wherein Petitioner alleges that the trial court erred in admitting gruesome and prejudicial photographs and videotape taken of the crime scene and the victims;

Claim XI, wherein Petitioner alleges that the grand jury and traverse jury were unconstitutionally composed and were the result of unconstitutional practices and procedures;

The portion of Claim XII wherein Petitioner alleges that the prosecution impermissibly struck a disproportionate number of jurors based on gender bias;

Claim XIII, wherein Petitioner alleges that the State destroyed and/or failed to preserve potentially exculpatory evidence;

Claim XVI, wherein Petitioner alleges that the lack of a uniform standard for seeking and imposing the death penalty across Georgia and the prosecutor's potential arbitrary abuse of discretion to seek the death penalty renders his death sentence unconstitutional;

The portion of Petitioner's Post-Hearing Brief (as it relates to **Claim XX**) wherein

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[4] To the extent Petitioner alleges that that the State suppressed exculpatory evidence with regard to Frankie Shields, this claim was addressed and decided adversely to Petitioner on direct appeal. Lance v. State, 275 Ga. At 24 (28).

Petitioner alleges that the trial court improperly qualified juror Queen to serve on Petitioner's case;

Claim XXII and Claim XXIII, wherein Petitioner alleges that the trial court's instructions to the jury regarding reasonable doubt were unconstitutional;

Claim XXIV, wherein Petitioner alleges that the verdict form was unconstitutionally vague;

Claim XXVIII, wherein Petitioner alleges that the application of Georgia's Unified Appeal Procedure is unconstitutional; and

The portion of Petitioner's Post-Hearing Brief wherein Petitioner alleges that the trial court erred when it denied Petitioner's request for additional counsel.

With regard to the allegation in **Petitioner's Post-Hearing Brief** that the trial court erred when it denied Petitioner's request for additional counsel, the Court notes that Petitioner had *retained* the counsel of his choice for his trial. J. Richardson Brannon, Petitioner's trial counsel, was an attorney who had extensive criminal litigation experience, including capital litigation experience. (Res. Ex. 2, HT 8304-8305, 8308-8309; HT 35-36). Petitioner relies on the American Bar Association's guidelines, which recommend that two qualified attorneys be assigned to represent capital defendants, as well as Georgia's Unified Appeal Procedure, in support of this claim. The Court notes that the ABA guidelines are not "requirements" which were binding on the trial court at the time of trial, and the Unified Appeal Procedure did

not become effective until after Petitioner's trial. Although the better practice would have been for the trial court to appoint second counsel to assist in the Petitioner's defense, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

In **Claim IV** Petitioner alleges that the jury committed misconduct throughout all phases of trial, including but not limited to the following:

1) Jurors searched the Bible during deliberations;

2) Jurors violated their oaths and the trial court's instructions;

3) Jurors were tainted and/or affected by and/or relied upon outside, extraneous and/or unlawful influences, facts, factors, sources of fact and/or law, persons and officials, including religious and/or religious-related materials;

4) Jurors failed to reveal relevant and material information during voir dire, on jury questionnaires, and/or when they were questioned by the parties and/or the judge;

5) Jurors improperly considered matters extraneous to the trial;

6) Certain jurors refused to deliberate;

7) Certain jurors participated in *ex parte* deliberations;

8) Certain jurors participated in deliberations prior to the conclusion of the guilt/innocence and/or penalty phases of trial;

9) Jurors had improper biases that infected their deliberations; and

10) Jurors improperly prejudged Petitioner's case;

Petitioner argues that the jurors prayed together, consulted the Bible to justify imposing the death penalty and that there were Gideon Bibles in their hotel rooms. Petitioner failed to raise these claims at trial or on direct appeal although the alleged basis for these claims was available to trial and appellate counsel, just as it was available to habeas counsel. Petitioner's allegation rests solely on the testimony of juror Tona Harrell. Significantly, the affidavit of Tona Harrell was obtained by Petitioner on October 23, 1999, which was four months after Petitioner's trial. (HT 3494). Petitioner's appeal was docketed in the Georgia Supreme Court on December 16, 1999. Subsequently, the case was remanded for an evidentiary hearing on the issue of whether Frankie Shields was given a "deal" by the State prior to trial. After the hearing was concluded, the appeal was docketed again on August 30, 2001. See Lance, 275 Ga. at 12. Accordingly, as Petitioner was aware of the basis of this claim at the time of the April 2000 hearing in the trial court, Petitioner could have reasonably raised this claim in a motion for new trial or on direct appeal.

Georgia law is clear that claims Petitioner failed to raise on direct appeal are not reviewable by this Court

as Petitioner has failed to establish the requisite cause and prejudice or a miscarriage of justice to overcome his procedural default of these claims. See, e.g., Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); O.C.G.A. § 9-14-48(d). Accordingly, Petitioner has procedurally defaulted this claim and it is barred from this Court's review. Black v. Hardin, supra.

As to prejudice, Petitioner has failed to show that the jury improperly relied on the Bible or prayer. The affidavit and deposition of Tona Harrell states that "[the jurors] also prayed together a lot and several people searched the Bible for assistance in being comfortable with our decision." (HT 1260, HT 3492). Regarding the fact that the jurors prayed together, Ms. Harrell stated:

> I don't recall any prayer to help us with the deliberation. I recall prayer because it was such an emotional task that we had ahead of us. And it was very emotional. I mean, we had a decision to make that was an important decision. And I remember – and I can't remember if it was a prayer led. I don't remember the exact details, but it was about just – it was for us. It wasn't the case. It was for us to give us comfort and to know that – you know, comfort. I mean, that's the only word I can think of to describe it to you. It was just to give us comfort.

(HT 1259-1260). She further stated that no one quoted verses from the Bible. (HT 1259).

Ms. Harrell testified that she did not search the Bible for assistance in making her decision, and she did not recall that other jurors were searching the Bible for

scriptures. (HT 1260). In fact, she did not recall seeing any jurors physically looking in the Bible. (HT 1261). She explained that she prayed for "personal reason" in that it was a "personal comfort." (HT 1258-1259). Ms. Harrell further stated that she did not pray out loud, and she could not recall any of the other jurors praying out loud. (HT 1259). Moreover, Ms. Harrell repeatedly stated in her deposition that there was not a Bible in the jury room, and none of the jurors quoted scriptures from the Bible during their deliberations. (HT 1259, 1261).

To establish the requisite prejudice, Petitioner had to show that the jurors relied on the Bible for their sentencing decision, not merely that the jury read the Bible or prayed for personal inspiration or spiritual guidance as the facts establish in the instant case. As held by the Georgia Supreme Court in Cromartie v. State, 270 Ga. 780, 789-790 (1999), "a juror's personal use of the Bible or other religious book outside the jury room is not automatically prohibited."

Additionally, in Cromartie, the Georgia Supreme Court relied on Jones v. Kemp, 706 F.Supp. 1534, 1560 (N.D. Ga. 1989), in which the district court held, "[t]he court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen...." Thus, "possession, *even in the jury room*, of personal Bibles, perhaps even consulted for personal" "inspiration or spiritual guidance" is not automatically prohibited. (Emphasis added).

Accordingly, Petitioner has failed to establish the requisite miscarriage of justice or cause and prejudice

to overcome his default of this claim and it remains barred from this Court's review.

As to the remainder of Petitioner's juror misconduct claims, he has failed to support them with any evidence or argue them to this Court, thus the Court find that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of these claims.

With regard to the portion of **Petitioner's Post-Hearing Brief** (as it relates to **Claim V**) wherein Petitioner alleges that the State made improper arguments to the jury, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

The Court finds that the State's argument that the past incidents of violence by Petitioner against both victims imply that he killed them was not improper. (T. 1926-28, 1929). Prior bad acts "are evidence of the relationship between the [victim and the defendant] and may show the defendant's motive, intent, and bent of mind in committing the act for which he is being tried." Graham v. State, 274 Ga. 696, 698 (2002); see also Dixon v. State, 275 Ga. 232, 233 (2002)(finding that the admission of prior violence was proper because it was "illustrative of [the defendant's] abusive course of conduct toward [the victim]"). Furthermore, this Court notes that this evidence was admitted at trial as unadjudicated prior bad acts and the admission of this evidence was upheld by the Georgia Supreme Court in Petitioner's direct appeal. See Lance v. State, 275 Ga 11, 19 (2002). Because the State relied upon admissible evidence in making a proper deduction of motive,

intent, bent of mind, or course of conduct, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

The Court finds that the prosecution's statements that Petitioner loved to inflict pain on the victim and that Petitioner's culpability for the murders can be implied from his own statement, "if I can't have you no one else can," were not improper. (T. 1928, 1935). Both the State and the defendant are given wide leeway during closing argument to argue all reasonable inferences that may be drawn from the evidence. Smith v. State, 279 Ga. 48, 50 (2005). An attorney may make almost any form of argument he or she desires if it is based upon the facts in the record and the deductions that may be drawn therefrom. Whether such argument is illogical, unreasonable, or even absurd, is a matter left for the reply of the adverse party, not for rebuke by the court. Morgan v. State, 267 Ga. 203, 203-204 (1996). As these arguments were reasonable inferences from the considerable evidence that came out at trial of violence, domestic abuse, and death threats that Petitioner repeatedly imposed on the victims, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State commented on Petitioner's failure to waive his privilege against self-incrimination, but has provided no citation to the trial transcript in support of this claim. The Court concludes Petitioner has abandoned his attempt to establish cause and prejudice or a miscarriage of justice and has not overcome the procedural default of this claim.

Petitioner also alleges that the State's comments about mercy and deterrence were in error. (T. 1936-37, 1940). The Court finds that both of these arguments are proper. The Georgia Supreme Court has held that it is acceptable for the prosecution to argue that the defendant showed the victim no mercy. See Crowe v. State, 265 Ga. 582, 592-593; Moon v. State, 258 Ga. 748, 760 (1988). The Georgia Supreme Court has also held that a prosecutor may vigorously argue that a death sentence is the appropriate punishment and may remind the jury of the retributive and general deterrent function of its verdict. Fleming v. State, 265 Ga. 541, 458 (1995); Ford v. State, 255 Ga. 81, 93 (1985). *As* such, the prosecutor's references in the instant case to Petitioner's lack of mercy and his use of the phrase, "There's only one verdict that will stop the Donnie Lances of this world," were not improper. Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State argued facts not in evidence; however Petitioner does not allege which facts he is challenging. Therefore, the Court concludes Petitioner has abandoned his attempt to establish cause and prejudice or a miscarriage of justice and has not overcome the procedural default of this claim.

Petitioner also claims that the prosecutor improperly offered his personal opinion during closing arguments. (T-1762-1765, 1769-72, 1773, 1776-77, 1778, 1785-86, 1790-91, 1805-06, 1807, 1808, 1810, 1813, 1814, 1823-27, and 1829). The Georgia Supreme Court has held that a prosecutor's statements, even if "couched in the framework of personal opinion," are not

improper if the statements are inferences drawn from the evidence. See Carr v. State, 267 Ga. 547, 556 (1997). See also Shirley v. State, 245 Ga. 616, 617 (1980)(holding that it is not improper for a prosecutor to urge the jury to draw conclusions as to a witness' veracity from the evidence); Jackson v. State, 281 Ga. 705, 708 (2007)(finding that a "prosecutor's use of phrases such as 'I think' and 'I know' does not amount to an impermissible statement of personal opinion"). The Court finds that some of the statements alleged by Petitioner to be opinions are actually not opinions, and the remaining statements are permissible inferences from the evidence that are merely set in the framework of a personal opinion. See Carr, 267 Ga. at 556. Thus, the Court concludes that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State improperly referred to religion and/or God in the closing argument. The laws of Georgia do not forbid all references to religion in a closing argument. The Georgia Supreme Court has held, "It is not and has never been the law of Georgia that religion may play no part in the sentencing phase of a death penalty trial." Greene v. State, 266 Ga. 439, 449 (1996). "While it is improper for the prosecutor to urge the imposition of the death penalty based on Appellant's beliefs or to urge that the teachings of a particular religion mandate the imposition of that sentence, the prosecutor nevertheless may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." Hill v. State, 263 Ga. 37, 46 (1993). While the Georgia Supreme Court has found error in references to religion which invite jurors to base their verdict on extraneous

matters not in evidence, (id. at 45-46), the Court has distinguished these direct references from passing religious references. See Carruthers v. State, 272 Ga. 306, 309-310 (2000).

In the instant case, the State did not impermissibly invite the jurors to base their verdict on divine law or on any extraneous matters not in evidence. During the State's closing argument, the prosecutor stated, "God does not like to see crimes like this go unpunished. ... And that unseen hand of God is what brought Donnie Lance to justice." (T. 1940-1941). When read in context, the prosecutor actually was referring to God's intervention in the discovery of incriminating evidence against Petitioner. (T. 1778, 1940). These statements did not suggest that the jury should rely on divine law in sentencing Petitioner to death.

In determining that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim, the Court also notes that defense counsel argued at length during his closing argument that the jury should give Petitioner a lesser sentence based on the teachings of Jesus and the Christian principles of forgiveness and mercy. (T. 1945-1949). Given the fervent religious arguments against the death penalty made by Petitioner's counsel at trial, there is no error resulting from the prosecutor's two references to God's involvement in bringing Petitioner to justice. See Crowe, 265 Ga. at 593 (finding that the State's references to religion and the Bible were not error because the defendant's own mitigation evidence focused on an appeal to religion).

In a portion of **Petitioner's Post-Hearing Brief** (as it relates to **Claim V**) Petitioner alleges that the State violated his constitutional rights by not disclosing an alleged deal with Morgan Thompson (a/k/a Frank Morton). Petitioner failed to raise this allegation on direct appeal. The Court finds that the claim was available to appellate counsel just as it was available to habeas counsel, particularly in light of the fact that habeas counsel rests this claim on the testimony of Frankie Shields, with whom appellate counsel spoke.

Further, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice with regard to this claim as Petitioner has failed to submit any admissible evidence in support of his allegation as Petitioner only introduced the hearsay testimony of Frankie Shields about statements Mr. Thompson allegedly made to Mr. Shields. (HT 426-430). The Court finds that these statements based on speculation and hearsay have no *indicia* of reliability and are not admissible evidence. (HT 426-430).

Moreover, the Court notes that the admissible evidence before it demonstrates that there was no deal with Mr. Thompson. Mr. Madison testified that there was no deal of any kind in exchange for Mr. Thompson's testimony against Petitioner. (HT 520-521). Mr. Thompson himself testified at trial that there was no deal, no promises, and no consideration offered in exchange for his testimony. (TT 1232).

For the above and foregoing reasons, the Court finds that Petitioner failed to overcome his procedural default of this claim.

In **Claim IX** Petitioner alleges that gruesome photographs and a video of the crime scene and the victims were improperly admitted into evidence. However, the admission of evidence is a matter within the sound discretion of the trial court. Baker v. State, 246 Ga. 317 (1980). This discretion extends to issues of whether the probative value of evidence is outweighed by its tendency to unduly arouse the jury. Smith v. State, 255 Ga. 685 (1986). The Georgia Supreme Court has explained, "any evidence is relevant which tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant." Owens v. State, 248 Ga. 629, 630 (1981). In Owens, the Georgia Supreme Court stated that "the trial court has wide discretion in determining relevancy and materiality," and that "where the relevancy or competency is doubtful, it should be admitted, and its weight left to the determination of the jury." Id. at 630.

Moreover, the Georgia Supreme Court has long held that photographs which are relevant to an issue in the case are generally admissible even though they may be horrific and have an effect upon the jury. Ramey v. State, 250 Ga. 455, 456 (1983); Simon v. State, 253 Ga. 681 (1985); Lee v. State, 247 Ga. 411 (1981). Photographs which are material and relevant to any issue are admissible even though they are duplicative. Moses v. State, 245 Ga. 180, 187 (1980).

Unless there are some very exceptional circumstances, photographs of the deceased are generally admissible to show "the nature and extent of the wounds, the location of the body, the crime scene, the identity of victim and other material issues." Moses

v. State, 244 Ga. 180, 187 (1980). "Although photographs of the victim are prejudicial to the accused, so is most of the state's pertinent testimony. The pictures may be gory, but murder is usually a gory undertaking." Id.

As the exhibits about which Petitioner complains were admissible to show the nature and extent of the wounds of the victims, the locations of their bodies, the crime and the crime scene, the trial court did not abuse its discretion in admitting these photographs. Thus, Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim.

In **Claims XXII and XXIII** Petitioner alleges that the trial court's instruction to the jury on reasonable doubt was unconstitutional in that it misstated the law and equated reasonable doubt with moral certainty which allegedly reduced the State's constitutionally mandated burden of proof. However, neither the United States Supreme Court nor the Georgia Supreme Court has found that the inclusion of the words "moral" and "reasonable" in a burden of proof charge violates due process by diminishing the legal standard required to convict the defendant. See Vance v. State, 262 Ga. 236, 237(1992); Rivers v. State, 224 Ga. App. 558 (1997); Head v. Ferrell, 274 Ga. 399, 403(IV)(A); Victor v. Nebraska, 511 U.S. 1 (1994).

In Vance, the Georgia Supreme Court did note that a better charge would not include the phrase "moral and reasonable certainty." However, the Court recognized that the language "moral and reasonable certainty" is all that can be expected in a legal investigation," and held that the charge granted no

reversible error when "considered in the context of the charge as a whole." Id. at 238 (citing Francis v. Franklin, 471 U.S. 307, 315 (1985)). Specifically, the Court found that "The trial court's charge as a whole repeatedly and accurately conveyed to the jury the concept of reasonable doubt." Id. at 237. See also Marion v. State, 263 Ga. 358, 359(2) (1993); Brown v. State, 264 Ga. 48, (1995) (finding charge properly defined reasonable doubt, in reference to "moral and reasonable certainty" and did not lessen the burden of proof).

Further, in neither of the two different state court charges dealing with the concept of reasonable doubt examined by the United States Supreme Court in Victor v. Nebraska and the companion case of Sandoval v. California, 511 U.S. 1 (1994), did the United States Supreme Court find a constitutional violation despite the use of the phrase "moral certainty" in the Nebraska charge and the use of the phrase "to a moral certainty" in the California charge. Instead, the Supreme Court held that in each instance, when the entire charge was taken as a whole, the phrases were adequately explained so that reasonable doubt was properly understood. As that Court explained, "The problem in Cage [v. Louisiana, 498 U.S. 39 (1990)] was that the rest of the instruction provided insufficient context to lend meaning to the phrase." Victor v. Nebraska, 511 U.S. at 16.

In the instant case, the trial court's reference to a "moral and reasonable certainty" appeared in the context of a charge which as a whole repeatedly and accurately conveyed to the jury the concept of reasonable doubt. Thus, the reference to "moral and

reasonable certainty" did not lessen the burden of proof necessary to obtain a conviction, and therefore did not violate the due process clause. Accordingly, Petitioner has failed to establish cause and prejudice or a miscarriage of justice and his claim remains defaulted.

VI. NON-COGNIZABLE CLAIMS

This Court finds that the following claims raised by Petitioner fail to allege grounds which allege a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and therefore are non-cognizable under O.C.G.A. § 9-14-42(a).

> **Claim XIV**: Petitioner's claim that O.C.G.A. § 17-10-38, was declared unconstitutional in Dawson v. State, 274 Ga. 327, 554 S.E.2d 137 (2001), and his death sentence is therefore null and void and may not be carried out is non-cognizable in these habeas proceedings. Alternatively, even if this claim was cognizable, this Court would find it is without merit. See Dawson supra; United States v. Chandler, 996 F.2d 1073, 1095 (11th Cir. 1993); Malloy v. South Carolina, 237 U.S. 180 (1915); Simms v. Florida, 754 So.2d 657 (2000);
>
> **Claim XV**: Petitioner's claim that death by lethal injection would subject Petitioner to punishment under a law which is *ex post facto,* fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences and is non-cognizable. Alternatively, even if this claim was cognizable, this Court

would find it is without merit. United States v. Chandler, 996 F.2d 1073, 1095 (11th Cir. 1993);

Claim XVIII: Petitioner's claim that execution by lethal injection is cruel and unusual punishment fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences and is non-cognizable in these habeas proceedings. Alternatively, even if this claim was cognizable, this Court would find it is without merit. See Baze v. Rees, 128 S.Ct. 1520 (2008) and the recent holding in Alderman v. Donald, Civil Action No.1:07-CV-1474 (ND. Ga May 2, 2008) (finding Georgia's method of execution constitutional);

Claim XXIX: Petitioner's claim of cumulative error. This Court finds that this claim is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences. Alternatively, even if this claim was cognizable, this Court would find it is without merit as there is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70 (2000);

Claim VI: Actual Innocence:

Petitioner's stand alone claim of actual innocence is non-cognizable in this habeas corpus proceeding, as the Georgia Supreme Court has held that "it is not the function of the writ of habeas corpus to determine the guilt or innocence of one accused of a crime." Deyton v. Wanzer, 240 Ga. 509, 510 (1978). Petitioner's proper

avenue to assert his bare allegation of actual innocence is in the trial court by properly filing an extraordinary motion for new trial. Cf. Felker v. Turpin, 83 F.3d 1303 (11th Cir. 1996) (noting that Georgia law, unlike a number of other states, permits motions for new trial on newly discovered evidence grounds and provides that the time for filing such motions can be extended). See also Mize v. Head, Civil Action No. 99-V-847 (death penalty habeas corpus case in Butts County in which the habeas corpus court found Petitioner's claim of actual innocence non-cognizable and Petitioner filed an extraordinary motion for new trial regarding that claim); Waldrip v. Head, Civil Action No. 98-V-139 (death penalty habeas corpus case in Butts County in which the habeas court found Petitioner's claim of actual innocence non-cognizable; application to appeal this issue was denied by Georgia Supreme Court). Thus, this claim is not reviewable by this Court as it is not a cognizable constitutional claim.

In order for Petitioner's allegation of actual innocence to be cognizable in this proceeding, it must be coupled with an allegation of constitutional error. See Schlup v. Delo, 513 U.S. 298, 321 (1995); Murray v. Carrier, 477 U.S. 478, 496 (1986); Herrera v. Collins, 506 U.S. 390, 400-401 (1993). This bedrock principle of law has not been eroded. See, e.g., Walker v. Penn, 271 Ga. 609, 612 (1999); Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002); High v. Head, 209 F.3d 1257, 1273 (11th Cir. 2000); Lee v. Kemna, 534 U.S. 362, 405-406 (2001).

Petitioner's Post-hearing brief II(B): Petitioner also raises the issue of the State's response to the open records requests *made by habeas counsel.* However,

this issue is not cognizable before this Court because it does not allege a substantial violation of Petitioner's rights "in the proceedings which resulted in [the petitioner's] conviction," O.C.G.A. § 9-14-42(a), and therefore cannot form a basis for habeas corpus relief:

VII. CLAIMS PROPERLY BEFORE THE COURT FOR HABEAS REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In Claim I and in numerous subparts to other claims, Petitioner alleges that he was denied his right to the effective assistance of counsel at all phases of his trial and appellate proceedings.[5] Because J. Richardson Brannon represented Petitioner at trial and on direct appeal, the instant proceeding is Petitioner's first opportunity to raise these claims and they are accordingly properly before the Court.

The standards for reviewing allegations of ineffective assistance of counsel are contained in the United States Supreme Court's seminal case of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. In order to establish his ineffectiveness claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel"

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[5] To the extent Petitioner failed to brief or to present evidence in support of his ineffective assistance of counsel claims, these claims are denied.

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

Strickland, 466 U.S. at 687. See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims); Smith v. Francis, 253 Ga. 782, 783 (1985) (adopting the Strickland standard). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

In Strickland, the Court established a deferential standard of review for judging ineffective assistance claims by directing 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." Strickland v. Washington, 466 U.S. 668, 688 (1984).

In Burger v. Kemp, 483 U.S. 776, 780 (1987), the Court again discussed the parameters for examining Strickland's performance prong and directed that, "we address not what is prudent or appropriate, but only what is constitutionally compelled." See Head v. Carr, 273 Ga. 613, 625 (2001) (quoting Zant v. Moon, 264 Ga. 93, 97-98(1994), relying on Burger v. Kemp, 483 U.S. 776, 780 (1987)).

Further, not only did the Strickland court establish a strong presumption in favor of effective assistance of counsel, but the Court in Strickland also instructed reviewing courts that the proper focus of a court reviewing a claim of ineffective assistance of counsel is 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." Strickland v. Washington, 466 U.S. at 688. See also Adams v. State, 274 Ga. 854, 856 (2002)("strong presumption" exists in favor of finding defendant was provided with effective representation).

With reference to the prejudice prong, the Georgia Supreme Court has adopted the Strickland test which requires that to establish actual prejudice, a petitioner "must demonstrate that 'there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Smith, supra. See also Strickland, supra at 694." Head v. Carr, 273 Ga 613, 616 (2001).

The Court notes that the presumption in favor of effective assistance is even greater when trial counsel is experienced and the implementation of this stronger

presumption is justified in light of the experience of Petitioner's trial counsel. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc). Thus, the Court concludes that the experience of Petitioner's trial counsel warrants the greater presumption in favor of this Court finding effective assistance of counsel.

In the instant case, Brannon had been a member of the State Bar of Georgia for 21 years at the time of Petitioner's trial. (HT 8304). The record establishes that Brannon was an experienced criminal lawyer as Brannon had tried approximately two hundred cases to verdict and approximately eighty percent of those cases were criminal cases. (HT 35-36). The record also establishes that Brannon had extensive experience in the representation of capital defendants. Brannon had been involved in approximately thirteen or fourteen cases that involved a capital offense. (HT 36). Prior to Petitioner's case, Brannon had worked on four death penalty cases. (HT 36; Res. Ex. 2, HT 8308).

The Court also notes that, during his representation of Petitioner, Brannon utilized the services of three paralegals, including one paralegal, Pat Dozier, who had assisted Brannon with another death penalty case, and understood what was required in preparing both phases of a death penalty trial. (HT 39, 74, 78-80, 8333).

Trial counsel also obtained and utilized the assistance of investigator Andy Pennington. Investigator Pennington had extensive law enforcement experience and death penalty investigation experience. (T. 1616-1625; HT 78).

In addition to his own extensive criminal litigation experience, trial counsel also consulted with Michael Mears during the course of Petitioner's case. (HT 83-84, HT 8347-8348, 8480-8497).

1) Denial of Request for Additional Counsel

Petitioner alleges that trial counsel was rendered ineffective by the trial court's denial of Brannon's request for a second attorney to assist in Petitioner's case. Specifically, Petitioner argues that at the time of Petitioner's case the American Bar Association's Guidelines (hereinafter "ABA Guidelines") and the Unified Appeal Procedure (hereinafter "UAP") "required" that two qualified attorneys be assigned to represent capital defendants. This Court finds that the ABA Guidelines are not "requirements" and these "guidelines" are not binding on this Court and were not binding on the trial court. Newland v. Hall, 527 F.3d 1162, 1207 (11th Cir. 2008). Additionally, the Unified Appeal Procedure (UAP) did not become effective until January 27, 2000, one year after Petitioner's trial. Based on its express effective date, at the time of Petitioner's trial the UAP did not mandate the appointment of additional counsel to represent Petitioner.

The Court further finds that Georgia case law does not support Petitioner's contention that additional counsel was required to be appointed as numerous death sentences have been upheld even where a defendant was represented by only one attorney. See e.g., Hammond v. State, 264 Ga. 879, 888 (1995); Gary v. State, 260 Ga. 38 (1990); Osborne v. Terry, 466 F.3d 1298, 1308 (11th Cir. 2006); Housel v. Head, 238 F.3d 1289, 1294 (11th Cir. 2001). The Court concludes that

Petitioner cannot establish ineffective assistance of counsel based merely on the fact that he was represented by one attorney. The Court finds that the Strickland standard applies to all of Petitioner's ineffective assistance of counsel claims and Petitioner bore the burden of establishing that trial counsel was deficient and Petitioner was prejudiced by trial counsel's representation with regard to all of his ineffective assistance of counsel claims.

2) Investigation of Prior Bad Acts

Petitioner alleges that based on the fact that trial counsel did not have co-counsel, Brannon was unable to perform a reasonable investigation of Petitioner's prior bad acts and that Petitioner was thereby prejudiced. The Court finds that Petitioner has failed to establish that trial counsel's representation was deficient due to trial counsel not obtaining additional counsel and has also failed to establish the requisite prejudice under Strickland with regard to this allegation.

The record establishes that trial counsel filed a Motion for Notice of Intent to Use Evidence of Other Crimes on March 31, 1998. (R. 142-144). On June 24, 1998, one year prior to trial, the State filed its notice of intent to introduce evidence of prior difficulties. (R. 211-215). On June 29, 1998, the State also filed its Notice of Intent to Introduce Evidence of Similar Transactions, which also set forth the specific factual instances the State was seeking to introduce and the witnesses that would testify with regard to these similar transactions. (R. 220-223). Following the filing of the State's notice, the trial court held an extensive hearing on the similar transactions evidence. (8/25/98

Similar Transaction Hearing; 9/28/98 Similar Transaction Hearing Continued). During that hearing, the State presented the testimony of 17 witnesses all of whom were cross examined by trial counsel. Id.

The trial court also conducted extensive hearings on the evidence of prior difficulties. (See 9/28/98 Pretrial Hearing; 9/29/98 Pretrial Hearing; 10/2/98 Pretrial Hearing and 11/9/98 Pretrial Hearing). During the hearings, the State presented the testimony of 30 witnesses. Id. The hearing transcripts reveal that trial counsel conducted a cross examination of 28 of the 30 witnesses. Id.

Following the prior difficulties hearings, the State submitted a letter to the trial court wherein it provided detailed information regarding each prior difficulty, including the factual allegations of the prior difficulties and the witnesses that the State would be presenting to testify about the prior difficulty. (R. 336-341). On November 9, 1998, the trial court entered an order regarding both the prior difficulties and similar transactions. (R. 360-373).

Trial counsel testified that, after learning that the State was going to present this evidence at trial, he spoke with Petitioner's family with whom he had excellent and continuous rapport regarding the circumstances surrounding the prior incidents. (HT 75, 96, 8333). Trial counsel also spoke with Jim Whitmer, who had previously represented Petitioner regarding Petitioner's prior criminal cases which the State was noticing its intent to introduce, and obtained Mr. Whitmer's files regarding his representation of Petitioner with regard to those cases. (HT 95-96, 8328-8329, 8540-9000, 10783). Trial counsel also obtained

medical records that document the injuries sustained by Joy Lance with regard to one of the prior similar transactions in which Joy Lance was "pistol whipped" by Petitioner, (HT 9450-9480), and counsel maintained a file on the prior difficulties that the State noticed they were seeking to introduce that included research and an index of the prior difficulties. (HT 9481-9505, 9506-9539).

On December 1, 1998, trial counsel filed a Motion to Appoint Additional Counsel, thirteen months after Brannon assumed representation of Petitioner and six months prior to Petitioner's capital trial. (R. 391-394; HT 42, 5233-5236). Billing records establish that trial counsel had conducted extensive investigation and preparation in Petitioner's case prior to requesting the appointment of additional counsel. (HT 10772-10790). Specifically, trial counsel had conducted numerous interviews with Petitioner and his family and other witnesses, drafted pleadings, performed legal research, reviewed crime lab and autopsy reports, visited the crime scene, listened to various tapes, visited Petitioner's shop and took photographs, and reviewed and made copies of the District Attorney's file. Id.

In denying trial counsel's motion for the appointment of additional counsel, the trial court held that "there is no right, even in a death penalty case, to the appointment of two counsel to represent the defendant." (R. 412-414). The trial court further noted:

> While the court is cognizant of the complexity of any death penalty trial, the court notes that counsel for the defendant has opted into the reciprocal discovery provisions of the Georgia criminal procedure code and the state began

> compliance with those provisions on or about April 2, 1998, and continues to serve defense counsel as required with discovery materials as they are made known to the state. In addition, the state has an 'open file policy' in this case which affords the defense access to the entire contents of the state's file. The defendant has had the services of his counsel since before indictment; counsel has had an opportunity for more than one year to discover the facts of this case. Counsel for the defendant has tried death penalty cases in the past and is familiar with the current state of the law on the subject, as evidenced by the motions filed in this case and his able and eloquent arguments thereon. The relative complexity of the similar transactions and prior occurrences have all been simplified by the court's conducting hearings thereon giving counsel an opportunity not only to discover the facts of those alleged occurrences but also to place the witnesses on cross-examination prior to trial and to 'lock in' their remembrance of these events. The conduct months before trial of motions to suppress and to determine the voluntariness of defendant's statements under Jackson v. Denno gives defense counsel ample time prior to trial to prepare to meet this evidence.

(R. 413-414).

In denying Petitioner's motion for reconsideration, the trial court held that "there's been no specific showing of need." (6/3/99 Pretrial Hearing, p. 16). This Court finds that the bulk of investigation and

preparation for trial had already been conducted prior to the filing of the motion for the appointment of additional counsel.

In the proceedings before this Court, Brannon testified that he was a dedicated and motivated advocate for Petitioner. Brannon described himself as a mad dog fighting meaning, "When I'm on something and I get started, I don't want to stop. And so I'll keep going for hours and hours when other people won't. And if I know there's a witness out there we may can find, I've stayed up all night to get the witness and get them under subpoena." (HT 114). Brannon further clarified that, "I just mean that that's my approach to it is this is serious business. Somebody's life's at stake." (HT 114). Therefore, Brannon's persistence and acknowledgment of the serious nature of representing a capital defendant is clearly significant in this Court's review of his performance and belies any assertion that the quality of Brannon's representation was impacted by the denial of his motion for additional counsel.

This Court finds that Petitioner has failed to establish the deficient performance of trial counsel based on Petitioner's contention that counsel was allegedly unable to investigate Petitioner's numerous bad acts prior to trial. This claim is therefore DENIED.

3) Representation at Guilt Phase and Strategy

Strickland instructs that with regard to trial counsel's obligation concerning making investigatory efforts, that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. 668. The "correct

approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994). The Court finds that a review of the totality of the circumstances in the record before this Court shows that trial counsel's investigation of the guilt phase of Petitioner's case was reasonable and did not constitute deficient performance.

Brannon testified that he worked "nonstop day and night on the guilt/innocence phase" of Petitioner's case. (HT 45). In investigating the guilt phase, trial counsel engaged in numerous conversations with Petitioner regarding the specific facts of the case and Petitioner's alibi. (HT 8326-8327, 10772-10790). Trial counsel also spoke with Petitioner's family members and other witnesses. (HT 10772-10790). In addition to interviewing witnesses, counsel visited the crime scene wherein he took photographs and measurements, and he examined the various places that were struck by the fired projectiles. (HT 67-68, 108, 8344-8345, 10785). Counsel also traveled to Petitioner's shop on three separate occasions and took photographs, (HT 10782-10783), reviewed the Georgia Bureau of Investigation file and was permitted access to the State's file. (HT 108, 110, 10774, 10787).

Trial counsel also employed the services of Investigator Pennington to assist in the investigation of Petitioner's case. Investigator Pennington's billing records reflect that he spent a considerable amount of time locating and interviewing witnesses and trial counsel's testimony confirms that Investigator Pennington was responsible for interviewing witnesses. (R. 554-555; HT 52-53). Trial counsel further testified

that Investigator Pennington continued to investigate and follow up on leads during the trial. (HT 77, 115-116).

In support of his theory that Petitioner was innocent, trial counsel presented the testimony of nine witnesses during the guilt phase of Petitioner's trial. Time of death was an issue for the defense as Petitioner was with several individuals for a large portion of November 8-9, 1997, the time period when the crime occurred. The State presented evidence that the time of death occurred, approximately, between midnight on November 8, 1997 and 5:00 a.m. on November 9, 1997. (T. 1472). Accordingly, trial counsel attempted to establish an alibi defense with a number of witnesses based on the time of death and Petitioner's whereabouts.

In support of Petitioner's alibi defense, trial counsel presented the testimony of Petitioner's uncle, Raymond Lance. Petitioner's uncle testified that he was with Petitioner from 7:00 p.m. to 11:30 p.m. on November 8, 1997 at the home of Gary Whitlock. (T. 1512-1514). Around 11:30 p.m., Petitioner initially went home, but then went to his uncle's residence where they talked and drank alcohol until 5:00 a.m. Id. At 5:00 a.m., Petitioner left his uncle's residence and returned home. (T. 1517). Petitioner's uncle then saw Petitioner the following day around 2:30 or 3:00 p.m., when Petitioner and Joe Moore, visited Gary Whitlock's residence. (T. 1518). The two men stayed for only a few minutes. (T. 1518). As far as Petitioner's demeanor on the day of the murder, the uncle testified that Petitioner acted normal. (T. 1519).

In an attempt to elicit further information about Petitioner's whereabouts on the day of the crime, trial counsel presented the testimony of Gary Whitlock. Mr. Whitlock, who was Raymond Lance's son-in-law, testified that Petitioner was at his residence on Saturday from 7:00 p.m. until 11:30 p.m. (T. 1586-1587). During that period of time, Petitioner, Marty Lance and Tony Whitlock went to the package store to purchase beer. (T. 1587-1588). Mr. Whitlock stated that the package store's location was away from the residence of Butch Wood, and that they were gone about thirty-five to forty minutes. (T. 1588).

Mr. Whitlock stated that, the following day (November 9, 1997), he saw Petitioner and Joe Moore at his residence around 1:00 p.m., and that they only stayed for about ten or fifteen minutes. (T. 1589-1590). Regarding Petitioner's demeanor, Mr. Whitlock testified that he acted normal. (T. 1590).

Trial counsel then presented the testimony of Walter Tonge who owned the Country Comer package store. (T. 1596). Mr. Tonge testified that he saw Petitioner and others on Saturday between 8:00 p.m. and 10:00 p.m. (T. 1596-1597). Mr. Tonge stated that Petitioner was only inside the store for a few minutes. (T. 1597).

Trial counsel also presented the testimony of Marty Lance who testified that he saw Petitioner at Petitioner's shop on November 8, 1997 around 6:00 p.m., and that he stayed with Petitioner for about forty-five minutes to an hour. (T. 1599-1600). During that time period, Marty Lance did not notice anything unusual about Petitioner's behavior. (T. 1600).

Marty Lance also saw Petitioner later that night at Gary Whitlock's house, and he again did not notice anything unusual about Petitioner's behavior. (T. 1601, 1603). Specifically, he stated that he arrived at Mr. Whitlock's house around 7:15 or 7:20 p.m., and he stayed until 11:00 p.m. Id. Marty Lance testified that, during the time at Mr. Whitlock's house, Petitioner and Tony Whitlock left and purchased beer at Walter Tonge's package store. (T. 1602). He estimated that they left around 8:00 p.m., and they were only gone about fifteen or twenty minutes. Id. He did not see Petitioner again until the Monday after the crime. Id.

Trial counsel presented the testimony of Matthew and Will Skinner, two children who lived next door to Butch Wood, who offered testimony that they heard gunshots and a scream on Sunday, November 9, 1997, sometime after lunch. (T. 1499-1500, 1508). Matthew Skinner testified that after the gunshots, he observed a man leaving the residence with what appeared to be a pistol in his hand and drive away in a red Camaro. (T. 1501-1502).

Trial counsel also presented the testimony of Petitioner's father Jimmy Lance to attempt to rebut the prior difficulties between Petitioner and Joy Lance. Regarding the incident wherein Petitioner attempted to electrocute Joy, Petitioner's father testified that they were fighting because Joy was having an affair. (T. 1547). When he arrived at Petitioner's shop, Petitioner and Joy had stopped fighting. (T. 1547-1548). Petitioner's father testified that Petitioner did not hit Joy during that fight; however, he did observe blood on Joy's nose. (T. 1548). He further denied that Petitioner had attempted to electrocute Joy during that incident.

(T. 1546, 1548). Regarding another incident of violence between Petitioner and Joy, Petitioner's father testified that Petitioner never attempted to set Joy's hair on fire by spraying WD-40 on her. (T. 1548-1549).

Regarding the crime, Petitioner's father testified that he did not recall going to Petitioner's shop on the day of the crime; however, he saw Petitioner "come up and down the road and go in his driveway." (T. 1553). On the day after the crime, he saw Petitioner around lunchtime. (T. 1553-1554). In an attempt to rebut the State's evidence that Petitioner's father assisted Petitioner in obtaining alibi statements the day after the crime, trial counsel had Petitioner's father deny the allegations that he assisted Petitioner in obtaining alibi statements from various individuals in that he did not know about the murders until it was reported on the news. (T. 1554).

Regarding Petitioner's firearms, Petitioner's father testified that he removed all of Petitioner's firearms from his residence after Petitioner was sent to boot camp as Petitioner was not allowed to have any firearms. (T. 1556). Petitioner also had a sawed off shotgun that was given to Gary Watson, which was subsequently recovered by the police. (T. 1557-1558). With regard to the red Camaro the Skinner boys testified they saw, Petitioner's father stated that Petitioner owned a white Monte Carlo, a white Chevy S-10 and a blue Chevrolet Caprice. (T. 1559-1560).

Gary Watson, who had known Petitioner for about thirty years, testified that Petitioner normally wore black, low-cut work shoes. (T. 1577). He also observed Petitioner wearing suede-like brown shoes. Id. Mr. Watson also testified that he had possession of

Petitioner's sawed-off shotgun, until it was recovered from the police. (T. 1577-1579). Mr. Watson also testified that the .22 rifle recovered by the police at Petitioner's shop was likely his rifle as he had taken it up to Petitioner's shop to shoot squirrels that were tearing the insulation out of the ceiling. (T. 1579-1581).

The final witness presented during the guilt phase was the defense investigator Andy Pennington. Mr. Pennington testified at trial as an expert crime scene technician. (T. 1637-1638). Trial counsel elicited testimony from Investigator Pennington as to the alleged flaws in the investigation performed by the State. Regarding the handling of the crime scene area, he testified that the investigators failed to maintain a log of who entered and exited the crime scene. (T. 1650). He also testified that the State investigators should have obtained measurements from the projectile hole through the blind in the window as it would have provided them with the caliber of the weapon, and they could have then verified "to see if it was one of the shotgun pellets or it was from another weapon." (T. 1650-1652). Based upon the number of projectile holes, Investigator Pennington opined that there could have been more than one weapon used in the crime. (T. 1651).

Additionally, Investigator Pennington testified that the photographs depicting projectile holes through the trailer were indicative of the possibility that more than one type of firearm had been discharged inside the trailer. (T. 1652-1654). Investigator Pennington further testified that the fact that Butch Wood had gunpowder residue on his right palm was also indicative of the

possibility that more than one weapon was used during the crime. (T. 1654).

As to the semi-moist dirt area surrounding the trailer, Investigator Pennington testified that it would be very difficult for a person to walk into the house without leaving a footprint. (T. 1654-1655). He stated that a person would likely "leave tracks all the way up to the steps and on to the deck itself." (T. 1656-1657). Regarding Petitioner's Diehard shoe, Investigator Pennington testified that it had a "very distinctive" sole that would have left a clear mark in the semi-moist dirt area. (T. 1657). Investigator Pennington further testified that the shoe print found on the door should have been visible with the naked eye in that there should have been "some kind of marking on the door or some kind of scuff or kick mark or dent or something on the door." (T. 1657-1658).

Trial counsel then questioned Investigator Pennington as to the significance in not finding any latent prints on the shotgun shell hulls located on the floor inside the trailer. Investigator Pennington testified that he would expect to find a latent print on the shotgun shell hulls as that is a good surface for obtaining latent prints, and he stated that the person loading the weapon would have to handle the ammunition unless they were wearing gloves. (T. 1658). Based upon his experience, he believed that the fact that no latent prints were located was indicative of a good burglar who would have wiped down anything that was touched. (T. 1659).

Investigator Pennington then provided testimony regarding the time of death of the victims. Specifically, be testified that heat would "accelerate" rigor mortis

whereas cold would "retard it." (T. 1662). As there are a number of variables involved in establishing time of death, Investigator Pennington stated that "no expert has ever been able to pin down the time of death." (T. 1662-1663).

During his guilt phase closing arguments to the jury, trial counsel stressed to the jury that Petitioner enjoyed the presumption of innocence until he was proven beyond a reasonable doubt by the State that Petitioner committed the crime. (T. 1724-1726). Counsel asked the jury to approach Petitioner's case as if it was a friend that was on trial in that they should look at "every single piece of evidence" to determine whether or not it proved what it should have proven. (T. 1726).

In reviewing the evidence that was presented during the guilt phase, trial counsel admitted to the jury that there were occasions wherein Petitioner would become angry and upset; however, that was explained by the fact that Petitioner was "a man submerged in a relationship with a crank addict who was having an affair." (T. 1729). However, trial counsel argued that, on the day of the crime, Petitioner was not agitated and "showed no signs of somebody who was going out to do some dastardly double murder" when he spoke with Jack Love around midnight. (T. 1728-1730).

Regarding the Diehard shoe print on the door, trial counsel stated that he was unable to determine whether or not there was actually a shoe print on the door. (T. 1730-1731). Counsel further stated that the investigators were unable to "see and couldn't take a gel impression" of the shoe print. (T. 1732). In addition, trial counsel stated that he was able to elicit during

cross-examination evidence that the various crime scene investigators were in disagreement about certain issues. (T. 1731). In addition, counsel noted that the State did not have any fiber, hair or blood evidence. (T. 1732-1733).

In further attacking the State's case based upon the lack of evidence, trial counsel argued that the State did not have the murder weapon. (T. 1734-1735). Counsel also attacked the State investigators for not locating the shotgun shells in the oil pit, and he argued that Joe Moore, not Petitioner, was the one who threw the shotgun shells away in a blue rag. (T.1735-1736, 1739).

Trial counsel then argued to the jury that the State "targeted" Petitioner as they had knowledge of the "past disputes between Donnie Lance and Joy Lance." (T. 1737, 1741). He asserted that the State "didn't ever turn their head and look anywhere else." (T. 1737). In arguing to the jury the possibility that Joe Moore was responsible for the crime, counsel stated that the prosecution failed to present "one single soul" who could "cover the time period that Joe Moore would need covered on an alibi." (T. 1737-1738). In addition, counsel argued to the jury that the prosecution misled them in presenting testimony that Mr. Moore wore a size nine shoe based upon the fact that they had not measured his foot. (T. 1738).

Additionally, trial counsel reminded the jury of the testimony of Will and Matt Skinner. Specifically, trial counsel stated that both Will and Matt provided testimony that they heard shots fired around noon, and they then observed a car leaving the scene at a high rate of speed. (T. 1740). Will Skinner also testified that he saw someone get into the car with what appeared to

be a pistol. Id. In questioning why the State did not pursue Will and Matt Skinner, trial counsel asserted that it did not "fit their time of death." (T. 1741). In an attempt to persuade the jury into believing the testimony of Will and Matt, counsel argued that "[c]hildren never tell a lie. If a child says it happened this way, surely it did." Id.

In requesting that the jury not allow the testimony of prior difficulties to prejudice them, trial counsel reminded the jury that Petitioner was on trial for murder not domestic violence. Id. Trial counsel also asked the jury to review their notes on the prior difficulties to determine "how many you actually had a single person testify to that actually saw anything, and it's going to get down to one or two." (T. 1745). Counsel further stated, "[y]ou look at the others and make your decision. But do you remember each time I asked who was there, who saw it? Usually nobody. Who said it? Joy." (T. 1747).

Regarding Petitioner's confession to Frankie Shields and Frank Morton, trial counsel stated that Petitioner was a quiet person who would not talk about fighting with his wife. (T. 1750). He also stated that the police failed to tape-record the interviews with the jailhouse snitches, and he suggested to the jury that the snitches must have received a deal from the State in exchange for their testimony. (T. 1750-1751).

In concluding his argument to the jury, trial counsel summarized the evidence that was presented by the defense as to Petitioner's whereabouts around the time of the crime. (T. 1752-1754). He also reminded the jury that the time of death was important, and that there

were a number of factors that would have affected a determination as to the time of death. (T. 1754-1756).

Petitioner bore the heavy burden of establishing deficiency and prejudice. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Based on counsel's investigation of Petitioner's guilt and the presentation of evidence at trial, the Court finds that Petitioner has failed to establish deficient performance as required by Strickland as to his contentions of ineffective assistance as to guilt phase investigation and presentation of evidence in the guilt phase.

Further, the Court finds that Petitioner has failed to establish prejudice as trial counsel presented a cohesive defense strategy, supported by a number of witnesses. Also of significance with regard to this Court's review of the prejudice prong, are the facts that established that there had been ongoing domestic disputes between Petitioner and the victim, Petitioner had made previous death threats to the two victims, Petitioner had committed a similar crime by kicking in the door of Mr. Wood's trailer, Petitioner knew his children were not at the trailer on the night of the murders, the shotgun shells at the scene matched shells owned by Petitioner, Petitioner had been seen wearing shoes of the same type and size as the shoeprint on the door of the trailer, Petitioner still had the shoebox in his possession, the State had a receipt for these shoes where Petitioner had purchased them, Petitioner had been seen with a sawed-off shotgun prior to the murders, the evidence from the crime scene

established that robbery/burglary was not a motive, Petitioner's shoes, gun and clothes were missing and trash smoldering at his house when arrested, Petitioner made statements about the victims' deaths before the bodies were discovered, and Petitioner confessed to other individuals. Based on the totality of the circumstances and the record before the Court, Petitioner has failed to establish the prejudice prong of Strickland and this claim of ineffective assistance of counsel is DENIED.

4) Requesting Non-Mental Health Experts

Under applicable Georgia case law, motions for the appointment of defense experts made on behalf of indigent defendants should disclose to the trial court with reasonable precision "why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services." Thomason v. State, 268 Ga. 298, 310 (1997).

Georgia law places the decision concerning whether to appoint defense experts within the discretion of the trial court, by holding that the "Authority to grant or deny a criminal defendant's motion for the appointment of an expert witness rests with the sound discretion of the trial court, and, absent abuse of that discretion, the trial court's ruling will be upheld." Crawford v. State, 267 Ga. 881(2) (1997). Georgia case law also provides that this discretion also extends to the trial court's grant or denial for a motion for assistance of other investigative services. Crawford v. State, 257 Ga. 681 (1987).

During a pretrial hearing Petitioner requested that in addition to funds he had already received, that the trial court grant additional funds to hire: (1) an expert to assist in jury selection; (2) a forensic psychology expert; (3) a DNA expert; (4) a firearms expert; and (5) a criminologist. (12/3/1998 Pretrial Hearing, p. 6-11). The trial court denied Petitioner's request for the appointment of experts. (HT 5426). In denying Petitioner's trial counsel's request for various forensic experts, the trial court found the following:

> While the cause of the deaths, the time of the deaths, the blood types found at the scene, and the shoe prints found at the scene may be important in this case, the defense has presented the court with only bare allegations of need; there is no evidence of need for the forensic experts. There is no mention that the state's experts have incorrectly or erroneously reached conclusions about their findings or made misrepresentations of any reports or evidence. There is not even an unsubstantiated allegation, much less documentation, in any of the requests for experts that any of the state's experts are biased or inept, that they reached erroneous conclusions, or that the opinions of any of the proffered experts would differ from the opinions of the state's experts. The motions, the argument heard at the *ex parte* hearing, and the curriculum vitae of the experts all fail to show the court either that material assistance would be provided to the defense by the experts or that without the assistance of these experts the

> defendant would receive a fundamentally unfair trial.

(HT 5426-5428).

On direct appeal, the Georgia Supreme Court found no abuse of discretion as to the trial court's denial of trial counsel's requests for funds for experts based on the trial court's finding that, "the requested funds were not necessary to a fair trial." Lance v. State, 275 Ga. 11, 14 (2002).

Brannon testified at the state habeas corpus hearing that he tried to be as specific as possible in his attempt to obtain the requested experts. Brannon testified, "I tried to point out what the fees were, why their testimony would be critical in the case, based on what I knew about the case at the time." (HT 125).

As the United States Supreme Court recognized in Ake v. Oklahoma, 470 U.S. 68 (1985), there is no requirement that indigent defendants be provided all of the assistance available to non-indigent defendants. Similarly, "Equal protection doctrine does not require that an indigent defendant be provided with funds for expert assistance simply because the state is assisted by experts." Isaacs v. State, 259 Ga. 717, 725 (1989).

Additionally, the Eleventh Circuit has noted that, "the Supreme Court has not yet extended Ake to non-psychiatric experts." Conklin v. Schofield, 366 F.3d 1191, 1206 (11th Cir. Ga. 2004). Therefore, the trial court had no obligation under Ake to appoint non-psychiatric experts for the defense, regardless of the showing trial counsel made to the trial court in support of his request for expert assistance.

The Court finds that Petitioner has not established that trial counsel's performance was deficient in seeking the assistance of these experts or prejudice from trial counsel's representation in requesting these experts. Accordingly, this claim is DENIED.

5) Not Utilizing a Crime Scene Expert

Petitioner claims that trial counsel was ineffective because he should have hired and presented testimony of a crime scene expert to attempt to rebut the evidence of the lack of any other Diehard shoeprints at the crime scene, to criticize how the crime scene was processed, and to testify that the perpetrator would have blood spatter on him. (HT 127).

It is critical, under Strickland, to place this ineffectiveness claim in the context of trial counsel's position at the time of trial. Strickland, 466 U.S. at 688. Brannon did view the crime scene, which was a trailer, but he was the only person for the defense who was able to do so, as the crime scene was not maintained since the trailer was sold. (HT 62; 67). In this regard, Brannon testified as to the limited assistance that any crime scene expert would be, stating, "And even if he [the trial judge] had given me experts, we couldn't have gotten to the crime scene because it was sold, which I felt like it certainly should have been maintained." (HT 62).

Additionally, as Brannon testified before this Court, there was very little physical evidence obtained from the crime scene, as there were no fingerprints of Petitioner found at the crime scene (HT 61); there was no DNA of Petitioner's found at the scene (HT 60); there was no hair or blood of Petitioner found at the

scene (HT 60); and there were no shotgun shells of Petitioner's that were linked to the scene. (HT 60). Brannon stated that there was only one shoeprint found at the scene, and that was an "invisible" footprint on the door, (HT 61), and that there were no footprints coming up the steps. (HT 59).

Additionally, trial counsel argued in his closing:

> Why is there not one smidgen of red clay on the steps – on the wooden steps? Why is there not one smidgen of red clay on the platform before you walk through the white door? Why? Why didn't they get down and blue light everything? They could have gotten him coming all the way up the steps if they can take it off the door. Don't be fooled by this. This is really significant. How did the people get into the house, whoever did it?

(T. 1732). Trial counsel minimized the importance of the Diehard shoebox found at the Petitioner's shop by asserting,

> The shoebox that Donnie had, they didn't find until later on. Why didn't he just throw it away? They're out there; they're casting Diehard prints; they're asking Donnie questions. Why didn't he go down to his house in a hurry and get the Diehard shoebox and burn it in that trash can where they say he must have burned some bloody clothes? Why not? It's a piece of evidence for a mastermind who knows how to kill two people, slip out of the house, and not leave a footprint and not leave a palm print and not leave a fingerprint, not leave a thing. Why

> wouldn't he get rid of the box? It's reasonable doubt.

(T. 1738-1739).

Most significantly, trial counsel did not need to hire a crime scene expert when such testimony would have been cumulative of the testimony given by State's witnesses and the testimony of Investigator Pennington, who testified as the defense expert at trial. Defense Investigator Pennington was authorized by the trial court to testify as a crime scene expert at trial. (T. 1636). Investigator Pennington testified concerning the proper processing of a crime scene (T. 1637-1644), and was qualified to testify and investigate the crime scene (T. 1621-1622, 1631). Additionally, Investigator Pennington was well-informed on the facts of Petitioner's case as he had assisted in the investigation of all aspects of the case and was able to counter the State's evidence on various crime scene issues. Therefore, there was no need for trial counsel to hire and expend funds for an additional forensic investigations consultant.

In contrast to the State's evidence, Investigator Pennington testified on behalf of the defense about: the need to keep the crime scene pristine; processing a crime scene; collecting evidence; testing evidence; wearing latex gloves; criticizing procedures that were not taken by Agent Cooper when the scene was being processed; the possibility of more than one weapon being fired; the probability of shoe prints in the mud or of mud being tracked onto the deck; multiple variables that need to be considered to determine time of death; and the concept of rigor mortis. (T. 1638-1666).

Also, Brannon cross-examined the State's experts on various issues relating to crime scene issues and in fact, the concessions that he obtained on cross-examination could easily have been perceived as more important by the jury than presenting his own experts. For example, trial counsel elicited from State's witness Agent Cooper on cross-examination that there was mud surrounding the crime scene, no mud on the door at the crime scene, only one Diebard shoeprint on the door at the crime scene, compared with the mud surrounding the Petitioner's shop and the number of Diehard shoeprints found at the shop location. (T. 931-939).

The Court finds that the expert opinions Petitioner presented in these habeas proceedings with regard to the crime scene and processing thereof are, in large part, cumulative of the testimony given at trial. Therefore, the fact that trial counsel did not hire another forensic investigations consultant to present testimony and/or evidence as to these issues does not meet Petitioner's burden of establishing deficient performance by trial counsel or prejudice. See De Young v. State, 268 Ga. 780, 786 (5) (1997); Osborne v. Terry, 466 F.3d 1310-1311 (11th Cir. 2006) ("The fact that present counsel might have chosen to try to undermine the State's experts with defense experts does not render trial counsel ineffective or unreasonable in attempting to support his chosen defenses of self-defense or voluntary manslaughter as trial defenses, based on Osborne's own statements.")).

As to Petitioner's claim that the suggestion of a second perpetrator should have been investigated (HT 139-142), even though, the ballistic tests confirmed that the two cartridges found at the crime scene were

fired by the same weapon, (HT 157), the possibility of a second perpetrator was raised by the defense at trial. Trial counsel was not deficient as he questioned how the "people" got into the house during his closing (T. 1732), thoroughly cross-examined Joe Moore on his possible involvement in this crime and questioned Mr. Moore's alibi during his closing argument. (T. 1080-1131; 1737-1738). The Court also finds that Petitioner has failed to show that there was a reasonable probability that the outcome of the trial would have been different if testimony such as that provided by Petitioner' s habeas crime scene expert had been given. This claim is DENIED.

6) <u>Not Utilizing a Forensic Pathologist</u>

At the hearing before this Court, Petitioner offered the affidavit of Dr. Jonathan L. Arden in support of his claim that trial counsel was deficient and Petitioner prejudiced by the trial court denying trial counsel's motion to have a forensic pathologist appointed for Petitioner's case. (See 12/3/98 Ex Parte Hearing, p. 9; Pet. Ex. 1). Petitoner asserts that an expert like Dr. Arden could have provided testimony concerning time of death, the likelihood of blood on the perpetrator or the weapon, an explanation as to why no weapon was found, and an explanation of mistakes allegedly made by the State crime scene investigators. The Court finds that Dr. Arden's affidavit does not dispute the conclusions reached by the State's medical examiner, Dr. Frederick Hellman, given during his trial testimony concerning the time of the victim's death. Instead, a comparison of Dr. Hellman's trial testimony with the conclusions reached by Dr. Arden in his affidavit shows that they both agreed that the time of

death could have possibly occurred after 5 a.m. (See T. 1471). Dr. Arden simply gives his opinion that the window of time when the death could have occurred was longer than the window of time testified to by Dr. Hellman. However, Dr. Hellman admitted on cross-examination that he could not exclude the possibility of the deaths occurring later than 5:00 a.m. (T. 1472). Brannon thoroughly cross-examined Dr. Hellman about his conclusions on the time of death. (T. 1473-1494).

In his closing argument, Brannon argued all of the variables that go into determining time of death and stressed that the time of death could be sometime after 7:00 a.m. until as late, as sometime after lunch on Sunday, which time was consistent with the alibi defense. (T. 1754-1756).

Additionally, trial counsel offered testimony about the inability of experts to pinpoint time of death, from his own witness, Investigator Pennington. Investigator Pennington testified, "My understanding is that no expert has ever been able to pin down the time of death, that it's - - they call it, like, still in the dark ages as trying to figure out the time of death. It's like the pathologist testified, that everything I've read is exactly as he says. Everything I've been taught is exactly what he was saying. You can't pin it down." (T. 1663).

The record shows that trial counsel cross-examined the medical examiner about the important testimony given concerning time of death and used his own expert witness to testify about the difficulty in pinpointing the time of death.

As to alleged errors made the State crime scene investigators, as set forth above, trial counsel elicited testimony from Investigator Pennington as to the alleged flaws in the investigation performed by the State. (T. 1650-1654).

Petitioner alleges that trial counsel was ineffective in failing to use an expert to establish the defense theory that the perpetrator would have inevitably had blood transferred to him in light of the large amount of blood generated due to the cause of death of Joy Lance.

The blood stain pattern analysis expert, Jerry Findley, testified at trial that there was blood spatter almost all the way around the victim, Joy Lance, and it radiated out virtually 360 degrees from the victim's head. (T. 1702). Mr. Findley further elaborated about cast-off stains going in different directions, casting off stains from the instrument itself, the direction of the instrument, and the location of the perpetrator. (T. 1702-1703). A layperson could easily conclude from this testimony that the perpetrator would have some blood spatter on him based on Mr. Findley's trial testimony and the crime scene photos. Most significantly, however, Brannon used the absence of blood on Petitioner, his clothing and in his car, to argue that the State had not proven that he was the perpetrator. (T. 759).

The Court finds that Petitioner has failed to establish deficient performance under Strickland due to Petitioner's trial counsel's inability to obtain the services of a forensic pathologist or blood spatter expert. Further, the Court finds that if trial counsel had presented the testimony of an expert, such as that given by Dr. Arden in the habeas proceedings,

including the blood spatter and weapon evidence, there is no reasonable probability that the results of Petitioner's trial would have been different. Accordingly, these claims are DENIED.

7) Not Utilizing a Polygraph Expert

Petitioner asserts that trial counsel was ineffective for failing to hire a polygraph expert, whom he claims could have undermined the testimony of Joe Moore, to whom a polygraph examination was administered to allegedly attempt to flesh out the theory that Mr. Moore was one of the two perpetrators who committed the murders.

During trial counsel's cross-examination of Joe Moore, Mr. Moore sua sponte brought up the fact that he had been given a polygraph examination. (T. 1083-1084). Brannon objected to this reference to polygraph and asked for a mistrial. The trial court denied the motion for mistrial, and with the agreement of both parties, gave the jury a curative instruction directing that they disregard any mention of a polygraph. (T. 1086, 1109). There was no reason for trial counsel to rebut this evidence with a polygraph expert because the jury was instructed not to consider any evidence about the polygraph, so expert testimony would not have been permitted about inadmissible evidence.

Further, in denying Petitioner's claim that the trial court erred in denying a mistrial with regard to the mention of the polygraph, the Georgia Supreme Court held on direct appeal, "The trial court's strong curative instruction and its questioning of the jury regarding their ability to follow that instruction were sufficient to

remedy any damage to the fairness of the proceedings." Lance, 275 Ga. at 22-23.

Further, Petitioner failed to show that trial counsel's performance was deficient in this respect or that Petitioner was prejudiced, as the record shows that trial counsel thoroughly cross-examined Mr. Moore's credibility, his motive for testifying, his hostility towards Butch Wood, Jr., the possibility that Mr. Moore shot Mr. Wood, Mr. Moore's changing story, and his whereabouts when the crime occurred. (T. 1119, 1122-1123). The record establishes that the jury heard about the inconsistencies of Mr. Moore's statements.

Further, the Court finds Petitioner's habeas expert's testimony that Mr. Moore's polygraph chart showed an immeasurable response unpersuasive. Petitioner's habeas witness, Cyrus Harden, conceded that he had testified less than ten times critiquing a polygraph test that someone else administered, that it is easier to testify about a polygraph test when you are the person who administered the test, and that he had administered polygraph tests to people who were under the influence, and "no response" does not mean that the person is lying. (HT 187-188). In contrast, Respondent presented the testimony of Paul Loggins, a polygraph expert who was assigned to the GBI's polygraph unit for fourteen years, has administered 7,030 polygraphs in the last eighteen years and administered the polygraph to Joe Moore on November 13, 1997. Mr. Loggins testified that he did not observe any indicator or physical characteristics that Mr. Moore was under the influence in any way when Mr. Loggins gave Mr. Moore the polygraph examination; and he saw nothing

to preclude Mr. Moore from being adequately tested. (HT 473-486). Mr. Loggins testified that, based on his training and experience, he saw nothing to indicate that Mr. Moore was lying during the polygraph test and his chart was not flat. (HT 492,495). Mr. Loggins concluded that Mr. Moore did not respond in a deceptive manner and Mr. Loggins would classify Mr. Moore's chart as someone who was telling the truth about the deaths of Butch Wood, Jr. and Joy Lance. (HT 496).

The Court finds that Petitioner failed to carry his burden of establishing deficiency of performance and resulting prejudice and this claim is DENIED.

8) Not Utilizing a Fingerprint Expert

Petitioner asserts that trial counsel should have expended funds to hire a fingerprint expert to testify that no fingerprints belonging to Petitioner were found at the crime scene. Charles Moss, the GBI's forensic latent print examiner, testified at trial that the partial latent prints from the crime scene were of no value. (T. 1012). Defense expert Andrew Pennington testified at trial that shotgun shell hulls are a good surface to lift a latent print from and someone handling the ammunition would leave a print unless he was wearing gloves. (T. 1658). In his closing argument to the jury and in his testimony before this Court, Brannon also stated that there was no fingerprint evidence linking Petitioner to the crime. (HT 61; T. 1736). Thus, based on the evidence presented during the trial, the Petitioner was not linked to the crime through fingerprint evidence and trial counsel did not need to further explore this issue. Petitioner has failed to

establish deficiency or prejudice and this claim is DENIED.

9) Failure to Investigate Petitioner's Mental Health and to Retain Mental Health Experts

Effective assistance of defense counsel, as guaranteed by the Sixth Amendment, requires the thorough investigation of a client's case, including any mitigating evidence that could be provided. The investigation of all matters relevant to a defendant's case is a necessary component of the Sixth Amendment right to effective assistance of counsel. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982).

According to the ABA guidelines in effect at the time of Petitioner's trial, counsel in a death penalty case should meet with his client immediately and, among other things, explore the existence of potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating or mitigating factors. ABA Guideline 11.4.1(D)(2)(a). With an eye towards the sentencing phase, counsel also should explore sources of information about the defendant's history, including his "medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and development delays)." Id. 11.4.1(D)(2)(c). Counsel also should promptly meet with witnesses "familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death." Id. 11.4.1(D)(3)(b). The ABA Guidelines articulate

reasonable professional standards for capital defense work and have long been referred to as guides to determining what is reasonable under the Sixth Amendment. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Hall v. McPherson, 284 Ga. 219, 221 (2008).

The evidence is undisputed in this case that trial counsel did not investigate Petitioner's mental health, did not retain mental health experts, and did not present to the jury, during either the guilt/innocence phase or the sentencing phase of the trial, evidence of Petitioner's significant mental impairments. Petitioner asserts that there was extensive evidence concerning Petitioner's diminished mental capacity that was available to trial counsel which warranted further investigation. Petitioner also asserts that, had trial counsel hired a mental health expert to evaluate Petitioner, trial counsel could have presented evidence that Petitioner was a "borderline retarded" person who had trouble controlling his impulses and who had significant cognitive impairments and dementia due to his abuse of alcohol and head injuries from a gunshot wound, physical altercations, and car wrecks.

Upon consideration and review of all of the evidence presented in this case, the Court finds that there is nothing in the record to establish that Petitioner was legally insane at the time of the commission of the crimes. Additionally, there has been no showing that Petitioner was incompetent to stand trial. Finally, Petitioner is not mentally retarded. At the habeas proceeding Petitioner and Respondent each presented testimony from mental health experts, and those experts had varying opinions as to what effect Petitioner's mental impairments would have had on

him at the time of the commission of the crimes. If such evidence had been presented at the guilt/innocence phase of the Petitioner's trial, a verdict of guilty but mentally ill would have not barred a sentence of death at the penalty phase. Hall v. Brannan, 284 Ga. 716, 722-723 (2008); Lewis v. State, 279 Ga. 756, 764 (12) (2005). Even if the Court were to conclude that trial counsel's performance was deficient in failing to present evidence of Petitioner's mental health during the guilt/innocence phase of the trial, the Court finds that the Petitioner has failed to establish the prejudice prong of Strickland. Accordingly, this portion of the claim is DENIED.

Of particular concern to the Court, however, is the fact that trial counsel failed to investigate Petitioner's mental health and, thus, failed to present easily obtainable psychiatric mitigating evidence during the sentencing phase of the trial. A reasonable investigation into Petitioner's life history would show that further investigation into Petitioner's mental health was warranted in this case. The duty to investigate all available sources of mitigating evidence is heightened for counsel in capital cases, particularly in preparing for the sentencing phase, where trial counsel has the opportunity to present "*anything* that might persuade a jury to impose a sentence less than death." Head v. Thomason, 276 Ga. 434, 436-37 (2003) (emphasis in original).

"The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant." Cunningham v. Zant, 928 F.2d 1006, 1019

(11th Cir. 1991). The U.S. Supreme Court has explained that:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted); see also Williams v. Taylor, 529 U.S. 362 (2002); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

The harm stemming from the failure to present psychiatric mitigating evidence in capital cases is clear. It has long been recognized in Georgia that "evidence of a diminished capacity to fully appreciate the 'cruelty and gravity of his acts' is critical at the penalty phase of a capital case 'because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation.'" Bright v. State, 265 Ga. 265, 275, 455 S.E.2d 37, 50 (1995) (citations omitted). Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. 'Thus, psychiatric mitigating evidence not

only can act in mitigation, it also could significantly weaken the aggravating factors.'" Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (citations omitted). See also, Turpin v. Christenson, 269 Ga. 226, 241 (1998) (endorsing and quoting Middleton on this point); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1993) ("prejudice is clear" where attorney failed to investigate adequately client's mental health and present evidence of client's mental problems in sentencing phase).

Experts are critical in helping to tie the various aspects of a defendant's life history, which may include instances affecting mental health, into a coherent picture of the defendant's state of mind throughout his life path leading up to the crime. The Georgia Supreme Court has repeatedly held that the average capital juror is hindered in his sentencing deliberations when available psychiatric opinion testimony or other psychiatric mitigating evidence is not presented in court. In Bright v. State, the Court found that a psychiatrist would have been of invaluable assistance to the jury in deciding the defendant's fate: "a psychiatrist could have evaluated, in terms beyond the ability of the average juror, Bright's ability to control and fully appreciate his actions in the context of the events that arose on the night of the murders, given his severe intoxication, his history of substance abuse, his troubled youth, and his emotional instability." 265 Ga. 265, at 276 (1995). Similarly, in Turpin v. Lipham, the Court found counsel ineffective for failing to present the testimony of a mental health expert to help the jury understand the mitigating significance of the defendant's troubled upbringing and mental disorders: *"[T]he average juror is not able, without expert assistance, to understand the effect [the defendant]'s*

troubled youth, emotional instability and mental problems might have had on his culpability for the murder." 270 Ga. 208, 219 (1998) (emphasis supplied). In this case, the jury was inexcusably deprived of expert testimony regarding Petitioner's psychiatric disorders, history of alcohol abuse, and head trauma which was critical to informed deliberation as to sentence.

Although trial counsel is afforded tremendous deference over matters of trial strategy, the decision to select a trial strategy must be reasonably supported and within the wide range of professionally competent assistance. Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir.1993); Strickland supra at 690. Before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing. Jefferson v. Zant, 263 Ga 316, 319-20 (1993); Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir.1995); Bush v. Singletary, 988 F.2d 1082, 1091 (11th Cir.1993) ("After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing"). An attorney is not ineffective because he fails to follow every evidentiary lead, but an attorney's strategic decision is not reasonable " 'when the attorney has failed to investigate his options and make a reasonable choice between them.'" Baxter, supra, quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir.1991). The failure to conduct a reasonable investigation may render counsel's assistance ineffective. Baxter, supra at 1514; Curry v. Zant, 258 Ga. 527, 530, (1988) (counsel ineffective for failing to further investigate client's mental health despite indications that client was mentally ill).

At the evidentiary hearing before this Court, Brannon acknowledged that he knew the potential importance of mental health testimony, as he had tried other death penalty cases where mental health was an issue. (HT 93; See Waldrip v. State, 264 Ga. 402 (1994)). In those prior cases Brannon had requested funds for mental health experts and presented mental health defenses and mitigation at trial. Id.

Brannon testified that, during his investigation and preparation for trial, he met and spoke with Petitioner frequently. (HT 1397). Brannon testified further that he and his paralegal assistant, Pat Dozier, had established an excellent rapport with Petitioner's family members and talked to them numerous times. (HT 1401-1405, 1410). After speaking with Petitioner and Petitioner's family members, Brannon felt that neither gave him any indication that Petitioner had any type of mental health problems. However, the record indicates that evidence regarding Petitioner's traumatic brain injuries and alcohol abuse was readily available to trial counsel. It was well known among Petitioner's family and friends that Petitioner was often involved in wrecks while racing cars, and that he rarely, if ever, sought medical care following these wrecks. (Pet. Ex. 10 ¶ 6; Pet. Ex. 26 ¶ 4). It was also common knowledge that Petitioner had a longstanding drinking problem. (Pet. Ex. 28 ¶ 16; Pet. Ex. 40 ¶ 5; Pet. Ex. 36¶ 4; Pet. Ex. 41 ¶ 10). Additionally, in 1993 Petitioner was shot in the head by unknown assailants while sleeping on his couch and, in direct conflict with his physician's orders, Petitioner refused to stay in the hospital. (Pet. Ex. 21 ¶ 11). After he was shot, Petitioner began having terrible headaches. (Pet. Ex. 31 ¶ 26; Pet. Ex. 5 ¶ 9; Pet. Ex 43 ¶ 11). Petitioner also

experienced dizziness and had difficulty working on cars in his shop. He became even more quiet than he had before. (Pet. Ex. 21 ¶ 9). Finally, Petitioner was hospitalized at Georgia Regional Hospital for mental health treatment (Pet. Ex. 21 ¶ 13).

Even though Brannon has noted the importance of mental health evidence in capital cases, he testified that he did not investigate Petitioner's mental health in this case. He did not review medical records regarding Petitioner's numerous head traumas; did not review medical records regarding Petitioner's hospitalization for mental health treatment; did not inquire with Petitioner's family, friends, or any other members of the small-town community as to whether Petitioner had any history of mental health issues or whether he could have suffered some debilitating head traumas. Although Brannon testified at the evidentiary hearing that having Petitioner evaluated by a mental health expert was on his list of things to investigate in the case, he testified further that it was not a top priority. (HT 68-69). Consequently, Brannon did not request the assistance of mental health experts that could have revealed the significant mental impairments from which Petitioner suffers. Based on the wealth of information that was readily available to trial counsel, and the lack of other evidence to offer in mitigation, the Court finds that trial counsel's failure to investigate Petitioner's mental health was unreasonable.

The Court notes that "the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in

preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation." Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003). In this case, however, very little was offered in the way of mitigating evidence. Therefore, the Court finds that there was no strategic reason justifying trial counsel's decision to forego the investigation of the Petitioner's mental health and to concentrate his time and efforts on other potential areas of defense and mitigation. He simply failed to conduct the investigation that reasonable professional norms require. Where, as here, the "failure to investigate thoroughly result[s] from inattention, not reasoned strategic judgment," counsel's performance is unreasonable and ineffective. Wiggins, 539 U.S. at 525; see also Hardwick, 320 F.3d at 1185 ("'counsel's failure to present or investigate mitigation evidence' cannot result from 'neglect'") (citations omitted).

In light of the readily available evidence regarding Petitioner's diminished mental capacity due to traumatic brain injuries and alcohol abuse, trial counsel's failure to specifically investigate Petitioner's mental health or to seek a mental evaluation of the Petitioner under these circumstances is constitutionally deficient performance. Cunningham, 928 F.2d at 1018 ("In light of the ready availability of this evidence [relating to petitioner's mild mental retardation] and in the absence of a tactical justification for its exclusion, the failure by trial counsel to present and argue during the penalty phase [evidence of petitioner's mental retardation] . . . [falls] outside the range of professionally competent assistance"); Christenson, 269 Ga. at 234-42.

Furthermore, had trial counsel investigated Petitioner's mental health, such an investigation/ evaluation would have provided significant mitigating evidence for the jury to consider. At the habeas evidentiary hearing Petitioner presented the testimony of three mental health experts (Dr. Hyde, Dr. Weinstein, and Dr. Pickar) and Respondent presented the testimony of two mental health experts (Dr. Martell and Dr. Griesemer). While the mental health experts had varying opinions as to the degree and effect of Petitioner's mental impairments, all of the mental health experts, including those employed by the Respondent, testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider in determining the appropriate sentence.

a) Petitioner's Mental Health Experts

Thomas Hyde M.D., Ph.D., an expert in Behavioral Neurology, testified that he performed an extensive neurological evaluation of Petitioner (over 100 tests) and concluded that Petitioner had "brain damage [frontal lobe damage] as a result of traumatic brain injury or the addictive effects of alcohol abuse." (HT 347-349, 369-371). Dr. Hyde further concluded that Petitioner was limited in his ability to conform his actions to the law, (HT 360), and he would be surprised if Petitioner was able to commit the crimes in this case. (HT 358).

Similarly, Ricardo Weinstein, Ph.D., an expert in Neuropsychology, found that Petitioner has frontal lobe damage. Dr. Weinstein also concluded that Petitioner has significant brain dysfunction and cognitive

impairments. (HT 1037). He further noted that Petitioner was an alcoholic, (HT 1040), had been treated for depression and anxiety, (HT 1041), and that Petitioner appears to meet DSM-IV-TR criteria for a diagnosis of Dementia Due to Multiple Etiologies (head injuries plus chronic alcohol abuse). (HT 312). Dr. Weinstein further found Petitioner to have an IQ of 78, which places him in the borderline range of intellectual abilities. Dr. Weinstein, however, did not conclude that Petitioner could not have planned and/or committed the crimes. Dr Weinstein testified that, in considering Petitioner's culpability for the crimes charged, it would be important for the fact finder to have information about Petitioner's impaired mental abilities. (HT 260).

David Pickar, M.D., an expert in Psychiatry and Clinical Neuroscience, testified that Petitioner suffers from neuropsychiatric impairments (dementia due to serious head trauma, frontal lobe dysfunction, alcohol abuse, and depression). Dr. Pickar testified that, in his opinion, the Petitioner had trouble planning and organizing based on frontal lobe issues. Dr. Pickar testified further that the neuropsychiatric impairments existed at the time of the murders and that the impairments would have significant implications for Petitioner's behavior at the time of the murders. (HT 968-970).

b) Respondent's Mental Health Experts

Daniel A. Martell, Ph.D., an expert in Neuropsychology, evaluated Petitioner and concluded that Petitioner suffered from brain dysfunction, but that it did not appear to affect Petitioner's ability to plan or control impulses. (HT 592-593). Dr. Martell agreed with Petitioner's expert (Dr. Weinstein) in

finding that Petitioner appears to meet DSM-IV-TR criteria for a diagnosis of Dementia due to head injuries and chronic alcohol abuse. (HT 597). However, Dr. Martell concluded that Petitioner's history of head injuries did not affect Petitioner's cognitive functioning. (HT 585-586). Dr. Martel testified further that Petitioner's IQ score of 79 placed Petitioner in the borderline range, higher than mild mental retardation and just one point away from being in the low average range. (HT 585). Although Dr. Martel testified that there was nothing to show that the Petitioner was incapable of committing the murders in this case, (HT 602), Dr. Martell also concluded that if Petitioner actually did commit the crime for which he was charged, his culpability for that offense would be affected by his brain dysfunction. Dr. Martell acknowledged that evidence regarding a defendant's mental illness, just like the information available, but never presented in Petitioner's trial, is routinely provided in capital cases. (HT 623-624.)

Dr. David Griesemer, an expert in Neurology, evaluated Petitioner and concluded that Petitioner suffered from mild cognitive dysfunction, as well as "anxiety and depression," but that it did not appear to affect Petitioner's ability to control impulses. Dr. Griesemer also concluded that the 1993 gunshot wound did not have an impact on the Petitioner's cognitive performance. Further, Dr. Griesemer found that the Petitioner appeared to be of low-average intelligence, but the Petitioner "fully retains his ability to understand lawful behavior and to conform his behavior to the requirements of the law." (Res. Ex. 54, HT 12315).

Introducing this mental health evidence would have been crucial in the sentencing phase of Petitioner's trial, as it directly related to the key issue before the jury: their individualized assessments of Petitioner's character, culpability, and worth. Trial counsel had no strategic reason for failing to inform the jury about Petitioner's mental deficiencies during sentencing. In fact, Brannon testified that evidence concerning Petitioner's organic brain damage and mental deficits was "precisely the type of evidence" he wanted to present at trial. (Pet Ex 3 ¶ 23.) Under these circumstances, the failure to provide the jury with evidence relating to Petitioner's mental impairments was objectively unreasonable. Crosby, 320 F.3d at 1164 (Eleventh Circuit has held that "[w]hen mental health mitigating evidence was available, and *absolutely none* was presented [by counsel] to the sentencing body, and . . . no strategic reason [w]as . . . put forward for this failure,'" the omission was objectively unreasonable); Brownlee, 306 F.3d at 1070 (holding that "counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence").

Respondent contends that the evidence of alcohol abuse and head injuries (car wrecks, fights, gunshot wound) presented by Petitioner in the habeas corpus proceedings is as potentially aggravating as it is mitigating. This contention fails to take into account that Petitioner's primary focus of his claim is trial counsel's failure to investigate and present evidence regarding Petitioner's mental health; particularly, his

significant mental impairments. The fact that Petitioner's brain damage and diminished mental capacity may be attributed to one or more causes, including alcohol abuse and various forms of head trauma, is not the primary focus of Petitioner's claim.

Upon consideration and review of all of the evidence presented in this case, the Court finds that trial counsel was ineffective for failing to investigate Petitioner's mental health as a possible source of mitigating evidence in this case. The Court finds that trial counsel's decision to forego the investigation of the Petitioner's mental health and to present very little in the nature of mitigating evidence was not a reasonable tactical decision under the circumstances. Further, the Court finds that trial counsel's failure to retain mental health experts and failure to present the evidence of the Petitioner's significant cognitive impairments to the jury during the sentencing phase of the trial constitutes legally deficient performance. In light of the strength of the mental health evidence offered at the habeas hearing, the Court further finds that there is a reasonable probability that, but for these deficiencies in trial counsel's performance, the outcome of the proceedings would have been different. See Hall v. McPherson, 284 GA 219 (2008) (affirming habeas court grant of sentencing relief based on trial counsel's failure to investigate or present mitigating background and mental health evidence at sentencing).

Accordingly, the Court finds that Petitioner is entitled to habeas relief on the portion of his ineffective assistance of counsel claim that is based on trial counsel's failure to investigate Petitioner's mental health, retain mental health experts, and present

evidence of Petitioner's mental health in mitigation during the sentencing phase of the trial. The petition for writ of habeas corpus is GRANTED as to the death sentences imposed.

10) Investigation And Presentation of Other Mitigation Evidence

a) Residual Doubt theory

During the trial of this case Petitioner's counsel utilized the defense theory that Petitioner did not commit the crimes and was not present at the scene of the crimes at the time they were committed. The defense called nine witnesses during the guilt/innocence phase to support the Petitioner's alibi defense. The evidence presented by the defense in the guilt/innocence phase carried over into in the sentencing phase, and the theory that the Petitioner did not commit the crimes became a theory of residual doubt during the sentencing phase.

It has been noted that "residual doubt is perhaps the most effective strategy to employ at sentencing." See Tarver v. Hopper, 169 F.3d 710, 715-716 (11th Cir. 1999)(citing law review study concluding that "the best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt"). The Georgia Supreme Court has expressly held that it is a reasonable and professional decision for a lawyer to choose a mitigation theory of residual doubt and to present testimony consistent with that theory. Head v. Ferrell, 274 Ga. 399, 405 (2001). See also Alderman v. Terry, 468 F.3d 775, 789-790 (11th Cir. 2006) (upholding the habeas court's finding that defense counsel's residual doubt strategy was a

reasonable, professional decision given the information that was available to counsel at the time of trial and the fact that the defendant maintained his innocence); Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 787-788 (11th Cir. 2003). Such was the strategy employed by Petitioner's trial counsel in this case.

Trial counsel's reliance on particular lines of defense to the exclusion of others is a matter of strategy and is not ineffective unless Petitioner can prove the chosen course, in itself, was unreasonable. See Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000). In light of the circumstantial evidence presented by the State in the guilt/innocence phase, trial counsel's residual doubt strategy at first appears reasonable. However, based on the readily obtainable evidence of Petitioner's significant mental impairments, the Court finds that trial counsel's decision to forego the investigation of the Petitioner's mental health as a possible source of mitigating evidence and to rely solely on residual doubt as mitigating evidence was not a reasonable tactical decision under the circumstances. Compare Williams v. Head, 185 F.3d 1223, 1244 (11th Circ. 1999) (where counsel on motion for new trial conducted a reasonable investigation into possibility that defendant suffered from mental health problems when determining whether trial counsel's failure to present mental health evidence as mitigation evidence met the ineffective assistance of counsel standard); see also Turpin v. Lipham, 270 Ga. 208, 218 (1998) (the test for determining whether trial counsel's performance in the sentencing phase was deficient is whether a reasonable lawyer at the trial could have acted, in the same circumstances, as defense counsel acted at trial).

Trial counsel's performance was deficient and Petitioner was prejudiced as a result. Accordingly, for the reasons set forth in Section VII.A.9 above, the petition for writ of habeas corpus is GRANTED as to the sentences of death.

b) Decision Not To Use Family Members

The Petitioner asserts that other types of evidence should have been presented in mitigation (good character, good father, not starting fights). This evidence was presented to the Court through the affidavits of family and friends. During the habeas evidentiary hearing, trial counsel stated his strategic reason for not calling this type of witness during the sentencing phase of Petitioner's trial. Specifically, he testified:

> Yes. All we're going to do, if we did that, was retry every bad word that had been said about Donnie during the entire trial. I knew that Mr. Madison would be allowed to cross-examine each person I called that had any knowledge of prior bad acts and that we were going right back over that evidence and reinforce it and repeat it in front of the jury.

(HT 103-104). In making his decision as to whether to present Petitioner's family during the sentencing phase of trial, counsel stated:

> And I did talk with them about that. And I thought about putting them up. But I told them here's what you're going to be faced with. And really nobody — I mean, they love Donnie and wanted to help Donnie, but nobody was dying to sit on the witness stand and be beat to death for

> another two or three hours with testimony that we'd already heard in the courtroom.

(HT 105).

The record establishes that trial counsel made a strategic decision to not present any of Petitioner's family members during the sentencing phase. The record indicates that trial counsel had numerous conversations with Petitioner's family members and interviewed various witnesses regarding Petitioner's case. (HT 10772-10790; and Pet Ex. 4; Pet. Ex. 5; Pet. Ex. 15; Pet. Ex. 16; Pet. Ex. 18; Pet. Ex. 21; Pet. Ex. 22; Pet. Ex. 27; Pet. Ex. 28; Pet. Ex. 36; Pet. Ex. 38). Prior to the sentencing phase closing arguments, trial counsel informed the trial court that he would not be presenting any of Petitioner's family members during the sentencing phase. Specifically, trial counsel stated:

> No, sir. We're not going to call in the family members for the reason that if we put them on the stand and they tell about Donnie, he's a good guy, and the things that they know about him and then subject to cross-examination the specific bad acts that would be allowed, we'd be all afternoon hearing the same negative similar transaction and prior difficulty hearing that we've heard for three days. So I'm not going to call family members to the stand.

(T. 1917-1918).

Trial counsel was concerned that the State would again question character type witnesses and again review evidence of Petitioner's prior violence against Joy Lance and Butch Wood including: approximately six months prior to the murders Petitioner offered

Mary Lance one thousand dollars to kill Joy Lance and Butch Wood Jr. (9/28/98 Pretrial Hearing, pp. 48-50); Petitioner telling various people he would kill Joy Lance and Butch Wood (9/28/98 Pretrial Hearing, pp. 50-51, 81, 109, 147, 157; 9/29/98 Pretrial Hearing, pp. 207, 259); Petitioner attempting to electrocute Joy in a tub of water (9/28/98 Pretrial Hearing, pp. 53, 58-59; 9/29/98 Pretrial Hearing, p. 220-221); Petitioner holding a pistol to Joy's head and threatening to kill her (9/28/98 Pretrial Hearing, pp. 74, 114); telling his and Joy's son that Joy, was a "slut whore mama," that she did not love him and to give his mother a "big hug bye because it will be the last time you see her" while holding a loaded gun to her head in front of the child (9/28/98 Pretrial Hearing, pp. 74, 114; 9/29/98 Pretrial Hearing, p. 238); Petitioner beating Joy with a gun (9/28/98 Pretrial Hearing, pp. 75, 115, 128); attacking Joy with a loaded gun and a chainsaw (9/28/98 Pretrial Hearing, pp. 81-83; 9/29/98 Pretrial Hearing, pp. 207, 259); pouring a flammable liquid in Joy's hair and then threatening to set her on fire (9/28/98 Pretrial Hearing, pp. 81, 109; 9/29/98 Pretrial Hearing, pp. 206-207, 258-259); and kicking in the back door of Butch Woods' residence brandishing a loaded shotgun (9/28/98 Pretrial Hearing, pp. 145, 151-153, 164; 9/29/98 Pretrial Hearing, pp. 216-218).

The Court finds that trial counsel's strategic decision not to present character witnesses in mitigation was reasonable. Thus, this Court finds that trial counsel was not deficient and Petitioner was not prejudiced by trial counsel not submitting the testimony of Petitioner's family members, which trial counsel reasonably determined may have been more

aggravating than mitigating to Petitioner's case. This claim is therefore DENIED.

c) Evidence Concerning Petitioner's Relationship with his Children

In the proceedings before this Court, Petitioner submitted affidavits from family and friends, including Petitioner's daughter, Stephanie Lance, to support his assertion that trial counsel was ineffective in not presenting evidence that Petitioner had a loving relationship with his children as mitigating evidence.

During the evidentiary hearing before this Court, trial counsel testified that he spoke with Petitioner's children. (HT 8335). Trial counsel testified that he reviewed the affidavit of Stephanie Lance, and that the affidavit was consistent with what he learned from talking to Stephanie. (HT 8335-8336). However, trial counsel testified that he did not present the testimony of Petitioner's children due to the emotional trauma it would cause them and because they lacked any "superior piece of testimony." (HT 8336).

With regard to the testimony of Petitioner's other family members and friends, trial counsel stated that he chose not to present their testimony because he did not want them to be subjected to a cross-examination by the State regarding the prior difficulties between Petitioner and Joy Lance, which trial counsel felt would have been harmful to the Petitioner.

The Court notes that trial counsel stated to the jury during his closing arguments that Petitioner had children who loved him. (T. 1943). He argued that if they sentenced Petitioner to death, then Petitioner's two children would not have a mother or father. (T.

1946-1947). Trial counsel asked the jury to "think about this long and hard before you decide to eliminate somebody. Think about Jessie and Stephanie." (T. 1948). Counsel argued that it was a "powerful thing, to take somebody's life. It will affect you forever." (T. 1944).

The Court concludes that trial counsel was not deficient in not presenting the Petitioner's children and family members to testify as to Petitioner's relationship and love for his children. Further, the Court finds that Petitioner has failed to show that he was prejudiced by trial counsel's decision in this regard. Therefore, this claim is DENIED.

d) Evidence of Petitioner's Nature to Help Others

Trial counsel was not unreasonable in not calling character witnesses to testify during the sentencing phase of trial. "The fact that [Appellant] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Appellant] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5 (1993)). See also Rogers v. Zant, 13 F.3d 384; Strickland, 466 U.S. at 700 (Strickland claimed that trial counsel was ineffective for not offering evidence that numerous persons thought Strickland was generally a good person. Court found the character evidence would not have changed the sentence imposed).

Further, trial counsel was not unreasonable in not calling these lay witnesses to testify on Petitioner's

behalf as counsel clearly stated his concern about putting up witnesses that would be cross-examined by the State regarding prior difficulties between Petitioner and Joy Lance. (HT 103-104). Informed strategy decisions by experienced counsel, such as this decision by Brannon, are the type of actions which Strickland prohibits being "second guessed" by reviewing courts. See also Jones v. Smith, 772 F.2d 668 (11th Cir. 1985); Gates v. Zant, 863 F.2d 1492 (11th Cir.) cert. denied, 110 S.Ct. 353 (1989).

Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden which is Petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers performances; we are interested in whether the adversarial process at trial . . . worked adequately." See White v. Singletary, 972 F.2d 1218, 1221, 11th Cir. 1992." Rogers v. Zant, 13 F.3d at 386.

As such, the Court finds that trial counsel cannot be deemed deficient in making the strategic decision under the facts of this case not to present these character witnesses during the sentencing phase of trial and that Petitioner was not prejudiced by trial counsel's tactical decision. This claim is DENIED.

B. OTHER CLAIMS

1) Mental Retardation (Claim III)

Petitioner alleges that the imposition of the death penalty is unconstitutional in this case because his mental impairments render him the "functional, moral,

legal, and constitutional equivalent" of an offender who is mentally retarded. The Court has previously found this claim to be procedurally defaulted. Regardless of whether the Court considers the claim for a miscarriage of justice excusing the default or on the merits, the claim fails. Petitioner has not established that his mental impairments rendered him mentally retarded, and Petitioner's mental impairments do not automatically exempt him from capital punishment.

Neither federal law nor Georgia law precludes capital punishment for someone with "mental impairments." In Georgia, the death penalty is only barred for offenders who were under the age of 18 at the time of the crime and for offenders who have been found to be mentally retarded under O.C.G.A. § 17-7-131(j).

Petitioner attempts to equate his alleged "mental impairments" with mental illness, which he, in turn, argues equates with mental retardation. Yet, Georgia law does *not* preclude a death sentence for someone who simply has been diagnosed with a mental illness. See O.C.G.A. § 17-7-131; Lewis v. State, 279 Ga. 756, 764 (2005)(finding that "unlike a verdict of guilty but mentally retarded, the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as a result of such verdict").

Significantly, the Georgia Supreme Court has expressly held that Atkins does not apply to persons who are not mentally retarded. In Lewis v. State, the Georgia Supreme Court heard the issue of whether the "ban [in Atkins] on executing the mentally retarded should be extended to apply to the mentally ill because [of] ... diminished culpability." 279 Ga. at 764. The

Georgia Supreme Court rejected this claim, specifically "declin[ing] to extend the holdings of cases like Atkins" to a petitioner who claims to be mentally ill. Id.

The record before this Court shows that Petitioner's experts did not find that Petitioner was mentally retarded, but instead found that he functioned in the range of borderline intellectual functioning. (HT 790-816, 968-978, 1031-1063). Because Petitioner is not mentally retarded, there is no legal impediment to the imposition of his death sentence for the purposes of retribution or deterrence. Petitioner's alleged mental impairments are legally insufficient to excuse his culpability or preclude him from being executed, and therefore, this claim is DENIED.

2) Sentencing Phase Jury Instructions (Claims XXV and XXVI)

As errors in the sentencing phase charge to the jury are "never barred by procedural default," these claims are properly before this Court for review on the merits. Head v. Ferrell, 274 Ga 399, 403, 554 S.E. 2d 155 (2001).

A review of the sentencing phase jury instructions, in their entirety, establishes that Petitioner failed to show that the trial court erred in defining mitigating circumstances or erred in not instructing the jury that unanimity was not required to impose a life sentence. The jury instructions in this case regarding mitigating circumstances and unanimity have all been held to be constitutional by the Georgia Supreme Court. See, e.g., King v. State, 273 Ga. 258, 276 (2000); Nance v. State, 280 Ga. 125, 126 (2005); Walker v. State, 281 Ga. 157, 165 (2006). See also McClain v. State, 267 Ga. 378, 386

(1996)(holding that a jury need not be instructed as to specific standards for considering mitigating circumstances so long as the jury is allowed and instructed to consider the evidence in mitigation and is instructed that it has a discretion, notwithstanding proof of aggravating circumstances, to impose a life sentence); Ford v. State, 257 Ga. 461 (1987)(the Georgia statutory capital sentencing scheme does not require a weighing or balancing of mitigating and aggravating circumstances); Jenkins v. State, 269 Ga. 282, 296 (1998)(holding that there is no error in refusing to charge the jury that its failure to reach a unanimous verdict as to sentence would result in imposition of a life sentence).

Accordingly, the trial court properly instructed the jury and this claim is DENIED.

VIII. CONCLUSION

Upon consideration of Petitioner's claims in the habeas corpus petition, Respondent's argument in opposition, the evidence presented in these proceedings, the applicable law, and all matters appropriate, the Court concludes that Petitioner is entitled to certain habeas relief as set forth below.

Based on the foregoing finding of fact and conclusions of law, the Court hereby Orders that the writ of habeas corpus is DENIED as to Petitioner's convictions and is GRANTED with respect to the death sentences imposed by the jury in Criminal Case No. 98-CR-0036 in the Superior Court of Jackson County, Georgia, and Petitioner's death sentences are hereby VACATED. Nothing in the Order shall prohibit the trial court from conducting further proceedings

regarding sentencing, and nothing in this Order shall preclude or prohibit the State from again seeking the death penalty in such proceedings.

The Clerk of the Superior Court of Butts County is directed to serve copies of this Order upon Petitioner's counsel of record, Respondent's counsel of record, and the habeas law clerk of the Council of Superior Court Judges.

IT IS SO ORDERED, this 22nd day of April, 2009.

/s/Michael C. Clark
MICHAEL C. CLARK
Judge Superior Court
Sitting by Designation in Butts County Superior Court

* * *

APPENDIX F

560 S.E.2d 663, 02 FCDR 595, 275 Ga. 11 (2002)

SUPREME COURT OF GEORGIA

No. S01P1813

[Filed February 25, 2002]
[Reconsideration Denied March 28, 2002]

LANCE	)
	)
v.	)
	)
The STATE	)
	)

Attorneys and Law Firms

J. Richardson Brannon, Gainesville, for appellant.

Timothy G. Madison, Dist. Atty., Thurbert E. Baker, Atty. Gen., Patricia B. Attaway, Romin Alavi, Asst. Attys. Gen., for appellee.

Opinion

BENHAM, Justice.

A jury found appellant Donnie Cleveland Lance guilty of murdering Sabrina "Joy" Lance and Dwight "Butch" Wood, Jr., and of burglary and possession of a

firearm during the commission of a crime.[1] The jury fixed the sentence for the murder of Joy Lance at death after finding beyond a reasonable doubt that the murder was committed while appellant was engaged in

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[1] The crimes were committed on November 9, 1997. Appellant was indicted by a Jackson County grand jury on March 3, 1998, on two counts of malice murder, two counts of felony murder, one count of burglary, one count of possession of a firearm during the commission of a crime, and two counts of possession of a firearm by a convicted felon. The State filed written notice of its intent to seek the death penalty on March 19, 1998. Lance's trial began on June 14, 1999, and concluded on June 23 when the jury returned its guilty verdicts and fixed Lance's sentences for the murders at death. The trial court imposed two death sentences on the two malice murder counts in conformity with the jury's sentencing verdicts and further imposed consecutive terms of imprisonment of twenty years for the burglary and five years for the possession of a firearm during a crime. The other firearm possession charges were dismissed. The felony murder verdicts were properly vacated by operation of law. See *Malcolm v. State,* 263 Ga. 369, 371–372(4), 434 S.E.2d 479 (1993); OCGA § 16–1–7(a)(1). Pursuant to a notice of appeal timely filed on July 19, 1999, Lance's appeal was docketed in this Court on December 16, 1999. The appeal was stricken from this Court's docket on February 11, 2000, and the case was remanded for an evidentiary hearing requested by Lance. This Court's remittitur issued on May 11, 2000. After the hearing was concluded, the appeal was docketed again in this Court on August 30, 2001. The absence of a notice of appeal preceding this appeal is not fatal to this appeal (compare *Davidson v. Callaway,* 274 Ga. 813, 559 S.E.2d 728 (2002); *City of Atlanta v. SDH Investment Corp.,* Case No. S02A0247, decided 11/30/01 (dismissed by unpublished order)) since OCGA § 17–10–35 requires mandatory appellate review of cases in which the death penalty is imposed (*Thomas v. State,* 260 Ga. 262, 392 S.E.2d 520 (1990)), and the Unified Appeal Procedure requires this Court to review a death penalty case whether or not a notice of appeal is filed. See Rule IV A3(a)(2000). *Colwell v. State,* 273 Ga. 338, 543 S.E.2d 682 (2001). Oral arguments were heard on February 11, 2002.

another capital felony (the murder of Butch Wood), was committed while appellant was engaged in a burglary, and was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim. See OCGA § 17–10–30(b)(2) and (7). The jury fixed the sentence for the murder of Butch Wood at death after finding beyond a reasonable doubt that the murder was committed while appellant was engaged in another capital felony (the murder of Joy Lance) and while appellant was engaged in a burglary. See OCGA § 17–10–30(b)(2).

1. The evidence presented at trial showed the following. The bodies of the victims were discovered in Butch Wood's home on November 9, 1997. Butch had been shot at least twice with a shotgun and Joy had been beaten to death by repeated blows to her face. Expert testimony suggested they had died earlier that day, sometime between midnight and 5:00 a.m. The door to Wood's home had imprints consistent with size 7 ½ EE Sears "Diehard" work shoes. Joy's father testified he told appellant Joy was not at home when appellant had telephoned him looking for Joy at 11:55 p.m. on November 8. A law enforcement officer testified he saw appellant's car leave appellant's driveway near midnight. When questioned by an investigating officer, Lance denied owning Diehard work shoes; however, a search of Lance's shop revealed an empty shoe box that had markings showing it formerly contained shoes of the same type and size as those that made the imprints on Wood's door, testimony by Sears personnel showed that Lance had purchased work shoes of the same type and size and had then exchanged them under a warranty for a new pair, and footprints inside and

outside of Lance's shop matched the imprint on Butch Wood's door. Officers also retrieved from a grease pit in Lance's shop an unspent shotgun shell that matched the ammunition used in Wood's murder.

Joe Moore testified he visited Lance at his shop during the morning of November 9, 1997, before the victims' bodies were discovered. Referring to Joy, Lance told Moore that "the bitch" would not be coming to clean his house that day. Lance stated regarding Butch Wood that "his daddy could buy him out of a bunch of places, but he can't buy him out of Hell." Lance also informed Moore that Joy and Butch were dead. Moore disposed of several shotgun shells for Lance, but he later assisted law enforcement officers in retrieving them. The State also presented the testimony of two of appellant's jail mates who stated appellant had discussed his commission of the murders.

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch.

Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home

committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.

Viewing all of the evidence adduced at the guilt/innocence phase in the light most favorable to the jury's guilt/ innocence phase verdicts, we conclude that the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Lance was guilty on all charges of which he was convicted. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We apply the same standard of review to conclude that the trial court did not err by denying Lance's motion for a directed verdict at the conclusion of the guilt/innocence phase. *Miller v. State,* 270 Ga. 741, 742(1), 512 S.E.2d 272 (1999).

Pretrial Issues

2. After receiving briefs from Lance and conducting an *ex parte* hearing, the trial court issued an *ex parte* order granting Lance $4,000 for investigative assistance and denying his request for funds to hire several experts. Lance argues on appeal that the trial court erred by denying his request for funds to hire experts on the issues of time of death and latent footprint analysis.

This Court has held the following:

> A motion on behalf of an indigent criminal defendant for funds with which to obtain the services of a scientific expert should disclose to the trial court, with a reasonable degree of

> precision, why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services.

Roseboro v. State, 258 Ga. 39(3)(d), 365 S.E.2d 115 (1988). The decision whether to grant or deny an indigent criminal defendant's motion for the appointment of an expert rests within the trial court's sound discretion, and the trial court's decision will be upheld in the absence of an abuse of discretion. *Crawford v. State,* 267 Ga. 881(2), 485 S.E.2d 461 (1997). Our review of the record indicates that Lance's request for the contested funds was too unspecific, uncertain, and conclusory to support a finding that the trial court abused its discretion in concluding that the requested funds were not necessary to a fair trial. See *Thomason v. State,* 268 Ga. 298(7), 486 S.E.2d 861 (1997).

3. After reviewing the record, we conclude the trial court did not abuse its discretion by denying Lance's motion for a continuance filed one month before trial. See OCGA § 17–8–22; *Johnson v. State,* 271 Ga. 375(8), 519 S.E.2d 221 (1999).

4. Appellant sees error in the trial court's denial of appellant's pre-trial motion to preclude the State from seeking the death penalty. Appellant's motion was based on his assertion that the State would not be able to prove its case against appellant. In order for the trial court to have granted appellant's motion, appellant would have had to prove that the State could not prove its case against him. See *Speed v. State,* 270 Ga. 688(49), 512 S.E.2d 896 (1999); *Jenkins v. State,* 269 Ga. 282(2), 498 S.E.2d 502 (1998) (motion to preclude

State from seeking death penalty properly denied when movant did not prove grounds on which motion was based). Appellant did not carry his burden; accordingly, the trial court did not err in denying the motion.

Voir Dire

5. Contrary to appellant's assertion, the process of qualifying potential jurors on the basis of their death penalty views is not unconstitutional. *DeYoung v. State,* 268 Ga. 780(11), 493 S.E.2d 157 (1997).

6. The trial court did not err by denying appellant's request that he be permitted to conduct voir dire about potential jurors' views on the meaning of a life sentence. In *Zellmer v. State,* 272 Ga. 735(1), 534 S.E.2d 802 (2000), this Court held that criminal defendants and the State are entitled to examine potential jurors on their inclinations and biases regarding parole, but the examination

> should be limited to jurors' willingness to consider both a life sentence that allows for the possibility of parole and a life sentence that does not. Exposure to the complexities of the future role of the Board of Pardons and Paroles ... is not an appropriate matter for voir dire. Likewise, because OCGA § 17–10–31.1(d) authorizes the trial court to charge the jury on the meaning of life imprisonment without parole and life imprisonment, "the juror(s)' beliefs regarding the *meaning* of those options (are) not a proper subject for voir dire."

7. Lance complains that both the trial court and the prosecutor asked questions during voir dire that amounted to improper "coaching" of potential jurors on

issues related to the jurors' death penalty qualifications. Since appellant did not object to any of the allegedly improper questions, this claim has been waived. See *Whatley v. State,* 270 Ga. 296(5), 509 S.E.2d 45 (1998).

8. Lance contends the trial court erred when it qualified three potential jurors who appellant believes automatically would have imposed a death sentence upon a conviction for murder. Because Georgia law entitles a defendant to a panel of 42 qualified jurors, the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal. *Lively v. State,* 262 Ga. 510 (2), 421 S.E.2d 528 (1992). "A juror who will automatically vote for the death penalty in every case" upon a conviction for murder is not qualified to serve. *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). This is true because such a juror, instead of giving consideration to mitigating circumstances, begins the trial with an unwavering bias in favor of one of the sentences authorized under law, to the exclusion of the others. See *Zellmer,* 272 Ga. at 736(1), 534 S.E.2d 802. A potential juror's views on capital punishment will disqualify the juror from service if the juror's views would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions given the juror and the oath taken by the juror. *Greene v. State,* 268 Ga. 47, 48, 485 S.E.2d 741 (1997). See also *Wainwright v. Witt,* 469 U.S. 412, 424(II), 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In conducting our review, this Court views the voir dire of each juror as a whole and gives deference to the findings of the trial court concerning any juror's possible bias. *Greene,* 268 Ga. at 48, 485 S.E.2d 741.

(a) Although prospective juror Casey stated that he believed in "an eye for an eye" and thought the death penalty should be given for a "violent murder," he also gave responses by which he indicated he would not automatically impose a death sentence upon a conviction for murder, he would consider any mitigating evidence that might be presented, and he would consider all three possible sentences.

(b) Prospective juror Dial acknowledged he would not automatically give a death sentence in every murder case. Although the juror later indicated he would have strong feelings in favor of the death penalty upon a conviction for murder and once stated that "if you're found guilty of murder you should get the death penalty," he also indicated he would also listen to "additional evidence" after a murder conviction and follow the law as given by the trial court.

(c) Prospective juror Braswell "guess[ed]" and "imagine[d]" that the death penalty would be the appropriate punishment for a murder. However, the juror also indicated he would give consideration to both a life and a death sentence, he would not automatically vote for the death penalty, and he would follow the law as given by the trial court.

Viewing as a whole the voir dire of each of these prospective jurors, we conclude that the trial court did not abuse its discretion by finding the jurors qualified.

9. Lance also argues the trial court erred when it refused to disqualify four prospective jurors who allegedly would not consider a life sentence.

(a) As discussed above, a juror who will consider only a death sentence upon a conviction for murder is

not qualified to serve in a death penalty case. Under Georgia law, the proper standard to be applied by the trial court where a juror disfavors life with the possibility of parole as a sentencing option is the standard applied where a juror so favors the death penalty that he or she might not give consideration to mitigating evidence and a life sentence with or without the possibility of parole. As stated above, that standard is whether the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the trial court's instructions and the juror's oath. *Greene,* 268 Ga. at 48, 485 S.E.2d 741. In conducting our review of the trial court's action, this Court views the voir dire of each juror as a whole and affords due deference to the trial court's application of this standard, both in the context of death versus life and in the context of life without the possibility of parole versus life with the possibility of parole. See *Greene,* 268 Ga. at 48, 485 S.E.2d 741.

(a) While juror Howard indicated he might favor or "lean towards" the death penalty upon a conviction for murder, he also indicated several times he would not automatically select the death penalty and he would give consideration to both life without the possibility of parole and life with the possibility of parole. We find no abuse of discretion in the trial court's determination that juror Howard was qualified.

(b) Our review of the record confirms the State's assertion that Lance did not move the trial court to disqualify the three other prospective jurors (Little, Atha, and Flint) of whom appellant now complains. The trial court did not err in failing to disqualify these

jurors sua sponte. *Whatley,* 270 Ga. at 298(3), 509 S.E.2d 45.

10. Lance contends the trial court erred in excusing prospective juror McCullers despite the juror's willingness to consider the death penalty as a sentencing option. Applying the same standard used in Divisions 8 and 9 and affording the trial court's determination the same deference, we conclude the trial court did not abuse its discretion by excusing this juror over Lance's objection. Juror McCuller's voir dire responses, viewed as a whole, demonstrated he did not believe it would be possible for anything presented at trial to overcome his strong religious conviction that he must not take part in imposing a death sentence. *Greene,* 268 Ga. at 51, 485 S.E.2d 741.

11. On appeal, Lance contends that jurors Peters, Witcher, and Dockery were unqualified to serve based on opinions formed through exposure to pretrial influences. Lance made no motion to excuse jurors Peters or Dockery, and the trial court did not err by failing to excuse these two jurors sua sponte. See *Whatley,* 270 Ga. at 297–298(2), 509 S.E.2d 45. Our review of the record indicates that the trial court did not abuse its discretion in finding that juror Witcher did not hold any fixed opinions that would require her disqualification. See id.

12. Lance asserts that the State's race-neutral reasons for striking three African American jurors were insufficient. See *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). After reviewing the State's asserted reasons for its strikes, we conclude the trial court was not clearly erroneous when it determined appellant had failed to carry his burden of

showing that the State was motivated by discriminatory intent in the exercise of its strikes. See *Barnes v. State,* 269 Ga. 345(6), 496 S.E.2d 674 (1998).

Guilt / Innocence Phase

13. Lance argued at trial that he should be permitted in the guilt/innocence phase to introduce evidence and to conduct direct and cross-examination concerning purported acts of violence by the victims against appellant and by Butch against Joy, and purported violent and illegal incidents involving the victims and third parties.

(a) This Court has long held that, as a general rule, evidence of the character of a murder victim is irrelevant and inadmissible at trial. *Henderson v. State,* 234 Ga. 827(1), 218 S.E.2d 612 (1975).[2] however, a defendant may present evidenCE OF A VICTIM'S VIOLENT ANd turbulent character when the defendant can make a prima facie showing of justification: that the victim was the assailant, the defendant was assailed, and the defendant was honestly seeking to defend himself. Id. See also *Lewis v. State,* 268 Ga. 83(2), 485 S.E.2d 212 (1997) (admission of victim's specific acts of prior violence must be preceded by same three-pronged showing that victim was the assailant, appellant was the assailed, and appellant acted to defend himself). In the case at bar, appellant did not assert the defense of justification; therefore, the exception to the general

[2] "The general character of the parties and especially their conduct in other transactions are irrelevant matter unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct." OCGA § 24–2–2.

rule is inapplicable, and the trial court did not err when it did not permit appellant to present evidence of the victims' purported bad character or their purported acts of violence against third parties.

Since the trial court announced it would allow evidence of any acts of violence by either victim that tended to directly rebut the State's evidence of Lance's prior acts of violence against the victims, we need not address appellant's assertions that the trial court would not permit him to present such evidence. Appellant's theory that Butch might have murdered Joy and then have been murdered himself by some other person in retaliation was too speculative and unsupported to justify a suspension of the prohibition against evidence of Butch's alleged bad character and past violent acts. The limitation actually imposed by the trial court regarding the other proffered evidence of the victims' characters and past acts discussed by Lance on appeal was proper, as Lance's proffered evidence would have served no proper purpose in the guilt/innocence phase of his trial. Finally, appellant's argument that the State "opened the door" to evidence of the victims' connection to an alleged drug dealer is without merit, because the incidental introduction of some such evidence by the State through Lance's own unedited, audiotaped statement did not harm Lance and, accordingly, should not be regarded as imparting a right upon Lance to introduce cumulative evidence for an improper purpose.

(b) A criminal defendant has the right to present evidence tending to show that another person is the guilty party. See *Henderson v. State,* 255 Ga. 687(1), 341 S.E.2d 439 (1986). In order for such evidence to be

admitted, it cannot raise the mere speculation that some other person committed the crime. Instead, "the proffered evidence must raise a reasonable inference of the defendant's innocence...." *Klinect v. State,* 269 Ga. 570(3), 501 S.E.2d 810 (1998). See also *Azizi v. State,* 270 Ga. 709(6), 512 S.E.2d 622 (1999). The trial court did not err in concluding that appellant's potential evidence that the victims allegedly used and sold illegal drugs and that two unidentified persons seven years earlier had kicked in Butch's door, abducted him, and beat him raised no such reasonable inference.

(c) Contrary to his assertions on appeal, Lance has shown no instance in the record where he was prevented from attempting to impeach the State's witnesses or hearsay declarants by the methods permitted under Georgia law. See *Smith v. State,* 270 Ga. 240(5), 510 S.E.2d 1 (1998) (noting that hearsay declarants may be impeached only by same methods applicable to witnesses testifying at trial).

14. The trial court did not err by refusing to apply the necessity exception to the hearsay rule to appellant's proffer of the hearsay statements of a witness living in Arizona whom Lance had not attempted to subpoena under interstate subpoena procedures. Compare *Cook v. State,* 273 Ga. 574(3), 543 S.E.2d 701 (2001).

15. The trial court was not clearly erroneous when, after conducting a pretrial hearing, it ruled that the similar transactions proffered by the State at the hearing and subsequently admitted into evidence at trial were sufficiently similar to the crime being tried and were not too remote in time. See *Mullins v. State,* 269 Ga. 157(2), 496 S.E.2d 252 (1998).

16. The trial court did not err by allowing evidence of prior difficulties between Lance and the victims.

> [E]vidence of the defendant's prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.

Wall v. State, 269 Ga. 506, 509(2), 500 S.E.2d 904 (1998).

17. The trial court did not abuse its discretion in concluding that the hearsay statements of Joy introduced at trial were attended by sufficient particularized guarantees of trustworthiness to be admissible under the necessity exception to the hearsay rule. See *Gissendaner v. State,* 272 Ga. 704(6), 532 S.E.2d 677 (2000).

18. The evidence of similar transactions and prior difficulties admitted by the trial court did not impermissibly place Lance's character at issue. See *McKissick v. State,* 263 Ga. 188, 189(2), 429 S.E.2d 655 (1993).

19. Appellant contends that the trial court erred by refusing to suppress the fruits of a number of searches. We find no error.

(a) Lance argues that a search conducted on November 10, 1997, was unlawful because the consent

form he signed did not sufficiently limit the search, making the search an allegedly illegal "general search." There is no merit in this argument since the consent form Lance signed clearly indicated the potentially extensive scope of the search to be conducted, Lance gave oral consent to the scope of the search actually conducted, and Lance attended the actual search and never withdrew his consent. See also *Hall v. State,* 239 Ga. 832(1), 238 S.E.2d 912 (1977) (where actual consent is given, considerations applicable to non-consensual searches generally do not apply).

(b) Lance argues that the searches conducted pursuant to warrants on the following dates were unlawful: November 11, 1997; December 5, 1997; January 19, 1998; and June 15, 1998. For the reasons set forth below, we conclude that each of these searches was lawful because the magistrate had a substantial basis for concluding probable cause existed and the search warrants that issued were sufficiently limited in scope.

In deciding whether to issue a search warrant, the magistrate makes

> a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Stephens, 252 Ga. 181, 182, 311 S.E.2d 823 (1984). The duty of the reviewing court is " 'to ensure that the magistrate had a "substantial basis for

conclud(ing) that probable cause existed.' " Id. After reviewing the record in light of appellant's arguments, we have determined there was before the magistrate a substantial basis to conclude that probable cause existed for each of the warrants in question. Our review of the record also leads us to dismiss as without merit appellant's assertion that the magistrate did not view the totality of the circumstances "for indications of the existence of reasonable probability that the conditions referred to in the sworn testimony would continue to exist at the time of the issuance of the search warrant." *Lewis v. State,* 255 Ga. 101, 104(2), 335 S.E.2d 560 (1985). See *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *State v. Luck,* 252 Ga. 347, 312 S.E.2d 791 (1984).

Appellant also complains the report of a "confidential witness" was improperly relied upon to show probable cause for the November 11, 1997, warrant. Although several unnamed witnesses were described in the affidavit used in the application for the warrant, these witnesses appear likely to have been merely "citizen informers" rather than the sort of "informants" typically deemed suspect without a showing of reliability. See 3 LaFave, Search and Seizure § 3.3, pp. 88–89 and § 3.4(a), p. 205 (3rd ed.1996). While naming the witnesses might have offered additional indicia of reliability by dispelling any suspicion the witnesses were fictitious or were somehow less credible than ordinary citizens, sufficient other facts from named and reliable sources were presented in the affidavit to show probable cause.

Appellant also maintains that the magistrate who issued the December 5, 1997, warrant relied upon

affidavit testimony about a "confidential witness" who had informed the affiant of a large hole filled with water on Lance's property that had not yet been searched. Even assuming that use of the report of this witness, unlike the reports of ordinary citizens, required a special showing of the witness's veracity, the affidavit specifically indicated that the witness had previously given information that had led to the discovery of "fruits" of the murders committed in this case. Accordingly, there is nothing objectionable in the magistrate's partial reliance on the witness's report.

Having determined that probable cause was shown for the issuance of each of the warrants in question at the time of their issuance, we turn to the question of whether the warrants were sufficiently limited in scope. Each warrant authorized a search for specified items of potential evidence as well as for "any other fruits of the crime of murder." Appellant contends the latter phrase authorized an impermissible "general search." The quoted phrase is understood as limiting the search to items (in addition to the items specifically mentioned in the warrant) reasonably appearing to be connected to the specific crime delineated in the warrant. Because of the nature of the probable evidence and "fruits" of the specific crime delineated, we conclude that the warrant did not authorize an unlawful general search in contravention of the Fourth and Fourteenth Amendments or of parallel provisions in Georgia law. See *Andresen v. Maryland,* 427 U.S. 463, 479–482, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *United States v. Logan,* 250 F.3d 350, 365(II)(B)(1) (6th Cir.2001) ("A description contained in a warrant is sufficiently particular if it is as specific as the circumstances and the nature of the alleged crime

permit."); *United States v. Smith,* 918 F.2d 1501, 1507–1508(II) (11th Cir.1990); *United States v. Buck,* 813 F.2d 588, 591(II) (2d Cir.1987) (noting that " 'boilerplate' language in a warrant" is more likely to be found permissible when "it was preceded by a list of specific items to be sought"); *United States v. Christine,* 687 F.2d 749, 752–753(II) (3d Cir.1982); see also *United States v. George,* 975 F.2d 72, 75–77(I)(A) (2d Cir.1992) ("[A]uthorization to search for 'evidence of *a* crime,' that is to say, any crime, is so broad as to constitute a general warrant."); *United States v. Maxwell,* 920 F.2d 1028, 1033–1034(II)(A) (D.C.Cir.1990) (holding that reference in an search warrant to certain crimes might be sufficiently narrowing but that reference to other crimes might leave the scope of the authorized search too broad).

20. Appellant's failure to demonstrate the trial court abused its discretion in deciding when to adjourn in the evenings of the trial makes his assertion of error in that regard without merit. *Spencer v. State,* 260 Ga. 640(9), 398 S.E.2d 179 (1990).

21. We find no error in the trial court's overruling Lance's "continuing witness" objection to the admission into evidence of diagrams of the crime scene and of Lance's shop since the "continuing witness" objection is not applicable to drawings or other documents which, as here, were admitted into evidence and were "demonstrative evidence that serve[d] only to illustrate testimony given by the witnesses." *James v. State,* 270 Ga. 675(7), 513 S.E.2d 207 (1999). Lance raised no constitutional objections to the diagrams and we see no merit in his conclusory appellate argument that a constitutional violation occurred.

22. Lance contends that the trial court erred by propounding to a certain witness questions submitted in writing to the trial court by the jury. While jurors may not ask questions of witnesses *directly* (*Hall v. State,* 241 Ga. 252(4), 244 S.E.2d 833 (1978)), a trial court may receive written questions from the jury and ask those questions the court finds proper. *Story v. State,* 157 Ga.App. 490, 278 S.E.2d 97 (1981). See *Matchett v. State,* 257 Ga. 785(2), 364 S.E.2d 565 (1988), where this Court noted that the trial court "properly instructed the jury as to the appropriate form of asking questions" which was "to submit any questions they might wish to have answered to the trial court in writing at the conclusion of the witness' testimony." The trial court did not abuse its discretion in propounding the questions at issue in a manner that intimated no opinion held by the trial court in an effort to fully develop the truth of the case. *Eubanks v. State,* 240 Ga. 544(2), 242 S.E.2d 41 (1978). We also find no error in the trial court having read aloud to the parties another question submitted by the jury in writing and then allowing the State to ask the question when a witness was later testifying. See *Story v. State,* supra, 157 Ga.App. 490, 278 S.E.2d 97.

23. Lance contends that the trial court erred when it declined to declare a mistrial when a State's witness being cross-examined by defense counsel testified he had taken and passed a polygraph examination. The trial court's strong curative instruction and its questioning of the jury regarding their ability to follow that instruction were sufficient to remedy any damage to the fairness of the proceedings. Accordingly, the trial court did not abuse its discretion in denying Lance's renewed motion for a mistrial. *Evans v. State,* 256 Ga.

10(5), 342 S.E.2d 684 (1986). Compare *Morris v. State,* 264 Ga. 823(2), (3), 452 S.E.2d 100 (1995), where no curative instructions were given.

Sentencing Phase

24. The trial court's failure to charge the jury that its findings of statutory aggravating circumstances must be unanimous was not reversible error because the trial court charged the jury that its sentencing verdict must be unanimous. *Wilson v. State,* 271 Ga. 811(12), 525 S.E.2d 339 (1999).

25. The jury found beyond a reasonable doubt that the murder of Joy was committed during the murder of Butch and that the murder of Butch was committed during the murder of Joy. See OCGA § 17–10–30(b)(2). The trial court did not err by submitting both of these statutory aggravating circumstances to the jury for its consideration since both were supported by the evidence. *Heidler v. State,* 273 Ga. 54(22), 537 S.E.2d 44 (2000). However, following this Court's rule against "mutually supporting aggravating circumstances," we set aside the jury's finding that the murder of Joy was committed during the murder of Butch (id.), but we need not vacate the death sentence imposed for Joy's murder since it remains supported by at least one remaining statutory aggravating circumstance. See Division 26, infra. *Heidler v. State,* 273 Ga. 54(22), 537 S.E.2d 44; *Jenkins v. State,* 269 Ga. at 294(23)(a), 498 S.E.2d 502..

26. Although there was evidence that many of the blows inflicted upon Joy likely would have rendered her unconscious, there was also sufficient evidence to support the jury's finding that Joy's murder was

outrageously or wantonly vile, horrible, or inhuman and that her murder involved torture, depravity of mind, and an aggravated battery against her before her death. See OCGA § 17–10–30(b)(7). There was evidence that Butch had been murdered by multiple shotgun blasts in the same dwelling as Joy and within her hearing before she was killed; that Joy had been taken from the bed and thrust face first into a door; and that Joy was returned to the bed and brutally beaten repeatedly in the face until she was horribly disfigured as well as dead. We reject appellant's argument that this statutory aggravating circumstance was used in his case as an unlawful "catchall" that failed to narrow appropriately the application of the death penalty. See *Phillips v. State,* 250 Ga. 336(6)(c), 297 S.E.2d 217 (1982); *Hance v. State,* 245 Ga. 856(3), 268 S.E.2d 339 (1980). Compare *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). We note with approval that the trial court's charge to the jury on the OCGA § 17–10–30(b)(7) statutory aggravating circumstance tracked the charge recommended by this Court in *West v. State,* 252 Ga. 156, 161–162, 313 S.E.2d 67 (1984). See Suggested Pattern Jury Instructions: Vol. II, Criminal Charges, Part 4(B), pp. 84–86 (1999).

27. OCGA § 17–10–1.2, which authorizes the presentation of certain victim impact testimony, is not unconstitutional. *Livingston v. State,* 264 Ga. 402, 444 S.E.2d 748 (1994). Appellant has not demonstrated how the victim impact testimony presented at the sentencing phase of his trial exceeded the limits set in *Turner v. State,* 268 Ga. 213, 214–215, 486 S.E.2d 839 (1997). Although the testimony was not read from written statements previously scrutinized outside the

jury's presence by the trial court and counsel as this Court recommended in *Turner,* there is nothing in the record indicating that this omission resulted in the admission of unlawfully prejudicial testimony and/or courtroom demeanor that the recommended procedure was designed to avoid. Cf. *Johnson v. State,* 271 Ga. at 385(19), 519 S.E.2d 221..

28. Lance has failed to demonstrate that the trial court erred by admitting, over Lance's objection during the sentencing phase, certain photographs of the victims and their family members. See OCGA § 17–10–1.2(a)(1).

29. Appellant has not shown error in the trial court's admission into evidence of either a wooden paddle with Joy's name written on it that appellant had used to beat her, or a photograph of that paddle. "[B]ad character evidence is admissible in the sentencing phase." *Gulley v. State,* 271 Ga. 337(8), 519 S.E.2d 655 (1999).

30. Appellant asserts that his cross-examination of certain witnesses during the sentencing phase was improperly limited by the trial court's previous rulings regarding evidence and testimony about the victims' alleged past bad acts and alleged bad characters. Pretermitting the question of what are the appropriate limits to evidence of a victim's character and past acts at the sentencing phase of a death penalty trial, we note that appellant is mistaken about the limits placed upon counsel at the sentencing phase. The trial court advised counsel that "the Court's limitations as to evidence in the first part of the trial are not necessarily the same in the second part of the trial, that there is a greater—a relaxation of some evidentiary rules in the

sentencing phase[.]" The trial court restated the point twice, the second time specifically indicating that the previous rulings on the State's motions in limine were no longer in force. In light of the trial court's statements, appellant has failed to show trial court error with regard to any alleged limitations placed upon him under these circumstances.

31. During the sentencing phase, Lance objected on hearsay grounds to the introduction of two letters written by Joy's son after her death, both of which expressed the child's love for his mother, the fact that he missed her and longed to see her, and the fact that he cried at certain times. While the trial court erred in overruling that hearsay objection on the ground that the letters were not offered to demonstrate the truth of the matter asserted therein (see *Gissendaner,* 272 Ga. at 714–715, 532 S.E.2d 677 where the hearsay rules were applied to letters written by children), we nevertheless conclude that the error was harmless in light of the cumulative evidence already properly admitted regarding the child's thoughts and emotional state. Appellant's argument regarding the inclusion in one of the letters of the titles of two songs does not alter our finding of harmlessness.

32. Although we have held that it "might be the better practice" to charge the jury on the subject of the credibility of witnesses during the sentencing phase as well as at the conclusion of the guilt/innocence phase, the failure to do so is not reversible error where a proper charge was given during the guilt/innocence phase. *Wilson,* 271 Ga. at 818, 525 S.E.2d 339.

33. The trial court did not err when it failed to charge the jury that findings regarding mitigating

circumstances need not be unanimous since the trial court properly charged the jury it was not necessary to find *any* mitigating circumstances in order to return a sentence less than death. *Gissendaner,* 272 Ga. at 716, 532 S.E.2d 677.

34. The trial court did not err by refusing to allow evidence regarding the possible timing of Lance's parole eligibility if the jury were to impose a sentence of life imprisonment rather than a sentence of life imprisonment without parole or a sentence of death. See *Philpot v. State,* 268 Ga. 168(2), 486 S.E.2d 158 (1997); *Burgess v. State,* 264 Ga. 777(33), 450 S.E.2d 680 (1994).

The trial court properly charged the jury on the meaning of life imprisonment without parole. See OCGA § 17–10–31.1(d).

Proceedings Held on Remand

35. Upon Lance's motion, this Court remanded this case for an evidentiary hearing regarding a letter written to a newspaper by Frankie Shields, one of the State's witnesses at trial. In the letter, Shields claimed the State had reneged on a promise, made in exchange for his testimony against appellant, to move him to a prison closer to his home. Shields's testimony at the hearing held on remand indicated he lied in his letter to the newspaper. That evidence authorized the trial court to find that no deal had been offered to or made with Shields by the State and, accordingly, the conclusion that Lance's claim of alleged suppression of exculpatory evidence must fail. See *McGee v. State,* 272 Ga. 363(2), 529 S.E.2d 366 (2000) (trial court was authorized to weigh conflicting testimony and to

conclude that defendant failed to prove he was deprived of any exculpatory material); *Jolley v. State,* 254 Ga. 624(5), 331 S.E.2d 516 (1985); see also *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

36. Appellant contends the trial court erred when it permitted the district attorney to continue to serve as the prosecutor after the DA testified at the post-trial hearing concerning the purported deal Shields had made with the DA in exchange for his trial testimony against appellant. Inasmuch as the district attorney's testimony was limited to a rebuttal of the contents of Shields's letter and was given nearly a year after the jury found appellant guilty, none of the dangers inherent in having an attorney testify in court was present. See *Timberlake v. State,* 246 Ga. 488(7), 271 S.E.2d 792 (1980) (trial court has discretion to allow a prosecutor to testify as a rebuttal witness).

Constitutional Questions

37. There is no merit to Lance's allegations that OCGA § 17–10–30 et seq. violated his right to "fundamental fairness," that those statutes are "vague and overbroad and not properly applied to the facts of this case," or that they are otherwise unconstitutional in general or in his case. See *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Morrow v. State,* 272 Ga. 691(15), 532 S.E.2d 78 (2000). Compare *Godfrey,* 446 U.S. 420, 100 S.Ct. 1759.

38. Because this Court has directed that all future executions in Georgia be carried out by lethal injection, Lance's argument that execution by electrocution is

unconstitutional is moot. See *Dawson v. State,* 274 Ga. 327, 328, 554 S.E.2d 137 (2001).

Sentence Review

39. Upon our review of the record, we conclude that the evidence adduced in the two phases of Lance's trial was sufficient to enable a rational trier of fact to find beyond a reasonable doubt the existence of the statutory aggravating circumstances supporting the death sentences in this case. See *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; OCGA § 17–10–35(c)(2).

40. Lance committed the two murders for which he has been sentenced to death as the culmination of a long history of abuse and violence and after announcing repeatedly his intent to harm the victims. See *Gissendaner,* 272 Ga. at 717(19)(a), 532 S.E.2d 677 (noting that past conduct is relevant to proportionality review). Considering both the crimes and the defendant, we conclude that the death sentences imposed for the murders in this case were neither excessive nor disproportionate to the penalties imposed in similar cases in this State. OCGA § 17–10–35(c)(3). The cases appearing in the Appendix support this conclusion in that they demonstrate the willingness of juries to impose a death sentence where a defendant has murdered more than one person.

41. After reviewing the record of this case, we conclude that the death sentences in this case were not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17–10–35(c)(1).

Judgment affirmed.

All the Justices concur, except FLETCHER, C.J., SEARS, P.J., HUNSTEIN, THOMPSON, CARLEY and HINES, JJ., who concur in judgment only as to Division 22.

APPENDIX

Lucas v. State, 274 Ga. 640, 555 S.E.2d 440 (2001); *Rhode v. State,* 274 Ga. 377, 552 S.E.2d 855 (2001); *Colwell v. State,* 273 Ga. 634, 544 S.E.2d 120 (2000)[(2001)]; *Heidler v. State,* 273 Ga. 54, 537 S.E.2d 44 (2000); *Morrow v. State,* 272 Ga. 691, 532 S.E.2d 78 (2000); *Pace v. State,* 271 Ga. 829, 524 S.E.2d 490 (1999); *Palmer v. State,* 271 Ga. 234, 517 S.E.2d 502 (1999); *Cook v. State,* 270 Ga. 820, 514 S.E.2d 657 (1999); *Jenkins v. State,* 269 Ga. 282, 498 S.E.2d 502 (1998); *DeYoung v. State,* 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State,* 268 Ga. 623, 491 S.E.2d 791 (1997); *McMichen v. State,* 265 Ga. 598, 458 S.E.2d 833 (1995); *Stripling v. State,* 261 Ga. 1, 401 S.E.2d 500 (1991); *Isaacs v. State,* 259 Ga. 717, 386 S.E.2d 316 (1989); *Ford v. State,* 257 Ga. 461, 360 S.E.2d 258 (1987); *Childs v. State,* 257 Ga. 243, 357 S.E.2d 48 (1987); *Romine v. State,* 256 Ga. 521, 350 S.E.2d 446 (1986); *Cargill v. State,* 255 Ga. 616, 340 S.E.2d 891 (1986); *Blanks v. State,* 254 Ga. 420, 330 S.E.2d 575 (1985); *Putman v. State,* 251 Ga. 605, 308 S.E.2d 145 (1983); *Wilson v. State,* 250 Ga. 630, 300 S.E.2d 640 (1983); *Rivers v. State,* 250 Ga. 303, 298 S.E.2d 1 (1982); *Rivers v. State,* 250 Ga. 288, 298 S.E.2d 10 (1982); *Waters v. State,* 248 Ga. 355, 283 S.E.2d 238 (1981).

APPENDIX G

IN THE SUPERIOR COURT
OF JACKSON COUNTY
STATE OF GEORGIA

Case No. M-98-CR-0000036

[Dated June 14-19, 21-23, 1999]

STATE OF GEORGIA	)
	)
vs.	)
	)
DONNIE CLEVELAND LANCE,	)
	)
Defendant.	)
	)

JURY TRIAL

VOLUME X of XI

The following proceedings were heard before the HONORABLE DAVID MOTES, Judge, Piedmont Judicial Circuit, Jackson County Superior Court, and a jury of twelve, and were reported by Debbie Seymour, Certified Court Reporter in the State of Georgia, on the 14th through the 19th of June, 1999, and the 21st through the 23rd of June, 1999, at the Walton County Judicial Annex, Monroe, Georgia.

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I N D E X (cont'd)

VOLUME XI

E X H I B I T S

IDENTIFIED	MARKED	TENDERED	ADMITTED	EXHIBITED
STATE'S 1	785	786	786	1977
STATE'S 10	835	1497	1498	W/CLERK
STATE'S 10A	836	837	837	1978
STATE'S 10B	836	837	837	1979
STATE'S 10C	836	837	837	1980
STATE'S 20	836	853	853	W/CLERK
STATE'S 30	836	853	853	W/CLERK
STATE'S 30A	849	849	850	1981
STATE'S 30B	849	849	850	1982
STATE'S 35A	1173	1174	1174	W/CLERK
STATE'S 35B	1173	1174	1174	W/CLERK

STATE'S 35C	1173	1174	1174	W/CLERK
STATE'S 35D	1173	1174	1174	W/CLERK
STATE'S 40A	830	1497	1499	W/CLERK
STATE'S 40B	830	1497	1498	W/CLERK

* * *

[p.1899]

evidence, which the Court will rule on if those objections are made.

If you'll bring the jury in, Mr. Bailiff.

(Whereupon, the jury entered the courtroom at 1:45 p.m.)

THE COURT: Would counsel approach the bench for just a minute?

(Whereupon, a bench conference ensued as follows:)

THE COURT: Mr. Brannon, I forgot to tell you this. What I'm planning to do is to put all 15 jurors back in there. And, of course, they're not going to be talking among one another. But if one of the jurors in the original 12 falls ill, then we may have to replace one with an alternate.

MR. BRANNON: I don't disagree with that decision.

(Whereupon, the bench conference was concluded.)

THE COURT: Good afternoon. Ladies and gentlemen of the jury, under the procedure followed in Georgia, criminal trials are in two stages in certain felony cases. In the first stage, the jury determines the guilt or innocence of the Defendant. If the jury determines that the Defendant is guilty, then the State and the Defendant both have a right to submit additional

* * *

[p.1940]

had moved it out of the road.

She got up and dusted herself off and started on her way, and she stumbled over what the stone had covered. And it was a little hole that the king had dug, and he'd put a little box in it, a little brown wooden box. And there was a note that said, "Whoever moves this stone can have what's in here." She pulled it out, and she pulled back the top, and it creaked very slowly. And inside was a box full of gold coins.

And the word spread throughout that kingdom of what she had done. Some people changed their actions; some people didn't. But the challenge for us in our society today is whether or not we're going to be like the banker and the farmer and those 27 other folks and walk by, or will we take a stand, a

stand for justice, a stand for victims, a stand for verdicts that speak the truth and hold folks accountable and responsible.

There's only one verdict that will do that, ladies and gentlemen. You know what that verdict is. There's only one verdict that will stop the Donnie Lances of this world. When I talked to you the other day in closing argument, I mentioned the unseen hand. The unseen hand is what caught Donnie Lance here. Because if you just look to the naked eye on that door you don't see much. But God does not like to see crimes like this

[p.1941]

go unpunished, ladies and gentlemen. And that unseen hand of God is what brought Donnie Lance to justice.

Now, will you impose a verdict that speaks the truth in this case that's supported by aggravating circumstances and a man that has shown no remorse, no concern, no care for anyone except himself? Will you hold that man fully accountable?

Law enforcement can't do it; judges can't do it; district attorneys can't do it. It comes down to 12 decent, law-abiding citizens, and that's you, ladies and gentlemen. Thank you.

THE COURT: Mr. Brannon.

MR. BRANNON: Thank you, Judge. Mr. Madison.

CLOSING ARGUMENT BY THE DEFENSE

MR. BRANNON: I didn't go eat anything at lunch because I was wondering what I could say to you people that would keep you from deciding that you would take Donnie Lance's life. It's been an emotional trial for both sides. Donnie's family members, of course, believe in his innocence as strongly as the other side believes in his guilt. They're going to stand by him, all of them, because they love him and they believe him. And that's the way it is. So nobody walks away unwounded from what we've been through. Anytime you go into combat, somebody walks away hurt. And that's the way it

[p.1942]

is.

Now, what can I say to you that would convince you that maybe you shouldn't kill Donnie Lance? Well, Donnie is kind of a quiet person and a country boy, and he doesn't talk a lot. That's his personality. I don't hold that against him. That's just the way he is. I've spent a lot of time around Donnie. Donnie's got sisters, his dad, and they all love him. As a matter of fact, I've gotten to know his dad so good that I'd be lying if I didn't say it's breaking my heart to have to do this, to try this case. I like his dad. I like all his family. They treated me like I was a member of their family.

What can I say to you about why you shouldn't kill Donnie Lance? Well, I could say Donnie Lance is innocent and I disagree with your decision, but you might just get mad at me and say, "Well, I don't

care. I decided it." Maybe you would. I don't know. And I do disagree, and I don't mind saying that. If you get mad at me, you'll just get mad at me.

But we need to think about this. We need to think about it for a while, because in this country in a death penalty case you are given the power to deliver death. That's a big power. A lot of times I think -- I hear people talk about crime and we need to wipe out crime

* * *

[p.1958]

I have instructed you is a matter solely for you, the jury, to determine. And if the Court has made any remark or done or failed to do any act which may have caused you to believe that the Court was expressing any opinion, I instruct you not to consider it, and you should disregard it completely.

Your verdict as to penalty must be unanimous, and it must be in writing, dated, signed by your foreperson, and returned and read in open court.

The Court has prepared for you two documents entitled "Verdict as to Sentence," one as to each victim in the case, stating the name and style of this case, which contains all of the forms of the verdict as to penalty which I have instructed you that you may return in this case. You may, if you care to do so, return your verdict as to penalty, whatever it may be, on these documents by completing the particular form of verdict you wish to return in this case and by having your foreperson date and sign that particular form of verdict, whatever it may be.

If you do not find that statutory aggravating circumstances exist beyond a reasonable doubt on the list of the alleged statutory aggravating circumstances which the State contends support the death penalty, then you must impose a life sentence. Then you would go to

[p.1959]

the verdict as to sentence and impose a life sentence, then date the verdict form, and one of you sign it as foreperson.

If you find beyond a reasonable doubt that one or more of the statutory aggravating circumstances contained on the list of the alleged statutory aggravating circumstances which the State contends support the death penalty do exist, then you would go to the document labeled "Finding of Jury as to Alleged Statutory Aggravating Circumstances" and check those that you find applicable. Then go to the verdict as to sentence and impose whichever of the three penalties that you think appropriate under the facts of this case and the law that I have given to you in charge. Then date the verdict form and one of you sign it as foreperson.

Members of the jury, you may now retire and make up your verdict as to penalty. Don't begin your deliberations until you receive the verdict form and other documents from the Court. And would the three alternates remain in the courtroom. I'll ask you to follow the Bailiff to the judge's chambers.

(Whereupon, the jury exited the courtroom at 3:55 p.m.)

THE COURT: Any objections to the Court's charge?

[p.1960]

MR. MADISON: None from the State, Your Honor.

THE COURT: Mr. Brannon.

MR. BRANNON: Not at this time, Your Honor.

THE COURT: With that, we'll be in recess until the jury returns with a verdict or a question. I will have these documents prepared to go out to the jury in just a few moments.

(Whereupon, court was in recess.)

THE COURT: The first question I have is whether we want to inquire of the jury if they want to take either a dinner break or quit for the day and come back tomorrow. Do you think I ought to make that inquiry or wait until we hear from them?

MR. MADISON: They told us yesterday what they wanted to do, so they probably know the procedure. When they want to stop, they'll tell us.

MR. BRANNON: It's getting close to suppertime. At some point you probably ought to inquire.

THE COURT: Okay. The other thing I believe the Court needs to ask is if the defense counsel has reviewed Part 3(c) and (d) of the checklist on the Unified Appeal and if counsel is familiar with those sections.

MR. BRANNON: I am familiar with them.

APPENDIX H

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS STATE OF GEORGIA

CIVIL ACTION FILE NO. 03-V-490

[Dated August 28-30, 2006]

DONNIE CLEVELAND LANCE	)
	)
Petitioner,	)
	)
vs.	)
	)
WILLIAM TERRY, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,	)
	)
Respondent.	)
	)

VOLUME I (pages 1 through 271)
VOLUME II (pages 272 through 569)
VOLUME III (pages 570 through 871)

Transcript of proceedings given before The Honorable Michael C. Clark, August 28, 2006 through August 30, 2006, at Jackson, Georgia.

APPEARANCES OF COUNSEL:
For the Petitioner: JOSEPH LOVELAND
LISA WOLGAST

JAMES BOSWELL
Attorneys at Law

For the Respondent: KRISTIN SCHMIT WHITE
BETH BURTON
Attorneys at Law

MARY M. (GIGI) GRUBB
Certified Court Reporter
P.O. Box 1950
Lawrenceville, Georgia 30046-1950
Phone: (770) 822-8633

* * *

[p.44]

Q. What about this case, if anything, was different about the punishment or penalty phase from your perspective?

A. It's not necessarily this case. It could be most cases. But in this one in particular the Lances all felt sure that Donnie was innocent, and Donnie told me he was innocent and I believed him. And I met with Donnie countless times before the trial. You can't go in to a family who's hired you and they've hired you because -- and this is not making me sound important -- but they hire you because you have a reputation for winning some cases and you've gotten acquittals in cases that were very difficult and they know it.

They came in and the first thing you start talking about is what we're going to do when we lose. Then their level of confidence with the lawyer they're hiring is hurt immediately and they begin to question your commitment to the case. So -- and that is in a lot of

death penalty cases. But this family clearly believed he was innocent. I did too. I really tend to love this family. I don't mind saying that. They treated me like I was a member of the family, and this was a really important case to me.

I thought if I could get a another counsel appointed, I would turn him loose to discuss with them the things that we should be working on, assuming something went wrong and there was a conviction. And that would isolate them from thinking that I might be thinking in terms of losing the case.

[p.45]

Q. Now, I want to jump ahead and then I'm going to come back. As we said, the trial was in December of 1999 -- excuse me in June of 1999. I apologize, sir. So this is December of 1998, six months before that. At this time you didn't know a trial date, did you, of June of 1999?

A. No, sir.

Q. Now, when the trial actually came up in June of 1999 had you been able to fully investigate the punishment or penalty phase of the case?

A. Oh, no. We were working nonstop day and night on the guilt-innocence phase.

Q. So let's talk about what you were doing and I want to go over the rest of this summary. You indicated on the summary that there's a significant number of witnesses to interview, witnesses' statements to analyze, and criminal records to research; is that correct?

A. That's correct.

Q. Okay. And why were there such a significant number of witnesses in this case? Was there something about the type of the case it was that made it so significant in terms of the number?

A. Well, a great deal of the number was what I call bad acts witnesses or bad prior acts, and those were numerous. I forgot the exact number but they had, as I recall, over 30 prior difficulties that I had to deal with in the case. I did

[p.46]

not know that when I took the case on. But when I got into it I realized that. So I had 30 other cases to defend at trial with I don't know how many witnesses. I'll tell you this. The last supplemental witness list, as I recall -- and I could be wrong.

> THE WITNESS: And if I am wrong, Judge, the record will reflect if I am or not. But I had something like 143 witnesses that I needed to interview.

BY MR. LOVELAND:

Q. Were you able to interview all those witnesses without a second counsel?

A. No.

Q. Now, you mentioned bad acts and the third bullet point that I identified here is numerous other crimes in the form of similar transactions and prior difficulties. Is that what you were referencing in your request for counsel at that time?

A. I was. And there was even a similar -- there was a case in which Donnie had gotten in a fight with some people and he was defending himself and we didn't even have time to try and locate the people, the fight, what happened with that. We were too busy attempting to get ready for the guilt-innocence phase. So that's something that I didn't get to spend much time on that I would like to have had. And I told the jury during the case that there's 30 something cases here for me to

* * *

[p.59]

from the floor of Donnie's garage where he works on his cars and all, and they utilized those casts at the trial to try and compare them to a Luma-Lite picture of a footprint on a door. One footprint on the door. No steps, no footprints coming up the steps, just one single footprint on a door. So in order to counteract that, I've got to have somebody to go up to the stand and testify besides me. And I wasn't allowed to have anybody to do that.

I mean, that was incredibly critical because Donnie did have a pair of shoes which were similar and had a similar pattern to the bottom of the shoe. But now let me tell you, they sold them all over the country. They were a Dale Earnhardt shoe that were very popular, and I made that point to the jury. I think I called a witness from wherever they bought the shoes and testified to that.

But still, that allowed them to take this one print that you couldn't even see on the door, bring it up on a Luma-Lite which none of the jurors had never seen, the judge had never seen, and I don't think Tim

Madison had ever done it, and I had no way to counter that whatsoever but to attempt to try to cross-examine this person on really what was a relatively brand new style of evidence on that subject.

Q. Now, I want to --

A. Can I finish?

Q. I'm sorry.

[p.60]

A. They compared that to the latent print and, even though they didn't match exactly, the expert gave an opinion about that which I felt like was devastating to the case.

Q. Now, a minute ago in an opening statement I made a couple of comments, sir, I'd like to ask you about because it goes to some of these experts we'll come back to in a second. In this trial and in this case was there a murder weapon that anybody ever found?

A. No.

Q. Was there an eyewitness who said I saw Donnie Lance do this?

A. No, sir.

Q. Was there any DNA from Mr. Lance?

A. No, sir.

Q. Was there any hair or blood from Mr. Lance found at the crime scene?

A. There was not.

Q. Was there any evidence of any hair or blood or brain matter from these horribly violent crimes found on Mr. Lance's car or in his clothing?

A. No.

Q. Was there -- were there shotgun shells that anybody could specifically link to the crime scene ever found at Mr. Lance's?

A. My recollection is no.

[p.61]

> THE WITNESS: And I'll say to the judge again, if I get anything wrong, the record of the trial will correct me because it's been a long time. They found some shell casings down where you pull a car over a pit where you're changing oil and draining oil. They did find, as I recall, a couple of shells down there. And my recollection is those shells were never tied in forensically to any weapon used in the crime.

BY MR. LOVELAND:

Q. You talked about these shoe prints, the one print on the door. Were there any other DieHard shoe prints in the mud or in the dirt around the scene?

A. No. And that was one of the most interesting parts of the case that I was able to show the jury that there was mud all around the scene on the -- on that particular evening and yet there was not another shoe print to be found anywhere, not coming up the wooden steps to the door, not inside the house. They had one invisible print on a door that you could only see with Luma-Lite, blue light.

Q. And were there any fingerprints of Mr. Lance at the scene?

A. My recollection is no, there were not.

Q. And with regard to this shoe print on the door, was there any way to determine when that shoe print had been made?

A. No. I think I pointed that out to the jury, that

* * *

[p.67]

assistance to try, and find out exactly what it was we needed to know to the very detail for each person, then sure, we could do it in more detail. But with what we had, I made it pretty clear what they were going to testify to. I mean, if time of death's not important in a murder case, I need to be, I guess, bagging groceries, to be candid. Anybody knows that time of death would be just ultra critical in most murder cases.

Q. Now, also in the appellate briefs in the Supreme Court which are in the record, the State argued that Mr. Pennington was able to examine the crime scene and testify with regard to that as effectively as their experts. Did Mr. Pennington ever look at the crime scene?

A. No. The crime scene was the gone. I'm the only person that ever saw the crime scene for the Defense.

Q. So by the time you had actually an investigator with funds in the May order, the crime scene didn't even exist?

A. No, it did not.

Q. What had happened to it?

A. Sold, repossessed. I can't remember exactly. But amazingly enough, the crime scene disappeared.

Q. Crime scene was a trailer, in essence; is that right?

A. Yes, sir.

Q. And it was gone?

A. It was gone. I'm the only person that went in and I went in and walked it, took measurements, and looked at the

[p.68]

various places where the projectiles struck when they were fired and did the best I could with what I had to work with.

Q. In the motions you filed on experts there is no request for a mental health expert, is there?

A. No, sir.

Q. Did you ever have anyone evaluate Mr. Lance's mental capacity?

A. I did not.

Q. Did you ever consult with a psychologist or psychiatrist or a neuropsychologist with regard to Mr. Lance's case?

A. No, I didn't.

Q. To your knowledge, did anybody on the Defense's behalf ever consult with any psychologist, psychiatrist, or neuropsychologist on Mr. Lance's case?

A. Not to my knowledge.

Q. If you'd had a second counsel who was able to focus on the penalty phase, is that an area you believe should have been explored?

A. Well, I've done it before and looked at it in most cases. In this case had I had assistance, yes, I would have said to him when you're going through the penalty phase you have to look at everything. But the defendant will many times balk at that idea. But even if they do, I have them address it with them. Sometimes the family will balk at that idea, but I

[p.69]

still think it's smart to address it with them and take a look at it. So yes, certainly that's something that we would have looked at. But that was down my list based on what we had to do to get ready for trial.

Q. And here again, considering everything that you had on your list, you just didn't get around to that?

A. That's correct.

Q. Since the Lance case, sir, have you handled any other death penalty cases?

A. I have not. I have a case now, I represent one of the Marines in the civilian shooting in Hindiya, Iraq. And the charges preferred -- they have not made a decision yet -- that the murder charge might go death penalty. I agreed to take it, and I am doing it, traveling

back and forth to California. At this point they have not preferred the death penalty charge, and we don't think they will. But that was a big factor in my decision on the Hindiya case. And I flew out there and met with military counsel and asked what the odds are they'll ask for the death penalty and they said they felt like they really would not. And so this family really wanted me to do it and I made a decision to do it.

Other than that, no. Have I been asked? Yes. Have they contacted me about appointing me? I told them absolutely not. I'm going to fight you on this appointment every step of the way. I tell you, this case broke my heart. I don't mind

[p.70]

saying so. Anybody who knows me knows that I'm serious about what I do. And I just can't do anything without doing it with intensity, some fashion. But this family is one of the sweetest, kindest family I ever met. And I became so engrossed with this family that I was literally just crushed with this verdict. I don't mind admitting it and I'm a pretty tough guy. But this verdict really hurt me.

Q. Do you think the fact that you didn't have a second counsel and that you didn't have the ability to call experts was a deficiency in the way this trial proceeded?

A. Oh, absolutely. I believe to this minute had we had nothing but a Luma-Lite expert and a forensic pathologist, this would have been an acquittal or a mistrial.

Q. And so do you believe that the deficiencies were prejudicial to Donnie Lance?

A. There's no doubt about it in my opinion, yes.

MR. LOVELAND: No further questions, Your Honor.

THE COURT: Okay. Cross?

MS. WHITE: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. WHITE:

Q. Good morning, Mr. Brannon. My name is Kristin White.

A. Good morning.

Q. You stated that you began representing the Petitioner in November of 1997?

* * *

[p.115]

prepare for this case?

A. No. Pat would go home most of the time during her regular hours when she worked for me. Her husband, Candler, didn't like for her to get home late. So I made it a point to get her out of there. Julie Barrett did work longer hours but usually she was out of there by 6:30, 7:00, 7:30. I'm the guy that stays until 11:00, 12:00, 1:00 in the morning, you know.

Q. So more hours were worked even by your employees and yourself than what's listed in these billing records?

A. Oh, yeah, sure.

Q. Do you remember roughly how many hours Andy Pennington worked on this case?

A. I know we used that $4,000.

Q. So would it be fair to say if the billing record that was entered into the court, he worked over 80 hours after you hired him for this case?

A. If the 80 hours uses up the 4,000 -- and I don't remember now how much he was paid -- then yes.

Q. And it could have been more than 80 hours, you didn't keep track of what he was -- how much he was working?

A. No, but I remember he told me that he went over but that he didn't just go way, way over. And he would go home at night too. It's just my personality. I just don't stop.

Q. But he was out investigating while you were proceeding with the trial?

[p.116]

A. He was out trying to do that, yes.

Q. Okay. I'm going to show you once again your affidavit in this case. It is Petitioner's Exhibit 3. If you would focus down on paragraph number nine?

A. Okay.

Q. At the bottom of page four. Can you read the sentence starting with "as I have noted"?

A. As I have noted, preparation necessary to investigate and rebut the guilt-innocence phase of this case was a full-time job and took all my efforts. Additionally, in a death penalty case you should always be litigating with an eye towards the second phase, even if, as in Donnie's case, there are real guilt-innocence issues. Without a second chair I had no way of doing that. I had very little time left to devote to investigating the penalty phase and informed the judge of my need for assistance. He was not swayed by my arguments.

Because the guilt-innocence phase took all of my time, I was unable to do the necessary investigation into the penalty phase issues.

THE WITNESS: Am I talking loud enough?

COURT REPORTER: (Nods head affirmatively.)

BY MS. WHITE:

Q. So based on that statement, you were very aware of how important the second phase of a death penalty trial was?

A. Yes.

[p.117]

MS. WHITE: May I have a moment, Your Honor? No further questions at this time.

THE COURT: Redirect?

MR. LOVELAND: Yes, Your Honor.

FURTHER DIRECT EXAMINATION

BY MR. LOVELAND:

Q. Mr. Brannon, a couple of questions. Pat Dozier, she left your office, did she not, sometime in about 1998? '97?

A. I think it's '97, as I recall.

Q. So sometime a year and a half before this trial we're talking about; correct?

A. Correct.

Q. And Julie Barrett, the other paralegal, was gone before the trial as well; correct?

A. She was.

Q. And then the third paralegal you discussed was Gwen, I believe?

A. Gwen Whitsett.

Q. And she was the brand new paralegal right out of paralegal school that you'd hired, and she was the legal assistant working with you when you had the trial?

A. She was.

Q. In your judgment, sir, is even a really good legal assistant --

MR. LOVELAND: And I should note on the record, Your

* * *

[p.544]

Q. Actually by my count in Exhibit 24 that the prosecution -- excuse me -- the State's Respondent's counsel were showing you a while ago, right after your notice is a letter and I think it's a very similar list to the one you were reading. I don't have the one you were reading, but I think it's a very similar letter of October 8, 1998, that's part of Respondent's Exhibit -- there's -- and it says, Dear Judge Motes, I'm listing the prior difficulties which were presented evidence at the three days of hearings we most recently conducted. Hope this list will assist you in preparing your order and then I'll be providing a copy of the letter with a list of counts to the defendant. And there are 30 -- I think that's the last page -- 37 of these prior acts that are identified. Did Judge Motes exclude any of them, or did he let them all in?

A. He excluded some of them.

Q. But he let in -- again, my reference to your closing argument it looks to me like in the overlays that Brad was putting up, it looks to me like there were 19 that you referenced in closing argument, two main ones in 1993 and then a list of 17 others. Does that sound about right?

A. That sounds right. 19 out of 37 were probably ruled admissible.

Q. And do you have any idea of the 40 some witnesses the State called, how many of them were related to the prior acts?

[p.545]

A. As I said earlier, probably half of them.

Q. Roughly 20 or so?

A. (Witness nods head affirmatively.)

Q. Do you recall that shortly before the trial the prosecution submitted to Mr. Brannon a list with approximately 143 potential witnesses as a supplemental witness list?

A. I would not be surprised because we list everyone that touches every single thing. And when you actually distill it down, there's only 40 witnesses that are relevant. But if we don't have them on the list, they can't be called.

Q. You don't put them on the list, you can't call them. So you've got to put them on the list?

A. Yes.

Q. And when you put them on the list as a may-call witness, the Defense has got to go try and find out who they are and what they may say, to the extent they don't know.

A. To the extent they don't know, but a lot of those were repetitious witnesses on the similar transactions and prior difficulties. For instance, instead of putting up four people on that one event, say, that happened in July of '93 we'd put up one and the others would not be called because after a while it gets repetitious.

Q. Of the roughly 19 prior acts that were introduced into evidence against Mr. Lance, do you know how

many of those that he'd actually been convicted or pled to?

[p.546]

A. Probably none.

Q. So these were effectively all issues that were coming into evidence where he had not been convicted or pled to a crime in the past?

A. That's correct.

Q. And if I understand correctly, some of the testimony that was being introduced in that regard was recordings of Joy Lance that had been made by individuals at the Jackson County sheriff's office is incidents where she had then declined to actually prosecute or pursue prosecution?

A. That's correct.

Q. And plus incidents where her statement was coming in through these investigators at that time?

A. That's correct.

Q. I want to talk very briefly about the sentencing phase, the penalty phase of the case. You, on behalf of the State, never suggested that Mr. Lance should receive any sort of medical evaluation or mental evaluation of any kind?

A. No.

Q. And if I understood your testimony, based on what you had seen and heard and knew about Mr. Lance, you didn't think there was any question at all about his mental capacity?

A. No.

Q. Are you familiar or aware, sir, that in this proceeding the State of Georgia has retained a

* * *

[p.602]

literature, from the person that publishes the test that he uses, it's clearly not intended for diagnostic work and, to me, seems inappropriate. It's used for biofeedback, not -- it's not the same as what they do for clinical diagnosis of brain dysfunction. so I find it misapplied and, to use a popular term, junk science

Q. Is it your understanding that you have to get a certification to administer QEEG tests?

A. Again, this is not something that I do. I know that there are multiple boards that certify people, from medical boards to technical, or technicians that do these tests in hospitals and one can be certified by -- I did a search on the Internet and found, I think, at least five different boards that certify QEEG practitioners.

Q. In your opinion, would the Petitioner be capable of committing the crime in this case?

A. Would he be capable of it? Maybe it's easier to do the inverse. There's nothing to show that he'd been incapable of doing it.

Q. And as you stated before, the way that Joy Lance was killed, would you -- in your opinion, was that a personal or someone that knew her was the perpetrator in this case?

A. Generally -- and here I'm basing this opinion on work by the FBI and classifying criminal offenses -- they refer to that as personalized violence, that kind of focal attack on a

[p.603]

specific area, here specifically the face. That is a very personal attack often associated in domestic violence situations where there's significant anger.

Q. And does the Petitioner know right from wrong?

A. There's nothing to indicate that he doesn't know right from wrong.

MS. WHITE: One moment, Your Honor. No further questions at this time.

THE COURT: Okay. Cross?

MR. LOVELAND: Yes, Your Honor.

CROSS- EXAMINATION

BY MR. LOVELAND:

Q. Dr. Morning, Dr. Martell. My name is Joe Loveland. We've never met before, but I appreciate you taking the time to come talk to us today. I want to ask you some questions about the work you did with Donnie Lance and the evaluation and conclusions you reached. Before we do that I want to make sure that we have a clear understanding of the conclusion you testified at the end, which was dementia due to multiple etiologies; correct?

A. Yes, sir.

Q. And you base that on DSM-IV-TR; correct?

A. Yes, sir.

Q. So if I could ask you to take a moment and make sure that this analysis of dementia due to multiple etiologies on

[p.604]

page 171 of DSM-IV-TR --

A. Okay.

Q. -- is the analysis that you reached?

A. Yes.

Q. And so make sure that we understand, in order to reach this diagnosis you have to have the development of multiple cognitive deficits manifested by both, one, memory impairment, paren, impaired ability to learn new information or to recall previously-learned information; and, two, one or more of the following cognitive disturbances, there are four listed. Which of those four did you find Mr. Lance manifested?

A. A and D. A is aphasia and D is disturbance in executive functioning.

Q. And then if we continue into part B of the diagnosis it says the cognitive deficits in criteria A-1 and A-2 each cause significant impairment in social or occupational functioning and represent a significant decline from a previous level of functioning; correct?

A. Yes.

Q. And that was your diagnosis?

A. Yes, sir.

Q. Now, I want to go back and ask you some questions about the work you did and the testing you did of Mr. Lance. One of the things you indicated was that you went back and you tried to clean up the tests that you saw that Dr. Weinstein had

[p.605]

given and that you actually rescored some things. You gave a few tests he didn't give as well; correct?

A. Yes, sir.

Q. In the back of your report on pages 18, 19, 20, and 21 you have a score chart basically where you have certain of your scores and certain of Dr. Weinstein's scores?

A. That's correct.

Q. And your scores, if I understand on this chart -- Dr. Weinstein's scores are the ones that show a one in certain columns; correct?

A. That's correct.

Q. And your scores show a two in certain columns; correct?

A. Yes.

Q. All right. Now, you have on this page a line down the middle that's called average. And then you have plus one, plus two, plus three on the right-hand side of average and minus one, minus two, and minus three on the left-hand side; is that correct?

A. Yes, sir.

Q. And the minus one is, that is one standard deviation below the mean?

A. Correct.

Q. And two is two standard deviations below the mean?

A. Yes, sir.

* * *

[p.642]

Q. Or after the remand hearing?

A. No, ma'am.

Q. Did you ever promise him any favors?

A. No, ma'am.

Q. Did you ever speak to U.S. marshals on his behalf?

A. For the transfer or anything?

Q. Anything.

A. No, not that I recall.

Q. Were you ever involved in later charges against Mr. Shields?

A. I may have charged -- prior to the trial I may have been involved in some type of -- Frankie was most of the time involved in forgery or something like that, and I may have been involved in a previous case prior

to trial of that, but I don't recall of anything afterwards.

MS. WHITE: No further questions at this time.

THE COURT: Okay: Cross-examination?

MR. BOSWELL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. BOSWELL:

Q. Good morning, Mr. Cochran.

A. Good morning.

Q. We've met before at a deposition we took.

A. That's correct.

Q. And you met me and Ms. Wolgast.

[p.643]

A. Yes.

Q. We may need to refer to that deposition.

A. That's fine.

Q. And it's on the ledge there right behind you --

A. Okay.

Q. -- if we do. So Mr. Cochran, you were the chief investigator at the time of the murders of Joy Lance and Butch Wood; is that correct?

A. Yes, sir.

Q. And you were the person who was in charge of the investigation into the murders; is that right?

A. Yes.

Q. Isn't it correct, Mr. Cochran, that the state did not actively investigate any suspects other than Donnie Lance?

A. I don't think that there were any evidence or any leads at that point that would point to anyone else at that time.

Q. So the answer's yes?

A. We never pursued any other suspects, no.

Q. Okay. And Mr. Cochran, there was never any doubt in your mind that Donnie Lance was the person who had committed the crime?

A. I wouldn't say that.

Q. Let me ask you to take a look at page 13 of your deposition there behind you.

[p.644]

THE COURT: They had it open to your deposition there.

THE WITNESS: Page what?

THE COURT: 13.

THE WITNESS: Okay.

BY MR. BOSWELL:

Q. Okay. If you'd take a look at line 2 on page 26?

A. Yes.

Q. I asked you, Was there ever any doubt in your mind that Donnie Lance was the correct suspect to pursue for the murders of Joy Lance and Butch Wood and you said, Never any doubt?

A. Right.

Q. That was your testimony when I deposed you in June of 2005?

A. Yes.

Q. Would you agree with me that was closer to the time of the events in question?

A. Yes.

Q. All right. Mr. Cochran, you didn't have a good impression of Donnie Lance, did you?

A. I had nothing personal against Mr. Lance, never had any problems with Mr. Lance.

Q. All right. But you didn't really think well of him, did you?

[p.645]

A. I had no opinion of him.

Q. Okay. Well, isn't it true that only a few days after the murder of Joy and Butch that you said in a recorded interview, Donnie don't give a shit about nobody but Donnie Lance?

A. In a recorded interview with who?

Q. Joe Moore.

A. Yes, I possibly said that, yes.

Q. Okay. Well, that would indicate you had some impression of him, wouldn't it?

A. I think that was maybe an investigative technique.

Q. Okay. And you're pretty sure Donnie Lance committed the murders; right?

A. I am.

Q. Despite that, you didn't find any fingerprints at the crime scene, did you?

A. We did.

Q. You didn't find any that matched Donnie Lance, did you?

A. No.

Q. And you don't recall even trying to match any prints at the crime scene to Joe Moore; correct?

A. I believe we took some latents from Joe Moore, but I don't think that they were submitted, no.

Q. Okay. Well, at the time I took your deposition you

[p.646]

didn't have any in your file; right? You didn't have any prints of Joe Moore?

A. That's correct.

Q. And you didn't recall having taken any of Joe Moore; correct?

A. Correct.

Q. All right. The only footprint you found was on the front door of the residence; is that right?

A. Correct.

Q. And there was no scientific evidence that that footprint was taken -- I'm sorry, there was no scientific evidence that that footprint was made at the time Joy and Butch were murdered; isn't that right?

A. No scientific evidence, no.

Q. Okay. In fact, there was no scientific evidence that dated any time that footprint was made; correct?

A. Correct.

Q. And at the trial, Mr. Cochran, no one was able to prove that the footprint was made by a shoe that was size seven and a half double E; right?

A. I don't think the size ever was brought into question I don't believe.

Q. And it wasn't proven what size shoe made it?

A. I don't think so, no.

Q. Okay. And no footprints were found on the porch;

[p.647]

correct?

A. Not that I recall.

Q. And no footprints were found in the yard; correct?

A. Not that I recall.

Q. But you did find a number of DieHard footprints on the floor in Donnie Lance's shop; correct?

A. Yes, sir.

Q. And those could be measured and found and casts were taken of them; right?

A. Correct.

Q. No murder weapon was ever recovered; correct?

A. No, sir.

Q. And there were some shotgun shells found at the scene; is that right?

A. Correct.

Q. But they were a fairly common type of shotgun shell?

A. Correct.

Q. And there was also no evidence discovered in Donnie's car; is that right?

A. That's correct.

Q. So the only physical evidence that the State used to tie Donnie Lance to the crime was a shoe impression and shotgun shells; right?

A. As far as physical evidence, yes.

Q. Okay. And what we're talking about is shotgun shells

[p.648]

that were found in the grease pit in Donnie's shop?

A. Correct.

Q. But there was no evidence that those were fired from the same gun that was involved in the murder; right?

A. That's correct.

Q. Let's talk for a minute about Joe Moore. Joe Moore told you at some point that he and Donnie had been talking about the murders?

A. Correct.

Q. Even before the bodies were found; right?

A. I believe on Sunday morning, the 9th.

Q. Okay. And it certainly crossed your mind that Joe Moore might have been at the scene of the crime?

A. Oh, sure.

Q. Okay. All right. And that was especially true because you knew Donnie and Joe had been accused of breaking into Butch's residence previously; right?

A. Correct.

Q. And the first time you interviewed Joe Moore he told you he had no knowledge about the crime; isn't that right?

A. Correct.

Q. Okay. He also told you the first time you interviewed him that he did not think Donnie had committed the murders; correct?

A. I don't recall that.

APPENDIX I

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

Case No. 2003-V-490
Habeas Corpus

[Dated September 12, 2005]

DONNIE CLEVELAND LANCE	)
	)
Petitioner,	)
	)
v.	)
	)
WILLIAM TERRY, Warden, Georgia Diagnostic and Classification Prison,	)
	)
Respondent.	)
	)

AFFIDAVIT OF J. RICHARDSON BRANNON

COUNTY OF HALL)
) ss.
STATE OF GEORGIA)

Comes now J. Richardson Brannon, before the undersigned officer duly licensed to administer oaths and swears and states as follows:

1. My name is J. Richardson Brannon and I am over the age of eighteen. The information

contained in this affidavit is based on my personal knowledge and I am competent to testify to matters contained herein.

2. I am an attorney in good standing with the State Bar of Georgia and have been duly licensed to practice law since 1978. Since 1979, I have operated a solo law practice, The Brannon Law Office, located at 400 Jesse Jewell Parkway, Gainesville, Georgia, 30501, 770-593-0140. At the time of Donnie Lance's trial, my office consisted of myself and one paralegal.

3. In November of 1998, I was approached by Sheila Oliver about representing her brother, Donnie Cleveland Lance, who was being investigated for the capital murders of Joy Lance and Dwight "Butch" Wood, Jr. After discussions with her and with Donnie Lance, I agreed to represent him. In connection with this engagement, I was paid a $50,000 retainer in installments by Donnie's father, Jimmy Lance. Jimmy Lance also agreed to pay me $15,000 for expenses. Shortly after I was retained, Donnie was charged with malice murder, felony murder, burglary and possession of a firearm in connection with the murders of Joy Lance and Dwight Wood, Jr.

4. By December 1998, seven months in advance of trial, the retainer paid by Jimmy Lance was exhausted and Donnie's family was unable to provide me with any further compensation in connection with my representation of him. The family had been unable to raise the $15,000 promised for expenses, so I had allocated

$45,000 for fees and $5,000 for expenses. The $5,000 was virtually depleted paying for pre-trial transcripts. Donnie Lance did not have any assets to pay my fees and expenses. Accordingly, I moved the trial court for payment of my fees in connection with my representation. A hearing was held on my motion, and on December 3, 1998, the trial court found Donnie Lance to be indigent. Thereafter, I was considered court-appointed counsel.

5. At the time of Donnie's trial, I had handled four prior death cases. Three of those cases resulted in life sentences. In both cases in which the client received death, Tommy Lee Waldrip and Donnie Lance, I had negotiated sentences of life prior to the trial. For reasons particular to their cases, both Mr. Waldrip and Mr. Lance chose to proceed to trial.

6. Donnie's reason for not taking the plea was very straightforward. He stated to me from the beginning that he did not commit the crime. As I began to look at the case, I realized that the evidence against Donnie was wholly circumstantial and that there was virtually no evidence to connect him to this crime. There was no eyewitness testimony to tie him to the scene of the crime nor any forensic evidence that would link him to the scene of the crime or the murders. Although there was a footprint on the door to the crime scene and the State presented evidence that it was consistent with the same make and size of shoes once owned by Donnie, they were unable to show that it was in fact

made by Donnie or that it was made at or around the time of the murders. I believed at the time of Donnie's trial and continue to believe that Donnie Lance was not involved in the murders of Joy Lance or Dwight Wood, Jr. My trial strategy was to present any and all evidence that would support this theory.

7. I represented Donnie throughout all pre-trial, trial, post-trial, and direct appeal proceedings. Throughout my representation of Donnie, I acted as sole counsel. As the sole counsel, I was responsible for all strategy decisions, witness interviews, and all briefing and trial preparation in Donnie's case and coordinated or personally conducted all of the investigation in the case.

8. Because neither Donnie nor his family had resources to pay all of my fees or pay for a second attorney, I requested that the trial court appoint a second attorney. My request was denied. I was shocked. As I explained to the trial court, second counsel is critical in a capital case. Simply investigating and presenting the case in a straightforward capital case often requires the efforts of two counsel. The legal research necessary to insure that I was raising all potential issues on Donnie's behalf and adequately presenting those to the court was a full time job. In addition to this, I had to investigate all of the issues relevant to Donnie's innocence so that I could present substantial evidence and arguments to rebut the State's case. The demands of this case were great.

9. Although I desperately needed someone to assist me at the guilt /innocence phase of the trial, the main reason I needed a second attorney was so that I could have someone else to be responsible for the penalty phase. As I have noted, the preparation necessary to investigate and rebut the guilt / innocence phase of this case was a full time job and took all of my efforts. Additionally, in a death penalty case you should always be litigating with an eye toward the second phase, even if, as in Donnie's case, there are real guilt / innocence issues. Without a second chair, I had no way of doing that. I had very little time left to devote to investigating the penalty phase and informed the judge of my need for assistance. He was not swayed by my arguments. Because the guilt/innocence phase took all of my time, I was unable to do the necessary investigation into the penalty phase issue.

10. I also requested that the trial court provide me with funds for experts in the defense of Donnie. I knew through discovery that the State intended to use all of its resources in investigating and presenting this case, and that I would need expert assistance in many areas to insure that I could adequately rebut their case. Four weeks before jury selection, the trial court granted me $4,000 for one expert, a private investigator, to assist in investigation of the case, and denied funds for any other type of expert. This was not enough to do what needed to be done. I was desperate for some expert help. I wanted to investigate several areas of the State's case, including the ballistics, the shoe

print, the lumilite, the time of death, the finger prints, and the crime scene. I knew the State would be presenting evidence in these areas and knew I was not qualified to rebut their arguments by myself. Whatever the lawyer says is not evidence.

11. I used the court-provided funds to hire Andy Pennington, a private investigator, the only expert for whom funds were designated. I relied on Mr. Pennington to interview witnesses in the case and provide me with interview summaries. However, because we were provided with a list of over 140 witnesses only several weeks before trial and I only received the funds to hire Mr. Pennington shortly before the trial, Mr. Pennington was unable to interview many of the witnesses on the State's witness list.

12. My fears about the lack of experts became true at the trial. The State presented several witnesses who were purported experts in their fields. Because I had no funds to hire experts, I had to try to become an expert in these fields quickly. For example, I read everything I could on the lumilite prior to the trial so that I could question the witnesses who testified about it's use. I wanted to show that the State could not prove when the shoe print was deposited on the door, but had to try to do this through their witnesses as I had no witness of my own. I felt like I was in a boxing match with my hands tied behind my back. I tried to argue through the States' witness, Terry Cooper, that the deck was unfairly stacked. Cooper testified as expert in

everything. He kept offering expert opinions on matters outside of the scope of any expertise he might hold. I tried to point out through my questions and through objections that he did not have the necessary expertise, but the judge would not allow me to make these points and allowed Mr. Cooper to testify to pretty much anything he wished. Without my own experts, I had no way to counter Mr. Cooper's testimony.

13. Another impact of the judge's decision to make me try this case by myself was the sheer exhaustion I experienced. At the end of each day in court, I had to interview and prepare witnesses for the following day's testimony. I was getting by on little to no sleep. I noted this to the judge on the record. I was so tired that I was afraid I would miss something, but I had no choice but to stay up late to insure that I was prepared for the following day.

14. I did not know before I accepted the representation of Donnie that the State was going to present evidence of prior difficulties. All the Lance family had discussed with me was the crime for which Donnie was being investigated. Had I known this, I probably would have refused to take the case without the assurance of sufficient funds and additional counsel. The State introduced a wealth of evidence of prior incidents involving Donnie and Joy Lance and other prior difficulties involving Donnie and similar transactions against Donnie. To adequately counter this evidence, I needed to investigate each incident. Not only was I

defending the capital case, I was in essence investigating and defending all of these other matters. There was no way that I could adequately do this with the meager funds and assistance allocated. Because of the trial court's refusal to provide adequate funds for second counsel and for expert assistance, I did not have the funds or resources necessary to investigate the thirty plus prior difficulties that the State intended to and did introduce at trial. For example, the State presented evidence that Donnie hit a man upside the head with a gun during a fight. The evidence presented at trial on this issue made it sound like Donnie was the instigator and that he used excessive force against a relatively peaceful person. I understand from habeas counsel that there are witnesses available who were present at the fight and could have painted a much different picture of this incident for the jury. This would have been critical evidence that I would have liked to present to the jury, but I was unable to adequately investigate the prior violence due to lack of funding, expert assistance, and co-counsel.

15. The key item of evidence they had against Donnie at trial was this Diehard shoe print they purportedly found on the exterior door at the crime scene. The State's theory was that Donnie had kicked in the door and that he had then thrown out the shoes he was wearing. It was important to our case to show that there was no way they could prove when the print was placed. Also, any information I could present to show

that they had not properly preserved the print or any information to show that this was a common shoe and that many different sizes of shoe could have left this print would have been critical to our defense. Without expert assistance, I was unable to adequately investigate and present evidence to rebut this evidence. I tried to discredit it through cross examination and argument, but my questions and argument were not evidence, something the judge repeatedly pointed out to the jury.

16. The actual crime scene provides a great opportunity to discover who committed the crime and what actual evidence exists against the client. Although I was able to do one initial walk through of the scene, as I got more discovery from the State and a better understanding of their case, I needed to be able to go back to check the information they were providing. Donnie had no information about the crime scene because he had never been in the trailer, so I was dependent upon what I could view and what the State provided me. Much to my surprise, the mobile home was not secured by the State and was repossessed prior to trial and prior to my being able to do all of the necessary investigation in the case. The State's failure to preserve the crime scene prevented me from fully investigating the crime scene and negatively impacted my defense of Donnie.

17. Obviously another key part of the State's case was the alleged confessions Donnie had given while in jail. There is no doubt in my mind that

these "confessions" were not valid. I spent quite a lot of time with Donnie and he is not a man who gives up information. I have had many clients whom I have had to advise over and over to keep their mouths shut, but Donnie was not that person. It is and has always been my practice to remind clients very early in our relationship that the other inmates are potential witnesses against them and they should not assume that they can talk safely to them about their cases. Unfortunately, clients routinely ignore this advice. I am confident that this did not happen with Donnie. For one, he has always professed his innocence from day one of our relationship. Secondly, as I noted above, he was not someone who gave up information about anything freely.

18. I believed strongly that Frankie Shields and Morgan Thompson had received some sort of preferential treatment from the State. I filed a pretrial motion asking for any evidence of deals between the State and it's witnesses. I received nothing in return. When Mr. Shields wrote the newspaper complaining how the State had reneged on its deal, I was not surprised. Based upon everything I know about this case, I feel strongly that Mr. Shields was being truthful in his letter to the editor but not when he testified at the remand hearing.

19. Joe Moore testified that Donnie had made an inculpatory statement to him the day after the crime. I requested any and all information of any deals or negotiations with Mr. Moore. In order to

properly impeach Mr. Moore, I needed to know of all meetings that he had with the prosecution and the content of those meetings. Information that he had a meeting with David Cochran at his home prior to his testimony and that he was in contact with Mr. Cochran frequently is the type of information that I was requesting and required to adequately defend Mr. Lance. Additionally, I knew before trial that Mr. Moore had allegedly passed a polygraph test. The rules on the admission of polygraphs at a criminal trial are clear -- they are inadmissible. I presumed that the State would instruct their witness not to mention the polygraph, so I did not file a motion in limine to preclude admission of this type of information. My failure to do so was not tactical nor strategical.

20. Throughout the trial, there was chronic tension between me and Judge Motes. I cannot overstate how hostile the environment was against me in his courtroom and I do not believe the transcript can adequately show the hostility. The judge was quite friendly in our initial hearings, but became increasingly hostile to me as the pretrial hearings began. There was an undercurrent of hostility throughout the trial. I felt as though I was on the verge of being found in contempt of court throughout the trial. It's difficult to explain how different this trial was from others in which I had been counsel. I have had trials prior to this one where the judge and I did not see eye to eye. This was different. For example, at one point in the trial I was making my argument and the judge just got up and left the

bench. I have never had anything like that happen in my twenty five plus years of courtroom experience. I felt like the judge was openly disparaging of my case, and felt like this was evident to anyone in the courtroom, including the jurors.

21. The negative relationship between me and the trial court also impacted the case in other ways. After I was denied a second chair and the judge's response to my initial requests for funds, I realized that I was fighting a losing battle. As I have noted previously, I believed that the only way to adequately investigate and counter the State's case was to have my own expert witnesses. I finally quit asking for expert witnesses at some point during the trial because I knew that any such requests would be futile, since the trial court had denied all such previous requests and virtually every one of my other motions and requests. This was not a tactical or strategical decision on my part. I wanted the experts and funding.

22. Likewise, I did not investigate or seek assistance in evaluating whether Donnie suffered from any mental disabilities or mental retardation. The trial court had refused to provide me with the necessary funds and with a second chair to investigate penalty phase. As a result of this I had been unable to investigate penalty phase. I did not think the judge would grant a request for a psychologist or psychiatrist. I had no tactical or strategical reason for not requesting these funds but simply did not do so because I

believed, based upon the Court's actions thus far, that the Court would not grant the funds.

23. When penalty phase came, I had nothing to put on because I had not been able to investigate the penalty phase case. All of my resources had been utilized to rebut the State's case at guilt / innocence. The judge asked me if I was choosing not to put on any witnesses and I said yes, because it would just be more of the same. The reason I said this is because I had not been able to investigate to determine what other information existed. I understand that habeas counsel has presented evidence to this Court that Donnie Lance suffers from organic brain damage, that his mental deficits contributed to his ability to make decisions and use sound judgment, that he was a kind person who assisted others in need, that he was a loving father to his children, that many of the instances between Donnie and Joy were not as one sided as presented by witnesses, that Donnie continued to assist Joy even after they were divorced, along with a wealth of additional evidence that is consistent with my theory of the case that Donnie did not commit this crime. This is precisely the type of evidence that I wanted to present at the trial, both in the guilt phase, where relevant, and in the penalty phase. I did not present it because I had neither the funds nor the assistance to investigate it and present it.

24. I have been a criminal defense attorney for my entire career and have represented several

capital defendants. I believe strongly in the right of those charged with crimes, particularly capital crimes, to a fair and adequate defense. I also take seriously my obligations to assist in this representation. Donnie Lance's case is the case that put me over the top. After this case, I realized that I can no longer do death penalty work. It is exhausting and expensive. As a sole practitioner, it is difficult if not impossible to handle a capital case and continue to meet the needs of other clients. It is unrealistic to expect one person to represent a man charged with a capital crime. The treatment by the judge during the pretrial and trial of Donnie Lance's case was the icing on the cake.

Further affiant saith naught.