No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12627-P

RAY JEFFERSON CROMARTIE,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

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

Before ED CARNES, Chief Judge, MARTIN, and JULIE CARNES, Circuit Judges.

ORDER:

Ray Jefferson Cromartie, a Georgia prisoner, moved for a certificate of appealability on two claims, and this Court denied his motion in its entirety. He now moves this Court to reconsider its order denying his motion for a COA.

I.

The Georgia Supreme Court summarized the facts of Cromartie's case as follows:

The evidence adduced at trial shows that Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid artery. The following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."

In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12-packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12-packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.

Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice.

> Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12-pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 514 S.E.2d 205, 209–10 (Ga. 1999). He was convicted of malice murder, armed robbery, aggravated battery, aggravated assault, and four counts of possession of a firearm during the commission of a crime, and was sentenced to death. Id. at 209. The Georgia Supreme Court affirmed his convictions and sentence on direct appeal. Id. at 215.

Cromartie filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, and he later filed an amended petition. The court held an evidentiary hearing, and Cromartie presented two witnesses, Terrell Cochran and Keith Reddick. They testified that, when interviewed by law enforcement officers about the Madison Street Deli shooting, they told the officers that they saw Gary Young — not Cromartie — running from the scene of the shooting. Cochran and Reddick also stated that they "would have told Mr. Cromartie's lawyers or investigators about seeing Gary Young had they asked about the Madison Street Deli shooting."

The state habeas court denied relief, and the Georgia Supreme Court summarily denied Cromartie's application for a certificate of probable cause to appeal the state habeas court's denial of his petition. He then filed a 28 U.S.C. § 2254 petition in federal district court. Over a year later, after § 2244(d)(1)'s one-year statute of limitations had expired, Cromartie moved to amend his § 2254 petition, and the district court granted his motion. The court, in an 86-page order, later denied his amended § 2254 petition and declined to issue a COA on any of his 24 claims.

II.

In determining whether to grant a COA on a particular claim, "[w]e look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). We may issue a COA "only if the [petitioner] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," we may issue a COA only if the petitioner shows both (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). In assessing the district court's application of AEDPA, § 2254(d) precludes habeas relief so long as "it is possible fairminded jurists could disagree that" the state court's decision is "inconsistent with the holding in a prior decision of [the Supreme] Court." Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

III.

Cromartie seeks a COA on (1) "the district court's ruling that his claim of ineffective assistance of counsel for failing to present mitigating evidence at the penalty phase [was] untimely" and (2) the district court's denial of his Brady claim that the State "suppressed material, exculpatory evidence that an alternate suspect committed the Madison Street Deli shooting."

A.

Cromartie first contends that reasonable jurists could debate the correctness of the district court's ruling that his ineffective assistance of counsel claim was untimely. He argues that Claim X in his amended § 2254 petition, which was filed after § 2244(d)(1)'s one-year statute of limitations expired, relates back to Claim II in his original § 2254 petition, which was timely.

Claim X in the amended § 2254 petition alleged that Cromartie's "trial counsel were ineffective in the investigation and presentation of mitigating evidence at the penalty phase." It specified that the mitigating evidence counsel

allegedly failed to investigate and present at sentencing was testimony about Cromartie's life history of "trauma, abuse, and neglect" and his mental health. Claim II in Cromartie's original § 2254 petition raised an ineffective assistance of counsel claim and alleged 15 different ways trial counsel were ineffective. Cromartie contends that Claim X relates back to Claim II in the original petition based on "[t]hree separate statements," "individually and in combination," within Claim II: its heading;[1] the general allegation of ineffective assistance of counsel and citation to five Supreme Court decisions involving ineffective assistance of counsel;[2] and the specific allegation in paragraph 38(b), which stated that trial counsel was ineffective by "[f]ail[ing] to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment."

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[1] The heading of Claim II, in its entirety, stated:

> Petitioner Was Deprived Of His Right To The Effective Assistance Of Counsel At Trial And On Appeal, In Violation Of His Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Strickland v. Washington, 466 U.S. 668 (1984), Williams v. Taylor, 529 U.S. 362 (2000), Rompilla v. Beard, 545 U.S. 374 (2005), and Related Precedent.

[2] The general allegation and the five citations came from paragraph 37, which stated in its entirety:

> Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §1, ¶¶ 1, 2, 11, 12, 14, and 17 of the Constitution of the State of Georgia. See also Strickland v. Washington, 466 U.S. 688 (1984); Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); Porter v. McCollum, 558 U.S. 30 (2009); Sears v. Upton, 130 S. Ct. 3259 (2010).

Cromartie asks too much of the relation back doctrine. As the Supreme Court and this Court have explained, a new claim relates back to a previous claim only when the two claims share a "common core of operative facts." Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574 (2005); see Dean v. United States, 278 F.3d 1218, 1222–23 (11th Cir. 2002).

In this Court's Dean decision, we addressed whether claims from a petitioner's amended habeas petition, which was filed after § 2244(d)(1)'s one-year statute of limitations, related back to claims in his original habeas petition, which was timely. 278 F.3d at 1222–23. In discussing the relation back doctrine from Federal Rule of Civil Procedure 15(c),[3] we explained that:

> Congress intended Rule 15(c) to be used for a relatively narrow purpose. . . . Congress did not intend Rule 15(c) to be so broad as to allow an amended pleading to add an entirely new claim based on a different set of facts. Thus, while Rule 15(c) contemplates that parties may correct technical deficiencies or expand facts alleged in the original pleading, it does not permit an entirely different transaction to be alleged by amendment.

Id. at 1221 (citation omitted). We stated that the "key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based." Id. at 1222.

[3] Federal Rule of Civil Procedure 15(c) provides, in relevant part, that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading . . . ." Fed. R. Civ. P. 15(c)(1)(B). Rule 12 of the Rules Governing Section 2254 and 2255 Proceedings provides for the application of the Federal Rules of Civil Procedure in habeas cases as long as the civil procedure rules are not inconsistent with the habeas rules. See Farris v. United States, 333 F.3d 1211, 1215 (11th Cir. 2003).

Applying those principles, we held in Dean that three claims from that petitioner's amended petition were timely because they related back to claims from the original petition.[4] Id. at 1222–23. As for the first claim from the amended petition, we stated that it "arose out of the same conduct or occurrence set forth in [ground one of] the original pleading, i.e., perjured testimony at trial. The amended ground one serves to add facts and specificity to the original claim; it specifies the exact witnesses that he alleges presented perjured testimony." Id. at 1222. We explained that the second claim from the amended petition was "a more carefully drafted version of the original claim," and that the original claim's reference to a particular section of the sentencing guidelines was "sufficient to put the government on notice of the nature of [the] claim." Id. at 1223. And finally, we reasoned that the amended petition's third claim related back because it "arose out of the same conduct or occurrence set forth in [ground H of] the original pleading, i.e., the district court's allowing the government to enter allegedly inadmissible evidence of uncharged misconduct at trial. The original claim gave notice that [the petitioner] believed that there was inadmissible evidence used against him at trial." Id. As a result, we held that the three claims related back to original claims because they "serve[d] to expand facts or cure deficiencies in the original claims." Id.

[4] We held that one claim from the amended petition did not relate back because the petitioner "did not make th[e] claim at all in his original petition." Dean, 278 F.3d at 1223.

The Supreme Court's Mayle decision clarified the contours of the relation back doctrine in the habeas context. In Mayle, the Ninth Circuit had held that the petitioner's claim in his untimely, amended habeas petition — which alleged that the police's coercive tactics to obtain pretrial statements from him violated his Fifth Amendment right against self-incrimination — related back to the claim in his original petition that the prosecution improperly showed the jury a witness's videotaped statements and, as a result, violated the petitioner's Sixth Amendment right to confront the witness. 545 U.S. at 648–50, 125 S. Ct. at 2566–67. The Supreme Court reversed, reasoning that under the Ninth Circuit's broad approach a "miscellany of claims for relief could be raised later rather than sooner and relate back" because "'conduct, transaction, or occurrence' would be defined to encompass any pretrial, trial, or post-trial error that could provide a basis for challenging the conviction." Id. at 661, 125 S. Ct. at 2573. It held that an "amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650, 125 S. Ct. at 2566. The Court explained that "relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims." Id. at 659, 125 S. Ct. at 2572 (quotation marks omitted). It concluded: "So long as the original and amended petitions state claims that are

tied to a common core of operative facts, relation back will be in order." Id. at 664, 125 S. Ct. at 2574.

The Mayle and Dean decisions illustrate how closely related a new claim in an untimely, amended habeas petition must be to a claim in a timely habeas petition — the claims must arise from a "common core of operative facts" so that the government is on notice of the nature of the petitioner's claim. Id.; see Dean, 278 F.3d at 1223.[5] Based on those decisions and the facts of this case, no reasonable jurist would find the correctness of the district court's procedural ruling debatable. The new, untimely claim that Cromartie raised in his amended petition (Claim X) does not share a "common core of operative facts" with any of the claims in his original petition, nor was there any claim in the original petition that would have put the government on notice that Cromartie was alleging that his trial counsel was ineffective for failing to investigate and present evidence of his mental health or life history. Mayle, 545 U.S. at 659, 125 S. Ct. at 2572. And although in Claim II of the original petition Cromartie alleged 15 different ways trial counsel

[5] See also Davenport v. United States, 217 F.3d 1341, 1346 (11th Cir. 2000) (holding that a petitioner's new, untimely claims that his counsel was ineffective for "(1) allowing [the petitioner] to be sentenced based on three grams of cocaine that were not part of the same course of conduct as the other forty-nine grams of cocaine, (2) relying on a summary lab report instead of requesting the complete lab report, and (3) failing to advise him that a plea agreement might be possible" did not relate back to the petitioner's original claims that his counsel was ineffective for (1) "not objecting that the drugs [he] had were not crack cocaine[ ] because they lacked sodium bicarbonate," (2) "not objecting to the drug weight as improperly including certain moisture content," and (3) "not asserting that the government allowed its witness to perjure himself by claiming he expected no benefit") (quotation marks omitted).

were ineffective, not one of those ways, including the allegation involving the Junior Food Store incident, has anything to do with trial counsel's failure to investigate and present mitigating evidence of Cromartie's mental health or his life history of abuse, trauma, and neglect.

The specific allegation in his original petition that Cromartie points to is the specification in paragraph 38(b), which stated that trial counsel's ineffectiveness included counsel's "[f]ailure to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment." But paragraph 38(b) does not allege that trial counsel were ineffective for failing to investigate and present evidence of Cromartie's background in mitigation at sentencing. Instead, it alleges that trial counsel failed to investigate the Junior Food Store incident and present evidence about that particular crime "that would exculpate [him at the guilt phase] or mitigate punishment" at the sentencing phase. That allegation, like the other allegations in Claim II, is tied to a specific factual event — the Junior Food Store incident — and trial counsel's alleged ineffectiveness for failing to investigate and present evidence about that event at the guilt and penalty phases. That allegation, like the 14 other allegations of ineffective assistance of counsel, does not share a "common core of operative facts" with Claim X, which focuses solely on trial counsel's failure to investigate and present at the penalty phase evidence of

Cromartie's mental health and life history of trauma, abuse, and neglect. See id. Claim X is "supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650, 125 S. Ct. at 2566.

He also points to his general allegation from paragraph 37 in his original petition that he was "denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments." That can't be enough. If it were, all a petitioner would have to do is include in his original petition a generalized allegation that trial counsel failed to adequately investigate and present evidence at the guilt and sentence stages. That would be enough for a petitioner to circumvent the statute of limitations and raise any conceivable ineffective assistance claim in an amendment filed months or even years after the limitations period ran. See id. at 661, 125 S. Ct. at 2573. The statute of limitations contained in 22 U.S.C. § 2244(d)(1) would be pretty much pointless.

Nor can it be enough for a petitioner to simply cite some Supreme Court decisions (without any pincites to specific pages of them). If that were enough, all a petitioner would have to do is cite some ineffective assistance of counsel decisions and withhold disclosure of his specific ineffective assistance claims and allegations until long after the limitations period ran. That is not how the relation back doctrine works. If it did, one of AEDPA's main goals — "to advance the

finality of criminal convictions" — would be thwarted. Id. at 662, 125 S. Ct. at 2573.

For those reasons, reasonable jurists would not find it debatable whether the district court correctly determined that Claim X in Cromartie's amended § 2254 petition does not relate back to any claim, including Claim II, in his original § 2254 petition and is, as a result, untimely. Because Cromartie cannot show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," we need not consider his argument that reasonable jurists could debate whether he stated a valid ineffective assistance of counsel claim. See Slack, 529 U.S. at 484, 120 S. Ct. at 1604.

B.

Cromartie also seeks a COA on his Brady claim, which alleges that the State suppressed Cochran's and Reddick's statements that they saw Young running away from the scene of the Madison Street Deli shooting. The state habeas court found that Cromartie had procedurally defaulted his Brady claim and also that the claim was meritless. The district court concluded that the record supported both determinations. That conclusion is not debatable by reasonable jurists.

To prevail on a Brady claim, a petitioner must show that (1) the State possessed evidence favorable to the defendant; (2) the petitioner does not possess the evidence nor could he obtain it with any reasonable diligence; (3) the State

suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002); United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989) (same).

Brady claims can be procedurally defaulted. Bishop v. Warden, GDCP, 726 F.3d 1243, 1258–59 (11th Cir. 2013). To overcome a procedural default, "a petitioner [must] show cause for the failure to properly present the claim and actual prejudice . . . ." Conner v. Hall, 645 F.3d 1277, 1287 (11th Cir. 2011).[6] In many cases "cause and prejudice . . . parallel two of the [four] components of the alleged Brady violation . . . ." Banks v. Dretke, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272 (2004) (alteration and citation omitted). The Supreme Court has explained that:

> Corresponding to the [third] Brady component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the [fourth] Brady component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is 'material' for Brady purposes.

Id.

Cromartie contends that the Thomasville police had "four statements" from Cochran and Reddick that they "saw Gary Young running from the Madison Street

[6] To overcome a procedural default, a petitioner can alternatively show "that the failure to consider the claim would result in a fundamental miscarriage of justice." Conner, 645 F.3d at 1287. Cromartie does not contend that the district court erred in ruling that he failed to make that showing.

Deli just after the shooting," and that the State suppressed those four statements. He bases those assertions on Cochran's and Reddick's testimony at the state habeas hearing that they told the Thomasville police that they saw Young running from the scene, along with a police file stating that the detectives "re interviewed Terrell Cochran and Keith Reddick." (Because the detectives "re interviewed" the two witnesses, Cromartie says there are "four statements.") He argues that the evidence likely "would have convinced at least one juror to spare his life." For the same reasons, Cromartie contends that he showed cause and prejudice to overcome his procedural default.

Cromartie cannot show cause or prejudice to overcome his procedural default, or suppression for Brady purposes, because there was no credible evidence for the State to suppress. There is no evidence at all that Cochran and Reddick told the police — or anyone, for that matter — that they saw Young running from the Madison Street Deli except for their testimony at the state habeas evidentiary hearing that they did. For a number of reasons, the state habeas court found that Cochran and Reddick were not credible witnesses, and Cromartie does not contend that they were. Because Cromartie points to no evidence, much less clear and convincing evidence, to rebut the state habeas court's credibility determination, we cannot review or revisit it. See Nejad v. Att'y Gen., Ga., 830 F.3d 1280, 1292 (11th Cir. 2016) ("Unless there is clear and convincing evidence in the record to

rebut [a state trial court's] credibility judgment, we are powerless to revisit it on federal habeas review."); Bishop, 726 F.3d at 1259 ("In the absence of clear and convincing evidence, we have no power on federal habeas review to revisit the state court's credibility determinations."). And because we cannot revisit that credibility determination, there was no favorable evidence for the State to suppress, meaning that Cromartie cannot show cause or prejudice to overcome his procedural default, or suppression under Brady.

Even if we could revisit the state court's credibility determination and we assume that Cochran's and Reddick's "statements" did exist, there was no suppression because Cromartie's trial counsel could have obtained the information from the "statements" by asking Cochran and Reddick about the Madison Street Deli incident. Trial counsel had access to the police file and to those two witnesses before trial. Indeed, the record shows that trial counsel marked up their copy of the police file on the page that mentions Cochran and Reddick, and both witnesses stated in their affidavits that they would have told Cromartie's trial counsel that they saw Young running from the Madison Street Deli had counsel asked them. Because trial counsel could have obtained the same information from the allegedly suppressed "statements" by exercising reasonable diligence, binding precedent precludes relief under Brady. LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1268 (11th Cir. 2005) ("To establish that he suffered a Brady violation, the

defendant must prove that . . . [he] did not possess the evidence and could not have obtained it with reasonable diligence . . . ."); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) ("Where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged Brady material, there is no suppression by the government."). And because binding precedent forecloses relief, Cromartie cannot show that reasonable jurists would find the district court's ruling on his Brady claim debatable or wrong, so a COA must be denied. See Gordon v. Sec'y, Dep't of Corr., 479 F.3d 1299, 1301 (11th Cir. 2007).

IV.

For those reasons, Cromartie's motion for reconsideration of the denial of his motion for a COA is **DENIED**.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

Mr. Cromartie tells us his trial counsel failed to investigate and present substantial mitigating evidence to the jury that sentenced him to death. He says this evidence could have swayed a jury that demonstrated difficulty in deciding whether to sentence Mr. Cromartie to death, even with only the scant evidence his lawyer did present.

No judge has thoroughly considered the merits of Mr. Cromartie's claim that his death sentence resulted from a violation of his fundamental right to effective representation. There was no hearing, briefing, or argument in state court on this Strickland[1] claim. Neither was this claim argued, briefed, or heard in federal district court. And, because the majority has denied Mr. Cromartie any opportunity to present his case here, there will be no full briefing or oral argument before this Court. That means, unless the Supreme Court intervenes—an unlikely event—Mr. Cromartie's claim will never be fully evaluated before the State of Georgia takes his life.

The majority has not refused to allow Mr. Cromartie's appeal because it believes his Strickland claim is frivolous. Instead, Mr. Cromartie's claim will not be heard here because the first lawyer who represented him in federal court did not include enough specifics in the original habeas corpus petition he filed for Mr.

[1] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Cromartie. As a result of this insufficiently pled petition, the majority says Mr. Cromartie's Strickland claim is not timely and can't be heard. I do not understand the majority's decision to be compelled by the rules or by our precedent. Neither is it compelled by Supreme Court precedent. I therefore dissent from the majority's decision to deny him a certificate of appealability ("COA").[2]

The only question now before this panel is whether we will allow Mr. Cromartie a COA. The grant of a COA would give Mr. Cromartie a chance to have his arguments heard and decided here after full briefing and oral argument.

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[2] I do agree, however, with the majority's conclusion that Mr. Cromartie is not entitled to a COA on his Brady claim. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). The state habeas court did not believe the testimony of Mr. Terrell Cochran and Mr. Keith Reddick, the only evidence Mr. Cromartie offered to prove the state was in possession of exculpatory evidence. Cromartie v. GDCP Warden, No. 7:14-CV-39, 2017 WL 1234139, at *15 (M.D. Ga. Mar. 31, 2017). Eleventh Circuit precedent makes clear that we are powerless to revisit a state habeas court's credibility findings, absent clear and convincing evidence that those findings were incorrect. Bishop v. Warden, GDCP, 726 F.3d 1243, 1259 (11th Cir. 2013).

I agree that, based on our precedent, Mr. Cromartie has not offered enough evidence to undercut these credibility findings. But I do not reach this conclusion without concern. Mr. Cromartie tells us that the state habeas court adopted the State of Georgia's proposed findings of fact nearly verbatim. For that reason, I am reluctant to defer to that court's factual findings. See Anderson v. City of Bessemer City, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510–11 (1985) ("We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties . . . ."). At the same time, I am aware that Eleventh Circuit precedent holds that adopting facts from an order written by the prosecutor does not rebut the presumption of correctness accorded to state habeas courts' factual findings. See, e.g., Jones v. GDCP Warden, 753 F.3d 1171, 1182–83 (11th Cir. 2014).

Mr. Cromartie's additional observations—i.e., the consistency of Mr. Cochran and Mr. Reddick's testimony and police corroboration that they had been interviewed twice and were witnesses to the shooting they testified about—may undermine the state court's credibility finding, but they do not indicate that "the state court's findings lacked even fair support in the record." Turner v. Crosby, 339 F.3d 1247, 1273 (11th Cir. 2003) (quotation omitted); see also Cromartie v. GDCP Warden, 2017 WL 1234139, at *15 (citing five reasons the state habeas court found Mr. Cochran and Mr. Reddick's testimony unreliable based on various parts of the record, and not just the prosecutor's proposed order).

When, as here, the District Court denied Mr. Cromartie's constitutional claim on procedural grounds, our only job on review is to decide whether jurists of reason would debate "whether the petition states a valid claim of the denial of a constitutional right and . . . whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). The Supreme Court has clearly told us that the inquiry at the COA stage is a limited, threshold inquiry. Buck v. Davis, 580 U.S. __, 137 S. Ct. 759, 773 (2017). As a result, our decision need not, and indeed must not, be approached like a decision on the merits. Id.

A reasonable judge could understand Mr. Cromartie's original and amended Strickland claims to be "tied to a common core of operative facts." See Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574 (2005). On this view, Mr. Cromartie's amended Strickland claim is "not entirely new," but rather "serves to expand facts or cure deficiencies in the original claim[]." See Dean v. United States, 278 F.3d 1218, 1223 (11th Cir. 2002) (per curiam). It is for that reason that I would grant Mr. Cromartie a chance to thoroughly brief and argue the timeliness of his Strickland claim.

I.

First I will examine whether, as this process requires, Mr. Cromartie has stated a claim that his constitutional rights were violated. Slack, 529 U.S. at 484,

120 S. Ct. at 1604. In my view, reasonable judges could debate whether Mr. Cromartie's trial counsel violated his Sixth Amendment right to effective assistance of counsel.

Georgia's case for seeking a sentence of death for Mr. Cromartie apparently left some room for debate. Before Mr. Cromartie's murder trial began, Georgia offered to allow him to plead guilty, with a sentence of life with the possibility of parole after seven years. This does not indicate to me that Georgia saw Mr. Cromartie as an extremely culpable offender deserving of execution. See Roper v. Simmons, 543 U.S. 551, 568–69, 125 S. Ct. 1183, 1194–95 (2005) (reiterating the long-held constitutional principle that "[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution") (quotation omitted). Or perhaps, Georgia did not believe its case against Mr. Cromartie was strong enough to test it before a jury. See Missouri v. Frye, 566 U.S. 134, 150, 132 S. Ct. 1399, 1411 (2012) (recognizing that the "strength of the prosecution's case" may affect the plea offered).

Then the jury demonstrated significant difficulty in deciding whether to sentence Mr. Cromartie to death. Only three hours into their deliberations, the jury asked the trial judge what would happen if they did not reach a unanimous vote about whether Mr. Cromartie should be executed. Cromartie v. State, 514 S.E.2d 205, 214 (Ga. 1999). Ultimately, it took the jury three days to recommend that Mr.

Cromartie be sentenced to death.[3] Thus, Mr. Cromartie's case appears to have compelled considerable debate among the jurors about whether a sentence of death was appropriate. Cf. Porter v. McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 453–54 (2009) (per curiam) (reiterating that reweighing the aggravating evidence against all available mitigating evidence is an essential part of the Strickland analysis).

In 2018, we now know of significant mitigating evidence that Mr. Cromartie's jury never heard back in 1997. His jury did not hear that his mother would binge drink for days on end while she was pregnant with him. His jury did not hear that, as a result, Mr. Cromartie suffers from Alcohol-Related Neurodevelopmental Disorder, which made it more likely that he would experience disruptions in his schooling; get into trouble with the law; and abuse drugs and/or alcohol. His jury never heard that Mr. Cromartie had a history of post-traumatic stress disorder and depression, as well as problems with language, memory, learning ability, and auditory attention. Despite the fact that a psychologist retained by Mr. Cromartie's trial lawyer began to identify a number of significant challenges Mr. Cromartie endured, the jury was never the wiser. Rather, the jury got just a glimpse of Mr. Cromartie's childhood trauma from the scattered testimony of five of his family members over a mere three hours. This is so, even though we now know that others were willing to testify who would have provided

[3] If the jury had not been able to reach a unanimous decision, Georgia law would have required the judge to sentence Mr. Cromartie to life. See O.C.G.A. § 17-10-31 (2002).

a more complete picture of the abuse Mr. Cromartie suffered. Also, the jury heard this limited testimony during Mr. Cromartie's defense case without expert testimony that would have conveyed the ways in which Mr. Cromartie's complex trauma made it more likely for him to act impulsively and react extremely to minor stimuli. Again here, the jury was deprived of this expert assistance despite the awareness of Mr. Cromartie's defense team that an expert's guidance would have made the mitigating nature of complex trauma apparent to the jury.

This record shows that the jurors who decided Mr. Cromartie would be put to death heard barely any of the evidence that would have humanized him or allowed the jury "to accurately gauge his moral culpability." See Porter, 558 U.S. at 41, 130 S. Ct. at 454; Williams v. Taylor, 529 U.S. 362, 398, 120 S. Ct. 1495, 1516 (2000). And even with this slim evidentiary record, the jury took three days to reach a unanimous decision on Mr. Cromartie's fate. Apparently the jurors knew very early in their deliberations that reaching unanimity on a sentence of death was not going to come easily, as they raised this possibility within three hours of beginning their deliberations. This record could certainly cause reasonable judges to debate the merits of Mr. Cromartie's claim of a violation of his Sixth Amendment right to effective assistance of counsel under Strickland and its progeny. Miller-El v. Cockrell, 537 U.S. 322, 342, 123 S. Ct. 1029, 1042 (2003). Thus, the merits of Mr. Cromartie's claim deserve encouragement to

proceed further. Slack, 529 U.S. at 483–84, 120 S. Ct. at 1603–04 (quotation omitted).

II.

Now for the procedural question. Again, the question for this panel is whether reasonable judges could debate the correctness of the District Court's procedural ruling, which here related to the timeliness of Mr. Cromartie's claim.

The District Court found that Mr. Cromartie's Strickland claim, which he developed further in an amended § 2254 petition filed after AEDPA's one-year statute of limitations, did not relate back to any of the Strickland claims he made in his original petition. Cromartie v. GDCP Warden, 2017 WL 1234139, at *36–37. It was for this reason, according to the District Court, that Mr. Cromartie's amended Strickland claim was untimely. Id.

Reasonable jurists could debate this finding by the District Court, and Mr. Cromartie's argument that his amended claim relates back to his original claim deserves encouragement to proceed further. Claim X in Mr. Cromartie's amended § 2254 petition could be read as an elaboration and specification of Claim Two, Paragraph 37 in his original § 2254 petition. See Dean, 278 F.3d at 1222.

In his original § 2254 petition, Mr. Cromartie laid out the framework for his Strickland claim by saying in "Claim Two" that he "was deprived of his right to the effective assistance of counsel at trial and on appeal, in violation of his rights

under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Strickland v. Washington, 466 U.S. 668 (1984), Williams v. Taylor, 529 U.S. 362 (2000), Rompilla v. Beard, 545 U.S. 374 (2005), and related precedent." Later in the same petition, Mr. Cromartie specifically alleged he "was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." Following this allegation were citations to: Strickland, Williams, Rompilla, Porter, and Sears.[4] Then in Claim X of his amended petition, Mr. Cromartie alleged that "trial counsel were ineffective in the investigation and presentation of mitigating evidence at the penalty phase" and then went on to elaborate (over sixteen pages) Mr. Cromartie's history of childhood trauma and significant cognitive and mental health impairments.

Consistent with Mayle and Eleventh Circuit precedent cited and described by the majority, a reasonable jurist could hold that Claim X (in the amended petition) relates back to Claim Two (in the original petition), because Claim X just added specifics to Claim Two. See Dean, 278 F.3d at 1222; see also Mandacina v. United States, 328 F.3d 995, 1000–01 (8th Cir. 2003); Panel. Op. 7–9. Claim Two, Paragraph 37 of Mr. Cromartie's original petition alleged that he received ineffective assistance of counsel at his capital trial. In support of this allegation,

[4] Sears v. Upton, 561 U.S. 945,130 S. Ct. 3259 (2010) (per curiam)

Mr. Cromartie cited cases that establish the scope of Strickland violations for failing to investigate and present proper mitigating evidence at the penalty phase.

These are not, as the majority says, just "some Supreme Court decisions." Panel Op. 12–13. They are the seminal cases outlining trial counsel's constitutional duty to investigate mitigating evidence about the troubled background of a capital defendant and present it to a penalty phase jury. In Williams, the Supreme Court held that Mr. Williams' right to effective assistance of counsel was violated where trial counsel failed to investigate and present evidence of, e.g., "Williams' nightmarish childhood." Williams, 529 U.S. at 390–91, 395–99, 120 S. Ct. at 1511–12, 1514–16. In Rompilla, the Court held that Mr. Rompilla's right to effective assistance of counsel was violated where his lawyers failed to look into the file of a prior conviction that "would have [revealed] a range of mitigation leads that no other source had opened up," including a history of serious mental health issues, cognitive difficulties, and childhood trauma. Rompilla, 545 U.S. at 377, 390–93, 125 S. Ct. at 2460, 2467–69. In Porter, the Court held that Mr. Porter's right to effective assistance of counsel was violated where trial counsel "failed to uncover and present evidence of Porter's mental health or mental impairment, his family background, or his military service." Porter, 558 U.S. at 38–43, 130 S. Ct. at 452–56. And, finally, in Sears, the Court held that Mr. Sears' right to effective assistance of counsel was violated where trial

counsel failed to investigate and present the childhood abuse Mr. Sears endured, his challenges in school, and his learning and cognitive difficulties. Sears, 561 U.S. at 945–51, 956, 130 S. Ct. at 3261–64, 3267.

Therefore, a reasonable judge could interpret Mr. Cromartie's case citations to reference or describe the constitutional violation he alleged. That being so, Claim Two asserted that trial counsel was unconstitutionally ineffective for failing to appropriately investigate and convey Mr. Cromartie's troubled background to the penalty-phase jury. And, with the facts it set forth, Claim X can reasonably be read to have "fill[ed] in facts missing from the original claim." See Dean, 278 F.3d at 1222 ("When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it."); see also Mandacina, 328 F.3d at 1000–01. And of course the evidence referred to in Mr. Cromartie's original petition, then elaborated on in his amended petition, is precisely the type of capital penalty-phase mitigation evidence that Georgia expects to see presented in most every one of its death cases.

Eleventh Circuit precedent supports the idea that a reasonable judge could conclude that Mr. Cromartie's amended Strickland claim relates back to his first. For example, in Dean, this Court held that a claim that a district court erred in admitting evidence of uncharged misconduct relates back to the more general

claim that the court erred in allowing inadmissible evidence. See Dean, 278 F.3d at 1223. Mr. Dean's initial petition merely asserted that the district court erroneously admitted some unspecified evidence during trial, but referenced no legal theory, case citations, or additional facts. See id. This Court nonetheless decided that the original claim sufficiently put the government on notice of the amended claim by giving "notice that Dean believed that there was inadmissible evidence used against him at trial." See id. And the Dean panel concluded that both the original and amended claims "arose out of the same conduct or occurrence." See id.

This precedent—which the majority cites, describes, but does not appear to rely on—certainly supports as reasonable the conclusion that Mr. Cromartie's Claim X in his amended petition relates back to Claim Two from his original petition. Panel Op. 7–13. Mr. Cromartie's original claim gave even more detail than Mr. Dean's, by not alleging just the relevant legal theory, but also by citing cases that would put any reasonable litigant on notice of the theory and at least some of the facts underlying Mr. Cromartie's Strickland claim. If Mr. Dean's sparse original pleading broadly complaining about the erroneous admission of evidence at trial and his amended pleading highlighting a particular type of inadmissible evidence "arise[] from the same conduct and occurrences," then a reasonable judge could surely conclude the same about Mr. Cromartie's Claim X

and Claim Two. See Dean, 278 F.3d at 1222–23. This conclusion is not foreclosed by Mayle. Indeed, recognizing that Dean and Mayle are consistent, our Court—including the majority here—has continued to apply Dean after Mayle. See Panel Op. 7–11; see also Ciccotto v. United States, 613 F. App'x 855, 858–59 (11th Cir. 2015) (per curiam) (citing Dean and Mayle); Mabry v. United States, 336 F. App'x 961, 963 (11th Cir. 2009) (per curiam) (same).

The paragraphs following Paragraph 37 in Claim Two of Mr. Cromartie's original § 2254 petition do not change my thinking. Paragraph 38 notes that Mr. Cromartie's allegations of ineffectiveness "include, but are not limited to the following." Thus, I read sub-paragraphs 38a[5] and 38b[6] the same way I do the remaining sub-paragraphs. They are illustrative examples of paragraph 37's primary claim that trial counsel was ineffective in a manner similar to trial counsel in Williams, Rompilla, Porter, and Sears. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132–33 (2012) (explaining that "to include" introduces an illustrative list).

The question we have here is different from the question the Supreme Court answered in Mayle. Mayle was about claims involving two different constitutional

[5] Paragraph 38a reads: "Failure to adequately investigate the Madison Street Deli shooting incident and present evidence at both phases of trial that would exculpate Petitioner or mitigate punishment."

[6] Paragraph 38b reads: "Failure to adequately investigate the Junior Food Store incident and to present evidence at both phases of trial that would exculpate Petitioner or mitigate punishment."

provisions and "target[ing] separate episodes." Mayle, 545 U.S. at 660, 125 S. Ct. at 2572–73. In contrast, the claims in Mr. Cromartie's original and amended claim arise from the same constitutional provision and target the same episode or "core of operative facts." See id. at 664, 125 S. Ct. at 2574. That is, trial counsel's ineffectiveness in failing to investigate and present mitigating evidence about Mr. Cromartie's background during the penalty phase of his trial.

Beyond that, in Mayle, the Court recognized the propriety of relation back under similar circumstances by citing favorably to Mandacina, which the Court deemed consistent with the rule it espoused. See id. at 664 n.7, 125 S. Ct. at 2574 n.7. The Mayle Court observed that in Mandacina, "the original petition alleged violations of Brady . . . while the amended petition alleged the Government's failure to disclose a particular report," and "[t]he Court of Appeals approved relation back." Id. Here, the original petition alleged violations not just of Strickland (equivalent to Brady in this context), but also Williams, Rompilla, Porter, and Sears, while the amended petition gave more facts showing how trial counsel was ineffective in ways similar to counsel in Williams, Rompilla, Porter, and Sears. See id. On this record, a judge could reasonably read precedent to support the conclusion that Claim X of Mr. Cromartie's amended petition relates back to Claim Two of his original petition.

III.

The majority says Mr. Cromartie asks too much of the relation back doctrine. Panel Op. 7. But the majority seems to me to ask too much of Mr. Cromartie, especially in light of our precedent. Mr. Cromartie merely asks for a chance to brief and argue the timeliness of his amended Strickland claim. In denying that reasonable request, the majority elevates finalizing Mr. Cromartie's case over this Court's precedent that allows inmates to refine their pleadings in similar circumstances. See, e.g., Dean, 278 F.3d at 1221–23.

The consequences of the majority's error of judgment are not academic. Indeed, the majority's denial of a COA to Mr. Cromartie on his Strickland claim renders it a virtual certainty that no court or jury will ever consider his troubled past. This means, of course, that no court or jury will ever thoroughly weigh whether, or how, Mr. Cromartie's "troubled history" affected his "moral culpability" for the crime for which he will be executed. Wiggins v. Smith, 539 U.S. 510, 535, 123 S. Ct. 2527, 2542 (2003). The Supreme Court has said that this consideration is a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976). Now without a COA, Mr. Cromartie will face his sentence without the benefit of this process. This is important, because in my view a thorough assessment of Mr. Cromartie's background may well have caused his

jury, which already appeared to struggle with whether he should die for his crime, to spare his life.

Reasonable jurists could debate whether Mr. Cromartie's amended Strickland claim relates back to his original, timely-filed petition, and reasonable jurists could debate the merits of his Strickland claim. I would grant the COA, and I dissent from the majority's unwillingness to do so.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 26, 2018

Aren K. Adjoian
Federal Community Defender for the Eastern District of Pennsylvania
Capital Habeas Unit
601 WALNUT ST STE 545 W
PHILADELPHIA, PA 19106-3822

Appeal Number: 17-12627-P
Case Style: Ray Jefferson Cromartie v. GDCP Warden
District Court Docket No: 7:14-cv-00039-MTT

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12627-P

RAY JEFFERSON CROMARTIE,

Petitioner-Appellant,

versus

GDCP WARDEN,

Respondent-Appellee.

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

ORDER:

Appellant's motion for certificate of appealability is DENIED.

CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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January 03, 2018

Aren K. Adjoian
Federal Community Defender for the Eastern District of Pennsylvania
Capital Habeas Unit
601 WALNUT ST STE 545 W
PHILADELPHIA, PA 19106-3822

Appeal Number: 17-12627-P
Case Style: Ray Jefferson Cromartie v. GDCP Warden
District Court Docket No: 7:14-cv-00039-MTT

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

RAY JEFFERSON CROMARTIE, Petitioner, vs. WARDEN, Georgia Diagnostic and Classification Prison, Respondent.	:	CIVIL ACTION NO. 7:14-CV-39 (MTT)

ORDER

RAY JEFFERSON CROMARTIE was sentenced to death for the murder of Richard Slysz. For the reasons discussed below, the Court denies habeas relief.[1]

I. BACKGROUND AND PROCEDURAL HISTORY

A. Facts

The Georgia Supreme Court summarized the facts of this case in Cromartie's direct appeal:

> Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid

[1] The Court instructed Cromartie to brief all outstanding issues that he wished to pursue, and this Order addresses only those claims that he argued in his briefs. Any claim not briefed is deemed abandoned. *Blankenship v. Terry*, 2007 WL 4404972, at *40 (S.D. Ga. 2007) (stating that claims not briefed are abandoned because "mere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments—hence, *litigate*—on a petitioner's behalf") (citations omitted). To the extent he has not abandoned any unaddressed claims, he certainly has failed to show that the state courts' denials of those claims were contrary to clearly established federal law, involved any unreasonable applications of clearly established federal law, or were based on any unreasonable factual determinations.

> artery. The following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."
>
> In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12–packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12–packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.
>
> Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice. Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12–pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 270 Ga. 780, 781-82, 514 S.E.2d 205, 209-10 (1999).

B. Procedural history

On September 26, 1997, a jury found Cromartie guilty of malice murder, armed robbery, aggravated battery, aggravated assault, and four counts of possession of a

firearm during the commission of a crime. *Id*. at 781 n.1, 514 S.E.2d at 209 n.1. On October 1, 1997, the jury sentenced Cromartie to death for the murder. *Id*.

Cromartie filed a motion for new trial, and a hearing was held on March 12, 1998. (Doc. 18-24).[2] On April 7, 1998, the Court denied the motion. (Doc. 17-8 at 187). Cromartie filed a notice of appeal on May 6, 1998. (Doc. 18-25 at 1-2). The Georgia Supreme Court affirmed his conviction and sentence on April 2, 1999. *Cromartie*, 270 Ga. at 781, 514 S.E.2d at 209. The United States Supreme Court denied his petition for certiorari on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974 (1999).

Cromartie filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on May 9, 2000. (Doc. 19-14). After conducting an evidentiary hearing, the state habeas court denied relief in an order dated February 8, 2012. (Docs. 21-14 to 23-20; 23-37). Cromartie applied for an extension of time to file his Application for Certificate of Probable Cause to Appeal ("CPC application"), which was granted on March 2, 2012. (Docs. 23-38; 23-39). Around this time, a key prosecution witness, Gary Young, said he testified falsely at Cromartie's trial. (Doc. 1 at 8). On March 8, 2012, Cromartie filed an emergency motion in the Georgia Supreme Court requesting an extension of time to file his notice of appeal. (Doc. 23-40). On March 9, 2012, the Georgia Supreme Court granted a 30-day extension. (Doc. 23-41).

Cromartie filed an emergency motion for reconsideration in the Butts County Superior Court and additional proceedings related to Young's recantation took place in that court. (Doc. 1 at 9). Because his emergency motion for reconsideration did not toll

[2] Because all documents have been electronically filed, this Order cites to the record by using the document number and electronic screen page number shown at the top of each page by the Court's CM/ECF software.

the time for filing a notice of appeal, Cromartie filed a notice of appeal on April 9, 2012. (Docs. 1 at 8; 24-2). In an order dated April 25, 2012, the Butts County Superior Court denied Cromartie's emergency motion for reconsideration. (Doc. 24-3). On October 1, 2012, the Georgia Supreme Court found that the superior court did not have jurisdiction when it entered the April 25, 2012 order because Cromartie had previously filed his notice of appeal on April 9, 2012. (Doc. 24-8). The Georgia Supreme Court, therefore, granted Cromartie's CPC application and remanded his case "to the habeas court to allow it to regain jurisdiction and . . . enter an appropriate new order." (Doc. 24-8). In an order dated October 5, 2012, the Butts County Superior Court re-entered its April 25, 2012 order denying reconsideration. (Doc. 24-9).

Cromartie filed a notice of appeal on October 24, 2012 and a CPC application on November 8, 2012. (Docs. 24-10; 24-11 at 64). The Georgia Supreme Court summarily denied his CPC application on September 9, 2013 and issued its remittitur on December 10, 2013. (Docs. 24-14; 33-1). The United States Supreme Court denied Cromartie's petition for writ of certiorari on April 21, 2014. *Cromartie v. Chatman*, 134 S. Ct. 1879 (2014).

Cromartie filed his habeas petition in this Court on March 20, 2014. (Doc. 1). On April 1, 2014, Respondent filed a motion to dismiss Cromartie's federal habeas petition as untimely. (Doc. 9). Respondent alleged Cromartie's federal habeas petition was untimely because statutory tolling under 28 U.S.C. § 2244(d)(2) ended on the date the Georgia Supreme Court denied Cromartie's CPC application. (Doc. 9 at 4). On December 29, 2014, this Court denied Respondent's motion to dismiss, finding that "Cromartie's federal habeas petition is untimely only if § 2244(d)(2) tolling ended on the

day the Georgia Supreme Court denied Cromartie's CPC application. It did not."[3] (Doc. 42 at 18). After this Court denied Respondent's motion to certify its December 29, 2014 Order for interlocutory appeal, Respondent moved for permission to appeal in the Eleventh Circuit, which was denied on April 10, 2015. (Docs. 45; 46; 51; 52)

Cromartie, now represented by the Federal Community Defender Office for the Eastern District of Pennsylvania,[4] filed an amended federal habeas petition on June 22, 2015 and Respondent filed an answer on July 22, 2015. (Docs. 62; 64). On March, 21, 2016, Respondent moved to amend his answer to assert a statute of limitations defense to Claim Ten in Cromartie's amended petition. (Doc. 74). After allowing both parties to brief the issue, the Court granted Respondent's motion to amend.[5] (Docs. 76 to 80).

Both parties have now briefed all outstanding issues.

[3] Since that ruling, the Eleventh Circuit has held that a state habeas petition is "pending," so as to toll the federal one-year statute of limitations, until the Georgia Supreme Court issues the remittitur for the denial of a petitioner's CPC application. *Dolphy v. Warden, Cent. State Prison*, 823 F.3d 1342, 1345 (11th Cir. 2016). Thus Cromartie's statute of limitations was tolled until December 10, 2013 and his federal habeas petition was timely filed.

[4] On March 24, 2014, the Court appointed Brian Kammer with the Georgia Resource Center to represent Cromartie. (Docs. 3; 6). Because Kammer's conduct might have been at issue in relation to Respondent's motion to dismiss, the Court allowed Kammer to withdraw and, on April 14, 2014, appointed Martin McClain. (Docs. 8; 11; 13). Citing his own conflict of interest, McClain moved for substitution of conflict-free counsel on September 16, 2014. (Doc. 31). On October 9, 2014, the Court granted his motion and replaced McClain with the Federal Community Defender Office for the Eastern District of Pennsylvania. (Doc. 36).

[5] Since that ruling, Respondent has not actually filed an amendment to his answer. The Court sees no need to require him to file an amended answer. *See* Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (stating that no answer required "unless judge so orders"). In his motion to amend (Doc. 74), Respondent requested to make only one amendment to his July 22, 2015 answer (Doc. 64). He sought to assert a statute of limitations defense to Claim Ten in Cromartie's amended habeas petition. (Doc. 74 at 2). Before granting Respondent's motion to amend, the Court allowed both parties to fully brief this issue. (Docs. 76 to 79). Because Cromartie was given the opportunity to address this issue before the Court granted Respondent's motion to amend, he is not prejudiced by the Court's decision that an actual amended answer is unnecessary.

II. STANDARD OF REVIEW

A. Exhaustion and procedural default

Procedural default bars federal habeas review when a habeas petitioner has failed to exhaust state remedies that are no longer available or when the state court rejects the habeas petitioner's claim on independent state procedural grounds. *See Michigan v. Long,* 463 U.S. 1032, 1040-42 (1983) (explaining that an adequate and independent finding of procedural default will generally bar review of the federal claim); *Frazier v. Bouchard,* 661 F.3d 519, 524 n.7 (11th Cir. 2011); *Ward v. Hall,* 592 F.3d 1144, 1156-57 (11th Cir. 2010).

There are two exceptions to procedural default. If the habeas respondent establishes that a default has occurred, the petitioner bears the burden of establishing "cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice." *Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81-88 (1977); *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995)). A petitioner establishes cause by demonstrating that some objective factor external to the defense impeded his efforts to raise the claim properly in the state courts. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (quoting *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003)). A petitioner establishes prejudice by showing that there is "a reasonable probability that the result of the proceeding[s] would have been different." *Id*. Regarding what is necessary to establish the narrowly-drawn fundamental miscarriage of justice exception, the Eleventh Circuit has stated:

> To excuse a default of a guilt-phase claim under [the fundamental miscarriage of justice] standard, a petitioner must prove "a constitutional

> violation [that] has probably resulted in the conviction of one who is actually innocent." To gain review of a sentencing-phase claim based on [a fundamental miscarriage of justice], a petitioner must show that "but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law."

Hill v. Jones, 81 F.3d 1015, 1023 (11th Cir. 1996) (citations omitted).

B. Claims that were adjudicated on the merits in the state courts

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standard of review. This Court may not grant habeas relief with respect to any claim that was adjudicated on the merits in state court unless the state court's decision was (1) contrary to clearly established Federal law; (2) "involved an unreasonable application of clearly established Federal law;" or (3) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(1)-(2); *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). The phrase "clearly established Federal law" refers to the holdings of the United States Supreme Court that were in existence at the time of the relevant state court decision. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (citing *Williams*, 529 U.S. at 404-05).

> Under § 2254(d)(1), "[a] state court's decision is 'contrary to'... clearly established law if it 'applies a rule that contradicts the governing law set forth in [the United States Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a [different] result. . . .'"

Michael v. Crosby, 430 F.3d 1310, 1319 (11th Cir. 2005) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003)).

A state court's decision involves an "unreasonable application" of federal law when "'the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011)). An "unreasonable application" and an "incorrect application" are not the same:

> We have explained that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. Indeed, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable. This distinction creates a substantially higher threshold for obtaining relief than *de novo* review. AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.

Renico v. Lett, 559 U.S. 766, 773 (2010) (citations and quotation marks omitted). To obtain relief "a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. In other words, a habeas petitioner must establish that no fairminded jurist could agree with the state court's decisions. *Woods v. Etherton*, 136 S. Ct. 1149, 1152-53 (2016); *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1262 (11th Cir. 2014); *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012).

Pursuant to 28 U.S.C. § 2254(d)(2), district courts can "grant habeas relief to a petitioner challenging a state court's factual findings only in those cases where the state court's decision 'was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding.'" *Price v. Allen*, 679 F.3d 1315, 1320 (11th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(2)). A state court's factual finding is not unreasonable simply because the federal habeas court might have made a different finding had it been the first court to interpret the record. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (citing *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Again, this Court can grant relief only if it finds "no 'fairminded jurist' could agree with the state court's determination" of the facts. *Holsey*, 694 F.3d at 1257 (quoting *Richter*, 562 U.S. at 101). Also, a state court's factual determination is "presumed to be correct," and this presumption can only be rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

C. The relevant state court decisions

When deciding if the state court's decision was contrary to Supreme Court precedent, or involved an unreasonable application of law or determination of fact, the court "review[s] one decision: 'the last state-court adjudication on the merits.'" *Wilson v. Warden*, 834 F.3d 1227, 1232 (11th Cir. 2016) (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)), *cert. granted*, 85 U.S.L.W. 3409 (Feb. 27, 2017) (No. 16-6855). The relevant decision in Cromartie's case for claims that were adjudicated on direct appeal is the Georgia Supreme Court's opinion. *Cromartie*, 270 Ga. at 780-89, 514 S.E.2d at 209-15. For claims that the Georgia Supreme Court "provide[d] a reasoned opinion," this Court "evaluate[s] the opinion." *Wilson*, 834 F.3d at 1235. The relevant decision for claims adjudicated during state habeas proceedings is the Georgia Supreme Court's summary denial of Cromartie's CPC application. *Id*. at 1232-35. Because the Georgia Supreme Court "provide[d] no reasoned opinion" this Court "review[s] that decision using the test announced in *Richter*":

> [A] petitioner's burden under section 2254(d) is to "show[] there was no reasonable basis for the state court to deny relief." "[A] habeas court must determine what arguments or theories . . . could have supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the United States Supreme] Court." Under that test, [Cromartie] must establish that there was no reasonable basis for the Georgia Supreme Court to deny his [CPC application].

Id. at 1235 (quoting *Richter*, 562 U.S. at 98, 102).

The state habeas court's final orders denying state habeas relief (Doc. 23-37; 24-9) are relevant in two respects.[6] First, if the state habeas court denied a claim on a procedural ground, such as procedural default, the Court assumes the Georgia Supreme Court's denial of relief "rests on the same *general* ground." *Id*. at 1236. Thus, there is a "rebuttable presumption that state procedural default rulings are not undone by" the Georgia Supreme Court's unexplained denial of a CPC application. *Id*. at 1237. Second, "[w]hen assessing under *Richter* whether there 'was no reasonable basis for the state court to deny relief,' a federal habeas court may look to a previous opinion as one example of a reasonable application of law or determination of fact." *Id*. at 1239 (quoting *Richter*, 562 U.S. at 98). If the reasoning of the state habeas court is reasonable, the federal court's inquiry ends because "there is necessarily at least one reasonable basis on which the [Georgia Supreme Court] could have denied relief." *Id*. The relevant state

[6] Cromartie argues this Court should exercise *de novo* review of the claims decided by the state habeas court because that court's February 8, 2012 order denying relief (Doc. 23-37) was a nearly verbatim adoption of a proposed order written by Respondent's counsel (Doc. 69 at 24). This argument fails for two reasons. First, the Georgia Supreme Court's denial of Cromartie's CPC application is the relevant state court decision, not the state habeas court's orders. (Docs. 23-37; 24-9). Second, even if the state habeas court's orders were the relevant decisions, this Court would still have to apply AEDPA deference. *Andersen v. Bessemer City*, 470 U.S. 564, 572 (1985) (finding that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous"); *Tharpe v. Warden*, 834 F.3d 1323, 1334 (11th Cir. 2016) (affirming the district court's rejection of petitioner's argument that the state habeas court "had almost verbatim, and thus improperly, relied on the State's proposed order in issuing its own order") (citations omitted); *Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014) (finding AEDPA deference still applies even when the state habeas court adopted verbatim the respondent's proposed order) (citations omitted); *Rhode v. Hall*, 582 F.3d 1273, 1281-82 (11th Cir. 2009) (same).

court decision, however, is still the Georgia Supreme Court's denial of the CPC application "and federal courts are not limited to assessing the reasoning of the lower court." *Id*. Thus, if the state habeas court's opinion "contains flawed reasoning," federal courts must give the Georgia Supreme Court "'the benefit of the doubt,' and presume that it 'follow[ed] the law.'"[7] *Id*. at 1238 (citations omitted).

III. CROMARTIE'S CLAIMS

A. Claim One: The trial court's failure to dismiss jurors for cause

Cromartie argues that the trial court violated the Sixth and Fourteenth Amendments when it failed to excuse for cause, on defense motion, five potential jurors whose statements made it "abundantly clear that, if they found the killing to be intentional, they would vote for death": Kenneth Barwick, Herman Burleson, Charles Bruce, Gary Pitts, and Harlan Rogers, Jr.. (Doc. 69 at 51). He also argues that the trial court erred when it refused to excuse for cause, on defense motion, two additional potential jurors with a pro-prosecution bias: Martha May and Phyllis Jones. (Doc. 69 at 53-54).

Respondent argues that Cromartie's challenges to Pitts and Rogers are unexhausted. (Doc. 75 at 42). On direct appeal, Cromartie argued that "[t]he trial court erroneously failed to excuse a number of prospective jurors whose voir dire responses demonstrated that they could not be fair and impartial in this case . . . ." (Doc. 18-26 at 109). He stated that prospective jurors Burleson, Bruce, Simmons, Barwick, Harden,

[7] *Wilson* is the "law of the circuit unless and until the Supreme Court overrules it." *Butts v. GDCP Warden*, 2017 W.L. 929749, at *2 n.2 (11th Cir. 2017). But, "[t]o simplify matters, and prevent them from being contingent on the Supreme Court's decision in *Wilson*," the Court has "made the § 2254 determination based on the state trial court's explanation for its rejection of [Cromartie's] claim[s]." *Id*. Doing so, the Court has determined that the state trial court reasonably denied relief. There was, therefore, "at least one reasonable basis on which the [Georgia Supreme Court] could have denied relief. *Wilson*, 834 F3d at 1239.

and Kornegay[8] indicated "they could not fairly consider a sentence less than death or mitigating evidence" and, therefore, the trial court's failure to excuse them violated his right to an impartial jury. (Doc. 18-26 at 114). Cromartie acknowledges he failed to argue in his appellate brief that Pitts and Rogers should have been excused.[9] He argues, instead, that his general claim regarding the trial court's failure to excuse potential jurors is "exhausted and the voir dire of jurors Rogers . . . and Pitts was part of the record considered by the state courts in adjudicating this claim." (Doc. 69 at 52 n.5).

To exhaust, Cromartie had to make the Georgia Supreme Court aware of both the legal and factual bases for his claims. *See Kelley v. Sec'y, Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004) (finding that "the prohibition against raising nonexhausted claims in federal court extends not only to broad legal theories of relief, but also to the specific assertions of fact that might support relief"). Cromartie's assertions about Pitts and Rogers are "specific assertions of fact" he never made before the Georgia Supreme Court. *Id*. Cromartie did not exhaust these factually specific allegations by arguing generally that the trial court erred for failing to excuse biased jurors. *See id*. (finding that a general claim of ineffective assistance of counsel presented to the state courts does not exhaust specific instances of ineffective assistance not presented to the state courts). Nor did Cromartie exhaust his allegations related to Pitts and Rogers simply because their voir dire "was part of the record considered by the state courts in adjudicating" his general claim that the trial court erroneously failed to excuse jurors. (Doc. 69 at 52 n.5). "[T]o preserve a claim . . . for federal review, the habeas petitioner must assert his theory

[8] In these proceedings, Cromartie makes no allegations regarding Simmons, Harden and Kornegay.

[9] In a different section of his appellate brief, Cromartie did argue that the trial court erroneously restricted trial counsel's questioning of Rogers. (Doc. 18-26 at 118). Cromartie does not argue that this exhausted his claim that Rogers should have been excused for cause due to his views on the death penalty.

of relief and transparently present the state courts" with the facts that support relief. *Kelley*, 377 F.3d 1317 at 1344. Cromartie failed to "transparently present" the Georgia Supreme Court with any facts about Pitts and Rogers to support his failure-to-excuse claim. *Id*.

Cromartie's reliance on *Miller-El v. Dretke*, 545 U.S. 231 (2005) is misplaced. In that case, no one disputed that Miller-El had fairly presented his *Batson* claim to the state court. *Id*. at 241 n.2. The dissent questioned whether the evidence Miller-El relied on in the federal courts had been presented to the state courts. *Id*. at 279 (Thomas, J., dissenting). The majority stated that the evidence on which it "base[d] [its] result, was before the state courts" and nothing in AEDPA prevented Miller-El from presenting a different theory based on that evidence. *Id*. at 241 n.2 (citations omitted).

In Cromartie's case, the Respondent does dispute whether Cromartie fairly presented his failure-to-excuse claims for Pitts and Rogers to the state court. When Cromartie argues that Pitts and Rogers should have been excused for cause, he is not presenting a different theory or argument based on evidence he presented to the Georgia Supreme Court. He is presenting a new challenge to two jurors who he never mentioned when his case was pending before the Georgia Supreme Court. Just as "habeas petitioners may not present particular factual instances of ineffective assistance of counsel in their federal petitions that were not first presented to the state courts," Cromartie cannot present "particular factual instances" of the trial court's failure to excuse for cause allegedly pro-death penalty jurors that were not first presented to the state court. *Kelley*, 377 F.3d at 1344 (quoting *Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992)).

But, even assuming Cromartie fully exhausted all of his failure-to-excuse claims, he is not entitled to habeas relief because none of the potential jurors about which Cromartie complains served on his jury. (Docs. 18-11 at 43-51; 75 at 36). Twelve jurors were empaneled before potential jurors May and Jones were called and trial counsel[10] used peremptory strikes to excuse Barwick, Burleson, Bruce, Pitts, and Rogers. (Doc. 18-11 at 42-51). Trial counsel did not have to use all of their peremptory strikes,[11] and none of the jurors who sat on Cromartie's jury had been challenged for cause by trial counsel. (Docs. 18-1 at 205; 18-2 at 110, 141; 18-3 at 16, 61, 160-61; 18-4 at 62; 18-6 at 82, 98,140-41, 155; 18-7 at 10, 64, 91, 127, 164-66; 18-11 at 11, 36-51, 100). Under *United States v. Martinez-Salazar*, if a trial court errs in failing to exclude a juror for cause and "the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right." 528 U.S. 304, 307 (2000). Therefore, even if the trial court erred in failing to remove the jurors about which Cromartie complains, he was not deprived of any "constitutional right" and this claim must be denied. *Id*.

Cromartie argues that *Martinez-Salazar* was wrongly decided and, regardless, the Georgia Supreme Court's decision was still contrary to clearly established federal law announced in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Wainwright v. Witt*, 469 U.S. 412 (1985), and their progeny. (Doc. 78 at 40). The Court disagrees. 28 U.S.C. §

[10] At trial, Cromartie was represented by Michael Mears and Gerard Kleinrock, both with the Multicounty Public Defender's Office, and Thomasville attorney Carl Bryant. (Docs. 17-1 at 46; 17-4 at 41-42; 18-1).

[11] When Cromartie was tried in 1997, he was allowed twenty strikes during the selection of twelve jurors and eight strikes during the selection of four alternate jurors. O.C.G.A. § 15-12-165 (1981) (amended by Laws 2005, Act 8, § 7, eff. July 1, 2005); O.C.G.A. § 15-12-169 (1981) (repealed by Laws 2011, Act 50 § 1-6, eff. July 1, 2012).

2254(a) provides that a federal "court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Under *Martinez-Salazar*, there was no constitutional violation because none of the jurors about which Cromartie complains were empaneled. Therefore, even if the Court found, under § 2254(d), that the Georgia Supreme Court's decision was contrary to, or an unreasonable application of, *Witherspoon* or *Witt*,[12] it could not grant habeas relief because there was no violation of the federal Constitution, laws, or treaties.

B. Claim Two: The trial court's dismissal of Juror Kelly Smith for cause

Cromartie claims that Juror Kelly Smith should not have been excused for cause. (Doc. 69 at 58-62). The record shows that the trial court asked Smith if she was conscientiously opposed to capital punishment and she answered, "No." (Doc 18-3 at 129). The court questioned if she would automatically vote to impose the death penalty regardless of the evidence and the instructions given. (Doc. 18-3 at 130). Again, she answered, "No." (Doc. 18-3 at 130).

Next, the State examined Smith:

> Q. Are you morally opposed to the imposition of the death penalty under any circumstances?

[12] The Court does not make such a finding. The Georgia Supreme Court cited *Witt* and quoted the correct standard: "[A] prospective juror is not disqualified based upon his views on capital punishment unless the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Cromartie*, 270 Ga. at 784, 514 S.E.2d at 211 (internal quotation marks and citations omitted). For the jurors who allegedly had pro-prosecution or other biases, the Georgia Supreme Court found they could set aside their opinions and render a verdict based solely on the evidence presented. *Id*. at 784-85, 514 S.E.2d at 211-12. Looking at the entire voir dire and affording the appropriate deference to the state courts, the Court cannot find the trial court's failure to excuse these prospective jurors and the Georgia Supreme Court's affirmance of those decisions were contrary to, or an unreasonable application of, clearly established federal law. *Uttecht v. Brown*, 551 U.S. 1, 6-10 (2007) (discussing the "limited role of federal habeas relief in the area" of juror excusals due to the deference that must be given to a trial court's determinations)

A. I'm opposed, but, I, I just don't believe in it, in the death penalty.

Q. The Judge asked you a minute ago were you conscientiously opposed to the death penalty. Are you conscientiously opposed to the death penalty?

A. Yes; I am opposed to the death penalty.

Q. Did you misunderstand the Judge's question a minute ago?

A. I guess so; yes, sir.

Q His question was, I think if I may state what I think he said was . . . are you conscientiously opposed to the death penalty?

A. Yes.

Q. Okay, is that fixed in your mind?

A. Yes.

Q. You could not give someone the death penalty?

A. No, sir.

Q. Under any circumstances?

A. No, sir.

Q. I believe the Judge – You, you, automatically would not impose the death penalty.

A. No, sir.

Q No matter what the evidence or the facts were.

A. No, sir.

(Doc. 18-3 at 132-33).

The Court intervened, stating it needed to "redo the questions" to make sure Smith understood:

[T]he question that I have to determine at this time in my mind is whether or not you would listen to the evidence, you would follow the [c]ourt's

> instructions in regards to the law concerning consideration of the three possible punishments and, of course, make your determination based on the evidence and the instructions of the law as opposed to a position of at this time in your mind being automatically and, and, as stated, irrevocably, meaning you would not change your mind under any circumstances, automatically and irrevocably opposed to the imposition of the death penalty. Do you understand what I'm talking about, my question?
>
> A. I think so.
>
> THE COURT: If you were selected and if this case reached the second phase, at this time, regardless of what the evidence was and regardless of what the instructions of the law were from the [c]ourt, is it my understanding that you could not and would not consider imposition of the death penalty?
>
> A. Yes, sir. Correct.

(Doc. 18-3 at 133-34).

Trial counsel then questioned Smith. She indicated that she would have no problems serving as a juror if the death penalty was not at issue. (Doc. 18-3 at 135-36). She reiterated that she did not "agree with" the death penalty and attributed her beliefs to her religious training. (Doc. 18-3 at 136). Smith affirmed that she "would listen" to all the evidence and instructions:

> Q. And would you listen and follow the instructions of the, of the [c]ourt, . . . before you made your decision about what penalty would be appropriate?
>
> A. Yes; I would listen.
>
> Q. Okay. Now, you would do all of that. The problem is, would you be able to vote for the death penalty if you thought it was appropriate?
>
> A. I would have to think about that. Since I don't agree with the death penalty it would take, you know, I would have to take great consideration in that before I could agree with it or hand that sentence out.
>
> Q. If you thought it was appropriate though after you considered it, and even though it's something that you personally don't believe in, if you were called to serve would you listen to the evidence—you said you would do that
>
> A. Um-hum (affirmative).

Q. And you'd listen to the instructions of the [c]ourt. You said you would do that?

A. Um-hum (affirmative).

Q. Could you, if you thought it was in accordance with the evidence and the instructions of the [c]ourt, an appropriate sentence, could you vote for the death penalty?

A. I, I don't know. To be honest, I don't know.

Q. Okay. That's a tough question.

A. It is.

Q. But at least you would consider the death penalty as part of a sentencing option if you were called upon to do so?

A. I, I would listen to all of the information I was given.

Q. And would you do your very best to be fair?

A. Yes, sir.

Q. And would you do your very best to make the right decision based upon the evidence and the instructions of the [c]ourt?

A. Yes, sir.

(Doc. 18-3 at 138-39).

The trial court again questioned Smith:

THE COURT: Ms. Smith, based on your religious belief, do you feel like it would be difficult for you to lay your personal feelings aside and follow the law in regards to the instructions given you by the [c]ourt?

A. Do I think it would be difficult?

THE COURT: Yes, ma'am.

A. No; not if that was the instructions I was given I don't think it would be. It's what I believe.

THE COURT: I understand that.

> A. But given the evidence that I would be given I would listen and try to follow the instructions.
>
> THE COURT: I guess we get back full circle to where we were. At this time, regardless of the evidence and the [c]ourt's instructions, do you feel that you would be able to vote to impose the death penalty in this particular matter?
>
> A. I'm sorry. I, I didn't understand.
>
> THE COURT: At this time, are you in a position, frame of mind, your views and opinions on capital punishment, the death penalty, are those such at this time that you would automatically vote against the imposition of the death penalty, again regardless of what the evidence showed and what the law was?
>
> A. At this time?
>
> THE COURT: Yes, ma'am.
>
> A. Yes, sir.

(Doc. 18-3 at 140)

The State moved to excuse Smith for cause. (Doc. 18-3 at 141). Trial counsel objected, pointing out that the trial court allowed allegedly pro-death penalty juror Barwick to remain on the panel.[13] (Doc. 18-3 at 141). The trial court explained its decision to excuse Smith for cause:

> Of course, my interpretation of, I believe it's Mr. Kenneth Barwick's answers to the voir dire questions, not only his verbalization but his demeanor, my interpretation of his responses are somewhat different from Ms. Smith's responses. Ms. Smith may have equivocated a very small amount on one or two, possibly two questions propounded by the Defense.
>
> But, I think taking all of her responses into consideration in the voir dire examination, at this time she'd be unable to apply the law based upon her religious views. She holds a strong personal aversion to the death penalty and is very uncertain as to whether or not she could actually impose such. And I think she would be unable to apply the law as opposed to following her personal beliefs in this particular matter.

[13] Barwick remained on the panel but, as explained previously, he did not ultimately serve on the jury.

> Therefore, I do find as a fact and determine that she should be and she is excused because of her views on capital punishment. I feel that her views would prevent, substantially impair her in the performance of her duties as a juror in accordance with the instructions of the [c]ourt and the oath that she would undertake as a juror in this case.

(Doc. 18-3 at 142).

On direct appeal, Cromartie argued Smith should not have been excused for cause, and the Georgia Supreme Court found:

> The trial court did not err by excusing prospective Juror Smith for cause due to her inability to consider a death sentence. "The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment 'is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" Although she answered several questions equivocally, Juror Smith also repeatedly and firmly stated that she could not vote to impose a death sentence under any circumstances. The trial court was authorized to excuse her for cause.

Cromartie, 270 Ga. at 783, 514 S.E.2d at 210-11 (citations omitted).

Cromartie argues this decision was based on an unreasonable determination of the facts. (Doc. 69 at 60). He alleges the Georgia Supreme Court's factual finding that Smith "repeatedly and firmly stated that she could not vote to impose a death sentence under any circumstances" was unreasonable in light of the evidence presented for two reasons. *Cromartie*, 279 Ga. at 783, 514 S.E.2d at 211. First, Smith stated she would "give the death penalty great consideration." (Doc. 69 at 60-61). According to Cromartie, Smith's anti-capital punishment protestations were no more pronounced than the pro-death penalty position taken by other prospective jurors who the trial court refused to excuse for cause. (Doc. 69 at 58 n.7). Second, when Smith said she could not vote for the death penalty "at this time," she merely meant that she could not vote for the death penalty before she heard any evidence, argument, or instruction. (Doc. 69 at

61).

The question of whether a juror should be disqualified is one of fact to which "the statutory presumption of correctness to the trial court's resolution" applies. *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). The fact that Smith's testimony was "ambiguous and at times contradictory" is not unusual. *Id*. at 1039. As the Georgia Supreme Court acknowledged, Smith answered equivocally at times, (Doc. 18-3 at 138-40), but she also firmly stated on several occasions that she could not vote for the death penalty. (Doc. 18-3 at 133-34, 140). Cromartie complains that the trial court's refusal to excuse the pro-death penalty jurors, while it excused Smith, shows the unfairness of the voir dire as a whole. (Doc. 69 at 58 n.7). It doesn't. The trial court's resolution of who to excuse "is essentially one of credibility, and therefore largely of demeanor." *Yount*, 467 U.S. at 1038. In Cromartie's case, the trial court stated that it considered not only the "verbalization," but the "demeanor" of the prospective jurors before concluding if their views would prevent or substantially impair them in the performance of their duties. (Doc. 18-3 at 142). Such considerations must be given deference, by both the appellate court and this Court. *Id*.

When Smith affirmed she could not vote for the death penalty "[a]t this time," it is not, as Cromartie argues, clear that she meant she could not vote for the death penalty at that moment because she had not heard the evidence, argument, or instruction. (Doc. 18-3 at 140). Another, perhaps more likely interpretation, is that she meant her currently held ("at this time") beliefs and opinions would prevent her from voting for the death penalty regardless of the evidence. (Doc. 18-3 at 140). The trial court specifically and repeatedly inquired whether Smith's views and opinions on capital punishment "[a]t this

time" would automatically lead her to vote against the death penalty "regardless of what the evidence showed and what the law was." (Doc. 18-3 at 140). She affirmed that they would. In fact, she affirmed at least twice that "at this time, regardless of what the evidence was and regardless of what the instructions of law were from the court" she "could not and would not consider the imposition of the death penalty." (Doc. 18-3 at 134).

Cromartie also argues the Georgia Supreme Court's decision involved an unreasonable application of *Witt*. The court correctly cited the *Witt* standard—whether a juror's views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Cromartie*, 270 Ga. at 783, 514 S.E.2d at 210-11 (internal quotation marks and citations omitted). And, the court reasonably applied this standard to Smith, who stated on several occasions that she could not vote for the death penalty, regardless of the evidence and the law. *Id*.; (Doc. 18-3 at 134, 140).

Cromartie has failed to show that no fairminded jurist could agree with the Georgia Supreme Court's factual determinations regarding Smith or its application of *Witt*. There was "fair support in the record for the state courts'" decision regarding Smith. *Yount*, 467 U.S. at 1038. This Court, therefore, denies relief on this claim.

C. Claim Three: The trial court's refusal to sever the charges

Cromartie argues that his rights to a fair trial and due process were violated when the trial court denied his motion to sever and ordered that the Madison Street Deli and Junior Food Store shootings be tried together. (Doc. 69 at 62-67). Citing circuit court opinions, Cromartie states that "[d]ue process requires severance whenever joinder

would result in a fundamentally unfair trial." (Doc. 69 at 62). Respondent argues there is no clearly established Supreme Court precedent that the misjoinder of claims violates due process and, therefore, this claim should be denied on that basis alone. (Doc. 75 at 96). In reply, Cromartie states he is not alleging the Georgia Supreme Court's decision was contrary to, or involved an unreasonable application of, federal law. (Doc. 78 at 43). Instead, he "argues that this Court must review the merits of his claim because the state court denial of the claim was based on an unreasonable determination of the facts pursuant to 28 U.S.C. § 2254(d)(2)." (Doc. 78 at 43-44). Specifically, he argues the Georgia Supreme Court unreasonably found the two shootings "'were part of a single scheme or plan to rob convenience[-type] stores.'" (Doc. 78 at 44) (quoting *Cromartie*, 270 Ga. at 783, 514 S.E.2d at 210).

Cromartie was indicted in a single indictment for both the April 7, 1994 aggravated assault and aggravated battery at the Madison Street Deli and the April 10, 1994 murder and armed robbery at the Junior Food Store. (Doc. 17-1 at 29-31). Trial counsel moved to sever the Madison Street Deli charges from the Junior Food Store charges, and the trial court held a hearing to address the motion. (Docs. 17-2 at 11-12; 17-7 at 252-75; 17-8 at 1-7).

Trial counsel argued that no evidence tied Cromartie to the April 7 Madison Street Deli robbery. (Docs. 17-7 at 273; 17-8 at 6). They stated that "there's no connection, there's no pattern, there's no . . . sufficiency of similarity between the offenses to . . . allow them to be tried jointly." (Doc. 17-8 at 6). Thomasville Police Department Lieutenant Melvin Johnson testified regarding the similarities between the two: (1) both occurred within days of each other (Doc. 17-7 at 272); (2) both occurred at night (Docs. 17-7 at 272,

274-75; 17-8 at 1); (3) both involved a white male clerk working alone in a convenience store (Docs. 17-7 at 272, 274-75, 17-8 at 1); (4) the same gun was used in both (Docs. 17-7 at 274; 17-8 at 1); (5) in both, the perpetrator attempted, without success, to open the cash register (Doc. 17-7 at 274); (6) no customers were present at either convenience store (Doc. 17-8 at 1); (7) both store clerks were shot in the head (Doc. 17-8 at 1); (8) the shooter engaged in no struggle at either convenience store and said nothing to the clerks before he shot them (Doc. 17-8 at 3); and (9) Madison Street Deli and the Junior Food Store are located within a mile of each other. (Doc. 17-8 at 3). The trial court denied the motion to sever. (Doc. 17-8 at 7).

On appeal, the Georgia Supreme Court found that

> [t]he trial court did not abuse its discretion in denying [Cromartie's] motion to sever the offenses at the Madison Street Deli from the offenses at the Junior Food Store. In this case, the two shootings were similar, occurred only three days apart, involved the same gun, and were part of a single scheme or plan to rob convenience-type stores.

Cromartie, 270 Ga. at 783, 514 S.E.2d at 210 (citations omitted).

Because a fairminded jurist could agree that the robberies "were part of a single scheme or plan to rob convenience-type stores," that factual finding was not unreasonable. *Id*. The record is not "devoid of any indication that they were committed in pursuit of some common scheme or that they had some connection." *Harrell v. State*, 297 Ga. 884, 890, 778 S.E.2d 196, 202 (2015). To the contrary, the facts surrounding the crimes—the same gun, same type of convenience store, proximity of the stores, same attempt to obtain cash from the register, proximity of time, the manner in which both were committed—indicate a single plan to rob convenience stores.

In *United States v. Lane*, the Supreme Court stated that "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." 474 U.S. 438, 446 n.8 (1986). Even then, "an error involving misjoinder 'affects substantial rights' and requires reversal only if the misjoinder results in actual prejudice because it 'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. at 449 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Relying on a case from the Ninth Circuit, Cromartie argues "[b]y trying the two cases together, the [S]tate encouraged the jury to convict Mr. Cromartie of the Madison Street Deli shooting based on the stronger evidence it presented as to the Junior Food Store shooting." (Doc. 78 at 45) (citing *Bean v. Calderon*, 163 F.3d 1073, 1085 (9th Cir. 1998)). There is no clearly established federal law holding that disparity of evidence causes misjoinder that renders a trial unfair. There was sufficient evidence of Cromartie's guilt in both robberies and shootings. *Cromartie*, 270 Ga. at 782, 514 S.E.2d at 209-10. Also, the evidence for both was straightforward and it seems unlikely the jury confused which crimes—Madison Street Deli versus Junior Food Store—the particular evidence was introduced to establish. Thus, even if joinder was improper, Cromartie has not shown it resulted in an unfair trial. This claim is, therefore, denied.

D. Claim Four: Suppression of evidence and ineffective assistance of counsel for failing to uncover and present the suppressed evidence

1. Suppression of statements

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). A *Brady* violation has three components: "[1]

The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). The prejudice prong is satisfied if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The Court must "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Kyles v. Whitley*, 514 U.S. 419, 436 n.10 (1995). Then, the Court must make a determination about the "cumulative effect." *Id*. at 437.

Cromartie argues that the State suppressed material, exculpatory evidence regarding the identity of the perpetrator of the Madison Street Deli shooting. He states the Thomasville police had in their possession, but failed to turn over to trial counsel, statements from "two disinterested witnesses" who saw Gary Young running from the Madison Street Deli just after Wilson was shot. (Doc. 69 at 67). These "disinterested witnesses" were Keith Reddick and his cousin, Terrell Cochran.[14] (Docs. 21-14 at 145-69; 21-15 at 7-20).

At the state habeas evidentiary hearing, both Reddick and Cochran testified that they told detectives they saw Young running from the area in front of the Madison Street

[14] The Court agrees with Respondent that it is a bit of a stretch to call these two "disinterested." (Doc. 75 at 107). On April 12, 2014, Reddick and Alonzo Brown were walking through the projects when they encountered several men. (Doc. 17-28 at 6, 32). According to Reddick, there were four men: Gary Young, Corey Clark, Ray Cromartie, and, possibly, Carnell Cooksey. (Docs. 17-28 at 8, 13-16, 18; 21-14 at 148-49). According to Brown, there were three men, who he could not identify at the time, but later learned were Young, Clark, and Cooksey. (Doc. 17-28 at 33-39.). Both Reddick and Brown testified that Young grabbed Reddick, placed a gun to his head, and robbed him. (Docs. 17-28 at 13; 21-14 at 148-50). In the record, this robbery is referred to as the "strong-arm robbery." (Doc. 21-14 at 72, 114, 123). While Cochran was not a victim, witness, or in any way connected to the strong-arm robbery, he is Reddick's cousin. (Doc. 21-14 at 145). Thus, Reddick and Cochran, had, as found by the state habeas court, "clear motives to be biased against Mr. Young." (Doc. 23-37 at 51).

Deli on April 7, 1994. (Docs. 20-47 at 30-33; 21-14 at 147; 21-15 at 11-12, 14; 21-31 at 9-10, 15-16). Both claimed that had trial counsel asked, they would have told them what they saw that night. (Docs. 20-47 at 31, 33; 21-31 at 10). The state habeas court found this claim was procedurally defaulted and Cromartie failed to prove cause and prejudice or a fundamental miscarriage of justice to overcome the default. (Doc. 23-37 at 18-50). Alternatively, the state habeas court found Cromartie's *Brady* claim was meritless. (Doc. 23-37 at 50-54). This Court looks at both determinations.[15]

The state habeas court found Cromartie failed to show cause to overcome procedural default or suppression to establish the second element of his *Brady* claim because he failed to prove Cochran and Reddick told anyone they saw Young running from the Madison Street Deli. (Doc. 23-37 at 21-23, 32-36, 51-52). Thus, he failed to "first establish that there was something for the State to suppress." *Bishop v. Warden*, *GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013). Also, trial counsel were aware that detectives interviewed Cochran and Reddick and trial counsel had access to both of these witnesses. (Doc. 23-37 at 19, 52-53). Thus, there could be no State

[15] Normally, when a state court rules in the alternative, finding both a procedural default and addressing the merits of a claim, as the state habeas court did with Cromartie's *Brady* claims, this Court should apply the procedural bar and decline to reach the merits of the claim. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Richardson v. Thigpen*, 883 F.2d 895, 898 (11th Cir. 1989). However, due to the overlap between cause and prejudice and the underlying *Brady* claim, this Court addresses both. Because the Court considers the merits of Cromartie's *Brady* claim, there is no need to address, at length, his arguments for getting around the procedural bar. The Court notes, however, Cromartie's argument that the state habeas court's procedural bar determination should be ignored because its analysis "was interwoven with the underlying merits" of the *Brady* claim is meritless. (Doc. 69 at 73). Courts frequently combine their procedural default and *Brady* analyses because cause and prejudice necessary to overcome procedural default "'parallel two of the three components of the alleged *Brady* violation itself.'" *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler*, 527 U.S. at 282). Also, Cromartie's allegation that procedural default should be excused because he "can demonstrate innocence of the death penalty" is meritless. (Doc. 69 at 77). Evidence allegedly kept from the jury due to the *Brady* violation—statements from Cochran and Reddick that they saw Young running from the Madison Street Deli on April 7, 1994—coupled with other witness recantations fail to show that Cromartie is actually innocent of the death penalty for murdering Slysz at the Junior Food Store on April 10, 1994. *In re Davis*, 565 F.3d 810, 825 (11th Cir. 2009) (finding that recantations of previous testimony "are viewed with extreme suspicion by the court") (quotation marks and citations omitted).

suppression. *Maharaj v. Sec'y for the Dep't of Corr*., 432 F.3d 1292, 1315 (11th Cir. 2005) (stating that "[w]here defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government.") (quotation marks and citations omitted); (Doc. 23-37 at 49-54).

The state habeas court also found that Cromartie could not establish prejudice or *Brady* materiality. (Doc 23-37 at 36-49, 54). Specifically, the court held that Cromartie "failed to show that had the jury heard the easily impeachable evidence of Reddick or Cochran there was a 'reasonable probability' 'that the outcome of' [Cromartie's] death penalty trial 'would have been different.'" (Doc. 23-37 at 54).

The record supports these findings. The State file Cromartie relied on to support his suppression argument showed only that Cochran and Reddick had spoken with detectives—something no one has ever disputed. (Doc. 21-27 at 107). It did not show that either reported seeing Young running from the Madison Street Deli on April 7, 1994. Cromartie deposed numerous detectives or, according to the state habeas court, "nearly the entire Thomasville police force that was involved in [Cromartie's] case and the District Attorney's Office" (Doc. 23-37 at 51), and none of them testified that Cochran or Reddick reported seeing Young running from the Madison Street Deli. (Docs. 21-31 at 20-52, 187-257; 21-32 at 161-202; 23-15 at 62-113). As the state habeas court pointed out, Cromartie has the burden of proving suppression and while state habeas counsel deposed all of these detectives, they never actually asked any of them if Cochran or Reddick said they saw Young running from the Madison Street Deli on April 7, 1994. (Doc. 23-37 at 32-34).

In short, Cochran's and Reddick's testimony was the only evidence that Cromartie presented to establish the existence of the alleged suppressed evidence. The state habeas court found their testimony to be unreliable for numerous reasons: both had lengthy criminal records (Doc. 23-37 at 40-41); both were biased for various reasons (Docs. 21-14 at 149-50, 164; 21-15 at 17; 23-37 at 42, 44, 51); Reddick changed his story numerous times and provided contradictory affidavits (Docs. 21-14 at 162-63; 23-37 at 41-43); neither testified that they heard a gunshot on the night of April 7 (Docs. 21-14 at 148; 23-37 at 40, 51); and Cochran unbelievably stated that he was interviewed by trial counsel (or their investigators), but just never mentioned seeing Young running from the Madison Street Deli.[16] (Docs. 21-15 at 13, 16; 23-37 at 44-45). Given these findings, which are supported by the record, the state habeas court found "Reddick's and Cochran's testimony is lacking in credibility and does not support [Cromartie's] allegation that the State was in possession of favorable evidence." (Doc. 23-37 at 52). "In the absence of clear and convincing evidence, we have no power on federal habeas review to revisit the state court's credibility determinations." *Bishop*, 726 F.3d at 1259. Cromartie has made no such showing, and, therefore, this Court cannot reconsider the credibility of these two witnesses, both of whom were observed first-hand by the state habeas court. While this finding alone precludes Cromartie's *Brady* claim, the Court addresses his various arguments.

[16] Cochran stated that trial counsel only spoke with him regarding the April 12, 1994 strong-arm robbery, and they asked him no questions about the Madison Street Deli shooting. (Docs. 21-15 at 13, 16; 23-37 at 44-45). The state habeas court found this unlikely because Cochran was not involved in any way with the strong-arm robbery; he was not a victim, not a perpetrator, and not a witness. Plus, trial counsel had "linked" Cochran to the Madison Street Deli shooting, and Cochran was mentioned in trial counsel's file only in connection with the Madison Street Deli shooting. (Doc. 21-14 at 99). Thus, as the state habeas court found, it was unlikely that trial counsel would have failed to ask Cochran about the Madison Street Deli when they interviewed him. (Doc. 23-37 at 23-30, 44-45).

Cromartie argues that the state habeas court's decision does not deserve deference because it contains unreasonable factual determinations and is contrary to, or unreasonably applies, *Brady*. First, relying on the detective's case summary notes, Cromartie argues that the state habeas court made an unreasonable factual determination when it "concluded that Mr. Cromartie failed to demonstrate that Mr. Cochran and Mr. Reddick gave a total of four statements to police." (Doc. 69 at 81).

The case summary notes show that on April 11, 1994, Detectives Chuck Weaver and Willie Spencer interviewed David McNeill, who informed them he overheard Cochran telling others "THAT HE HEARD THE SHOTS AND THEN HE AND SOME OTHER GUYS STANDING OUT FRONT, RAN."[17] (Doc. 21-27 at 107). According to the notes, the detectives

> FOUND TERRELL COCHRAN . . . . DET. WILLIE SPENCER WROTE OUT A STATEMENT BY COCHRAN. TERRELL COCHRAN DID SIGN THIS STATEMENT AT 1245 HOURS ON 4-11-94. TERRELL ADVISED THAT KEITH REDDICK WAS WITH HIM. AT THIS TIME WE ARE LOOKING FOR KEITH REDDICK TO GET A STATEMENT FROM HIM CONCERNING WHAT THEY HEARD CONCERNING THIS ROBBERY.

(Doc. 21-27 at 107). Notes dated April 12, 1994 show that Weaver talked with Spencer and Guy Winklemann and "THEY HAVE REINTERVIEWED TERRELL COCHRAN AND KEITH REDDICK. NAMES GIVEN ARE KEITH REDDICK, JAMAL HAYES, KEVIN WILLIAMS, ERIC SCOTT, DEON COLEMAN AND MARCO LNU." (Doc. 21-27 at 107).

The state habeas court did not, as Cromartie argues, find Cromartie failed to prove that Cochran and Reddick gave four statements to the detectives. (Doc. 69 at 81).

[17] In his brief before this Court, Cromartie tries to manipulate this sentence to support his suppression argument. Citing these same case summary notes, Cromartie states that, "According to McNeil, one of the men, Terrell Cochran, heard the shooting take place **and saw a man run out of the deli immediately afterwards**." (Doc. 69 at 69) (citing Doc. 21-27 at 107) (emphasis added). This is a misstatement. These notes do not show that Cochran reported seeing a man running from the Madison Street Deli. Instead, they clearly show Cochran reported he ran when he heard shots. (Doc. 21-27 at 107).

Instead, it found there was one written statement, which was missing, and Cromartie failed to prove any other statements "were memorialized or contained exculpatory information." (Doc. 23-37 at 32). It also found that "there is no evidence that the one written statement and the three other interviews of Reddick and Cochran produced any exculpatory evidence or information that Mr. Young was seen running from the Madison Street Deli on the night of the crime." (Doc. 23-27 at 36).

These findings are supported by the case summary notes and testimony from detectives Weaver, Spencer, and Winklemann. (Docs. 21-32 at 161-202, 257-86; 21-33 at 1-50; 23-15 at 62-113). The case summary notes show that Spencer had Cochran sign one written statement. This statement has never been found. Spencer testified that he would have turned over any written statements to Weaver, who was the lead investigator on the case. (Doc. 21-32 at 175, 177-78). Weaver could not recall if any of Cochran's or Reddick's statements were made part of the file and he left the Thomasville Police Department during the investigation. (Doc. 21-33 at 32-34). None of the detectives recalled what Cochran or Reddick told them and, while Spencer said any statement should have been written, none of the detectives could specifically recall obtaining written statements from Cochran or Reddick. (Docs. 21-32 at 198; 21-33 at 32-34; 23-15 at 95, 97, 99). Winklemann testified that he did not recall what Cochran or Reddick said in their re-interview or whether he "memorialized" the re-interviews. (Doc. 23-15 at 98-99). He stated they would not necessarily obtain a written statement every time they interviewed someone: "If they weren't suspects and they couldn't give us anything pertinent to the case, then they were probably released without any documentation." (Doc. 23-15 at 102). Given the record, the state habeas court's

factual findings that one written statement was missing and that Cromartie failed to show the other statements were memorialized or exculpatory were reasonable. *Holsey*, 694 F.3d at 1257 (stating that a factual finding is "unreasonable only if no 'fairminded jurist' could agree" with it) (citations omitted).

Next, Cromartie argues that the state habeas "court's imposition of a due-diligence standard [on trial counsel] is contrary to *Brady* and its progeny." (Doc. 69 at 80). It is not. The underlying "'purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him.'" *United States v. Valera*, 845 F.2d 923, 927 (11th Cir. 1988) (citations omitted). There is no *Brady* violation if the defendant could have obtained the evidence with reasonable diligence. *LeCroy v. Sec'y., Fla. Dep't of Corr*., 421 F.3d 1237, 1268 (11th Cir. 2005) (citing *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989)).

Finally, Cromartie claims that even if *Brady* imposes a diligence requirement on trial counsel, "the manner in which the state-habeas court imposed that requirement here was objectively unreasonable." (Doc. 69 at 80). He states that

> [t]he state-habeas court concluded that counsel should have known about the Reddick and Cochran statements because counsel knew from the police summary report that the pair talked to the police about the Madison Street Deli shooting. But that is a non sequitur; the *Brady* violation was the suppression of the *statements*, not the suppression of the fact that police talked with the two witnesses.

(Doc. 69 at 80). Quoting *Strickler*, Cromartie argues that "simply because an attorney is on notice that a witness has talked to police, 'it by no means follows that [defense counsel] would have known that records pertaining to those interviews . . . existed and had been suppressed.'" (Doc. 69 at 80) (quoting *Strickler*, 527 U.S. at 285).

Unlike the situation in *Strickler*, the state habeas court reasonably found that Cromartie did not even establish the existence of the alleged statements from Cochran and Reddick. (Doc. 23-37 at 19, 21-22, 36, 45). Thus, there was nothing to suppress. But, even if the Court assumes the statements did exist, there was still no "suppression" under *Brady* because reasonably diligent counsel could have obtained the information in the statements. In *Strickler*, the witness whose notes and letters the State suppressed refused to speak with trial counsel prior to trial. 527 U.S. at 285 n.27. There was, therefore, no reasonable way for trial counsel to learn the information contained in the notes and letters. Here, both Cochran and Reddick testified that they "would have told Mr. Cromartie's lawyers or investigators about seeing Gary Young had they asked . . . about the Madison Street Deli shooting." (Doc. 21-31 at 10, 16). Thus, assuming that Cochran and Reddick actually saw Young running from the Madison Street Deli on April 7, 1994, this information was available to trial counsel. (Doc. 23-37 at 52).

Having determined that the state habeas court's factual findings and application of the law were reasonable, there was "necessarily at least one reasonable basis on which the [Georgia Supreme Court] could have denied relief."[18] *Wilson*, 834 F.3d at 1239. This Court, therefore, must deny relief.[19]

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[18] Alternatively, the state habeas court found Cromartie's *Brady* claim was procedurally defaulted. (Doc. 23-37 at 18-50). If the Court assumes the Georgia Supreme Court's denial of relief "rests on the same *general* ground[,]" Cromartie has not shown cause and prejudice, or a fundamental miscarriage of justice, to overcome this default. *Wilson*, 834 F.3d at 1236.

[19] Cromartie argues that the Court should allow him to conduct discovery to obtain all documents, records, reports, statements, and notes in the possession of the Thomasville Police Department, Thomas County Sheriff's Office, District Attorney's Office, GBI, and Georgia Department of Corrections that relate to or refer to statements made by Reddick and Cochran about the Madison Street Deli shooting. (Doc. 69 at 179-80). While the state habeas court found Cromartie's *Brady* claim procedurally defaulted, it also reached the merits of the claim and denied relief. This Court's review, therefore, is "limited to the record that was before the state court" and discovery should not be allowed. *Pinholster*, 563 U.S. at 181. Also, Cromartie's state habeas was pending for over eight years before the state habeas evidentiary hearing and, during that time, Cromartie received hundreds of records from these State agencies and deposed

2. Ineffective assistance of counsel regarding the allegedly suppressed statements

Strickland v. Washington is unquestionably the clearly established federal law for all ineffective assistance of counsel claims. 466 U.S. 668 (1984); *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *Wong v. Belmontes*, 558 U.S. 15, 16 (2009).

To establish deficient performance, Cromartie "must show that counsel failed to act 'reasonabl[y] considering all the circumstances.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, Cromartie must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because Cromartie must establish both deficient performance and prejudice, if he fails to establish one, the Court need not analyze the other. *Boyd v. Allen*, 592 F.3d 1274, 1293 (11th Cir. 2010).

Cromartie argues that trial counsel were ineffective for failing to procure and present Reddick's and Cochran's statements that they saw Young running from the Madison Street Deli. (Doc. 69 at 75). Cromartie states that he failed to brief this claim

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numerous law enforcement officers. (Docs. 19-14; 21-14 to 23-20; 23-37 at 51). Even Cromartie admits that "the existence of the Cochran and Reddick statements has already been subject to substantial litigation in state court." (Doc. 69 at 181 n.35). Cochran's written statement referenced in the April 11, 1994 case summary notes was not found during the many years that this case was pending before the state habeas court. Cromartie gives the Court no reason to believe that it will be found now and no reason to believe, other than Cochran's own discredited testimony, that it contains exculpatory information. The Court, therefore, **DENIES** Cromartie's request for discovery for Claim Four. (Doc. 69 at 181).

before the state habeas court, the state habeas court deemed the claim waived, and the claim is, therefore, procedurally defaulted. (Doc. 69 at 75). Respondent argues the state habeas court addressed the claim on the merits and denied relief. The record shows Respondent is correct.

In Claim One of his amended petition for writ of habeas corpus, Cromartie alleged misconduct by the prosecutorial team and stated that "[t]o the extent that the suppressed favorable evidence might have been available to [Cromartie], but his counsel failed to obtain and effectively utilize the information, counsel [were] ineffective . . . ." (Doc. 20-22 at 5, n.1). In Claim Two, he alleged trial counsel were ineffective for failing to "adequately investigate the Madison Street Deli shooting incident and present evidence at both phases of the trial that would exculpate [Cromartie]." (Doc. 20-22 at 7). He also alleged counsel were ineffective for failing to "investigate and present testimony to implicate other suspects in the shooting incidents for which [Cromartie] was convicted." (Doc. 20-22 at 8).

When discussing Cromartie's *Brady* claim, the state habeas court found that trial counsel "attempted or did in fact interview" Cochran and Reddick prior to Cromartie's trial. (Doc. 23-37 at 23). The state habeas court also found Claim Two was "properly before [the] [c]ourt for review." (Doc. 23-37 at 83). The court discussed the *Strickland* standard and ruled Cromartie "has failed to brief this claim or otherwise present evidence in support thereof, and as he carries the burden of proof, this claim is **DENIED**." (Doc. 23-37 at 85).

Cromartie filed a motion requesting the state habeas court to reconsider this order because Gary Young, who refused to testify during the state habeas hearing (Doc. 21-15

at 23-29), subsequently denied giving Cromartie his gun on the night of the Madison Street Deli shooting. (Doc. 23-42). In the motion for reconsideration, Cromartie argued that the state habeas court had found Cochran and Reddick informed trial counsel that they saw Young running from the Madison Street Deli. (Doc. 23-42 at 15-21). The state habeas court made no such finding. It only found that trial counsel had interviewed or attempted to interview Cochran and Reddick, not that Cochran and Reddick had told them (or anyone else) about seeing Young running from the Madison Street Deli. (Doc. 23-37 at 23). The state habeas court denied the motion for reconsideration, finding: "[Cromartie's] attempt to bolster his ineffectiveness claims with findings from this [c]ourt's [f]inal [o]rder are without merit." (Doc. 24-9 at 3). The Georgia Supreme Court denied Cromartie's CPC application without explanation. (Doc. 24-14). Thus it appears the state courts addressed this particular ineffective assistance claim on the merits. The question for this Court, therefore, is whether Cromartie has shown there was no reasonable basis for the denial of relief. *Wilson*, 834 F.3d at 1235. He has not.

The record shows that trial counsel had the police reports, knew the police had interviewed and obtained statements from various people, including Cochran and Reddick, and knew, based on information obtained from the State, that Cochran and Reddick may have been present at the Madison Street Deli. (Docs. 21-14 at 73-75; 21-26 at 287, 305; 21-27 at 4). Regarding Cochran, trial counsel acknowledged that they "obviously . . . had linked him someway to the Madison Deli" and "were trying to find out what he knew or didn't know." (Doc. 21-14 at 99). Mears stated they would have followed up on any leads they had regarding witnesses to the Madison Street Deli shooting, (Doc. 21-14 at 97), but he simply did not have "any recollection . . . of having

discussed" this with Cochran. (Doc. 21-14 at 117). Trial counsel did have a file with Cochran's name on it but the file was empty, which Mears explained might indicate the defense team was unable to locate Cochran.[20] (Doc. 21-14 at 100). Regarding Reddick, Mears recalled Reddick was a witness in a pre-trial hearing on a motion to exclude the strong-arm robbery as a similar transaction. (Doc. 21-14 at 72). Mears stated he had no recollection of interviewing Reddick, but it was their practice to interview, or attempt to interview, witnesses before any pretrial hearing. (Doc. 21-14 at 72, 75, 117). He testified that "if . . . we thought that he had any knowledge about [the Madison Street Deli shooting], it would have been unusual for us not to have asked him about it." (Doc. 21-14 at 73).

Mears stated that his investigators, not trial counsel, normally interviewed witnesses. (Doc. 21-14 at 65). Investigator Pamela Leonard was "in charge of the investigation." (Doc. 21-14 at 51). Despite bearing the burden of proof on these issues, state habeas counsel offered no testimony from Leonard. Leonard was assisted by David Mack, a "parole advocate," who was brought into the case to help with the investigation and "assist in encouraging Mr. Cromartie to accept [a] plea" that had been offered. (Docs. 21-16 at 33-34; 21-14 at 83). Mack testified that he specifically recalled Cochran and Reddick and remembered that they were never questioned regarding the Madison Street Deli shooting. (Doc. 21-16 at 43-46, 54). He testified that they were questioned only regarding the strong-arm robbery. (Doc. 21-16 at 43-46, 54). The state habeas court found Mack was biased and his testimony lacked credibility for several

[20] Cochran remembered being interviewed but claimed he was only questioned regarding the strong-arm robbery. (Doc. 21-15 at 13-16). As discussed previously, the state habeas court disbelieved this because Cochran had nothing to do with the strong-arm robbery and was only mentioned in trial counsel's files in connection with the Madison Street Deli. (Doc. 23-37 at 25-32).

reasons: (1) it was "improbable" that Cochran would have been questioned about the strong-arm robbery when he had absolutely no connection to that robbery and his only mention in trial counsel's files was in connection with the Madison Street Deli shooting (Doc. 23-37 at 30); (2) records showed Mack had interviewed numerous other individuals, including Tina Washington, Lisa Young, Emmy Clark, Alonzo Brown, Tanya Frazier, Steve Andrews, and Gary Young, but, when questioned at the state habeas hearing, Mack could not recall being at these interviews and remembered nothing at all about them (Docs. 21-16 at 49, 51; 23-37 at 30-31); and (3) Mack gave contradictory statements about his involvement with the investigation (Doc. 23-37 at 30-31). Absent clear and convincing evidence to the contrary, which Cromartie has not presented, this Court presumes the state court's determination that Mack was not credible is correct. *Consalvo v. Sec'y for Dep't of Corr*., 664 F.3d 842, 845 (11th Cir. 2011).

The burden is on Cromartie to demonstrate trial counsel's performance was defective. *Blankenship*, 542 F.3d at 1274 (citations omitted). "Because of this burden, when the evidence is unclear or counsel cannot recall specifics about his actions due to the passage of time and faded memory, we presume counsel performed reasonably and exercised reasonable professional judgment." *Id*. (citing *Romine v. Head*, 253 F.3d 1349, 1357-58 (11th Cir. 2001); *Williams v. Head*, 185 F.3d 1223, 1227 (11th Cir. 1999)). Cromartie was tried in September 1997, and Mears was questioned about his performance almost eleven years later in August 2008. (Doc. 21-14 at 120-21). Trial counsel testified that they normally would have questioned Cochran and Reddick regarding the Madison Street Deli shooting; he just could not recall doing so due to the passage of time. (Doc. 21-14 at 72, 75, 117, 120-21). Thus, the state habeas court

reasonably determined that trial counsel interviewed, or attempted to interview Cochran and Reddick, regarding the Madison Street Deli shooting. Apparently, Reddick and Cochran failed to tell trial counsel, or anyone else, before Cromartie's state habeas proceedings that they saw Young running from the Madison Street Deli shooting.

Having determined that the state courts reasonably found trial counsel's performance was not deficient; the Court need not address prejudice. The Court notes, however, that Cromartie has not shown that had the jury heard the "easily impeachable" testimony from Cochran and Reddick, there is a reasonable probability the result of his trial would have been different. (Doc. 23-37 at 54); *Strickland*, 466 U.S. at 694. Like the underlying *Brady* claim, this ineffective assistance claim turns on credibility. Given their records, their changing stories, and the conflicting testimony and evidence, the state courts reasonably found Cochran's and Reddick's statement that they saw Young running from the Madison Street Deli, which did not surface until Cromartie's state habeas proceedings, to be "unreliable" and "tenuous." (Doc. 23-37 at 54). As such, their testimony would not "have created a reasonable probability of a different outcome at [Cromartie's] death penalty trial." (Doc. 23-37 at 54).

Having found the state habeas court's factual findings and application of *Strickland* were reasonable, the Georgia Supreme Court necessarily had at least one reasonable basis for the denial of relief. *Wilson*, 834 F.3d at 1239. This Court, therefore, denies relief for this claim.

E. CLAIM FIVE: PRESENTATION OF FALSE EVIDENCE

"A *Giglio*[21] claim involves an aggravated type of *Brady* violation in which the suppression of evidence enable[s] the [State] to put before the jury what [it] knew was

[21] *Giglio v. United States*, 405 U.S. 150 (1972).

false or misleading testimony . . . ." *Hammond v. Hall*, 586 F.3d 1289, 1306-07 (11th Cir. 2009) (citing *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008)) (explaining that *Giglio* error, like *Brady*, involves undisclosed evidence). It is fundamentally unfair to obtain a conviction by the known use of false testimony. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Such a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id*. (footnotes omitted); *see Giglio,* 405 U.S. at 154 (finding that "[a] new trial is required 'if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury'") (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)). To prevail, a petitioner must show "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material—i.e., that there is 'any reasonable likelihood' that the false testimony 'could . . . have affected the judgment.'" *Davis v. Terry*, 465 F.3d 1249, 1253 (11th Cir. 2006) (quoting *Giglio*, 405 U.S. at 154). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 269).

Cromartie argues that three key State witnesses—Gary Young, Carnell Cooksey, and Corey Clark—presented false testimony that the State failed to correct.

1. Gary Young

Cromartie makes two arguments regarding Young's testimony. First, he argues that the State failed to correct Young's false testimony that only one criminal charge against him had been dismissed in exchange for his testimony against Cromartie. (Doc. 69 at 85). Second, he argues the State failed to correct Young's "known false" testimony

that he gave Cromartie a gun the night before the Madison Street Deli shooting and that Cromartie told him about shooting the Madison Street Deli clerk. (Doc. 69 at 86-87).

a. Testimony regarding dismissed charges

Young was arrested and indicted for aggravated assault, aggravated battery, and possession of a firearm by a convicted felon in connection with the Madison Street Deli shooting. (Docs. 18-13 at 90-91; 18-22 at 95). He gave a statement implicating Cromartie in the crimes. (Docs. 17-7 at 250-51; 18-14 at 1-37). The State subsequently dismissed charges against Young. Trial counsel questioned Young regarding the dismissal:

> Q. Okay. . . . The case against you from the Madison Street Deli was dismissed some time after you gave your statement to the police; wasn't it?
>
> A. I don't know. . . .
>
> Q. Okay. . . . Were ever any cases dismissed against you for any reason?
>
> A. Was there?
>
> Q. Um-hum (affirmative).
>
> A. The only case dismissed from me was, uh, was this right here.

(Doc. 18-13 at 90).

Cromartie argues "Young did not answer those questions truthfully, and the [State] knew it." (Doc. 69 at 85). He alleges Young failed to disclose that, three years after he gave his statement about the Madison Street Deli shooting and just four months prior to Cromartie's trial, he was arrested for possession with intent to distribute cocaine and marijuana on May 7, 1997.[22] (Doc. 69 at 85). He also argues that Young failed to

[22] Young was arrested on May 7, 1997 because he was "present at the time of the search warrant" when agents searched a residence belonging to Kimberly Bryant. (Doc. 22-1 at 14). Agents found crack cocaine, powder cocaine, and marijuana in her home. (Doc. 22-1 at 14). When Bryant was searched, the

disclose that the State was not going to prosecute him for the "half-kilogram of cocaine" that he had buried in a neighbor's yard.[23] (Doc. 69 at 85). According to Cromartie's argument to the state habeas court, the State agreed not to prosecute Young for these crimes in exchange for his testimony at Cromartie's trial. (Doc. 23-37 at 67).

The state habeas court denied this *Giglio* claim on the merits:

> [Cromartie] alleges the State did not prosecute Gary Young on a drug related offense in exchange for his testimony at trial. The only evidence [Cromartie] presented to this Court to support this portion of his Giglio claim is an indictment and the unsubstantiated testimony of a witness, Kimberly Bryant, who was involved in illegal drug activities. As none of this evidence would have been admissible during [Cromartie's] trial, and does not prove the State had promised Young any type of deal in exchange for his testimony, this Court finds [Cromartie] has failed to prove this Giglio claim.
>
> Three years after Young had provided his statement to the police regarding the crimes for which [Cromartie] received the death penalty, Young was arrested for selling illegal drugs. Other than the indictment stating Young possessed illegal drugs with the intent to distribute, [Cromartie] has failed to present any evidence regarding this alleged crime. [Cromartie] claims Young was not prosecuted for this crime in exchange for his testimony at [Cromartie's] trial however, [sic] there is nothing in the record before this Court to support this contention. It could just as easily be stated that the State did not pursue this case because it lacked the necessary evidence to support a conviction. In fact, [Cromartie] has failed to present any evidence that Young has been involved in any criminal activity since this indictment in 1997.
>
> [Cromartie] also presented the unsubstantiated testimony of Kimberly Bryant that she once informed the police that Young had buried half of a kilogram of cocaine in a neighbor's backyard and the State chose not to arrest Young for this in exchange for his testimony at [Cromartie's] trial.

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agents found marijuana in her pants pocket. (Doc. 22-1 at 14). No drugs were found on Young's person. When interviewed, Bryant told the police that the crack cocaine, powder cocaine, and marijuana belonged to her. (Doc. 22-1 at 14-15, 20). She said that both she and Young were using powder cocaine just before the search, and Young threw some of the cocaine down the kitchen sink as the agents entered her residence. (Doc. 22-1 at 15, 20). Young admitted that he used cocaine, but claimed that he did not know Bryant had any drugs in her home. (Doc. 22-1 at 15).

[23] The only evidence of this crime is an affidavit that Kimberly Bryant gave Cromartie's state habeas counsel. (Doc. 21-31 at 2-3). In the affidavit, she testified that she cooperated with police following her May 7, 1997 arrest and told them Gary Young had buried a cigar box containing "one-half kilo of cocaine" in his neighbor's yard. (Doc. 21-31 at 2-3).

> [Cromartie] cites to a letter written by an officer in the Thomasville Narcotics Vice Division as proof that Ms. Bryant informed the police of Young's actions, however, the letter relied upon does not support [Cromartie's] claim.

(Doc. 23-37 at 67-69) (citations and footnotes omitted). The Georgia Supreme Court denied Cromartie's CPC application without explanation. (Doc. 24-14). The question, therefore, is whether Cromartie has shown there was no reasonable basis for the Georgia Supreme Court to deny relief. *See Wilson*, 834 F.3d at 1235. He has not.

First, Cromartie has failed to show that Young testified falsely at trial. Young was questioned whether any charges against him had been dismissed. He correctly testified that only charges related to the Madison Street Deli shooting had been dismissed. Charges stemming from Young's May 7, 1997 arrest for possession with intent to distribute marijuana and cocaine were still pending at the time of Cromartie's September 1997 trial. (Doc 23-32 at 89-90). No charges have ever been pending or dismissed based on Young's alleged burial of cocaine in his neighbor's yard. Because Young's testimony was not false, there was nothing for the State to correct. *See Hammond*, 586 F.3d at 1307 (finding *Giglio* requires "[t]he testimony or statement elicited or made must have been a false one").

Second, Cromartie presented no evidence to show that the State agreed not to prosecute Young for the May 7, 1997 offense or the buried cocaine in exchange for his testimony in Cromartie's trial. In fact, as the state habeas court found, the evidence suggests that the State did not pursue prosecution for the possession with intent to distribute charges because it did not have enough evidence to secure a conviction. The cocaine and marijuana seized on May 7 were found in Kimberly Bryant's residence and on her person. (Doc. 22-1 at 14-15). She told law enforcement that all of the drugs

belonged to her. (Doc. 22-1 at 14-15). No drugs were found on Young's person. Thus, it is reasonable to assume that law enforcement did not think they could obtain a conviction against Young. The only evidence regarding Young's possession of buried cocaine is an unsubstantiated[24] affidavit from Kimberly Bryant. According to Bryant, she informed the authorities of this cocaine and they dropped all outstanding charges against her.[25] But there is absolutely no evidence the State agreed not to press charges against Young relating to this cocaine if he testified against Cromartie. As Respondent points out, Young certainly did not testify like a witness who hoped to benefit from his testimony. (Doc. 75 at 147). Young repeatedly testified he did not know who shot the clerks at the Madison Street Deli and the Junior Food Store; that he had forgotten any conversation he had with Cromartie; and that he could not recall the statement he gave police about the shootings. (Doc. 18-13 at 43-44, 52, 56-57, 60). He was so un-cooperative, he had to be declared a hostile witness. (Doc. 18-13 at 44).

Third, the record shows trial counsel was well-aware of Young's pending drug charges. In an August 15, 1997 pretrial hearing, trial counsel asked for any additional

[24] Cromartie argues that the state habeas court made an unreasonable finding of fact when it characterized Bryant's affidavit as "unsubstantiated." (Doc. 69 at 93). It did not. There was no other evidence before the state habeas court showing that Young buried "a half kilo of cocaine" in his neighbor's yard. Her affidavit was, therefore, "unsubstantiated." (Doc. 23-37 at 68).

[25] While evidence indicates that charges were dismissed against Bryant because she assisted law enforcement, there is no evidence to support Bryant's statement that her drug charges were dismissed because she told authorities about cocaine Young buried in his neighbor's yard. (Doc. 21-12 at 3). In a December 22, 1997 letter, Agent Kevin Lee requested that the district attorney dismiss Kimberly Bryant's pending drug charges because she "assisted Agent Lee in arresting a subject with over two ounces of cocaine" and in "arresting two subjects for Possession of Cocaine with Intent to Distribute and one subject with Possession of Marijuana with Intent to Distribute." (Doc. 20-41 at 17). Lee states he "could not have arrested these subjects without the help of Kimberly Bryant." (Doc. 20-41 at 17). The letter does not mention Young. The letter mentions four arrests as a result of Bryant's tips, and Young was not arrested following Bryant's alleged tip regarding the buried cocaine. And the letter mentions the seizure of drugs while no drugs were seized from Young following Bryant's alleged tip. It therefore seems unlikely that the dismissal of charges against Bryant had anything to do with information she provided about Young's buried cocaine.

mitigating evidence that the State might have. (Doc. 17-27 at 21). The State responded that "Young, as they're well aware of, has been arrested. He's in jail but not been convicted of anything." (Doc. 17-27 at 22). On August 21, 1997, trial counsel requested a certified copy of the "charging docs." for Young's 1997 "Poss./Distribution." (Doc. 17-6 at 210-11). Trial counsel's files show the booking number and date of Young's May 1997 arrest and contain copies of Young's Thomas County Detention Center records following his drug arrest. (Doc. 22-12 at 200, 218-22). Thus, there simply was no "undisclosed evidence." *Ventura v. Att'y Gen., Fla*., 419 F.3d 1269, 1276-77 (11th Cir. 2005) (explaining that "*Giglio* error is a species of *Brady* error that occurs when 'the **undisclosed evidence** demonstrates that the prosecution's case included perjured testimony.'") (emphasis added) (citations omitted).

Citing *Davis v. Alaska*, 415 U.S. 308 (1974), Cromartie argues the state habeas court unreasonably found the indictment for Young's May 7, 1997 offense would not have been admissible at trial and unreasonably found that, other than the indictment, Cromartie failed to present any evidence regarding the May 7, 1997 offense. Cromartie argues that

> [i]t was not necessary for Mr. Cromartie to present any evidence of the underlying crime to impeach Mr. Young. Under *Davis*, Mr. Cromartie needed simply to present evidence that Mr. Young had a pending drug-dealing case at the time of his testimony to demonstrate Mr. Young's motive to curry favor with the [S]tate. Mr. Cromartie never had this opportunity because the prosecutor failed to disclose the charges, and then failed to correct Mr. Young when he was asked on cross examination about his criminal cases.

(Doc. 69 at 92).

Cromartie's arguments fail for several reasons. Most significantly, the Court fails to see the relevance of *Davis*. In *Davis*, the Court held that the petitioner was denied his

rights under the Confrontation Clause to adequately cross-examine a witness when the court prohibited trial counsel "from making inquiry as to the witness' being on probation under a juvenile court adjudication." 415 U.S. at 313. In this case, Cromartie is not arguing that the trial court prohibited trial counsel from inquiring into Young's pending criminal charges. Instead, Cromartie is arguing that the State knowingly allowed Young to testify falsely when he said no other criminal charges against him had been dismissed. But, this testimony was not false. The State had not dismissed any other case against Young. Young's drug charges came three years after he gave his statement to police, and these charges were still pending at the time of Cromartie's trial. Also, the record belies Cromartie's argument that trial counsel could not inquire into Young's pending drug charges because the State "failed to disclose the charges." (Doc. 69 at 92). As explained above, the record clearly demonstrates that the State was not hiding Young's pending charges. (Doc. 17-27 at 22).

b. Young's changing testimony

Cromartie argues that Young testified falsely when he stated that he gave Cromartie his gun before the Madison Street Deli shooting and that Cromartie told him about shooting the Madison Street Deli clerk. (Doc. 69 at 86). The only evidence to support this allegation is Young's state habeas recantation of his testimony, which the state habeas court found to be "unreliable."[26] (Doc. 24-9 at 2). Other than alleging Young was "pressured when interviewed by police" and "knew many details of that

[26] Young's testimony was constantly changing. He initially told police that he did not know where Cromartie got the gun. (Doc. 18-13 at 68, 80-81). Next, he told police he gave Cromartie the gun. (Doc. 17-7 at 250-51). At trial, he claimed to have no knowledge of who shot the clerk at the Madison Street Deli and stated that he forgotten any conversations he previously had with Cromartie. (Doc. 18-13 at 43-44, 52). Then he acknowledged Cromartie told him that he shot the Madison Street Deli clerk, but he could not recall Cromartie telling him about the Junior Food Store shooting. (Doc. 18-13 at 52, 56-57).

shooting," Cromartie does not explain how Young's recantation establishes the State "knowingly" used perjured testimony. (Doc. 69 at 86); *Davis*, 465 F.3d at 1253. The state habeas court denied this *Giglio* claim on the merits, finding that Young's recantation "does not show that the State coerced Mr. Young, suppressed evidence regarding Mr. Young's alleged involvement in the Madison Street Deli shooting of Mr. Wilson, or falsely presented testimony from Mr. Young." (Doc. 24-9 at 2) (citations omitted). The state habeas court determined that:

> Although Mr. Young has now provided testimony that he did not give his gun to [Cromartie] on the night of the Madison Street Deli incident and that [Cromartie] did not confess involvement in the shootings to Mr. Young, Mr. Young denied he was coerced by the State to fabricate his pre-trial statements or his trial testimony. Additionally, Mr. Young did not provide any testimony that the State suppressed any evidence that Mr. Young was lying or that the State had any reason to know that Mr. Young was testifying falsely at trial.

(Doc. 24-9 at 2-3).

This *Giglio* claim turns, in part,[27] on credibility. "We consider questions about the credibility and demeanor of a witness to be questions of fact," which are "afford[ed] a presumption of correctness." *Consalvo,* 664 F.3d at 845. Cromartie has not presented any, much less clear and convincing, evidence to overcome the presumption that the state habeas court correctly found Young's recantation unreliable. The Court, therefore, denies this claim.

[27] The Court states "in part" because even if Young's recantation was found to be reliable, Cromartie still has not presented any evidence showing the State had reason to know Young was not being truthful in his statement or his trial testimony. In his recantation, Young testified: the authorities did not tell him "to say it was Mr. Cromartie who did the shooting" (Doc. 23-47 at 10); neither the State nor the Thomasville Police Department told him to say that he gave Cromartie his handgun (Doc. 23-47 at 14, 29); and neither the State nor the Thomasville Police Department told him to say that Cromartie confessed to shooting the Madison Street Deli clerk. (Doc. 23-47 at 29). Young's own testimony shows he was not coerced into testifying falsely or that the State had any reason to know he was testifying falsely. Thus, there is no *Giglio* violation. *See Giglio*, 405 U.S. at 154.

2. Carnell Cooksey

Carnell Cooksey was arrested for the April 12, 1994 strong-arm robbery of Reddick and Brown. (Docs. 21-45 at 99-100; 23-15 at 77). When officers started to question him about the robbery, he reported that he had information about the Madison Street Deli and Junior Food Store shootings. (Docs. 21-45 at 103; 23-15 at 77). In his pretrial statement and during trial, Cooksey testified: He was at Tina Washington's house on the night of the Madison Street Deli shooting and witnessed Young give Cromartie a handgun (Docs. 18-12 at 107-08; 21-45 at 104-05, 108-09, 113); Cromartie and others showed up at Tonya Frazier's house with a case of Budweiser on the night of the Junior Food Store shooting (Docs. 18-12 at 113; 21-45 at 107, 109-10, 117); and Cromartie told him he shot the clerk at the Junior Food Store twice in the face, was unable to open the cash register, and grabbed some beer and ran. (Docs. 18-12 at 114, 117-18; 21-45 at 110, 120). Cooksey also told investigators he was drunk during the weekend of the Junior Food Store shooting and admitted on cross-examination during trial that he had "been drinking a pretty good bit" and was "pretty drunk" on the night of the Junior Food Store shooting. (Docs. 21-45 at 118-19; 18-12 at 123).

Eight years after Cromartie's trial, Cooksey changed his story. In a September 17, 2005 affidavit, Cooksey stated: The Thomasville police threatened to charge him with murder and send him to the electric chair for the Madison Street Deli and Junior Food Store shootings (Doc. 21-31 at 11-12); the police suspected Young's involvement in these shootings and to protect Young, Cooksey told the investigators that he "thought Jeff Cromartie did the shootings" (Doc. 21-31 at 12); Cromartie never told him that he shot anyone (Doc. 21-31 at 13); Young and Corey Clark told him that Cromartie shot the

Madison Street Deli and Junior Food Store clerks (Doc. 21-31 at 13-14); he did not see Young give Cromartie his gun (Doc. 21-31 at 13); he was drunk on the night of the Junior Food Store shooting and has no recollection of that night (Doc. 21-31 at 13); he does not know who shot the clerks at either of the convenience stores (Doc. 21-31 at 14); and the police threatened to arrest him if he did not testify at Cromartie's trial. (Doc. 21-31 at 14).

Approximately three years later, at Cromartie's state habeas evidentiary hearing, Cooksey testified that he implicated Cromartie because the police told him to:

> A. And I told them what I had heard from them because, like I said, I was scared. And sometimes during the questioning they would turn the tape off.
>
> Q. What would happen when they'd turn the tape off?
>
> A. They would, like, not actually tell me what to say but they would put it in a question form, what to say. So, and once they done that they'd turn the tape back on and ask the question again, and I would just pretty much say what they wanted to hear.

(Doc. 21-14 at 129-30). He testified that he never saw Young give his gun to Cromartie and he does not know what happened at either the Madison Street Deli or the Junior Food Store. (Doc. 21-14 at 130).

The state habeas court addressed Cromartie's argument that the State coerced Cooksey into providing false testimony. It found Cromartie had "failed to present any corroborating evidence to support his allegations and, more importantly, failed to show that the State was aware that Cooksey allegedly testified falsely during [Cromartie's] trial." (Doc. 23-37 at 70). The court pointed out that, until the state habeas hearing, Cooksey never indicated that the police pushed him to implicate Cromartie. (Doc. 23-37 at 71-72). That allegation was at odds with his 2007 affidavit, in which he testified that he implicated Cromartie because he was scared and wanted to protect Young, on whom the police

were focusing. (Doc. 23-37 at 71-72). The allegation was also at odds with testimony from one of the interviewing officers, who said Cooksey voluntarily started talking about the murder at the Junior Food Store. (Doc. 23-37 at 71). Also, the police transcripts did not show any evidence of coercion.[28] (Doc. 23-37 at 73-75). The state habeas court also noted that the level of detail Cooksey provided in his pretrial statement contradicted his more recent claim that Cromartie did not tell him about the Junior Food Store shooting and that he was too drunk to remember what happened the night of that shooting.[29] (Doc. 23-37 at 74). Ultimately, the state habeas court found Cromartie failed to prove Cooksey's trial testimony was false and failed to show the State knew that Cooksey was allegedly testifying falsely. (Doc. 23-37 at 70).

Cromartie argues that the state habeas court made an unreasonable factual determination when it "rejected this claim on the basis that Mr. Cromartie 'failed to present any corroborating evidence to support his allegations.'" (Doc. 69 at 93) (quoting Doc. 23-37 at 70). Cromartie cites Young's recantation as corroboration of Cooksey's testimony that he did not see Young give Cromartie his gun on the night of the Madison Street Deli shooting. (Doc. 69 at 93). But, it was only after the state habeas court

[28] The state habeas court also pointed out that, contrary to Cooksey's testimony that he was scared of being charged with the Madison Street Deli and Junior Food Store shootings, there was no evidence in the record showing that he was ever suspected or accused of these crimes. (Doc. 23-37 at 72-73).

[29] To support its finding that Cooksey provided detailed information about the night of the Junior Food Store shooting, the state habeas court quoted this portion of Cooksey's pretrial statement to police: "So I'm not gonna (sic) say who went with him. I'm not gonna (inaud). So, he, uh, they came back with some beer. I woke up bout (sic) round four or five and they had some beer in the refrigerator. And it was busted. It was a case of Budweiser. Twelve ounce cans. It was busted and some of it had mud on it. And so, after that, you know, I asked them where'd they get it from. Then, you know [Cromartie], called me and [Young] out the door and told us. You know, what went on. Say he shot the clerk in the face twice. Then he tried to open the cash register. He got the beer first. He tried to open the cash register and he couldn't. So, he grabbed the beer and ran out the store. And he say he was droppin (sic) it and he was runnin (sic), pickin (sic) it up and he said he dropped two of em (sic) that he hadn't picked up. They [were] in a mud puddle. And he left those two there. And that was basically what happened. And he say he didn't have any more shells. Say he didn't have but two shells when he went." (Doc. 23-37 at 74-75) (quoting Doc 21-45 at 110).

issued its February 8, 2012 final order that Cromartie came forward with Young's recantation. (Doc. 24-9 at 1). Therefore, at the time the state habeas court found Cooksey's recantation uncorroborated, it was, in fact, uncorroborated. After receiving "an affidavit from Gary Young in support of [Cromartie's] *Brady* . . . and *Giglio* . . . claims," the state habeas court reopened the evidence to allow Young to be deposed. (Doc. 24-9 at 1). After considering Young's testimony, the state habeas court found, "the affidavit and deposition testimony of Mr. Young do not justify vacating this [c]ourt's final order." (Doc. 24-9 at 3). Cromartie has not shown that the state habeas court unreasonably decided not to use Young's recantation testimony, which it found to be lacking in credibility, to support Cooksey's recantation, which it also found to be lacking credibility. Plus, as Respondent points out, even if Young's recantation supports Cooksey's claim that he never saw Young give Cromartie his gun, it does nothing for Cooksey's claim that the police coerced him into implicating Cromartie. Without this, Cromartie has not established that the State knowingly used false testimony and, therefore, has not asserted a viable *Giglio* claim.

As with Young, the state habeas court was in the best positon to determine Cooksey's credibility. "Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review." *Consalvo*, 664 F.3d at 845. Cromartie has not presented clear and convincing evidence to overcome the state court's determination that Cooksey's recantations and claims of police coercion lack credibility. The Court, therefore, denies relief.

3. Corey Clark

Clark, one of Cromartie's co-defendants, testified that Cromartie shot Slysz. (Doc. 18-15 at 140, 144). Clark testified that he was with Cromartie in the Junior Food Store on April 10, 1994, and he was originally charged with being a party to the crimes of murder and armed robbery. (Doc. 18-15 at 130, 147). He testified that he could have been sentenced to death if found guilty of murder. (Doc. 18-15 at 149). Instead, in exchange for his testimony against Cromartie, he was allowed to plead guilty to robbery and hindering the apprehension of a criminal. (Doc. 18-15 at 130, 149, 153). He was sentenced to twenty-five years in prison. (Doc. 18-15 at 130). Clark testified that when he decided to plead guilty, he did not know he would receive the twenty-five year sentence. (Doc. 18-15 at 131). Clark told the jury that the murder and armed robbery charges were dismissed "all in exchange for [his] testimony." (Doc. 18-15 at 153, 184).

Clark submitted an affidavit to the state habeas court in which he claimed he had an additional, undisclosed inducement to testify against Cromartie: His trial counsel, Gail Lane, told him the prosecutor would reduce his sentence to five years in exchange for his testimony. (Doc. 21-31 at 7).

Cromartie maintains that the state habeas court found this claim procedurally defaulted. (Doc. 69 at 89-90). The state habeas court found some of Cromartie's *Giglio* claims related to Clark were procedurally defaulted, but not this particular one. In the state habeas proceedings, Cromartie made several *Giglio* arguments concerning Clark's testimony. Specifically, he argued that Clark's testimony at trial was false and misleading because it was inconsistent with his pretrial statement to police, an August 24, 1994 letter Clark wrote to the District Attorney's office, and his testimony during his guilty

plea. (Doc. 23-37 at 55). The state habeas court found that claim procedurally defaulted:

> Clark's statements and testimony prior to trial were in the possession of trial counsel and therefore available for argument at trial, at [Cromartie's] motion for new trial and on direct appeal. Consequently, the [c]ourt finds this Giglio claim is procedurally defaulted as [Cromartie] has failed to provide this Court with an argument showing cause to overcome the procedural bar to this claim.

(Doc. 23-37 at 55-56).

But that is not the claim he makes here. Again, his claim here is that Clark's attorney informed him the prosecutor offered an unwritten deal of five years in prison if Clark testified against Cromartie. Cromartie also made this claim in the state habeas court, and the court denied relief on the merits, finding Cromartie "failed to prove the necessary prongs of his Giglio claim" because he "failed to present any credible evidence that Clark was promised a reduction in his sentence following his testimony at [Cromartie's] trial." (Doc. 23-37 at 67). The Georgia Supreme Court then denied relief without explanation. (Doc. 24-14). To obtain habeas relief, Cromartie must show there was no reasonable basis for that denial. *See Wilson*, 834 F.3d at 1235. He has not done so.

As the state habeas court found, Clark's affidavit was the only evidence offered to support Cromartie's claim that Clark was offered an unwritten deal of five years if he testified against Cromartie. (Doc. 23-37 at 64). Clark refused to testify at Cromartie's state habeas evidentiary hearing.[30] (Doc. 21-15 at 22). His trial counsel, who had allegedly informed him of the unwritten plea deal, did testify. Lane testified that there

[30] Respondent subpoenaed Clark to appear at the state habeas evidentiary hearing. (Doc. 21-15 at 20). As it did with other witnesses who had previously testified at Cromartie's trial, the state habeas court advised Clark of the penalties for perjury in a death penalty case. (Doc. 21-15 at 21-22). Clark invoked his Fifth Amendment rights and refused to testify. (Doc. 21-15 at 22).

was no agreement ahead of time as to what Clark's sentence would be when he pleaded guilty. (Doc. 21-16 at 7). Instead, it was a "blind plea," in which the sentence was left up to the judge. (Doc. 21-16 at 7). She testified that "all of us expected the maximum sentence," and she never would have told Clark that he would only receive five years. (Doc. 21-16 at 7). She stated that "a five year sentence under the circumstances of this case was just totally outside the realm of possibility." (Doc. 21-16 at 7). Lane unequivocally refuted Clark's allegation that she informed him the twenty-five year sentence would be reduced following his testimony at Cromartie's trial. (Doc. 21-16 at 9, 22-23). The state habeas court found that Lane's live testimony "effectively rebutted" Clark's affidavit testimony. (Doc. 23-37 at 64).

As with Young and Cooksey, Cromartie's *Giglio* claim involving Clark turns on credibility. As such, the Court presumes the state habeas court correctly credited Lane's live testimony over Clark's affidavit testimony. Cromartie has not presented clear and convincing evidence to overcome this presumption of correctness. *See Consalvo*, 664 F.3d at 845.

Having found the state habeas court's factual findings and application of *Giglio* were reasonable, the Georgia Supreme Court necessarily had at least one reasonable basis for the denial of relief. *See Wilson*, 834 F.3d at 1239. This Court, therefore, denies relief for Claim Five.

F. CLAIMS SIX AND SEVEN: THE MADISON STREET DELI SURVEILLANCE VIDEO

The Madison Street Deli surveillance video from the night of April 7, 1994 is approximately two hours long. (Doc. 18-11 at 147). It is undisputed that Cromartie cannot be identified on the video. (Doc. 18-11 at 216). The State sought to introduce

about twenty minutes of the footage surrounding the actual shooting. (Doc. 18-11 at 208). After a pre-trial hearing, trial counsel objected on the basis of lack of foundation, insufficient chain of custody, and because they had not seen the entire two hours of the video. (Docs. 18-11 at 214-20; 18-12 at 1-3). The trial court gave trial counsel the opportunity to view the entire video and told them to notify the court of any other relevant portions of the video. (Docs. 18-11 at 215, 218-19; 18-12 at 2-3).[31] The trial court informed them that

> unless [it was] shown that something is relevant on that other hour and forty minutes, then [it was] not going to sit here and spend an hour and forty minutes watching something that . . . sheds no light whatsoever and is not going to help these jurors whatsoever in deciding the issues . . . .

(Doc. 18-11 at 215).

After viewing the video, trial counsel argued the entire two hours should be shown to the jury because it shows individuals entering and leaving the convenience store; it was unclear when some of the other customers left the store; and there was a ten to fifteen second break in the tape at some point. (Doc. 18-12 at 6-8). Trial counsel maintained that the jury should be able to consider whether the persons going in and out of the store were "scouting out the store" or acting as a lookout for others. (Doc. 18-12 at 9). The trial court disagreed:

> [A]t this time I do not feel that any portions of the videotape, other than the portions showing the actual incident which is being tried . . . are relevant. You know, the fact that other persons went in the store, the fact that someone might surmise or speculate that someone may have been casing the store, so to speak, or acting as a lookout, so to speak, there's nothing on the videotape to raise more than a bare conjecture or speculation as to that.

(Doc. 18-12 at 11).

[31] The trial court also viewed the entire video. (Doc. 18-17 at 63).

During Cromartie's trial, trial counsel objected again to the admission of the twenty-minute segment of video, again requesting that the entire two hours be shown to the jury or, alternatively, other segments, which they deemed relevant, be played for the jury. (Doc. 18-17 at 62, 64). Trial counsel argued that other individuals going in and out of the convenience store during the two hours shown on the video might be Gary Young, but they acknowledged they could not identify Young on the video. (Doc. 18-17 at 65-66). The trial court stated that "there is no evidence that anyone else, other than one individual that came into the store that is depicted on the video was involved in the [shooting]." (Doc. 18-17 at 73). The trial court, therefore, ruled it would not play the entire two-hour video, but would allow trial counsel to play the portion they alleged might be Young, and any other portion they could establish was relevant. (Doc. 18-17 at 69, 71-74). Trial counsel ultimately objected to playing just a portion of the video on the grounds that they wanted the jury to see the entire two hours. (Doc. 18-17 at 74).

The jurors saw at least a portion of the twenty-minute video twice during Cromartie's trial, the full twenty minutes once at regular speed with audio and the first part of the twenty minute video once in slow motion without audio. (Doc. 18-12 at 86). At the jurors' request, they watched both the regular speed and the slow motion version again during deliberations. (Doc. 18-19 at 36-47). The tape was "too indistinct to conclusively identify Cromartie" and no one testified that Cromartie was the person shown on the tape. *Cromartie*, 270 Ga. at 781, 514 S.E.2d at 209.

Cromartie argues that his rights to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments were violated when the trial court denied his motion to exclude the twenty-minute video. (Doc. 69 at 95). Cromartie states that the video

was irrelevant—it did not reveal the identity of the shooter—and prejudicial—it showed the "pain that store clerk Dan Wilson endured after the shooting as he called for and eventually received help from paramedics." (Doc. 78 at 49). He also argues that, even assuming the introduction of the twenty-minute video was not by itself unconstitutional, his rights to due process and to present a defense under the Fifth, Sixth, and Fourteenth Amendments were violated when the trial court refused to play the entire two-hour video. (Doc. 69 at 98).

On direct appeal, the Georgia Supreme Court held:

> The trial court did not abuse its discretion in admitting, after a proper foundation had been laid, the 20-minute portion of the Madison Street Deli surveillance video that depicted the assailant entering the store, the sound of the shot, the assailant's attempt to open the cash register, and the arrival of law enforcement.
>
> Nor did the trial court err in denying Cromartie's request to show the entire videotape. Cromartie argued that the entire two-hour videotape was relevant because it shows a customer who might resemble his cousin, Gary Young (the man who supplied Cromartie with the murder weapon), enter the store prior to the shooting and also shows unidentified people entering and leaving the store who could have been "scouting" for the shooter. The trial court allowed Cromartie to play for the jury that portion of the videotape showing a customer who may look like Gary Young and stated that it would admit other portions of the videotape if Cromartie identified the specific portions believed to be relevant. Cromartie refused to identify other portions of the videotape he believed to be relevant and instead insisted that the entire videotape be shown. We conclude the trial court did not abuse its discretion in denying the motion to show the entire videotape in that Cromartie failed to show how an hour-and-forty minute depiction of customers shopping at the store was relevant.

Cromartie, 270 Ga. at 786, 514 S.E.2d at 212-13 (citations omitted).

Cromartie faults the Georgia Supreme Court for denying relief in a "conclusory fashion," and argues the decision was "'contrary to' clearly established federal law" because the court failed to cite controlling Supreme Court precedent. (Doc. 69 at 97)

(citation omitted). State courts do not have to provide explanations for their decisions. *Blankenship*, 542 F.3d at 1271. This Court must give the same deference to summary adjudications as it does to those accompanied by explanations into the state court's rationale. *Id*. Also, a state court is not required to "cite or even be aware of Supreme Court precedent." *Clark v. Att'y Gen.*, *Fla*., 821 F.3d 1270, 1282 (11th Cir. 2016) (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)); *see also Esparza*, 540 U.S. at 16 ("A state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [Supreme Court] opinions.") (citation omitted). All that is required of a state court's decision is that it not contradict clearly established federal law. *Esparza*, 540 U.S. at 16 (quoting *Early*, 537 U.S. at 8). The Georgia Supreme Court's decision passes this test.

Without much explanation, Cromartie argues that the Georgia Supreme Court's decision upholding the presentation of the twenty-minute video constituted an unreasonable application of *Dowling v. United States*, 493 U.S. 342 (1990). To the contrary, if anything, this factually-dissimilar case supports the state court's ruling. In *Dowling*, the defendant was tried for bank robbery. 493 U.S. at 344. A witness testified that the defendant, wearing the same type of mask, with the same type of gun, and accompanied by the same accomplice present during the bank robbery, assaulted and robbed her just two weeks after the bank robbery. *Id*. at 344-45. The defendant objected, arguing it was fundamentally unfair to allow this testimony because he had already been acquitted for this assault and robbery. *Id*. at 344, 352-54. The Supreme Court disagreed, finding that while the evidence had the potential to prejudice the jury, it "was at least circumstantially valuable in proving [the defendant's] guilt" in the bank

robbery and was, therefore, properly admitted. *Id*. at 353.

The similarity between the Madison Street Deli shooting and the Junior Food Store shooting was contested, as was the State's contention that the same person committed the crimes at both locations. (Docs. 17-7 at 252-61; 17-8 at 5-7). A co-defendant testified that Cromartie walked in the Junior Food Store, shot the clerk, and unsuccessfully tried to open the cash register. (Doc. 18-15 at 140-41). The twenty-minute video showed the shooter at the Madison Street Deli did the same thing: walked in the store, shot the clerk, and unsuccessfully tried to open the cash register. *Cromartie*, 270 Ga. at 781, 514 S.E.2d at 209. While Cromartie could not be identified on the video, it was "at least circumstantially valuable in proving [his] guilt" because it showed the similarity between the two crimes. *Dowling*, 493 U.S. at 353.

Cromartie alleges that the Georgia Supreme Court's decision upholding the denial of trial counsel's request to play the entire two-hour video was contrary to *Washington v. Texas*, 388 U.S. 14 (1967), *Crane v. Kentucky*, 476 U.S. 683 (1986), and *United States v. Scheffer*, 523 U.S. 303 (1998). (Doc. 69 at 101). His only argument to support this allegation is that the Georgia Supreme Court "failed to identify or even cite" these cases. (Doc. 69 at 101). The fact that the Georgia Supreme Court did not cite these cases does not make its decision contrary to them. *See Clark*, 821 F.3d at 1282. A state court decision is contrary to Supreme Court precedent only when (1) faced with materially indistinguishable facts from a Supreme Court case, the state court arrives at a result different from that reached by the Supreme Court; or (2) the state court applies a rule that contradicts the law set forth in a Supreme Court case. *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000) (citation omitted). The Georgia Supreme Court did neither in this

case.[32] Thus, its decision was not contrary to clearly established federal law.

This Court's review of a state court's decision regarding the admissibility of evidence is extremely proscribed. The Eleventh Circuit has explained that:

> In reviewing the evidentiary determination of a state trial judge, we are mindful of the fact that we do not sit as a super state supreme court. Unlike a state appellate court, we are not free to grant the petitioner relief simply because we believe the trial judge has erred. The scope of our review is severely restricted. Indeed, the general rule is that a federal court will not review a trial court's actions with respect to the admission of evidence. A state evidentiary violation in and of itself does not support habeas corpus relief. Before such relief may be granted, the violation must rise to the level of a denial of fundamental fairness

Shaw v. Boney, 695 F.2d 528, 530 (11th Cir. 1983) (quotation marks and citations omitted). Given this limited scope of review, the Georgia Supreme Court's rulings regarding the Madison Street Deli video are reasonable, both factually and legally.

Even if this Court found an evidentiary error occurred, which it does not, habeas relief is "warranted only when the error 'so infused the trial with unfairness as to deny due process of law.'" *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014) (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)). "In the context of state evidentiary rulings, the established standard of fundamental fairness is that habeas relief will be granted only if the state trial error was material in the sense of a crucial, critical, highly significant factor." *Shaw*, 695 F.2d at 530 (citations and quotations marks

[32] The facts of these three cases have nothing in common with Cromartie's case. In *Washington*, the Court struck down a Texas statute which provided that principals, accomplices, or accessories in the same crime could not be introduced as witnesses for each other. 388 U.S. at 16-17. The Supreme Court found the state law violated a defendant's Sixth and Fourteenth Amendment right to have compulsory process for obtaining witnesses. *Id*. at 19, 23. In *Crane*, the sixteen-year-old defendant was prohibited from introducing testimony describing the length and manner of his interrogation to show his confession was unworthy of belief. 476 U.S. at 686. The Court held that the exclusion of testimony about the circumstances of his confession deprived the defendant of a fair opportunity to present a defense. *Id*. at 691. In *Scheffer*, the Court upheld Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings. 523 U.S. at 317.

omitted). Cromartie has not made such a showing. The Court, therefore, denies relief on these claims.

G. CLAIM EIGHT: SHOE PRINT COMPARISON EVIDENCE

Cromartie alleges that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated by the admission of shoe print comparison evidence. Over trial counsel's objection, Dr. James Howard, a micro-analyst and criminalist with the Georgia Bureau of Investigation, testified as an expert in shoe print identification. (Doc. 18-16 at 13-15). Howard compared two plaster casts of footprints (one right foot and one left foot) from the field adjacent to the Junior Food Store to Cromartie's, Thaddeus Lucas's, Corey Clark's, and Gary Young's shoes. (Doc. 18-16 at 23-31). Howard testified that the plaster casts were similar only to Cromartie's shoes. (Doc. 18-16 at 32).

On direct appeal, the Georgia Supreme Court held:

> Cromartie contends that the trial court erred in denying his motion to suppress plaster cast shoe print evidence, claiming that the comparison of shoes with plaster casts of shoe prints cannot be verified with sufficient scientific certainty to make it admissible in court under the standards set forth in *Harper v. State*, 249 Ga. 519, 523-526 (1), 292 S.E.2d 389 (1982). In *Belton v. State*, 270 Ga. 671, 512 S.E.2d 614 (1999), we held with regard to this very issue that the standards for admissibility relating to scientific principles or techniques set forth in *Harper* are not applicable to shoe print identification because "the comparison of shoe prints to external physical characteristics of particular shoes is not a matter of scientific principle or technique." Moreover, we note that shoe print comparison evidence has been widely admitted for many years in the courts of this State. Accordingly, this enumeration lacks merit.

Cromartie, 270 Ga. at 787, 514 S.E.2d at 213 (citations omitted).

Cromartie argues that the Georgia Supreme Court "failed to cite or apply relevant U.S. Supreme Court precedent" and "[i]ts decision was thus 'contrary to' clearly established federal law." (Doc. 69 at 104) (citation omitted). This is simply incorrect.

"A state court's decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite [the Supreme Court's] opinions." *Esparza*, 540 U.S. at 16 (citation omitted). Cromartie also faults the Georgia Supreme Court for failing to "conduct any meaningful analysis of the reliability of the testimony." (Doc. 69 at 104). As explained above, the state courts are not required to conduct any analysis at all. Allegations that a state court "failed to say enough" and should have "provided a detailed explanation" cannot prevail. *See Evans v. Sec'y, Dep't of Corr*., 703 F.3d 1316, 1329 (11th Cir. 2012) (finding that requiring the state courts to provide detail "smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era") (quoting *Wright v. Moore*, 278 F.3d 1245, 1255 (11th Cir. 2002)).

Cromartie argues that the Georgia Supreme Court's decision involved an unreasonable application of *Dowling* or *Lisenba*.[33] It did not. While factually dissimilar to Cromartie's case, *Dowling* and *Lisenba* both stand for the broad proposition that States are free to adopt their own rules of evidence and procedure as long as the application (or misapplication) of such does not render a defendant's trial fundamentally unfair. *Dowling*, 493 U.S. at 352-53; *see also Lisenba*, 314 U.S. at 228. This Court cannot find the trial court's admission of shoe print testimony rendered Cromartie's trial fundamentally unfair.

As Respondent points out, expert testimony that Cromartie's shoe was similar to a shoe found near Junior Food Store was not the "linchpin" of the State's case against

[33] *Dowling* is discussed above. In *Lisenba*, the Court addressed, *inter alia*, the admission into evidence of two rattlesnakes and the defendant's allegedly coerced confession. 314 U.S. at 228-29. As for the snakes, the Court found they did not "so infuse[] the trial with unfairness as to deny due process of law." *Id*. at 228. As for the confession, the Court condemned the arresting officers for violating "state statutes" and committing "criminal offenses" in order to obtain the defendant's statement, but ultimately determined its admission into evidence was not so "fundamentally unfair" as to result in a denial of due process. *Id*. at 234-40.

Cromartie. (Doc. 75 at 197). Instead, the State presented eye witness testimony, fingerprint evidence, ballistics evidence, and Cromartie's confession to other people. *Cromartie*, 270 Ga. at 781-82, 88, 514 S.E.2d at 209-10, 214. Given this, the Court cannot find that the admission of the shoe print evidence rendered his trial fundamentally unfair. *See Taylor*, 760 F.3d at 1297. The Georgia Supreme Court's denial of this claim was not contrary to, and did not involve an unreasonable application of, Supreme Court precedent.[34]

H. CLAIM NINE: GUILT-PHASE INSTRUCTIONS

Cromartie argues the trial court made three errors in its guilt-phase instructions: (1) it failed to give a charge on felony murder (Doc. 69 at 105); (2) its instruction on witness credibility "effectively lower[ed] the prosecution's burden of proof" and "curtailed the jury's right to disbelieve even uncontradicted testimony" (Doc. 69 at 107); and (3) its instruction on reasonable doubt "effectively lower[ed] the prosecution's burden of proof" (Doc. 69 at 107), and "suggested to the jury that it could acquit only if it reached a level of uncertainty as to guilt far beyond what is required by the reasonable-doubt standard." (Doc. 69 at 108).

1. Felony Murder

Cromartie was indicted for aggravated assault, possession of a firearm during the commission of a crime, aggravated battery, malice murder, and armed robbery. (Doc. 17-1 at 29-34). The malice murder count alleged Cromartie did "unlawfully, knowingly,

[34] In his reply brief, Cromartie states, "Respondent also fails to develop any argument for why the admission of the shoe-print testimony did not violate Mr. Cromartie's Eighth Amendment rights." (Doc. 78 at 52). Cromartie, not Respondent, bears the burden here. Cromartie has done nothing more than make the conclusory allegation that the admission of shoe-print testimony violated his right to a reliable sentencing determination under the Eighth Amendment. He has not pointed to clearly established Supreme Court precedent, or any precedent for that matter, that holds such evidence is so unreliable its admission renders the sentencing phase of a defendant's trial unfair under the Eighth Amendment.

willfully and intentionally with malice aforethought cause the death of Richard A. Slysz, a human being by shooting said victim in the head." (Doc. 17-1 at 30). Cromartie was not indicted for felony murder.[35] (Doc. 18-17 at 183). The death penalty can be imposed for either felony murder or malice murder. (Doc. 18-15 at 149, 184).

Trial counsel requested that the jury be charged: "If you find the defendant guilty of the lesser crime of [f]elony [m]urder, then your verdict should be so stated." (Doc. 17-7 at 186). The State objected, arguing that Cromartie had not been indicted for felony murder and felony murder is not a lesser included offense of malice murder. (Doc. 18-17 at 183-87). The Court agreed with the State and declined to give trial counsel's requested felony murder charge. (Doc. 18-17 at 187).

On appeal, the Georgia Supreme Court found that

> Cromartie's challenge to the failure of the trial court to charge the jury on felony murder as a lesser-included offense of malice murder, where Cromartie was not indicted for felony murder, is controlled adversely to him by *Henry v. State*, 265 Ga. 732(6), 462 S.E.2d 737 (1995). In *Henry* we held that although the defendant was indicted for armed robbery and kidnapping with bodily injury along with malice murder, since reference was not made to these separate counts in the malice murder count, no charge on felony murder was required. We concluded that because the evidence in the case independently established the offense of malice murder, without the evidence necessary to prove the armed robbery or the kidnapping, felony murder was not, as a matter of fact, a lesser included offense of malice murder mandating a separate felony murder charge. As in *Henry*, Cromartie was indicted solely for malice murder, not felony murder. In separate counts, Cromartie was also indicted for armed robbery and possession of a firearm during the commission of a crime . . . . Because the malice murder count did not allege that the murder was committed while engaged in an armed robbery and "because the offense of felony murder would have required the proof of at least one additional fact beyond that required to establish malice murder," it was not error for the trial court to refuse to charge on felony murder. As we have noted in Division 1, the

[35] Under Georgia law, "[f]elony murder requires proof that the defendant caused the death of another human being while in the commission of a felony." *Henry v. State*, 265 Ga. 732, 737, 462 S.E.2d 737, 744 (1995) (citing O.C.G.A. § 16-5-1(c)). "Malice murder requires proof that the defendant caused the death of another human being with malice aforethought." *Id.* (citing O.C.G.A. § 16-5-1(a)).

> evidence that Cromartie's finger and shoe prints were found at the murder scene, that Cromartie had borrowed the murder weapon before the crime, that the murder victim was shot twice in the head at close range, and that Cromartie had boasted about shooting Slysz was sufficient to establish malice murder independent of evidence necessary to establish any other charged felony.
>
> Furthermore, assuming arguendo that felony murder was a lesser-included offense of malice murder in this case, we conclude that Cromartie can show no harm resulting from this ruling. Considering the evidence adduced, a felony murder conviction of Cromartie would not preclude the imposition of the death penalty.

Cromartie, 270 Ga. at 787-88, 514 S.E.2d at 213-14 (citations and footnotes omitted). .

Cromartie argues that the Georgia Supreme Court's failure to cite *Beck v. Alabama*, 447 U.S. 625 (1980), rendered its opinion "contrary to clearly established federal law." (Doc. 69 at 108). It did not. *Esparza*, 540 U.S. at 16. He also argues that "to the extent the court can be viewed to have applied *Beck*, its application was objectively unreasonable and thus constituted an unreasonable application of that precedent." (Doc. 69 at 108). It was not. In *Beck*, the Supreme Court held "a sentence of death [may not] constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, . . . when the evidence would have supported such a verdict[.]" 447 U.S. at 627. In Georgia, felony murder is not a "lesser-included" offense to malice murder, and felony murder is not a "non-capital" offense. *Cromartie*, 270 Ga. at 787-88, 514 S.E.2d at 213-14. *Beck* does not require a state court "to instruct juries on offenses that are not lesser included offenses of the charged crime under state law." *Hopkins v. Reeves*, 524 U.S. 88, 90 (1998). Also, even if felony murder was a lesser-included offense of malice murder, it is still a capital offense and, if found guilty of such, Cromartie would still have been eligible for the death penalty. The Georgia

Supreme Court's decision on this issue did not, therefore, involve an unreasonable application of *Beck*.

2. Reasonable Doubt

The government has the burden of proving each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361 (1970). Cromartie argues that the trial court's instruction that jurors "should find reasonable doubt only if their minds were 'wavering, unsettled, unsatisfied'" effectively lowered the prosecution's burden of proof. (Doc. 69 at 107) (quoting Doc. 18-19 at 9). He states this language "suggested to the jury that it could acquit only if it reached a level of uncertainty as to guilt far beyond what is required by the reasonable-doubt standard." (Doc. 69 at 108).

The trial court's entire reasonable doubt charge was as follows:

> Now, ladies and gentlemen, this Defendant is to be presumed innocent until proven guilty. A Defendant enters upon the trial of the case with a presumption of innocence in his favor and this presumption remains with the Defendant until it is overcome by the State with evidence which is sufficient to convince you beyond a reasonable doubt that the Defendant is guilty of the offense charged.
>
> Now, no person shall be convicted of any crime unless and until each element of the crime charged is proven to the satisfaction of the jury beyond a reasonable doubt.
>
> Now, the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of each crime charged beyond a reasonable doubt. There is no burden of proof upon the Defendant whatever, and the burden never shifts to the Defendant to prove his innocence. However, the State is not required to prove the guilt of the accused beyond all doubt.
>
> And a reasonable doubt means just what it says. It's a doubt of a fair-minded, impartial juror honestly seeking the truth. It's a doubt based upon common sense and reason. It does not mean a vague or an arbitrary doubt, but is a doubt for which a reason can be given arising from the evidence, a lack of evidence, a conflict in the evidence, or any combination of these.

> Now, ladies and gentlemen, if after giving consideration to all the facts and circumstances of the case your minds are wavering, unsettled, unsatisfied, then that is a doubt of the law and you should find the Defendant not guilty. But, if that doubt does not exist in your minds as to the guilt of the Defendant, then you would be authorized to find the Defendant guilty. If the State fails to prove the Defendant's guilt beyond a reasonable doubt, then it would be your duty to find the Defendant not guilty.

(Doc. 18-19 at 8-9).

On appeal, the Supreme Court held that "[t]he trial court's charge on the definition of reasonable doubt, which has been previously approved by this [c]ourt, did not erroneously diminish the State's burden of proof." *Cromartie*, 270 Ga. at 788, 514 S.E.2d at 214 (citations omitted). Cromartie argues this decision involved an unreasonable application of *Cage v. Louisiana*, 498 U.S. 39 (1990), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991).

In *Cage*, the trial court instructed the jury that "reasonable doubt"

> *must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.

Id. at 40. The Supreme Court held that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Id*. at 41. When read along with the phrase "'moral certainty,'" "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id*.

The Court fails to see the similarity between the words in *Cage*—"substantial" and "grave" and the trial court's words—"wavering, unsettled, [and] unsatisfied"—in Cromartie's case Additionally, *Cage* "is limited precedent," *Johnson v. Alabama*, 256 F.3d 1156, 1192 (11th Cir. 2001), that has been both clarified and modified by later decisions. *Felker v. Turpin*, 83 F.3d 1303, 1308 (11th Cir. 1994). In the consolidated companion cases of *Victor v. Nebraska* and *Sandoval v. California*, the Court held that

> the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury."

511 U.S. 1, 5 (1994) (citations omitted). Also, the constitutional inquiry under *Cage* was whether a reasonable juror "could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41. In subsequent cases, the Court clarified that "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it. *Victor*, 511 U.S. at 6 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)).

The Eleventh Circuit has upheld a jury instruction that contained the same "wavering, unsettled and unsatisfied" language used by Cromartie's trial court. *Felker*, 83 F.3d 1309 n.5. The instruction emphasized Cromartie's presumed innocence, the State's necessity to prove every element beyond a reasonable doubt, and "grounded the definition of reasonable doubt in the evidence." *Id*. at 1309. Looking at the trial court's reasonable doubt instruction as a whole, this Court cannot find "a reasonable likelihood

that the jury understood the instructions to allow conviction based on proof" lower than that required by the Due Process Clause. *Victor*, 511 U.S. at 6. Certainly, applying AEDPA deference, the Court cannot find the Georgia Supreme Court's denial of relief was contrary to, or involved an unreasonable application of, clearly established federal law.

3. Witness Credibility

Cromartie complains that the trial judge instructed the jury as follows regarding witness credibility: "Now, when you consider the evidence in this case, if you find a conflict in the evidence you should settle this conflict, if you can, without believing that any witness has made a false statement." (Doc. 69 at 106) (quoting Doc. 18-19 at 10). He argues this instruction "curtailed the jury's right to disbelieve even uncontradicted testimony." (Doc. 69 at 107).

Had this been the trial court's complete charge on witness credibility, perhaps Cromartie would be correct. But, this one sentence was not the full charge. *Francis v. Franklin*, 471 U.S. 307, 315 (1985) (stating that any "potentially offending words must be considered the in context of the charge as a whole"). The trial court's complete charge on witness credibility was:

> Now, ladies and gentlemen, you must determine the credibility or believability of the witnesses who have appeared before you and testified in this case. It's for you to determine what witness or witnesses you will believe and what witness or witnesses you will not believe if there are any that you do not believe.
>
> Now, in deciding or passing upon their credibility, you may consider all of the facts and circumstances of this case, the witnesses' manner of testifying, their intelligence, their interest or lack of interest in the case, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony and of the occurrences about which they testify. And you may

> also consider their personal credibility insofar as that may legitimately appear from the trial of this case.
>
> Now, when you consider the evidence in this case, if you find a conflict in the evidence you should settle this conflict, if you can, without believing that any witness made a false statement. However, if you cannot do this, then it is your duty to believe that witness or those witnesses you think best entitled to belief. You must determine what testimony you will believe and what testimony you will not believe in this case.

(Doc. 18-19 at 9-10).

On direct appeal, the Georgia Supreme Court found that "[t]he trial court's charge on determining the credibility of witnesses was not error." *Cromartie*, 270 Ga. at 788, 514 S.E.2d at 214. Contrary to Cromartie's arguments, the state court's failure to cite Supreme Court precedent did not "render[] [the] decision contrary to clearly established federal law." (Doc. 69 at 108); *Esparza*, 540 U.S. at 16. Cromartie states in conclusory fashion that the decision amounted to an unreasonable application of clearly established federal law. But, he fails to show how. The Court's review of the clearly established federal law regarding jury charges shows the state court's denial of relief did not involve an unreasonable application of any Supreme Court precedent.[36]

I. CLAIM TEN: TRIAL COUNSEL'S LACK OF INVESTIGATION AND PRESENATION OF MITIGATING EVIDENCE DURING THE PENALTY PHASE OF TRIAL

Cromartie first raised his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence ("Claim Ten") in his amended habeas petition filed on June 22, 2015. (Doc. 62 at 55-66). At that time, Cromartie was

[36] Without explanation, Cromartie argues the decision involved an unreasonable application of three Supreme Court cases: *Cage, Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970). (Doc. 69 at 108). These cases all stand for the proposition that the State bears of burden of proving beyond a reasonable doubt every element of a charged offense. *Cage*, 498 U.S. at 40-41; *Mullaney*, 421 U.S. at 703-04; *In re Winship*, 397 U.S. at 361-62. Cromartie has not shown how the Georgia Supreme Court's decision upholding the trial court's credibility instruction constituted an objectively unreasonable application of any of these cases.

385 days beyond AEDPA's one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1)(A). On March 21, 2016, Respondent sought leave to amend his answer to allege that Claim Ten was time-barred. (Doc. 74). Cromartie was given the opportunity to brief the merits of Respondent's time-bar defense. (Doc. 77 at 2). Cromartie argued Respondent's motion should be denied because: (1) it was futile; (2) Respondent unduly delayed filing the motion; and (3) the totality of the circumstances counseled against allowing the amendment. (Doc. 78 at 11-12 and n.4, 27-28). Cromartie also argued that if the Court found Claim Ten untimely, he was entitled to equitable tolling pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). (Doc. 78 at 9-36).

In its August 22, 2016 Order, the Court granted Respondent's motion to amend. (Doc. 80). The Court found that the motion to amend was not futile, as Claim Ten did not relate back to Cromartie's original petition and was accordingly untimely; Respondent did not unduly delay filing the motion to amend; and the totality of the circumstances were in favor of granting the motion to amend. (Doc. 80 at 4-17). The Court also found that Cromartie was not entitled to equitable tolling under *Martinez* and *Trevino*. (Doc. 80 at 17-18).

Based on reasoning fully explained in the August 22, 2016 Order, Claim Ten is time-barred. (Doc. 80 at 4-18).[37] The Court, therefore, does not consider the merits of this claim. Having found Claim Ten time-barred, the Court **DENIES** as unnecessary

[37] The Court notes that Cromartie has not argued that the time-bar can be overcome by a showing of "actual innocence" under *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). When addressing his *Brady* claim, however, Cromartie did argue he could overcome the procedural default by showing he is "innocen[t] of the death penalty." (Doc. 69 at 77). The Court finds that Cromartie has not shown that "in light of . . . new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt," *McQuiggin*, 133 S. Ct. at 1928 (quotation marks and citations omitted). Nor has he shown that "he is 'innocent' of the death penalty because none of the aggravating factors legally necessary for invocation of the death penalty applied." *Sibley v. Culliver*, 377 F.3d 1196, 1205 (11th Cir. 2004).

Cromartie's and Respondent's requests for discovery of mitigation material and requests for an evidentiary hearing related to the merits of Claim Ten (Docs. 69 at 134, 178-80; 75 at 227-30; 78 at 56-57).

J. CLAIM ELEVEN: ARBITRARY IMPOSITION OF O.C.G.A. § 17-10-30(B)(7)

The jury sentenced Cromartie to death after finding the existence of three statutory aggravating circumstances: (1) "The offense of [m]urder was committed while the Defendant was engaged in the commission of . . . [a]rmed [r]obbery;" (2) "[t]he Defendant committed the offense of [m]urder . . . for the purpose of receiving money or any other thing of monetary value;" and (3) "the offense of [m]urder was outrageously or wantonly vile, horrible or inhumane in that it involved depravity of mind or it involved an [a]ggravated [b]attery to the victim prior to the death of the victim." (Doc. 18-19 at 209). Cromartie argues that his death sentence was imposed arbitrarily and capriciously in violation of the Eighth and Fourteenth Amendments because there was no evidence to support the finding of the third statutory aggravating circumstance. (Doc. 69 at 153-54)

Before the trial court charged the jury, trial counsel moved for a directed verdict regarding the O.C.G.A. § 17-10-30(b)(7) aggravating circumstance ("the (b)(7) aggravator"), arguing the State had presented no evidence of torture, depravity of mind, or an aggravated battery. (Doc. 18-19 at 64-66). The trial court decided it would charge the jury on the (b)(7) aggravator, but would not include the language regarding torture.[38] (Doc. 18-19 at 157-58, 182-83). Cromartie raised this issue on direct appeal and the Georgia Supreme Court summarily denied it: "Cromartie's remaining contentions

[38] O.C.G.A. § 17-10-30(b)(7) reads: "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." The trial court charged the jury that they would need to determine if the murder was "outrageously or wantonly vile, horrible or inhumane in that it involved depravity of mind or an [a]ggravated [b]attery to the victim . . . prior to the death of the victim…." (Doc. 18-19 at 181-82).

regarding the sentencing phase jury charge are also without merit." *Cromartie*, 270 Ga. at 789, 514 S.E.2d at 215.

Cromartie argues this Court should address the claim *de novo* because the Georgia Supreme Court failed to "meaningfully address this claim" (Doc. 69 at 155); did not "address the claim individually" (Doc. 69 at 156); and failed to "identify the law that governs this claim" (Doc. 69 at 156). These arguments are meritless. It is beyond dispute that the deference mandated by § 2254(d) applies even when a state court summarily denies relief. *Pinholster*, 563 U.S. at 187-88; *Richter*, 562 U.S. at 99. And, as stated previously, there is no requirement that that "a state court . . . even be aware of [Supreme Court] precedents," much less cite them. *Esparza*, 540 U.S. at 16.

Next, Cromartie argues that even if deference applies, the Georgia Supreme Court's denial of this claim was contrary to, or involved an unreasonable application of, *Godfrey v. Georgia*, 446 U.S. 420 (1980). (Doc. 69 at 155-56). Godfrey shot his wife "in the forehead and killed her instantly." *Godfrey*, 446 U.S. at 425. "He then fired the gun at his mother-in-law, striking her in the head and killing her instantly." *Id*. During closing arguments, the prosecutor acknowledged that the case "involved no allegation of 'torture' or of an 'aggravated battery.'"[39] *Id*. at 426. The judge charged the jury using "the statutory language of the § (b)(7) aggravating circumstance in its entirety." *Id*. The jury recommended death for both murder convictions, finding that the murders were "'outrageously or wantonly vile, horrible, and inhuman.'" *Id*. Setting aside the death sentence, the Supreme Court found that "[n]o claim was made, and nothing in the record before us suggests, that the petitioner committed an aggravated battery upon his wife or

[39] The trial judge's report prepared after completion of the trial showed that, beyond the actual murders, neither victim had been "'physically harmed or tortured.'" *Godfrey*, 446 U.S. at 426.

mother-in-law or, in fact, caused either of them to suffer any physical injury preceding their deaths." *Id*. at 432.

Contrary to Cromartie's arguments, the facts in his case are not "materially indistinguishable from the facts in *Godfrey* as they relate to the (b)(7) aggravator." (Doc. 69 at 156). First, "interfamilial emotional upset" motivated Godfrey to kill his wife and mother-in-law while greed apparently motivated Cromartie to kill Slysz. *Drake v. Francis*, 727 F.2d 990, 1000 (11th Cir. 1984), *aff'd in part, rev'd in part*, *remanded in part sub nom*. *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir. 1985) (en banc). Second, there was no question that each of Godfrey's victims died instantaneously from one gunshot wound. *Godfrey*, 446 U.S. at 425. Testimony indicated Cromartie first shot Slysz below his right eye and then his left temple.[40] (Doc. 18-14 at 13-14). The medical examiner testified that the shot below his eye would have caused Slysz to lose consciousness more slowly than the second shot to his left temple. (Doc. 18-15 at 19). Either shot would have rendered Slysz unconscious, but not caused immediate death. (Doc. 18-15 at 19-20). These facts distinguish Cromartie's case from *Godfrey*. Thus, the Georgia Supreme Court's decision was not contrary to, and did not involve an unreasonable application of, *Godfrey*.

Even assuming improper application of the (b)(7) aggravator, Cromartie's death sentence is still valid. The jury found two additional statutory aggravating circumstances: The offense of murder was committed while Cromartie was engaged in the commission of an armed robbery and Cromartie committed the offense of murder for

[40] Cromartie correctly argues that the medical examiner testified he could not determine which shot occurred first. (Doc. 18-15 at 8, 19). Cromartie is incorrect, however, when he states that Respondent's argument about the sequence of bullets has no support in the record. (Doc. 78 at 59). In Young's statement, which was read to the jury, Young stated that Cromartie told him he shot the clerk in the eye, through the glasses and then "shot him again." (Doc. 18-14 at 13).

the purpose of receiving money or any other thing of monetary value. (Doc. 18-19 at 209). The invalidation of a statutory aggravating circumstance does not render a death penalty invalid if another statutory aggravating circumstance remains. *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (certifying the following question to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?"); *Zant v. Stephens*, 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982) (answering the certified question and holding that each case must be looked at individually, but when a jury separately considers and finds two statutory grounds supporting the death penalty, the subsequent invalidation of one of the grounds will not necessitate reversal of the jury's death penalty recommendation); *Terrell v. GDCP Warden*, 744 F.3d 1255, 1265 (11th Cir. 2014) (ruling that because "the jury need only find one statutory aggravating factor to justify the imposition of the death penalty, the invalidation of [a second] factor would not have likely changed the outcome of [the defendant's] sentence"); *Drake*, 727 F.2d at 1000 n.10 (ruling that even if the jury arbitrarily considered the (b)(7) aggravator, the defendant's death sentence was still valid because the jury had also found the defendant committed the murder while he was engaged in the commission of another capital felony under O.C.G.A. § 17-10-30(b)(2)).

Cromartie acknowledges *Zant* (Doc. 78 at 61), and that, under O.C.G.A. § 17-10-31 "any single aggravator may itself be *sufficient* for a jury to recommend death." (Doc. 69 at 154 n.23). But, without citation to authority, Cromartie argues that "it is likely that the jury's recommendation of death . . . would differ depending on the number of statutory aggravating circumstances found." (Doc. 69 at 154 n.23). He also argues

that, if the (b)(7) aggravator fails, the Court must "'determine whether, because of the failure, the sentence was imposed under the influence of an arbitrary factor.'" (Doc. 78 at 61) (quoting *Zant*, 250 Ga. at 100, 297 S.E.2d at 4). Even assuming the invalidity of the (b)(7) aggravator, Cromartie was not prejudiced by "evidence . . . submitted in support of that statutory aggravating circumstance which was not otherwise admissible." *Zant*, 250 Ga. at 100, 297 S.E.2d at 4. Also, evidence established that Cromartie murdered Slysz while he was engaged in an armed robbery, and he murdered him to get money or another thing of monetary value—beer. Therefore, even had the jury arbitrarily considered (b)(7), Cromartie's death sentence would be upheld on both of these points.

K. CLAIM TWELVE: JUROR'S RELIANCE ON THE BIBLE AND OTHER EXTERNAL SOURCES DURING PENALTY PHASE DELIBERATIONS

Cromartie argues that one of the jurors, Gladys Leaks, originally supported sentencing him to life imprisonment. (Doc. 69 at 157). She, however, changed her vote after consulting the dictionary and the Bible, specifically "a passage in the Bible that commands death for those who commit 'iniquity.'" (Doc. 69 at 157). He argues that Leaks's "exposure to this biblical passage and consultation of a dictionary—and her subsequent reliance on these external sources to sway her vote—violated [his] right to have his punishment determined solely on the evidence presented in open court." (Doc. 69 at 157-58).

Trial counsel raised this issue during the motion for new trial and called several jurors, including Leaks, and their investigator, David Mack, to testify at the motion for new trial hearing.[41] (Doc. 18-24). Leaks testified there was no Bible in the jury room during

[41] In addition to calling Mack and various jurors, trial counsel submitted several newspaper articles and affidavits from witnesses they did not call to testify. (Doc. 18-24 at 104-21). Trial counsel explained that the newspapers were not submitted "for any evidentiary value contained therein, but simply to perfect the

deliberations, but she personally reads the Bible in her home every day of her life.[42] (Doc. 18-24 at 13-14, 17). She stated that she did not read the Bible for Cromartie's case (Doc. 18-24 at 13-14, 17-18, 30); she did not use the Bible as a "reference" in Cromartie's case (Doc. 18-24 at 17); her decision regarding Cromartie's sentence was not based on her reading of the Bible or her religious beliefs (Doc. 18-24 at 30); and she did not "change[] her verdict" based on anything in the Bible (Doc. 18-24 at 16-17, 20-22).

When trial counsel asked Leaks if she recalled telling investigator Mack that she changed her vote from life to death after reading Ezekiel 33:19 and Proverbs 17:26 she stated:

> A. No.
>
> . . . .
>
> A. That's a lie. No. I did not tell him that.
>
> Q. You deny having made that statement?
>
> A. Um-hum. And Mr. Mack also came back with an affidavit written stating those same things there that he asked me and asked me to sign it. And I told him I wouldn't sign it because that wasn't the way it was.
>
> . . . .
>
> Q. And so I'm perfectly clear. You read those two scripture prior to making your vote on the sentence of death?
>
> A. No.
>
> Q. You did not read those two scriptures prior to making your sentence?
>
> A. My decision was already made and it was time for to leave . . . .

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record with regard to what newspaper articles were published . . . [about] this particular matter." (Doc. 18-24 at 78-79). The trial court admitted the newspapers for this sole purpose and not to prove the truth of matters asserted therein. (Doc. 18-24 at 78-79). The State objected to the admission of affidavits from witnesses who were not called to testify on the grounds of hearsay and the State's inability to cross examine the witnesses. (Doc. 18-24 at 79). The trial court sustained the objection but let trial counsel submit the affidavits for the record. (Doc. 18-24 at 79-83).

[42] At trial counsel's request the jury was not sequestered. *Cromartie*, 270 Ga. at 789 n.3, 514 S.E.2d at 215 n.3.

> Q. Do you recall discussing your reading of the Bible with any of the other jurors . . . ?
>
> A. No. Uh-uh.

(Doc. 18-24 at 16-17). Leaks also denied looking up the word "malicious" in the dictionary. (Doc. 18-24 at 25-26).

Trial counsel called Mack "as a facts witness as to the credibility of" Leaks, who had allegedly given inconsistent statements regarding her use of the Bible and dictionary. (Doc. 18-24 at 64, 66). Mack testified that Leaks told him Ezekiel 33:19 and Proverbs 17:26 helped her reach the decision to sentence Cromartie to death. (Doc. 18-24 at 71). According to Mack, Leaks told him that she changed her vote to death the day after she read Ezekiel and Proverbs. (Doc. 18-24 at 73). He also testified that Leaks told him she looked up the work "malice" in the dictionary during the penalty phase deliberations. (Doc 18-24 at 73). Mack admitted Leaks refused to sign the affidavit he prepared that contained these statements. (Doc. 18-24 at 76). Mack said that Leaks did not indicate the affidavit was untrue. (Doc. 18-24 at 76-77). Instead, she indicated that she no longer wanted to be involved in the case. (Doc. 18-24 at 76).

After the close of evidence, the trial court ruled:

> Gentlemen, I think both the State and the Defense has . . . reviewed the law in the area of the issue . . . . The Court has reviewed the law that it could find in regards to that particular issue.
>
> Based upon testimony that witnesses in this hearing, those being jurors and Mr. Mack, I do find that the testimony of Ms. Leaks and the other jurors are more credible in regards to the conflicts in the testimony.
>
> In recalling the instructions given to the jury by the Court during the trial, I, of course, have not been over those in the transcript, but I think we went over them so many times that we all are very familiar with what those were, cautionary instructions to the jury specifically.

I believe that the jury followed the Court's instructions. If I recall, I did ask them as a part and parcel of those instructions not to take a Bible into the jury room with them. I do not recall having asked them or instructed them that they could not – I don't recall addressing the issue of whether or not in their personal lives they could make, they could continue to practice their religion. I don't recall, certainly don't recall prohibiting them from continuing to practice any religion.

I don't know that simply – I think in your closing Mr. Mears, you were referring to Ezekiel and/or Proverbs, et cetera, and, you know, if you look at the content of a particular passage, I don't know that we can say that, based on what that content says, that no one could find comfort or something – or that their purpose of reading is different. We can all get different interpretations. I'm sure, being married to a Presbyterian minister, you know that you can get comfort from all parts of it and different people find comfort in different ways in their religions.

I don't feel that based upon the evidence in this case that the jury's decision to impose a sentence of death in this case was based on any arbitrary factors. I believe from the trial of this case, from the Court's poll of the jurors, both guilt and sentencing phases, that they based their decision, and the evidence testimony presented today, that they based their decision on the evidence presented during the trial and the law charged them by the [c]ourt during the trial.

. . . .

And as I've stated, I don't find from the evidence that the jury in this case based their decision by reference to anything in an improper basis. I don't find that the decision was arbitrary and I do not find that it violated Mr. Cromartie's constitutional rights.

And the Motion for New Trial is overruled and denied.

(Doc. 18-24 at 98-100).

Cromartie raised the issue on direct appeal and the Georgia Supreme Court found:

Cromartie claims that a juror changed her vote to a death sentence after consulting the Bible and that she looked up the word "malice" in a dictionary. At the hearing on Cromartie's motion for new trial, the juror in question testified that she reads the Bible every day as a personal matter and denied that her Bible reading had anything to do with Cromartie's case or her sentencing decision. She also denied looking up anything in a dictionary during her jury service. She and the five other jurors who testified at the

> hearing stated that no Bible or dictionary was brought into the jury room and that the Bible did not enter into their deliberations. The only contradictory evidence came from a defense investigator who claimed that the juror in question had admitted to him that she read Bible passages and looked up "malice" in the dictionary. We hold the trial court did not abuse its discretion in crediting the testimony of the jurors and in concluding that the jury based its sentencing decision solely on the evidence and the trial court's instructions. Furthermore, a juror's personal use of the Bible or other religious book outside the jury room is not automatically prohibited.

Cromartie, 770 Ga. at 789, 514 S.E.2d at 215 (citations and footnotes omitted).

Cromartie argues that the Georgia Supreme Court's decision was contrary to, and involved an unreasonable application of, clearly established federal law,[43] "when [the court] concluded that 'a juror's personal use of a Bible or other religious book outside the jury room is not automatically prohibited.'" (Doc. 69 at 161) (quoting *Cromartie*, 270 Ga. at 789, 514 S.E.2d at 215). With this statement, the Georgia Supreme Court did not find, as Cromartie argues, that there was no constitutional violation simply because Leaks read the Bible "in the privacy of her own home, away from the jurors." (Doc. 69 at 161). To the contrary, the Court specifically found that although Leaks read her Bible on a daily basis, which is not "automatically prohibited," the Bible did not enter the jurors' deliberations and the jury based its decision solely on the evidence and the trial court's

[43] Cromartie claims three cases make up the clearly established federal law: *Remmer v. United States*, 347 U.S. 227 (1954), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Parker v. Gladden*, 385 U.S. 363 (1966). (Doc. 69 at 160). In *Remmer*, an unnamed person communicated with the jury foreperson that he could profit by finding in favor of the defendant. 347 U.S. at 228. The Court held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a [criminal] trial about the matter pending before the jury is . . . deemed presumptively prejudicial" and "the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant." *Id*. at 229. No such contact occurred in Cromartie's case. In *Turner*, two deputy sheriffs were both the principal prosecution witnesses and the persons in charge of the jurors during their sequestration. 379 U.S. at 467-69. The Court held that the constant and close association between these key witnesses and the jury deprived the defendant of his right to a fair and impartial trial. *Id*. at 473-74. No such contact occurred in Cromartie's case. In *Parker*, a bailiff told the jurors that the defendant was guilty and advised them that if there was anything wrong in finding him guilty, the Supreme Court would correct it. 385 U.S. at 363-64. The Supreme Court held the statements violated the defendant's Sixth Amendment right to trial by an impartial jury and the right to confront witnesses. *Id*. at 364-65. Again, no such contact occurred in Cromartie's case.

instructions. *Cromartie*, 270 Ga. at 789, 514 S.E.2d at 215. This is exactly what the clearly established federal law requires—that the jury base its decision on the law and the evidence. *Turner*, 379 U.S. at 472-73 (finding that "'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel"). The Georgia Supreme Court's ruling, therefore, was not contrary to, and did not involve an unreasonable application of, clearly established federal law.

Cromartie argues the trial court's failure to credit Mack's testimony over Leaks's testimony was unreasonable because his testimony matched the information contained in a newspaper article. (Doc. 69 at 162). According to the newspaper article, an anonymous juror "said the juror holding out for a sentence of life without parole read a Bible scripture Tuesday night that changed her mind." (Doc. 18-24 at 105). The trial court refused to admit the article for the "truth of the matter asserted." (Doc. 18-24 at 78-83). The anonymous juror could not be cross-examined and, as Respondent points out, "the statement clearly contained speculation as to another person's thought processes." (Doc. 75 at 240). The Court cannot find that the state habeas court acted unreasonably when it believed Leaks's testimony over that of Mack. Leaks unequivocally and repeatedly stated that, while she read the Bible every day, she did not change her verdict based on anything in the Bible, and she did not consult the dictionary. (Doc. 18-24 at 15-17, 20-30). When trial counsel questioned her fellow jurors, they all testified that they did not discuss the Bible; they did not know if the Bible helped Leaks reach her decision; and they reached their sentencing decision based on the evidence and the trial court's instructions. (Doc. 18-24 at 36-38, 41, 44, 53, 55-56, 60, 62-63).

Credibility determinations are for the state courts, not federal courts considering § 2254 petitions. *Consalvo*, 664 F.3d at 845. Cromartie has not presented the necessary clear and convincing evidence to overcome the presumption that the state court correctly determined Leaks to be credible. *Id*.; *McNair v. Campbell*, 416 F.3d 1291, 1309 (11th Cir. 2005) (denying habeas relief because, *inter alia*, petitioner did not present clear and convincing evidence to overcome the state court's factual finding that readings from the Bible, which was brought to the jury room, and prayers, also in the jury room, did not encourage the jurors to base the verdict on anything other than the evidence presented in the trial of the case). The Court, therefore, denies relief on this claim.

L. CLAIM THIRTEEN: DISPROPORTIONATE AND ARBITRARY DEATH SENTENCE

Cromartie argues that his death sentence for a murder conviction that involved a single killing of an adult "during a botched convenience-store robbery" violates his Eighth Amendment right to be free from cruel and unusual punishment. (Doc. 69 at 163). On direct appeal he argued that the death sentence was disproportionate in his case. Citing twelve cases, the Georgia Supreme Court found that

> [t]he death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The death sentence is also not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all involve a deliberate killing during the commission of an armed robbery.

Cromartie, 270 Ga. at 789, 514 S.E.2d at 215 (citations omitted). Cromartie raised the issue again during his state habeas proceedings and the court found his claim regarding the proportionality of his sentence was *res judicata*, and Cromartie's challenge to the Georgia Supreme Court's proportionality review was procedurally defaulted and,

alternatively, without merit. (Doc. 23-37 at 9-10).

There is no constitutional right to proportionality review, and the Eleventh Circuit has instructed the district courts not to conduct proportionality reviews in death penalty habeas corpus cases. In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court held, "[t]here is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed." *Id*. at 50. In *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir. 1983), the Eleventh Circuit held:

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death.

Id. at 1518 (citing *California v. Ramos*, 463 U.S. 992, 996-1001 (1983)).

Because the Constitution does not entitle Cromartie to proportionality review and the Eleventh Circuit has specifically instructed district courts not to review the proportionality review undertaken by the state supreme court, the Court must refuse Cromartie's request for such.

M. CLAIM FOURTEEN: UNCONSTITUTIONALITY OF THE DEATH PENALTY

Cromartie argues that the death penalty is incompatible with "'evolving standards of decency that mark the progress of a maturing society.'" (Doc. 69 at 164) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). He points out that some States are moving to abolish the death penalty while other States, which continue to employ the death penalty, are turning away from it as a matter of practice. (Doc. 69 at 149-60). He cites the dissent in *Glossip v. Gross*, in which Justice Breyer, joined by Justice Ginsburg, stated

that it is "highly likely that the death penalty violates the Eighth Amendment." 135 S. Ct. 2726, 2776-77 (2015) (Breyer, J., dissenting). Cromartie argues that in the near future the Supreme Court might embrace the logic of Breyer's dissent and find the death penalty no longer comports with the Eighth Amendment. (Doc. 69 at 175).

It might; or it might not. At this time, however, the law "is settled that capital punishment is constitutional." *Glossip*, 135 S. Ct. at 2732. Unless, and until, that changes, this Court is bound by the Supreme Court's ruling that the death penalty does not violate the Constitution.[44] *Id*. The Court, therefore, denies relief on this claim.

N. CLAIM TWENTY-FOUR: CUMULATIVE ERROR

Cromartie argues that if the Court finds he is not entitled to relief based on any single claim because he has not shown the prejudicial effect of a single error, the Court should find he is entitled to relief because of the cumulative prejudicial effect of all of the errors. (Doc. 69 at 177). Respondent argues there is no Supreme Court or Eleventh Circuit precedent that calls for the Court to conduct a cumulative error analysis. (Doc. 75 at 265). Plus, to conduct such analysis would violate the rule of comity in § 2254 because Georgia has no cumulative error rule. (Doc. 75 at 265).

[44] Cromartie acknowledges that he did not present this claim to the state courts and it is, therefore, unexhausted and procedurally defaulted. (Docs. 69 at 176; 78 at 65). He states that he can overcome the default by showing that the death penalty is unconstitutional and, therefore, no reasonable juror could possibly find him eligible for the death penalty. (Doc. 69 at 176). He requests a hearing because "full factual development of the questions of the death penalty's reliability, arbitrariness, delays, and decline in usage would entitle him to relief." (Doc. 69 at 176). Cromartie is correct that *Pinholster* does not bar an evidentiary hearing because this claim was not decided on the merits by the state court. *Pinholster*, 563 U.S. at 181-82 (holding that where a claim has been "'adjudicated on the merits in the state court proceedings[,]'" the record is limited to the "record before the state court.") (quoting 28 U.S.C. § 2254(d)). But, Cromartie's argument regarding the constitutionality of the death penalty is clearly foreclosed by Supreme Court precedent. An evidentiary hearing is, therefore, unnecessary. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (holding that an evidentiary hearing should be granted only if alleged facts would entitle petitioner to habeas relief). Consequently, the Court **DENIES** Cromartie's request for an evidentiary hearing on Claim Fourteen.

Even if the Court should undertake a cumulative error analysis, Cromartie would not be entitled to relief. "For our purposes, it is enough to say that [Cromartie's] cumulative error claim clearly fails in light of the absence of any individual errors to accumulate." *Morris v. Sec'y, Dep't of Corr*., 677 F.3d 1117, 1132 n.3 (11th Cir. 2012); *see also Insignares v. Sec'y, Fla. Dep't of Corr*., 755 F.3d 1273, 1284 (11th Cir. 2014).

IV. CONCLUSION

For the reasons explained above, Cromartie's petition for writ of habeas corpus, his requests for discovery, and his requests for an evidentiary hearing are **DENIED**.

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A). As amended effective December 1, 2009, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a [COA] when it enters a final order adverse to the applicant," and, if a COA is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)."

The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved,

the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[45]

The Court finds the standard for the grant of a COA has not been met.

SO ORDERED, this 31st day March, of 2017.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

[45] This Court determined that it could not reach the merits of Claim Ten, trial counsel's alleged failure to investigate and present mitigating evidence during the penalty phase of trial, because the claim was time barred. (Doc. 80 at 4-17). The Court also found that Cromartie was not entitled to equitable tolling under *Martinez* and *Trevino*. (Doc. 80 at 17-18). Cromartie's argument that *Martinez* and *Trevino* should be extended to the statute of limitations has been foreclosed by binding circuit precedent. *Arthur v. Thomas*, 739 F.3d 611, 630 (11th Cir. 2014) ("At no point in *Martinez* or *Trevino* did the Supreme Court mention the 'statute of limitations,' AEDPA's limitations period, or tolling in any way" and, therefore, these cases do "not apply to AEDPA's statute of limitations or the tolling of that period."). "If the petitioner's contention about the procedural ruling against him is foreclosed by a binding decision[,]" the Court should not issue a COA "because reasonable jurists will follow controlling law." *Gordon v. Sec'y Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007). No reasonable jurist would find it debatable that Claim Ten is untimely and it is not debatable that *Martinez* and *Trevino* do not toll AEDPA's statute of limitations. Therefore, while this Court often grants a COA when the issue is one of trial counsel's performance in the investigation and presentation of mitigating evidence, it declines to do so in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

RAY JEFFERSON CROMARTIE, Petitioner, VS. WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent.	:	CIVIL ACTION NO. 7:14-CV-39 (MTT)

ORDER

Respondent moves to amend his answer to Cromartie's amended habeas corpus petition to assert a statute of limitations defense to Claim X in Cromartie's amended petition. (Doc. 74). The motion is **GRANTED**.

I. Relevant procedural history

Cromartie filed his federal habeas petition on March 20, 2014. (Doc. 1). Respondent filed his motion to dismiss the petition as untimely on April 1, 2014. (Doc. 9). The Court ordered that Respondent did not have to answer Cromartie's habeas petition until after the Court determined if the petition was timely. (Doc. 12). On December 12, 2014, the Court found Cromartie's habeas petition was timely and denied Respondent's motion to dismiss.[1] (Doc. 42). On January 6, 2015, 218 days after the

[1] Direct review of Cromartie's conviction and sentence concluded when the United States Supreme Court denied his request for certiorari review on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974 (1999); 28 U.S.C. § 2244(d)(1)(A). The statute of limitations was tolled when he filed his state habeas petition on May 9, 2000. (Doc. 19-14). The trial court denied relief on February 9, 2012. (Doc. 23-37). The Georgia Supreme Court denied Cromartie's application for a certificate of probable cause to appeal ("CPC application") on September 9, 2013 (Doc. 24-14), and issued the remittitur on December 10, 2013 (Doc. 33-1). The remittitur was filed in the trial court on February 4, 2014. (Doc. 33-1). Respondent states that the Court previously ruled Cromartie's "one-year limitation did not begin to run again until the filing of the remittitur in the Butts County Clerk's office . . . ." (Doc. 74 at 3). What this Court actually concluded was that "Cromartie's federal habeas petition is untimely only if § 2244(d)(2) tolling ended on the day the Georgia Supreme Court denied Cromartie's CPC application. It did not." (Doc. 42 at 18). Since this

one-year statute of limitations expired, Cromartie moved to amend his federal habeas petition and the Court granted him 90 days to do so. (Docs. 43, 44). When he filed his amended habeas petition on June 22, 2015, Cromartie was 385 days beyond his one-year statute of limitations. (Doc. 62). In Claim X of his amended habeas petition, Cromartie alleged that trial counsel were ineffective in the investigation and presentation of mitigating background evidence at the penalty phase of his trial. (Doc. 62 at 55-71). Respondent filed his answer to the amended habeas petition on July 22, 2015. (Doc. 64). Respondent asserted that Claim X was unexhausted and procedurally defaulted because it was not raised during Cromartie's state habeas proceedings. (Doc. 64 at 13).

On March 21, 2016, Respondent moved to amend his answer to raise a statute of limitations defense to Claim X. (Doc. 74). Respondent states he should have originally alleged Claim X was time-barred, but counsel's misunderstanding of the law regarding claims brought in amended petitions caused his failure to do so. (Doc. 74 at 2, 5). Cromartie has responded to the motion to amend and Respondent has filed a reply. (Docs. 78, 79).

II. Standard for granting a motion to amend

Federal Rule of Civil Procedure 15(a)(2), made applicable to habeas proceedings by 28 U.S.C. § 2242 and Rule 12 of the Rules Governing Section 2254 Cases, provides that "a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." "Resolving a . . . motion to amend is 'committed to the sound discretion of the district

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ruling, the Eleventh Circuit has held that a state habeas petition is "pending," so as to toll the federal one-year statute of limitations, until the Georgia Supreme Court issues the remittitur for the denial of a petitioner's CPC application. *Dolphy v. Warden*, 822 F.3d 1342, 1345 (11th Cir. 2016). Therefore, Cromartie's statute of limitations was tolled until December 10, 2013. (Doc. 33-1). Petitioner had 174 days from December 10, 2013, or until June 2, 2014, to file his federal habeas petition. He timely filed the petition on March 20, 2014. (Doc. 1).

court,' but that discretion 'is strictly circumscribed' by Rule 15(a)(2) of the Federal Rules of Civil Procedure, which instructs that leave to amend should be 'freely give[n] when justice so requires.'" *City of Miami v Bank of Am. Corp*., 800 F.3d 1262, 1286 (11th Cir. 2015) (citations omitted). "The Supreme Court has emphasized that leave to amend must be granted absent a specific, significant reason for denial . . . ." *Spanish Broad. Sys. of Fla. v. Clear Channel Commc'n*, *Inc*., 376 F.3d 1065, 1077 (11th Cir. 2004) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Bellefleur v. United States*, 489 F. App'x 323, 324 (11th Cir. 2012) (reversing district court's unexplained denial of petitioner's motion to amend his 28 U.S.C. § 2255 petition).

There are several significant reasons that justify denying leave to amend, including (1) futility of the amendment; (2) "'undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed'"; or (3) "'undue prejudice to the opposing party.'" *In re Engle Cases*, 767 F.3d 1082, 1108-09 (11th Cir. 2014) (quoting *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001)). Cromartie argues Respondent's motion for leave to amend should be denied because of futility, undue delay,[2] and the totality of the circumstances counsels against amendment. (Doc. 78 at 11, 27-28).

[2] In a related argument, Cromartie claims that Respondent's ignorance of the law does not constitute "good cause" to modify the Court's January 6, 2015 scheduling order under Fed. R. Civ. P. 16(b)(4). (Doc. 78 at 25-27). Fed. R. Civ. P. 16(b)(1) provides that a district judge must issue a scheduling order "[e]xcept in categories of actions exempted by local rule." M.D. Ga. LR 26 (C)(4) exempts habeas actions from this requirement. In capital habeas actions, the Court routinely enters orders to establish deadlines for responses, motions, and briefs. It entered such an order in this case on January 6, 2015. (Doc. 44). These orders are designed to ensure complete briefing in complex death penalty habeas litigation and a timely resolution of the case. Such orders, however, cannot be governed by Fed. R. Civ. P. 16 because habeas actions are expressly exempted from the rule. M.D. Ga. LR 26(C)(4). Also, in this case the Court has, without reference to Fed. R. Civ. P. 16, granted several requests from both parties to modify the January 6, 2015 order. (Docs. 48, 49, 59, 67, 68, 70, 72, 76, 77). Allowing Respondent to amend his answer to assert a statute of limitations defense will not thwart either goal the January 6, 2015 order sought to achieve, i.e., full briefing of the issues and timely resolution of Cromartie's habeas petition. The parties fully briefed the statute of limitations defense when they briefed the merits of Cromartie's claims. Thus, Respondent's amendment to his answer will not add to the time it takes to resolve Cromartie's petition. Alternatively, even if Fed. R. Civ. P. 16(b)(4) applies to the January 6, 2015 order, Respondent has, for reasons fully discussed in this order, shown "good cause."

A. Futility

Cromartie argues it would be futile for Respondent to allege a time-bar defense because Claim X is timely. Specifically, he states that Claim X in his amended petition relates back, under Federal Rule of Civil Procedure 15(c)(1)(B), to Claim II in his original petition. (Doc. 78 at 9-20). Federal Rule of Civil Procedure 15(c)(1)(B) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." "An amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 545 U.S. 644, 650 (2005). Only if the "original and amended petitions state claims that are tied to a common core of operative facts . . . [will] relation back be in order." *Id*. at 664 (footnote omitted).

Cromartie argues that three separate statements within Claim II establish that he raised the claim that trial counsel were ineffective for failing to investigate and present mitigating background evidence at sentencing. First, he cites the heading of Claim II, which reads:

> Petitioner was deprived of his right to the effective assistance of counsel at trial and on appeal, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005), and related precedent.

(Doc. 78 at 14) (quoting Doc. 1 at 16).

Second, he cites paragraph 37 in Claim II, which reads similarly to the heading:

> Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Fifth, Sixth, Eighth, and Fourteenth

> Amendments to the United States Constitution and Article I, § 1, ¶¶ 1, 2, 11, 12, 14, and 17 of the Constitution of the State of Georgia. *See also Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009), and *Sears v. Upton*, [561 U.S. 945] (2010).

(Doc. 78 at 15) (quoting Doc. 1 at 16).

Third, he cites paragraph 38(b) in Claim II:

> 38. Trial counsel's ineffectiveness includes, but is not limited to the following:
>
> . . . .
>
> (b) Failure to adequately investigate the Junior Food Store incident and to present evidence during both phases of the trial that would exculpate Petitioner or mitigate punishment.

(Doc. 1 at 17).

A general allegation that trial counsel were ineffective, such as those contained in the heading and paragraph 37 of Claim II, is not sufficient to preserve an untimely specific claim that trial counsel were ineffective when they failed to investigate Cromartie's background and present mitigating background evidence at sentencing. A habeas petitioner must, pursuant to Rule 2(c) of the Rules Governing Section 2254 Cases, "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." "Rule 2(c) 'mandate[s] "fact pleading" as opposed to "notice pleading" as authorized under Federal Rule of Civil Procedure 8(a).'" *Hittson v GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014) (citations omitted); *see also* Rule 4 of the Rules Governing Section 2254 Cases advisory committee notes to the 1976 adoption ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a 'real possibility of constitutional error.'") (citations omitted).

Cromartie, quoting language from *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002), argues that "[i]t is not necessary even for the initial claim to 'explicitly

state supporting facts' at all, as '[o]ne purpose of an amended claim is to fill in facts missing from the original claim.'" (Doc. 78 at 13) (citations omitted). This is too broad of an interpretation of *Dean*. In his original *pro se*[3] habeas petition, Dean claimed (1) his conviction was obtained by use of perjured testimony, (2) the "United States Sentencing Guidelines [sic] Sec. 1B1 and 3B1" were incorrectly used, and (3) the court allowed the government to enter inadmissible evidence. *Dean*, 278 F.3d at 1222-23. In his amended petition, Dean (1) named the three witnesses who presented the perjured testimony, (2) provided the specific subsection for United States Sentencing Guideline § 1B1.3(a)(1), and (3) specified the inadmissible evidence the court allowed was evidence of uncharged misconduct. *Id*. The Eleventh Circuit found the three amendments met "the intent of Rule 15(c)" because they were "not entirely new claims" and "[e]ach of them serve[d] to expand facts or cure deficiencies in the original claims." *Id*. at 1223. The court did not, as Cromartie argues, hold that a generic claim as all-encompassing as "[p]etitioner was deprived of his right to the effective assistance of counsel at trial and on appeal," without more, was enough to preserve any subsequent ineffectiveness claim.[4]

[3] Dean was proceeding *pro se* when he filed his original and amended habeas petitions. Thus, the petitions had to be construed liberally in Dean's favor. *Diaz v. United States*, 930 F.2d 832, 834 (1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Eleventh Circuit obviously gave Dean the benefit of the doubt—noting that an amended claim arose from conduct "that he attempted to set forth in the original pleadings" and that his amended petition was a "more carefully drafted version" of the original. *Dean*, 278 F.3d at 1223. Cromartie was represented by counsel who are experts in the field of death penalty habeas litigation when he filed both his original and amended habeas petitions. Thus, the Court is not required to construe Cromartie's habeas petitions as liberally as those filed by *pro se* litigants.

[4] None of the unpublished Eleventh Circuit opinions cited by Cromartie hold that a represented petitioner's untimely claim that trial counsel were ineffective for a specific action or inaction relate back to his generic claim that he was deprived of the effective assistance of counsel. First, like *Dean*, they all involve *pro se* petitioners, whose federal habeas petitions must be construed liberally. *Gunn v. Newsome*, 881 F.2d 949, 961 (11th Cir. 1989) ("[W]e have never wavered from the rule that courts should construe a habeas petition filed *pro se* more liberally than one drawn up by an attorney.") (citations omitted). Second, in the two cases where timeliness and relation back were at issue, *Ciccotto v United States*, 613 F. App'x 855 (11th Cir 2015) and *Mabry v. United States*, 336 F. App'x 961 (11th Cir. 2009), the initial petitions alleged much more specific claims than that alleged in the heading and paragraph 37 of Claim II in Cromartie's original habeas petition. For example, in *Ciccotto*, the court found petitioner's new claims related back when the *pro se* petitioner originally claimed his sentence was too harsh in light of several specific factors and, in his amended petition, alleged his sentence was too harsh in light of several additional circumstances. 613 F.

(Doc. 1 at 16).

Even if Cromartie's interpretation of *Dean* is correct, his argument that relation back is appropriate even if the original claim contains no "'supporting facts' at all" was foreclosed by *Mayle*. (Doc. 78 at 13) (quoting *Dean*, 278 F.3d at 1222). In *Mayle*, the Supreme Court stated that habeas petitioner's must "plead with particularity" the grounds for relief and state the facts that support each of the grounds raised. 545 U.S. at 656 (citations omitted). Relation back under Federal Rule of Civil Procedure 15(c)(2) is allowed "only when the claims added by amendment arise from the same core facts as the timely filed claims." *Id*. at 657. Thus, the timely filed claims must contain some "core facts" as opposed to just conclusory allegations. *Id*. If Cromartie's argument that any untimely ineffective assistance claim relates back to a "skeletal" (Doc. 78 at 10) or "bare-bones" (Doc. 78 at 12) claim that counsel were ineffective prevailed, "[a] miscellany of claims for relief could be raised later rather than sooner and relate back, for 'conduct, transaction or occurrence,' would be defined to encompass any pretrial, trial, or post-trial" instance of ineffective assistance. *Id*. at 661. "An approach of that breadth . . . 'views "occurrence" at too high a level of generality.'" *Id*. (quoting *United States v. Pittman*, 209 F.3d 314, 318 (4th Cir. 2000)).

After *Mayle*, the Eleventh Circuit has held that timely generic assertions that counsel were ineffective, without more, cannot save untimely specific claims of ineffective assistance. For example, in *McLean v. United States*, 2005 WL 2172198 (11th Cir.

App'x at 859. In *Mabry*, the petitioner originally alleged, *inter alia*, that trial counsel were ineffective because they allowed him to "forego his appellate rights without proper investigation, review, and consultation." 336 F. App'x at 964. In his amended petition, he alleged that trial counsel rendered ineffective assistance by telling him that he had waived all of his appeal rights when the waiver actually allowed him to appeal one of the district court's rulings. *Id*. Notably, "**[t]he government concede[d] that the new claim ha[d] a connection to the original claim**" and the court, construing "liberally a *pro se* petitioner's pleadings," found the new claim related back to the original claim. *Id*. at 964 (emphasis added). In this third case cited by Cromartie, *Williams v. Fla. Dep't of Corr.*, 391 F. App'x 806 (11th Cir. 2014), neither timeliness nor relation back were at issue.

2005), the Eleventh Circuit originally held that the petitioner's untimely claim that trial counsel were ineffective for failing to show him a videotape of the drug transaction related back to his generic claim that trial counsel failed to adequately prepare for trial." *Id*. at *2. The Supreme Court decided *Mayle* ten days later and the Eleventh Circuit granted the government's motion for a rehearing. *Id*. at *1. Based on "guidance" provided in *Mayle,* the court withdrew its previous opinion and "substitute[d] the following in lieu thereof":

> [W]e cannot say that McLean's amended claim regarding counsel's failure to show him a videotape of a drug transaction, and the affect this would have had on plea negotiations, relates back to any of his timely filed §2255 claims. The magistrate judge erroneously concluded McLean's claim related back stating: "Although this precise issue was not fully articulated in any of McLean's prior pleadings, he complained throughout his pleadings that counsel did not adequately prepare for trial." The magistrate judge's rationale here is guilty of the "high level of generality" the Supreme Court warned against in *Mayle*, as a plethora of potential claims regarding pretrial and trial errors fit under the umbrella of failure to adequately prepare for trial.

Id. at *2 (citations and footnotes omitted); see also Randy Hertz & James Liebman, Federal Habeas Corpus Practice and Procedure, § 11.6. (7th ed. 2015) (stating that while a habeas petitioner need not recite "every item of relevant evidence or every relevant legal authority," he must "include in the statement of each claim enough supporting facts to distinguish it from claims of its generic type").

One of the major goals of the Antiterrorism and Effective Death Penalty Act ("AEDPA") is "'to expedite collateral attacks by placing stringent time restrictions on [them].'" *Mayle*, 545 U.S. at 657 (citations omitted). This goal would be thwarted if the general allegation of ineffective assistance, with no specification as to how or when (pretrial, trial, sentencing), preserved an unlimited number of specific ineffective assistance claims made after the expiration of AEDPA's statute of limitations. Therefore, the generic ineffective assistance language in the heading and paragraph 37 of Claim II in

Cromartie's original habeas petition did not preserve Cromartie's more specific claim that trial counsel were ineffective when they failed to investigate his background and present mitigating background evidence at sentencing.

Cromartie obviously was aware that he needed to allege facts to support his ineffective assistance claim. After Claim II's heading and the generic ineffective assistance language in paragraph 37, he listed numerous facts or instances of ineffective assistance of trial counsel in paragraphs 38(a) through 38(o). (Doc. 1 at 17-18). Cromartie argues that Claim X in this amended petition just adds additional facts to those contained in paragraph 38(b). (Doc. 1 at 17). In paragraph 38(b) Cromartie alleged that trial counsel were ineffective for failing to "adequately investigate the Junior Food Store incident and to present evidence during both phases of trial that would exculpate Petitioner or mitigate punishment." (Doc. 1 at 17).

Paragraph 38(b), as written,[5] does not allege that trial counsel were ineffective for failing to investigate Cromartie's background and present background evidence in mitigation at sentencing. Instead, the paragraph faults trial counsel for failing to investigate the crimes committed at the Junior Food Store[6] and present evidence that,

[5] Cromartie is literally asking the Court to rewrite paragraph 38(b) so that it would cover trial counsel's failure to investigate his background and present background evidence during sentencing. He provides two alternatives of how that might be done. First, he wants the Court to restructure and reword the paragraph to read: "[T]rial counsel failed 'to present evidence during both phases of the trial' on the Junior Food Store charges 'that would exculpate [Mr. Cromartie] or mitigate punishment." (Doc. 78 at 10) (emphasis omitted). Alternatively, he asks the Court to delete five words in the paragraph—"the Junior Food Store incident." (Doc. 78 at 15-16). If the Court deletes those words, the paragraph alleges that trial counsel were ineffective for failing to adequately "'investigate' and 'to present evidence during both phases of trial that would exculpate Petitioner or mitigate punishment.'" (Doc. 78 at 15-16) (emphasis omitted). The Court cannot, however, rewrite the paragraph to suit Cromartie.

[6] Cromartie was charged with, and convicted of, entering the Junior Food Store on April 10, 1994 and shooting the clerk twice in the head. *Cromartie v. State*, 270 Ga. 780, 781, 514 S.E.2d 205, 209 (1999). The clerk died and the State sought the death penalty for this murder. *Id*. at 781 n.1, 514 S.E.2d at 209 n.1. Cromartie was also charged with, and convicted of, entering the Madison Street Deli on April 7, 1994 and shooting the clerk in the face. *Id*. at 781, 514 S.E.2d at 209. The clerk lived and Cromartie was charged with, *inter alia*, armed robbery, aggravated battery, and aggravated assault. *Id*. at 781 n.1, 514 S.E.2d at 209 n.1.

during the guilt phase, would exonerate Cromartie of these crimes or, during the sentencing phase, would mitigate Cromartie's punishment.[7] Similarly, in paragraph 38(a) Cromartie alleges that trial counsel were ineffective for failing to investigate the crimes committed at the Madison Street Deli and present evidence during the guilt phase to exculpate Cromartie and during the sentencing phase to mitigate punishment.

Cromartie's original claim in paragraph 38(b) and his amended claim in Claim X are not "tied to a common core of operative facts." *Mayle*, 545 U.S. at 664. Contrary to Cromartie's arguments, Claim X does not "provide the factual support" for the general claim raised in paragraph 38(b). (Doc. 78 at 16). The facts in Claim X are: (1) "Cromartie's life has been plagued by trauma, abuse, and neglect" (Doc. 62 at 55); (2) Cromartie "suffers from Alcohol-Related Neurodevelopmental Disorder, multiple neuropsychological impairments, including impaired executive functioning, and the effects of complex trauma" (Doc. 62 at 56); and (3) trial counsel failed to present evidence, including expert testimony, that could "contextualize and explain Mr. Cromartie's life history from a mitigating and mental health perspective" (Doc. 62 at 63). These facts in no way support the claim in paragraph 38(b) that trial counsel failed to investigate and present evidence regarding the "Junior Food Store incident." (Doc 1 at 17). "Although both claims involve counsel's performance at sentencing, they involve very different aspects of counsel's performance" and the claims do not arise out of the same set of facts. *Mabry*, 336 F. App'x at 964 (Untimely ineffective assistance claims which "do not have core facts that coincide" with timely ineffective assistance claims do

[7] Evidence that created lingering doubts in the jurors' minds regarding Cromartie's guilt "in the Junior Food Store incident" would mitigate his punishment. (Doc. 1 at 17). *See Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 787-88 (11th Cir. 2003) ("Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but 'is perhaps the most effective strategy to employ at sentencing'.") (citing *Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir 2000); *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999)).

not relate back.); *see also Davenport v. United States*, 217 F.3d 1341, 1346 (11th Cir. 2000) (Untimely claims that (1) trial counsel were ineffective for allowing defendant to be sentenced based on drugs that were not part of the same course of conduct, (2) improperly relying on a summary lab report, and (3) failing to advise the defendant that a plea may be available did not relate back to timely claims that (1) counsel were ineffective for failing to allege that the drugs were not crack cocaine because they lacked sodium bicarbonate, (2) failing to object that the drug weight improperly included moisture content, and (3) failing to assert that the government allowed its witness to perjure himself.); *United States v. Duffus*, 174 F.3d 333, 337-38 (3d Cir. 1999) (Untimely claim that counsel were ineffective for failing to move to suppress evidence did not relate back to timely ineffective assistance claims that counsel failed to object to the court's use of the sentencing guidelines and failed on appeal to raise insufficiency of evidence to convict.); *United States v. Craycraft*, 167 F.3d 451, 456-57 (8th Cir. 1999) (Untimely claim that trial counsel were ineffective for failing to file an appeal does not relate back to timely ineffective assistance claims that trial counsel failed to pursue a downward departure, failed object to the characterization of methamphetamine, and failed to raise challenges to the defendant's prior state convictions.). Cromartie's new claim that trial counsel failed to investigate his background and present mitigating evidence from such investigation does "not arise from the same set of facts as his original claim[]" that trial counsel failed to investigate the robbery and murder at the Junior Food Store and present mitigating evidence from such investigation. *Davenport*, 217 F.3d at 1346. Thus, his new claim does not relate back, under Federal Rule Civil Procedure 15(c), to his original habeas petition.

Cromartie argues that "if Claim X does not relate back to Claim II, it is difficult to imagine which claims in the petition are timely." (Doc. 78 at 12). It is not. The claims in the amended petition that concern the same "core set of operative facts" as the claims in the original petition relate back. *Mayle*, 545 U.S. at 664. For example, in Claim I(A) of Cromartie's amended petition, he alleges that the trial court erred for failing to excuse for cause five specifically named jurors because of their views on the death penalty. (Doc. 62 at 19-24). This claim relates back to at least two claims in his original petition. First, it relates back to Claim IV, paragraph 42(g), in which Cromartie alleged that "[t]he trial court improperly failed to strike for cause several venire persons whose attitudes towards the death penalty would have prevented or substantially impaired their performance as jurors." (Doc. 1 at 22). It also relates back to Claim IV, paragraph 42(l), in which Cromartie alleged "[t]he court erred in its rulings on motions to challenge prospective jurors, including but not limited to Juror Smith, for cause based on their attitudes about the death penalty and stated biases . . . ." (Doc. 1 at 23). While Cromartie did not originally name the specific jurors at issue or provide the level of detail he did in his amended petition, Claim I claim relates back to the original petition because it "arise[s] from the same set of facts" as his original claims. *Davenport*, 217 F.3d at 1346

In conclusion, Claim X does not relate back to Claim II in the original petition. Therefore, Respondent's amendment to assert a time bar would not be futile.

B. Undue delay and totality of the circumstances

Respondent acknowledges he should have raised the statute of limitations defense in his response to Cromartie's amended habeas petition. (Doc. 74 at 5-6). Respondent's counsel states she has never served as "lead counsel" in a case in which new claims were brought in an amended petition following the filing of a timely original

habeas petition. (Doc. 74 at 6). She "mistakenly thought that claims brought in amended petitions following the filing of a timely petition, were timely even if new." (Doc. 74 at 5). Respondent states this "misunderstanding of the law," as opposed to any bad faith, undue delay, or dilatory motive, caused the failure to assert the defense in the response. (Doc. 74 at 5-6, 9). While researching Cromartie's merits brief, Respondent's counsel discovered that new claims in an amended petition could be time barred. (Doc. 74 at 6). Upon making this discovery, counsel moved to amend on March 21, 2016—eight months after filing Respondent's response to Cromartie's amended habeas petition. (Docs. 64; 74). Cromartie argues that Respondent's explanation regarding counsel's misunderstanding of the law is either untrue or unreasonable and, therefore, the Court should find Respondent unduly delayed filing his motion for leave to amend. (Doc. 78 at 22).

To support his argument that Respondent is being untruthful about his counsel's knowledge of the law, Cromartie states that "counsel for Respondent should be well familiar with the relation-back doctrine" because both current counsel for Respondent served as counsel in *Sallie v. Chatman*, No. 5:11-CV-75 (MTT) (M.D. Ga.), a case in which the relation back of new claims brought in amended petition was at issue in both this Court and the Eleventh Circuit.[8] (Doc. 78 at 22). Cromartie points out that on June 26, 2014, Respondent's counsel, Sabrina Graham, was present at oral argument in this Court during which the relation-back doctrine was discussed. *Sallie*, No. 5:11-CV-75 (MTT) (M.D. Ga.) (Doc. 168 at 14-21, 27-30, 32-34). Though present, Graham was not lead counsel in *Sallie*, and she did not argue the case before the Court. *Sallie*, No.

[8] Respondent's counsel, Sabrina Graham and Beth Burton, both served as "section leader" for the capital litigation section during the litigation of *Sallie v. Chatman*, No. 5:11-CV-75 (MTT). (Doc. 79 at 24-25). While Richard Tangum was lead counsel, both Graham and Burton were, at one time, counsel of record in *Sallie*. *See Sallie v. Chatman*, No. 5:11-CV-75 (MTT) (Doc. 7 Beth Burton notice of appearance; Doc. 119 Sabrina Graham notice of appearance; Doc. 120 Beth Burton notice of withdrawal).

5:11-CV-75 (MTT) (M.D. Ga.) (Doc. 168). Also, the relation-back doctrine was never briefed by either party. It was first mentioned during the June 26, 2014 oral argument, and the Court ruled shortly thereafter that the relation-back question was moot because Sallie's initial petition was untimely. *Sallie*, No. 5:11-CV-75 (MTT) (M.D. Ga.) (Doc. 168 at 29-30) (Questioning Richard Tangum, lead counsel for the Respondent, the Court asked, "What about his relation back argument? I know that one only got raised today . . . ."); *Sallie v. Chatman*, 2014 WL 3509732, at *2 (M.D. Ga. 2014) ("When he filed his motion to amend, Sallie did not contend his new claim related back to his initial habeas petition pursuant to Fed. R. Civ. P. 15(c). However, at oral argument, Sallie . . . invoked Rule 15 and argued his new claim related back to his initial petition."). The fact that the relation-back doctrine was discussed at one oral argument second-chaired by Graham does not show Respondent is being untruthful about Graham's lack of knowledge regarding the doctrine.

After this Court found his habeas petition was untimely, Sallie petitioned the Eleventh Circuit for a certificate of appealability ("COA"). *Sallie v. Chatman*, No. 14-13719-P (11th Cir. Sept. 9, 2014). Included among his arguments was the allegation that his amended petitions related back to his initial petition. The Eleventh Circuit denied his application for a COA and subsequently denied his motion for reconsideration. *Sallie,* 14-13719-P (11th Cir. September 29, 2015, March 28, 2016). Respondent's counsel never briefed or otherwise addressed the relation-back doctrine in the Eleventh Circuit. Sallie was apparently the first, and to this Court's knowledge only, untimely federal capital habeas case in Georgia. The Court has no reason to question Respondent's assertion that the capital litigation section has not briefed, researched, or extensively argued the relation-back doctrine. (Doc. 79 at 27). Furthermore,

Respondent has no reason, other than a misunderstanding of the law, for failing to assert the time-bar defense in his response to the amended petition. Respondent stands to gain nothing from the delay in asserting this defense. Given these facts, the Court cannot find untruthful counsel's plea that she misunderstood the law.

Nor can the Court find that Respondent's justification for the delay in asserting the statute of limitations is unreasonable. Cromartie does cite several cases for the proposition that ignorance of the law or a mistake of the law does not provide a reasonable justification for delay. (Doc. 78 at 22). However, none of these are habeas cases; much less habeas cases in which the respondent seeks to assert a time-bar defense that he mistakenly failed to assert in his answer. The Supreme Court has, however, addressed a similar situation in which the lower court raised a time-bar defense that the respondent mistakenly failed to raise in his answer. *Day v. McDonough*, 547 U.S. 198 (2006).

In *Day*, the respondent, "[o]verlooking controlling Eleventh Circuit precedent," miscalculated the one-year statute of limitations and asserted in its answer that Day's petition was timely. *Id*. at 203. The lower court raised the time-bar defense *sua sponte* and dismissed Day's petition as time-barred. *Id*. at 204. The issue on appeal was whether a federal court could dismiss a habeas petition as untimely when the respondent failed to assert the statute of limitations defense in his answer. *Id*. at 205. The respondent argued that instead of an "inflexible rule" that treated the failure to plead the defense as an absolute waiver, an "'intermediate approach" should be taken "to permit the 'exercise [of] discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.'" *Id*. at 208 (citations omitted). The Supreme Court agreed. *Id*.

at 209. The Court stated that (1) only nine months had passed between respondent's answer and the court's notice to Day that it was raising the statute of limitations defense, (2) Day had "the opportunity to show why the limitation period should not yield dismissal of the petition" *Id*. at 210, (3) no court proceedings occurred in the interim, and (4) "nothing in the record suggest[ed] that the [respondent] 'strategically' withheld the defense or chose to relinquish it. *Id*. at 211. Based on this, the Supreme Court concluded that Day was "not significantly prejudiced by the delayed focus on the limitation issue" and the interests of justice were served by dismissing Day's petition as time barred versus addressing its merits. *Id*. at 210.

When affirming the lower court's decision to raise the time-bar defense if the respondent inadvertently fails to assert it, the unanimous Court agreed that the lower court could have allowed the respondent to amend his answer:

> [T]he Magistrate Judge, instead of acting *sua sponte*, might have informed the [respondent] of [his] obvious computation error and entertained an amendment to the [respondent's] answer. Recognizing that an amendment to the [respondent's] answer might have obviated this controversy, we see no dispositive difference between that route, and the one taken here.

Id. at 209. *See also id*. at 216 n.2 (Scalia, J., dissenting) (agreeing that "a judge may call the timeliness issue to the [respondent's] attention and invite a motion to amend the pleadings under Civil Rule 15(a)."); *Sweet v. Sec'y, Dep't of Corr*., 467 F.3d 1311, 1321 (11th Cir. 2006) (finding no waiver when respondent first asserted the statute of limitations defense in his motion for summary judgment as opposed to his answer).

The facts here are similar to those in *Day*. Eighth months passed between Respondent's answer and his motion to amend the answer. (Docs. 64, 74). In *Day*, nine months passed between the filing of the answer and the Magistrate Judge's notice to Day that he was raising the time-bar defense. *Day*, 547 U.S at 211. Here, no

substantial court proceedings occurred between the filing of the Respondent's answer and his motion to amend the answer. Although Cromartie did investigate and submit evidence to the Court to support his new ineffective assistance claim, he performed this investigation prior to filing his amended habeas petition and, therefore, prior to Respondent filing his answer. (Docs. 50, 55, 56, 57, 58, 62, 64). In other words, Cromartie was not relying on Respondent's failure to raise the statute of limitations in his answer when he conducted this investigation. Like Day, Cromartie has had the opportunity to show the time bar should not apply. *Day*, 547 U.S. at 210-11. Also, as in *Day*, there is nothing to suggest that Respondent strategically withheld the time-bar defense. *Id.* at 211. As Respondent points out, he has gained nothing from his delayed assertion of this affirmative defense. (Doc. 79 at 27). Based on these facts, the Court finds that Cromartie was "not significantly prejudiced by the delayed focus on the limitation issue" and the interests of justice are served by allowing the Respondent to amend his answer to allege that Claim X is time barred. *Day*, 547 U.S. at 210. Indeed, given that a court can on its own raise a time-bar defense, it likely would be an abuse of discretion not to allow a respondent to raise such a defense under the circumstances here.

III. Equitable tolling

Cromartie argues that should the Court grant Respondent leave to amend and find that Claim X does not relate back to Claim II, he is entitled to equitable tolling pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Cromartie acknowledges, however, "that controlling Eleventh Circuit precedent currently forecloses an argument that ineffective assistance of prior counsel can serve to equitably toll the AEDPA statute of limitations pursuant to *Martinez* and/or *Trevino*. (Doc. 78 at 28)

(citing *Lambrix v. Sec'y, Fla. Dep't of Corr*., 756 F.3d 1246, 1262 (11th Cir. 2014)). Cromartie alleges that "such precedent is incorrect" and states that he wishes to "preserve this argument for potential future appellate review." (Doc. 78 at 28).

The Eleventh Circuit has held that *Martinez* and *Trevino* have no effect on AEDPA's one year statute of limitations. *Arthur v. Thomas*, 739 F.3d 611, 630-31 (11th Cir. 2014). "[W]hile the federal limitations period is subject to equitable tolling in certain circumstances, [the Eleventh Circuit has] rejected the notion that anything in *Martinez* provides a basis for equitably tolling the filing deadline." *Chavez v. Sec'y, Fla. Dep't of Corr*., 742 F.3d 940, 946 (11th Cir. 2014) (citing *Arthur*, 739 F.3d at 630-31); *Lambrix*, 756 F.3d at 1262 ("Martinez does not alter the statutory bar against filing untimely § 2254 petitions").

As Cromartie concedes, this Court is bound by these Eleventh Circuit cases and, therefore, cannot find he is entitled to equitable tolling pursuant to *Martinez* and *Trevino*.

In conclusion, Respondent's motion to amend his answer to assert a time-bar defense to Claim X is **GRANTED**.

SO ORDERED, this 22nd day of August, 2016.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

SUPREME COURT OF GEORGIA
Case No. S13E0351

Atlanta, September 09, 2013

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

RAY JEFFERSON CROMARTIE v. BRUCE CHATMAN, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur.

Trial Court Case No. 2000V295

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Pamela M. Fishburne, Deputy Clerk

Res. Ex. No. 247
Case No. 7:14-CV-39

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

RAY JEFFERSON CROMARTIE,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	2000-V-295
	*	
v.	*	HABEAS CORPUS
	*	
STEPHEN UPTON, Warden, Georgia Diagnostic and Classification Prison,	*	
	*	
Respondent.	*	

FINAL ORDER

COMES NOW before the Court, Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentences in the Superior Court of Thomas County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on August 12-14, 2008, the arguments of counsel and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction and sentence.

I. PROCEDURAL HISTORY

A. Trial Proceedings In Thomas County Superior Court

Petitioner, Ray Jefferson Cromartie, was convicted by a jury in the Superior Court of Thomas County of one count of

malice murder, one count of armed robbery, one count of aggravated battery, and four counts of possession of a firearm during the commission of a crime on September 26, 1997. On October 1, 1997, Petitioner was sentenced to death. In addition to the death sentence, the trial court sentenced Petitioner to life imprisonment for armed robbery, twenty years for aggravated battery, and five years for each count of possession of a firearm during the commission of a crime, all to be served consecutively.

The Georgia Supreme Court on direct appeal found the facts of Petitioner's crimes as follows:

> The evidence adduced at trial shows that Cromartie borrowed a .25 caliber pistol from his cousin Gary Young on April 7, 1994. At about 10:15 p.m. on April 7, Cromartie entered the Madison Street Deli in Thomasville and shot the clerk, Dan Wilson, in the face. Cromartie left after unsuccessfully trying to open the cash register. The tape from the store video camera, while too indistinct to conclusively identify Cromartie, captured a man fitting Cromartie's general description enter the store and walk behind the counter toward the area where the clerk was washing pans. There is the sound of a shot and the man leaves after trying to open the cash register. Wilson survived despite a severed carotid artery. The following day, Cromartie asked Gary Young and Carnell Cooksey if they saw the news. He told Young that he shot the clerk at the Madison Street Deli while he was in the back washing dishes. Cromartie also asked Cooksey if he was "down with the 187," which Cooksey testified meant robbery. Cromartie stated that there was a Junior Food Store with "one clerk in the store and they didn't have no camera."
>
> In the early morning hours of April 10, 1994, Cromartie and Corey Clark asked Thaddeus Lucas if he

would drive them to the store so they could steal beer. As they were driving, Cromartie directed Lucas to bypass the closest open store and drive to the Junior Food Store. He told Lucas to park on a nearby street and wait. When Cromartie and Clark entered the store, Cromartie shot clerk Richard Slysz twice in the head. The first shot which entered below Slysz's right eye would not have caused Slysz to immediately lose consciousness before he was hit by Cromartie's second shot directed at Slysz's left temple. Although Slysz died shortly thereafter, neither wound caused an immediate death. Cromartie and Clark then tried to open the cash register but were unsuccessful. Cromartie instead grabbed two 12-packs of Budweiser beer and the men fled. A convenience store clerk across the street heard the shots and observed two men fitting the general description of Cromartie and Clark run from the store; Cromartie was carrying the beer. While the men were fleeing one of the 12-packs broke open and spilled beer cans onto the ground. A passing motorist saw the two men run from the store and appear to drop something.

Cooksey testified that when Cromartie and his accomplices returned to the Cherokee Apartments they had a muddy case of Budweiser beer and Cromartie boasted about shooting the clerk twice. Plaster casts of shoe prints in the muddy field next to the spilled cans of beer were similar to the shoes Cromartie was wearing when he was arrested three days later. Cromartie's left thumb print was found on a torn piece of Budweiser 12-pack carton near the shoe prints. The police recovered the .25 caliber pistol that Cromartie had borrowed from Gary Young, and a firearms expert determined that this gun fired the bullets that wounded Wilson and killed Slysz. Cromartie's accomplices, Lucas and Clark, testified for the State at Cromartie's trial.

Cromartie v. State, 270 Ga. 780, 781-782(1), 514 S.E.2d 205 (1999).

B. Appeal to the Georgia Supreme Court

The Georgia Supreme Court affirmed Petitioner's convictions and sentence on March 8, 1999. Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999). Petitioner's motion for reconsideration was denied on April 2, 1999.

C. Appeal to the United States Supreme Court

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 1, 1999. Cromartie v. Georgia, 528 U.S. 974, 120 S.Ct. 419 (1999). Petitioner filed a petition for rehearing in the United States Supreme Court, which was denied on January 10, 2000. Cromartie v. Georgia, 528 U.S. 1108, 120 S.Ct. 855 (2000).

D. Instant Habeas Proceedings In The Butts County Superior Court

Petitioner filed this instant habeas corpus petition on May 9, 2000, and his amended petition on December 9, 2005. An evidentiary hearing was held on August 12-14, 2008.

II. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR STATE HABEAS CORPUS RELIEF

Petitioner's Amended Petition enumerates thirty-three (33) claims for relief. As is stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of

justice exception; (3) some claims are non-cognizable; and, (4) some claims are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review.

To the extent Petitioner failed to brief his claims for relief, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are **DENIED**.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE BARRED

Many of Petitioner's grounds for relief in the instant action were rejected by the Georgia Supreme Court on direct appeal. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Hance v. Kemp, 258 Ga. 649(6), 373 S.E.2d 184 (1988); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996).

This Court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999), and may not be raised in this habeas corpus proceeding:[1]

[1] To the extent that there are allegations contained in supporting paragraphs of these claims which set forth new

That portion of Claim I, wherein Petitioner alleges prosecutorial misconduct in that the State suppressed information favorable to the defense at both phases of the trial in violation of Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419 (1995) and Banks v. Dretke, 540 U.S. 668 (2004). Cromartie v. State, 270 Ga. at 785-786(12));

That portion of Claim III, wherein Petitioner alleges juror misconduct in that the jurors improperly considered matters extraneous to the trial. Cromartie v. State, 270 Ga. at 789 (24));

That portion of Claim III, wherein Petitioner alleges juror misconduct in that the jurors had improper biases which infected their deliberations. Cromartie v. State, 270 Ga. at 783-784 (9).

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court excused for cause jurors whose views on the death penalty were not extreme enough to warrant exclusion under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985). Cromartie v. State, 270 Ga. at 783(4).

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court improperly restricted voir dire. Cromartie v. State, 270 Ga. at 783, 785 (8)(10).

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court refused to grant the defense motion requesting that the incidents at the Madison Street Deli and the Junior Food Store be severed. Cromartie v. State, 270 Ga. at 783(3).

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arguments in support of these issues and allege violations under different constitutional provisions, these allegations are procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the default. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985).

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court denied the defense motion to quash the indictment based on the defense challenge to the composition of the grand jury. Cromartie v. State, 270 Ga. at 783 (4). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or a miscarriage of justice to overcome the procedural default.

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court improperly allowed into evidence various items of prejudicial, unsubstantial and irrelevant evidence tendered or elicited by the State at both phases of the trial. Cromartie v. State, 270 Ga. at 786-787 (15) (16) (17) (18). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or a miscarriage of justice to overcome the procedural default.

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court failed to give certain requested charges, specifically including charges on lesser included offenses. Cromartie v. State, 270 Ga. at 787-788 (19). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default.

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court failed to require the State to disclose exculpatory or impeaching evidence to the defense. Cromartie v. State, 270 Ga. at 785-786 (12). To the extent

Petitioner is alleging error regarding the admission of other evidence not complained about on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or a miscarriage of justice to overcome the procedural default.

That portion of Claim IV wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court allegedly failed to properly respond to the jury's inquiry regarding their inability to reach a unanimous verdict. Cromartie v. State, 270 Ga. at 789 (21).

Claims V and VI, wherein Petitioner alleges that he is innocent of malice murder because he did not kill Mr. Slysz and therefore his execution would be unconstitutional, to the extent an assertion of "actual innocence" is even cognizable in a habeas corpus proceeding[2], this claim was decided adversely to Petitioner on direct appeal. Cromartie v. State, 270 Ga. at 781-782 (1).

That portion of Claim X, wherein Petitioner alleges that he was denied due process of law by the instructions given to the jury at the guilt/innocence phase of trial. Cromartie v. State, 270 Ga. at 787-788 (19). To the extent Petitioner is alleging error regarding the admission of other evidence not complained about on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or a miscarriage of justice to overcome the procedural default.

As these claims were raised and rejected by the Georgia Supreme Court on direct appeal, they are barred under the well-

[2] To the extent this claim seeks to assert new evidence of Petitioner's innocence, it may properly be the subject of an extraordinary motion for new trial, see Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980), but is not a cognizable claim for habeas corpus relief.

established doctrine of *res judicata* and are not properly before this Court for review.

1. Petitioner's Claims Regarding Proportionality Review Are Barred from this Court's Review (Claim VII and that portion of Claim VIII)

a. Petitioner's Claim Regarding the Proportionality of His Sentence is *Res Judicata*

Petitioner asserts that the Georgia Supreme Court did not conduct a proper proportionality review of his case and sentence. However, the exclusive procedure for conducting a sentence review proceeding is set forth in O.C.G.A. § 17-10-35(b), et. seq. and this statute clearly contemplates that this sentence review will occur only on direct appeal before the Georgia Supreme Court. The Court performed this statutory sentence review and specifically held:

> The death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The death sentence is also not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all involve a deliberate killing during the commission of an armed robbery.

Cromartie v. State, 270 Ga. 780, 790 (1999). Because the proportionality of Petitioner's death sentence was appropriately adjudicated by the Georgia Supreme Court on direct appeal, this Court finds Petitioner's claim may not be relitigated in this habeas corpus proceeding. See Hall v. Lee, 286 Ga. 79, 97, 684

S.E.2d 868 (2009) (holding that the state habeas court correctly found Lee's proportionality challenge was *res judicata*); Schofield v. Meders, 280 Ga. 865, 871, 632 S.E.2d 369 (2006) (declining to re-examine the issue of proportionality on habeas corpus); Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (2000). Accordingly, this portion of Petitioner's claim is **DENIED**.

b. Challenge to the Georgia Supreme Court's Proportionality Review

Petitioner also alleges that the proportionality review conducted by the Georgia Supreme Court in capital cases is unconstitutional. However, as this claim was available to Petitioner during his direct appeal this Court finds it is procedurally defaulted. Further, this Court finds Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome this default. Accordingly, this claim is **DENIED**.

Alternatively, this Court also finds this claim fails on the merits. In support of this allegation, Petitioner relies heavily upon Justice Stevens' statements respecting the denial of petition for writ of certiorari in Walker v. Georgia, 129 S.Ct. 453 (2008), to support his attack on the Georgia Supreme Court's proportionality review. However, Justice Stevens' statements were rebutted by Justice Thomas in his concurrence of the denial of the petition for certiorari:

> In Pulley, the Court considered the history of Georgia's capital sentencing scheme and dismissed Justice Stevens' assertion that the constitutionality of Georgia's scheme had rested on its willingness to conduct proportionality review. Id., at 44-46, 50, 104 S. Ct. 871, 79 L. Ed. 2d 29; id., at 58-59, 104 S. Ct. 871, 79 L. Ed. 2d 29 (Stevens, J., concurring in part and concurring in judgment). The Court explained that, although it may have emphasized the role of proportionality review as "an additional safeguard against arbitrarily imposed death sentences" in Gregg, supra, and Zant, supra, it had never held that "without comparative proportionality review the [Georgia] statute would be unconstitutional." Pulley, supra, at 50, 104 S.Ct. 871, 79 L. Ed. 2d 29. Justice Stevens acknowledged in his Pulley concurrence that his interpretation of Gregg and Zant differed from the Court's. 465 U.S., at 54, 104 S. Ct. 871, 79 L. Ed. 2d 29. He continues to adhere to his distinctive interpretation of Gregg and Zant today, ante, at 2-3, 6, and questions whether the Georgia scheme as currently administered provides the additional review that he believes is constitutionally required. But, under this Court's precedents, Georgia is not required to provide any proportionality review at all.
>
> Having elected to provide the additional protection of proportionality review, there can be no question that the way in which the Georgia Supreme Court administered that review in this case raised no constitutional issue. The State's proportionality review was lauded in Gregg as a protective measure that would ensure that "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, … no defendant convicted under such circumstances will suffer a sentence of death" because there will be no comparable cases to support a finding of proportionality. 428 U.S. at 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and Stevens, JJ.).

Walker v. Georgia, 129 S.Ct. 481 (2008).

Moreover, the Georgia Supreme Court has continuously rejected challenges to the manner in which it conducts its

statutory proportionality review. See Hall v. Lee, 286 Ga. 79, 97-98, 684 S.E.2d 868 (2009)(holding that the "method by which th[e] Court conducts its proportionality review satisfies Georgia statutory requirements and is not unconstitutional"); Gissendaner v. State, 272 Ga. 704, 716(16), 532 S.E.2d 677 (2000) (holding that the Court's proportionality review is neither unconstitutional nor inadequate under statutory law); McMichen v. State, 265 Ga. 598, 611, 458 S.E.2d 833 (1995) (citing McCleskey v. Kemp, 481 U.S. 279, 306-308 (1987)(The method by which the Georgia Supreme Court conducts its review of the proportionality of death sentences is constitutionally sound.)). Accordingly, even if this Court were to assume this claim is properly before it, which the Court does not, the Court finds in the alternative that this claim is without merit and is **DENIED**.

c. Petitioner's Claim of Arbitrary and Capricious Sentencing is Barred By *Res Judicata*.

As part of his proportionality claim, Petitioner also claims that the Georgia Supreme Court's proportionality review inadequately protects against arbitrary and racially discriminatory death sentences and the alleged "unfettered" discretion of the district attorneys to seek the death penalty. However, on direct appeal, the Georgia Supreme Court specifically held:

> Cromartie, an African-American, claims that the death penalty was sought and imposed in a racially discriminatory manner. In Crowe v. State, 265 Ga. 582, 595 (24) (458 S.E.2d 799) (1995), we recognized that a district attorney's discretion to seek the death penalty is not unfettered as it requires the exercise of professional judgment. Here, Cromartie fails to show that racial considerations played a part in the decision to seek the death penalty against him or that the decision-makers in his case acted with a discriminatory purpose. See Rower v. State, 264 Ga. 323 (1) (443 S.E.2d 839) (1994).

Cromartie v. State, 270 Ga. at 789. As this claim was raised and decided adversely to Petitioner on direct appeal, this Court finds it is barred from review under the doctrine of *res judicata*. Accordingly, this portion of Petitioner's claim is **DENIED**.

Summary of Findings - Claims That Are Barred

This Court is bound by the decisions of the Georgia Supreme Court as to the portions of **Claims I, III, IV, VIII, X,** and **Claims V, VI and VII set forth above,** and habeas corpus relief is **DENIED** as to each of these claims.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985);

O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4), 373 S.E.2d 184 (1988); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. See Earp v. Angel, 257 Ga. 333, 357 S.E.2d 596 (1987). See also Turpin v. Todd, 268 Ga. 820, 493 S.E.2d 900 (1997)(a procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors. A habeas petitioner who meets both prongs of the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

This Court concludes that the following grounds for habeas relief, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted, and that this Court is barred from considering any of these claims on their merits due to the fact that Petitioner has failed to demonstrate cause and prejudice, or a fundamental miscarriage of justice sufficient to excuse his failure to raise these grounds:

1. **The Following Claims Are Procedurally Defaulted:**

That portion of Claim I, wherein Petitioner alleges that the State engaged in prosecutorial misconduct at

all stages of Petitioner's trial by the withholding or destruction of pertinent evidence in that:

1) the State allegedly failed to disclose benefits or promises given to State witnesses in exchange for testimony in violation of Giglio v. United States, 405 U.S. 150 (1972);

2) the State allegedly failed to preserve and maintain evidence that was exculpatory in violation of Petitioner's due process rights; and

3) the State allegedly suppressed evidence that was exculpatory in nature;[3]

That portion of Claim I, wherein Petitioner alleges that the State engaged in prosecutorial misconduct at all stages of Petitioner's trial by the presentation of perjured testimony and false evidence at trial in that:

1) the State took advantage of Petitioner's ignorance of the undisclosed favorable information and of the false and manufactured evidence by arguing to the jury that which it knew or should have known to be false and/or misleading;

2) the State allegedly elicited false and/or misleading testimony at trial in violation of Mooney v. Holohan, Napue v. Illinois and Miller v. Pate; and

3) the State allegedly allowed its witnesses - either knowingly or negligently - to convey a false impression to the jury, and there is a reasonable likelihood that the false impression could have affected the jury;

That portion of Claim I, wherein Petitioner alleges his due process rights were violated when the State allegedly made improper and prejudicial remarks during both phases of trial;

[3] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is *res judicata*. Cromartie v. State, 270 Ga. at 785 (12).

That portion of Claim I, wherein Petitioner alleges the State improperly struck potential jurors on the basis of race and/or gender;

That portion of Claim I, wherein Petitioner alleges the jury bailiffs and/or sheriff's deputies and/or other State agents had improper communications with jurors;

Those portions of Claim III, wherein Petitioner alleges juror misconduct in that jurors considered matters extraneous to trial, had improper racial attitudes, provided false or misleading responses during voir dire, had improper biases which infected their deliberations, were exposed to prejudicial third party opinions, had improper communications with third parties, had improper communication with jury bailiffs, had improper ex parte communication with the judge, and improperly prejudged both phases of trial;[4]

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court allegedly improperly excused jurors for reasons of "hardship;"

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court allegedly improperly restricted Petitioner's voir dire;[5]

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court granted

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[4] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is therefore *res judicata.* Cromartie v. State, 270 Ga. at 783-784 (7) (9).

[5] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is *res judicata.* Cromartie v. State, 270 Ga. at 783 (8) (10).

Petitioner's request to not sequester the jury during Petitioner's trial;[6]

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court denied the defense motion to close the pretrial proceedings;

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court denied the defense motion to quash the indictment based on the defense's challenge to the grand and traverse juries;[7]

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court admitted various items of evidence by the State at both phases of trial;[8]

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court allegedly failed to curtail the State's improper arguments and grant the defense motion for mistrial after these alleged improper arguments;

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[6] The Georgia Supreme Court took judicial notice of Petitioner's request to not sequester the jury, thus, as Petitioner requested the trial court take this action Petitioner cannot now claim that this was an improper ruling. Cromartie v. State, 270 Ga. at 789.

[7] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is *res judicata*. Cromartie v. State, 270 Ga. at 783 (4).

[8] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is *res judicata*. Cromartie v. State, 270 Ga. at 786-787 (15) (16) (17) (18).

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court did not grant the defense motions for directed verdicts and when the trial court did not direct verdicts of acquittal or life sentence on its own motion;

That portion of Claim IV, wherein Petitioner alleges that the trial court's improper rulings and other errors deprived Petitioner of a fair trial and reliable sentencing when the trial court allegedly inquired about the jury's progress after receiving a note from the jury requesting information about what would happen should they not reach a unanimous vote;[9]

Claim IX, wherein Petitioner alleges he was denied due process of law when he was sentenced by the same jury that convicted him; and,

Claim XI, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional.

Accordingly, as Petitioner did not raise these issues at trial and/or appeal and did not make a showing of cause and actual prejudice or of a miscarriage of justice which would be sufficient to excuse his procedural default of these claims, the claims are procedurally defaulted and therefore are not reviewable by this Court.

1. **PETITIONER'S *BRADY* CLAIM IS PROCEDURALLY DEFAULTED**

Petitioner alleges the State withheld exculpatory information from trial counsel in violation of his rights under Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Petitioner

[9] To the extent that this claim was raised and decided adversely to Petitioner on direct appeal, it is *res judicata*. Cromartie v. State, 270 Ga. at 789 (21).

contends that statements regarding the shooting at the Madison Street Deli made by two alleged witnesses, Keith Reddick and Terrell Cochran, were withheld by the State. However, this Court finds Petitioner has failed to prove that trial counsel were unaware that Reddick and Cochran were interviewed by the Thomasville Police Department regarding the Madison Street Deli shooting or that Petitioner's trial defense team did not interview Reddick or Cochran prior to trial. As Reddick and Cochran were available to trial counsel, and as neither have provided testimony during this state habeas proceeding that they would not have informed trial counsel of any information they had regarding the Madison Street Deli shooting, Petitioner has failed to prove cause to overcome the procedural default of this claim. Additionally, Petitioner has failed to prove that Reddick or Cochran provided exculpatory information when interviewed by the Thomasville Police Department or that their state habeas testimony is credible and, therefore, has also failed to show prejudice to overcome the procedural bar to this claim. Accordingly, this Court finds this claim is procedurally defaulted and Petitioner has failed to prove cause and prejudice or a miscarriage of justice to overcome the default of this claim.

The law is clear that Brady claims can be defaulted. See Head v. Thomason, 276 Ga. 434(9), 578 S.E.2d 426 (2003) (*citing*

Head v. Ferrell, 274 Ga. 399, 401-402(III), 554 S.E.2d 155 (2001)); Strickler v. Greene, 527 U.S. 263 (1999). It is also clear that Petitioner did not raise this Brady claim at trial or on appeal. Therefore, if Petitioner is raising the instant claim solely as a substantive Brady claim, it is defaulted and not properly before this Court for review as Petitioner has failed to establish State misconduct as cause to overcome this default as he has failed to show the State suppressed evidence.

Furthermore, as required by the Georgia Supreme Court decision in Turpin v. Todd, 268 Ga. 820, 828(b), n. 43, 493 S.E.2d 900 (1997), for Petitioner to overcome procedural default of his claim he must establish "actual prejudice." As to prejudice to excuse the procedural default of a Brady claim, the Supreme Court has maintained the proper analysis parallels the issue of Brady "materiality" such that if information is not material for Brady purposes, no prejudice to excuse the procedural default of the Brady claim has been established. Strickler, 527 U.S. at 302-303. In United States v. Frady, 456 U.S. 152 (1982), relied upon by the Court in Todd, 268 Ga. at 829, the United States Supreme Court held that Petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady,

456 U.S. 152, 170 (emphasis in original). In other words, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." U.S. v. Bagley, 473 U.S. 667, 682 (1985). See also Strickler, 527 U.S. at 291.

a. Cause to Overcome Procedural Default

Petitioner provides this Court with a lengthy argument regarding his request for documents during his state habeas proceeding from various state agencies, including, but not limited to, the Thomasville District Attorney's Office, the Thomasville Police Department, the Thomasville Police Department Narcotics and Vice Division, the Moultrie Detention Center and the Georgia Pardons and Paroles Board. However, there is no information, upon which Petitioner relies to support his Brady claim, that comes from any state agency from which Petitioner requested documents during his state habeas proceeding. Instead, Petitioner alleges that statements taken by the Thomasville Police Department from Keith Reddick and Terrell Cochran regarding the Madison Street Deli shooting, which are referenced in a police document taken from trial counsel's files, contain exculpatory information. (See PX, 48:1700). Petitioner alleges Reddick and Cochran informed the police during these statements that they saw Gary Young running from

the Madison Street Deli on the night of the shooting, yet the police file summarizing the pertinent data regarding the shooting at the Madison Street Deli contains no such information. (See PX 41-68, 8:1607-1914).

In this police file, which is a summary report of the crimes committed by Petitioner at the Junior Food Store and the Madison Street Deli, compiled by Detective Charles Weaver, there are two notations that reference Cochran and Reddick and the Madison Street Deli. These notations state the following:

> Today's Date 4-11-94. Earlier today at approximately 11:40, myself, Det. Sgt. Chuck Weaver and Det. Willie Spencer interviewed David McNeil. David McNeil is a black male, DOB 7-20-75. He lives at 218 Grady Street, SSN ... McNeil came down to the Jail-Justice Center. We we're (sic) interviewing him in reference to information that Officer Kathy Murphy had received on 4-8-94, concerning the robbery and shooting at the Madison Street Deli, which occurred on 4-7-94. At this time, we understood the information was that he had heard two black males talking about the robbery from the Madison Street Deli. He overheard one of them saying that he heard the shots and then he and some other guys standing out front, ran. He said that the person that heard this was a person by the name of Terrell Cochran. We found Terrell Cochran at 610 Wolf Street. Det. Willie Spencer wrote out a statement by Cochran. Terrell Cochran did sign this statement at 1245 hours on 4-11-94. Terrell advised that Keith Reddick was with him. At this time we are looking for Keith Reddick to get a statement from him. Concerning what they heard concerning this robbery.
>
> ...
>
> Today's date is 4-12-94. The time is 1715 hours. I have talked with Det. Willie Spencer and Det. Guy Winkelmann at the Jail-Justice Center. They have re interviewed (sic) Terrell Cochran and Keith Reddick.

> Names given are Keith Reddick, Jamal Hayes, Kevin Williams, Eric Scott, Deon Coleman and Marco LNU.

(PX 48, 8:1700).

This Court concludes there was a signed statement taken from Terrell Cochran, however, neither the police file, law enforcement officials nor trial counsel provided evidence that signed statements were taken from Reddick or further signed statements from Cochran. This Court will not assume the existence of evidence without further proof as discussed in more detail directly below.

i. Trial Counsel Were Aware of Reddick's and Cochran's Statements to the Thomasville Police.

Trial counsel were aware of the Thomasville Police Department's interviews of Mr. Reddick and Mr. Cochran concerning the Madison Street Deli and attempted or did in fact interview these individuals prior to Petitioner's trial. (See HT 1:93, 3:248-251, 258-259; RX 88, 32:8770-771; PX 48, 8:1700). As stated above, Petitioner's exhibit 48 comes directly from the trial attorney files and portions of the file pertaining to Cochran and Reddick are underlined, contain notations and a star is written by Cochran's name thereby proving trial counsel took notice of this information.

Additionally, in a memorandum from the Multi-County Public Defender's Office to local defense attorney Carl Bryant, Mr. Mears informed Mr. Bryant that the "police reports mention the

statements of Gary Young, Lisa Young, Anthony Delaney, Tanya Frazier, Terrell Cochran, Keith Reddick," all individuals that gave information regarding the crimes committed at the Junior Food Store and the Madison Street Deli. (PX 36, 7:1572). Also, a document identified as the handwriting of one of defense counsel's investigator's, Pam Leonard, listed Keith Reddick, David McNeil and Terrell Cochran, with Cochran's and McNeil's addresses and McNeil's Social Security Number. (HT 1:93; RX 81, 32:8750). Additionally, a document entitled "List of Witnesses" from the trial attorney files shows trial counsel were aware of Cochran's and Reddick's possible link to the Madison Street Deli incident. The pertinent portions of the document state:

> SGT./DET. Chuck Weaver TPD (Slysz/Jr. Foods) NO LONGER WORKING AT TPD. This DET. recorded a lengthy, daily report of the entire investigation from the time he arrived on the scene. On 4/11 he and Officer Spencer were looking for McNeil and ex-girlfriend Cherry Ivey re: info McNeil overheard about Madison Street Deli robbery.
>
> ...
>
> David McNeil (witness) DOB 7/20/75; SS...Told Officer Kathy Murphy and later Chuck Weaver that he overheard TERRELL COCHRAN and KEITH REDDICK discussing the robbery that they may have witnessed at Madison Street Deli. Officer Wiilie (sic) Spencer took statements from both young men.
>
> Cherry Ivey (witness) had info. re Madison Street Deli robbery
>
> Terrell Cochran (witness) possibly present at Deli robbery

Jamal Hayes (witness) name given by Terrell Cochran or Keith Reddick

Kevin Williams (witness) name given by Terrell Cochran or Keith Reddick

Eric Scott (witness) name given by Terrell Cochran or Keith Reddick

Deon Coleman (witness) name given by Terrell Cochran or Keith Reddick

Marco (LNU) (witness) name given by Terrell Cochran or Keith Reddick

(RX 88, 32:8769-770). Mr. Mears stated that this was a document that was obviously a list of witnesses either defense counsel intended to call or "anticipated the State calling." (HT 1:95). Most importantly, Mr. Mears admitted that the defense team "linked" Cochran to the Madison Street Deli and they "were trying to find out what he knew or didn't know" about the crimes committed at the Deli. Id. at 96. Further, Mr. Mears recalled searching for a statement taken by Detective Spencer. (HT 1:72, 89). Mr. Mears, however, did not recall whether he or his team questioned Mr. Reddick about his statement. (HT 1:72).

ii. Petitioner Failed to Present Credible Evidence that Trial Counsel Did Not Investigate Reddick's and Cochran's Possible Knowledge of the Madison Street Deli Shooting.

Petitioner claims trial counsel "solely focused," (Petitioner's Brief, p. 32), upon Mr. Reddick because of the

strong-armed robbery[10] that occurred a couple of days after the Junior Food Store murder, however, as shown above in trial counsel's files and through Mr. Mears's testimony, trial counsel attempted to interview Mr. Cochran regarding his knowledge of the Madison Street Deli shooting. (HT 1:93). The only evidence in support of Petitioner's contention is the testimony of David Mack, one of the defense team's investigators.[11]

Mr. Mack testified before this Court that he recalled interviewing Cochran and Reddick but alleged that he specifically recalled that these interviews only involved the strong-armed robbery. (HT 3:257, 260). Regarding Mr. Reddick, Mr. Mack testified to the following:

> Q Now, do you specifically recall Reddick and Cochran, those names coming up?
>
> A Yes, I do specifically recall those names.
>
> Q And do you recall when those names came up in relationship to the trial?
>
> A I think it was during the armed robbery cases this witness was involved in.
>
> Q To the extent that Mr. Reddick was a victim of an armed robbery?

---

[10]On April 12, 1994, Keith Reddick and Alonzo Brown were allegedly held at gunpoint by Gary Young, Corey Clark and Petitioner and robbed of several dollars and some change. (PX 200(B), 19:4873-881, police reports of strong-armed robbery).

[11] Petitioner failed to present the testimony of trial counsel's main investigator, Pamela Leonard.

A Exactly, Mr. Reddick was a victim of an armed robbery.

Q Okay. And so did one day Ms. Leonard said (sic) we need to go talk to these guys?

A Exactly.

Q Okay. What do you recall happening?

A The only thing I recall happening is going there with Ms. Leonard. And, once again, what's happening in these conversations is again I'm a conduit, I come in, introduce myself to the victim in this case and the witness in this case, knock on the door, give them the introduction to let them know that I'm working on Mr. Cromartie's case, here's what I'm here for, and then allow, Ms. Leonard would then take the lead in doing all the questioning. So, I'm there simply as a conduit, for that purpose, that's all I was doing, allowing the conversation to happen because, obviously, what happens in these cases is that there's simply, you know, a stranger knocking on the door and asking them to have a conversation and we're both strangers. So, I'm trying to allow that -- I am also but since I am who I am and know my community well throughout my experience, know how to be able to bridge that gap, and that's my expertise. So, I was simply a conduit for the conversation.

Q And when you say the victim, you're referring to Mr. Reddick?

A That is correct.

Q And do you recall specifically going and talking to Mr. Reddick?

A Yes, sir.

Q And so both you and Ms. Leonard would have been present for the entire conversation?

A Yes, sir.

Q And do you recall that conversation?

A Yes, sir.

Q What was discussed?

A It was simply about his, about him being the victim of the armed robbery. I mean, there was just nothing else that I recall, anything else about it.

Q Was there any discussion about him being an eyewitness in the Madison Street Deli case?

A Not to my knowledge.

Q Do you have any knowledge, I mean, are you aware that he was at all involved in any case other than the armed robbery case?

A Not --

Q And when I'm speaking of the armed robbery case, just to clarify, this is the one that Mr. Young holds the gun on him?

A Yes.

Q And you discussed that with him?

A Yeah, I discussed that with him.

Q And you discussed with him who was present when that occurred?

A Exactly.

Q And, in fact, he indicated in court that Mr. Cromartie was present when that occurred?

A That is correct?

Q And is that what he also indicated to you?

A That's correct.

Q Okay. Did the Madison Street Deli come up?

A Not with me. Again, specifically, conduit. I recall that conversation, the overall strategy for the case, what the pieces to the puzzle, how it all fits together, not involved.

(HT 3:250-252).

Mr. Mack recalled the following regarding the defense team's interview of Cochran:

Q Do you recall interviewing Terrell Cochran?

A Do I remember Terrell Cochran? I think the name came up. I think it did, yes.

Q What do you recall asking Terrell Cochran?

A I don't recall but I remember I think it was about the armed robbery.

Q You don't recall asking Mr. Cochran anything about the Madison Street Deli?

A Never did.

...

Q Do you recall seeing a police report in which it mentions Mr. Cochran may have seen who came out of the Madison Street Deli?

A No.

Q Do you ever recall discussing that with Pam Leonard?

A No, ma'am.

(HT 3:260-261).

After reviewing the record, this Court finds the veracity of Mr. Mack's testimony to be questionable. Terrell Cochran was neither a victim nor a witness to the strong-armed robbery, and the only mention of Cochran in the police file or the trial

attorney files is in reference to the Madison Street Deli. Therefore, it seems improbable that, especially given the trial attorney notes mentioned above, (RX 88, 32:8769-770), Cochran was questioned about an incident of which he had no knowledge, the strong-armed robbery of Reddick. Furthermore, Mr. Mack claimed that all he needed to refresh his recollection regarding Cochran and Reddick were a few questions by Petitioner's current counsel yet, as will be explained below, when given detailed memorandums by counsel for Respondent during the evidentiary hearing regarding his conduct while working on Petitioner's case, Mr. Mack's memory repeatedly failed.

Further, Mr. Mack provided many contradictory statements during his testimony before this Court. Mr. Mack testified that he was brought into Petitioner's case to help facilitate the negotiations for a plea deal between Petitioner and his trial attorneys and that he did not discuss any substantive matters of Petitioner's case, including the investigation, with Petitioner. (HT 3:239-240, 252). However, memorandums discovered in trial counsel's files proved that Mr. Mack was involved in the investigation of Petitioner's case and discussed the investigation with Petitioner. When confronted with these memorandums, (RX 19, 24:6187; RX 119, 34:9234, 238), Mr. Mack had a lapse in memory and continued to dispute that he discussed any substantive issues with Petitioner. (HT 3:254-258). In one

memorandum, Ms. Leonard states that she and Mr. Mack visited Petitioner and informed him they were doing further investigation upon his case and at a later date trial counsel and Mr. Mack reported to Petitioner the status of his alibi[12] for the Madison Street Deli. (RX 119, 34:9234, 9238). However, Mr. Mack could not recall any of the meetings or information contained within these memorandums. Id. at 253-254, 256.

Additionally, Mr. Mack allegedly could not recall interviewing critical witnesses in Petitioner's case such as Gary Young, but claimed he remembered exactly what was discussed during the interviews of two peripheral witnesses, Reddick and Cochran. (HT 3:253, 258). Moreover, Mr. Mack testified that trial counsel had not completed any investigation in the three years during which Petitioner was awaiting trial, prior to Mr. Mack's involvement, but then claimed he never discussed with trial counsel their investigation. (HT 3:272-273). When confronted with this contradiction, Mr. Mack then stated his only role was to come in and facilitate the plea deal. Id. at 273.

[12] Petitioner informed his defense team that on the night of the Madison Street Deli he had been on the phone with a girlfriend at the time of the crime, however, the phone records subpoenaed by trial counsel did not substantiate Petitioner's alleged alibi. (RX 19, 24:6187; RX 85, 32:8759; RX 86, 32:8759; RX 119, 34:9238).

Accordingly, given the contradictory and clearly biased tone of Mr. Mack's testimony, this Court finds Petitioner's contention that his trial defense team focused solely upon the strong-armed robbery when interviewing Reddick and Cochran, to be without merit.

iii. Petitioner has Failed to Prove that There Were Four Missing Written Statements from Reddick and Cochran.

Petitioner alleges there are "four" missing written statements from the Thomasville Police Department, however, as stated above, the record before this Court does not substantiate this allegation. The officers mentioned in the summary report, (PX 48, 8:1700), in conjunction with the interviews of Cochran and Reddick, were deposed during Petitioner's state habeas proceeding. The statement mentioned in the summary report regarding Cochran, which states he signed his statement, was clearly a written statement, however, this Court finds Petitioner has failed to prove that the other three interviews, two of Reddick and one of Cochran, were memorialized or contained exculpatory information.

As stated above in the summary police report, (PX 48, 8:1700), Det. Weaver and Det. Willie Spencer interviewed Cochran on April 11, 1994, and obtained a written statement from him regarding the Madison Street Deli. Det. Spencer was never questioned by Petitioner during his deposition about the content

of the statement taken from Cochran. Moreover, Det. Spencer was not questioned about whether Cochran ever informed the police that he saw Mr. Young running from the Madison Street Deli following the shooting. Further, Det. Spencer did not recall interviewing Reddick about the Madison Street Deli shooting. (RX 289, 52:14,792). Det. Spencer only stated that the interview should have been memorialized, not that it actually was memorialized in writing. Id. at 14,793.

Detective Guy Winkleman was involved in the second interviews of Reddick and Cochran as stated in the summary report. (PX 48, 8:1700). When questioned about the re-interview of Cochran and Reddick, Det. Winkleman stated the following:

> Ms. Piazza: So if you re-interviewed Terrell Cochran and there is no statement or interview notes or tape recording in this file, it's because you didn't memorialize it?
>
> Det. Winkleman: Correct.
>
> Q: Why would you not memorialize it?
>
> A: I don't remember what the re-interviewing was about. It must have been something minimal that we could verify immediately. And we more than likely did that, I guess. It couldn't have had any significance to the case.
>
> ...
>
> Q: This seems to indicate that Keith Reddick and Terrell Cochran have information about who may have committed the Madison Street Deli--

> A: Absolutely, and if that was the case and we brought them in and we interviewed them and they both said "No, we have no idea who did it. We have absolutely no idea who did it. We weren't there, we weren't here, we weren't anywhere," then it probably wouldn't have been documented.

(RX 290, 52:14,835, 14,839). Det. Winkelmann was never asked by counsel for Petitioner if he received information that Mr. Young was seen running from the Madison Street Deli on the night of the shooting.

Det. Weaver, the officer in charge of compiling the police file regarding the Madison Street Deli, did not recall whether he was present when Cochran provided his written statement. (RX 284, 51:14,641-642). Also, contrary to Petitioner's assertions, Det. Weaver testified that Cochran's written statement "may not" have been made a part of the Junior Food Store and Madison Street Deli file. Id. at 14,642. Additionally, Det. Weaver did not know whether or not there was a report compiled regarding the re-interview of Reddick and Cochran. Id. at 14,644. Further, Det. Weaver did not know if the second interviews of Reddick and Cochran concerned the Madison Street Deli. Id. at 14,645-646. Most importantly, Det. Weaver was also never asked by counsel for Petitioner whether or not Reddick or Cochran provided information regarding Mr. Young and the Madison Street Deli shooting. As Petitioner carries the burden of proof, it is his duty to prove the elements of his allegations.

Petitioner repeatedly cites to a portion of the police file that Petitioner alleges proves these statements are missing; however, the page containing the notation of "statement missing from original case file" to which Petitioner repeatedly cites, refers to a statement from an entirely different witness. (PX 200(A), 18:4712). At the beginning of Petitioner's Exhibit 200(A), which is the police file provided in response to Petitioner's Open Records Act Request during his state habeas proceeding, is an "Exhibit List" which identifies all of the documents contained in the file. Id. at 4572. Thereafter, each document is stamped at the bottom with its corresponding exhibit number. At the bottom of the document to which Petitioner repeatedly refers is the stamp "Exhibit #18" which, when cross-referenced with the "Exhibit List" at the beginning of the police file, identifies Exhibit 18 as the "Statement of Jerome Delaney[13] to Det. Chuck Weaver." Id. at 4573. The Court's review of this file uncovered no missing statements from either Reddick or Cochran. (See PX 200(A), 18:4569-4790; PX 200(B), 19:4793-5000).

As shown from the testimony of the police officers in charge of interviewing Reddick and Cochran, there is no evidence that four written statements were provided by Reddick or

[13] Petitioner does not mention Jerome Delaney in his post-hearing brief.

Cochran. Moreover, there is no evidence that the one written statement and the three other interviews of Reddick and Cochran produced any exculpatory evidence or information that Mr. Young was seen running from the Madison Street Deli on the night of the crime.

Therefore, this Court finds that as trial counsel were aware of the statements given by Reddick and Cochran regarding the Madison Street Deli and had the opportunity to interview these individuals, Petitioner has failed to show cause to overcome the procedural default of this claim.

b. Petitioner Failed to Prove Prejudice to Overcome the Procedural Default of His Brady Claim.

This Court finds that Petitioner has also failed to prove prejudice to overcome the default of his Brady claim. Petitioner contends that these allegedly missing statements are proof of a conspiracy on the part of every state agency involved in this case to wrongfully convict him of a crime for which the State allegedly knows was committed by Gary Young. As will be shown below, there is no credible evidence linking Mr. Young to the Madison Street Deli and no conspiracy on the part of the State of Georgia to allow an alleged attempted murderer, Mr. Young, to escape prosecution.

After reviewing the facts of the crimes of which Petitioner was convicted, this Court finds Petitioner's allegations that

two separate individuals, Gary Young and ostensibly Corey Clark, shot clerks Dan Wilson and Richard Slysz are not supported by the evidence. The crimes were committed two days apart: Mr. Wilson, the clerk of the Madison Street Deli, was shot and injured on April 7, 1994, at 10:15 p.m.; and, Mr. Slysz, clerk of the Junior Food Store, was shot and killed, in the early morning hours of April 10, 1994. Both victims were shot without warning,[14] in the head, with the same weapon, a .25 caliber pistol. (TT, Vol. 5, p. 1779; TT, Vol. 7, pp. 2502-2511; RX 90, 32:8823-8825).

During the crime scene investigation at the Madison Street Deli, a fingerprint expert, Glen Hutchinson, lifted prints but was unable to develop any identifiable fingerprints. (TT, Vol. 8, pp. 2589-590). Mr. Hutchinson was given twelve latent fingerprint cards, taken from inside the Junior Food Store, to compare and six prints from five of the cards were identifiable. (TT, Vol. 8, pp. 2643-644). Mr. Hutchinson compared the prints from the cards with those of Petitioner, Corey Clark, Thaddeus Lucas, Gary Young and Mr. Slysz, but found no matches. Id. at 2645-646.

[14] Mr. Slysz was found lying behind the counter, a pencil still in his hand, his paperwork on the counter, with his .38 caliber derringer still in its holster on his belt. (TT, Vol. 7, pp. 2440-443, 2447).

On the night of the Junior Food Store robbery, Walter Seitz was working as the clerk at the Jack Rabbit Foods, which sat across a well-lit street from the Junior Food Store. At the time of the robbery, Mr. Seitz was outside emptying trashcans when he heard the gunshots. He then witnessed a "light skinned black" person run from the front of the store "where the clerk was to the back of the store," then run from the store with "two twelve packs of beer." (TT, Vol. 7, pp. 2246-2247). Following this individual, Mr. Seitz saw another male, "darker in complexion and thinner," exit the store in the same direction as the first male. Id. at 2248-249. David Keith Allen, a police officer with the Thomasville Police Department, testified that Mr. Clark was darker in skin tone than Petitioner, (State's Exhibit 171 was referenced), and Mr. Clark testified that he was darker-skinned than Petitioner. (TT, Vol. 8, pp. 2697-698; Vol. 7, p. 2362).

William Taylor testified that, on the night of the crime, he was driving by the Junior Food Store and saw two black individuals come out of the Junior Food Store, run to the left of the store, "drop something perhaps and go back to pick it up." (TT, Vol. 5, 1876). Mr. Taylor stated he thought the item the individual was carrying was beer. Id. at 1877. On the same side of the store in which Mr. Taylor testified he saw the individuals drop what he thought was beer, the police found a

footprint, a couple of beers, and a portion of a Budweiser beer carton. (See TT, Vol. 6, pp. 1905, 2088-2090; Vol. 7, pp. 2427-430, 2437-438; Vol. 8, p. 2697).

Dr. James Howard of the Georgia Crime Lab made shoe comparisons from the footprint with those of Petitioner, Mr. Lucas, Mr. Young and Mr. Clark, and found Petitioner's shoe tread was similar to those found in the footprint. (TT, Vol. 6, pp. 2027-2028, 2035). Dr. Howard testified that he could not eliminate Petitioner's shoes as a possible match; however he did eliminate the shoes of Lucas, Young and Clark. Id. at 2036-2037. In addition to the shoeprint, a print was lifted from the portion of the beer carton that was found near the Junior Food Store and was identified as Petitioner's left thumb print.[15] (TT, Vol. 8, pp. 2599-2600).

i. State Habeas Testimony of Keith Reddick and Terrell Cochran

Keith Reddick and Terrell Cochran provided testimony during Petitioner's state habeas proceeding that they saw Gary Young running from the Madison Street Deli on the night of the shooting. (HT 1:143, 2:176; PX 91, 10:2212-2213; PX 93,

[15] The Multi-County Public Defender's Office interviewed Mr. Taylor prior to trial and expressed concern that Mr. Taylor's account of the events on the night of the crime "directly connect[ed] the fingerprint to the events that night." (HT, Vol. 35, RX 128, 9506). Additionally, Mr. Taylor reported that the individual who stopped and possibly dropped something was "laughing." Id.

10:2218-2219). Neither Reddick nor Cochran testified that they heard gunshots on the night of the Madison Street Deli shooting, what time exactly they saw Mr. Young allegedly running from the Madison Street Deli, or that they witnessed Mr. Young commit a crime or witnessed Mr. Young with a weapon. Further, both Reddick and Cochran provided contradictory testimony to this Court regarding this issue and both have lengthy criminal records that call into question the veracity of their character and testimony.

As of 1994, Mr. Reddick had the following prior record: 1) Burglary (two counts), 02-12-1991; 2) Burglary, 07-02-1991; 3) Interfering with an Officer, 01-27-1994; 4) Resisting arrest, 01-27-1994; 5) Sale of cocaine to undercover officer, 03-22-1994; 6) Resisting arrest, 10-19-1994; and, 7) Interfering with an Officer, 10-19-1994. (PX 198, 17: 4258-4369). In 2005, Reddick's probation was revoked and he was remanded to the custody of the Georgia Department of Corrections. (RX 301, 54:15,533).

Mr. Cochran has a Georgia Criminal History Record encompassing nearly twenty pages, with the most serious crimes listed as the following: 1) Violation of the Georgia Controlled Substance Act, 02-28-1996; 2) Theft by Receiving Stolen Property, 08-11-1997; 3) Driving Under the Influence of Drugs, 03-24-1999; 4) Criminal Trespass, 05-26-1999; 5) Battery-Family

Violence, 02-21-2001; 6) Possession of Cocaine with Intent to Distribute, 04-11-2002; 7) Criminal Trespass, 08-16-2006; 8) Armed Robbery, Burglary, 02-18-2008; and, 9) Probation Violations on 09-19-1998, 10-15-1999, 07-15-2001, 08-01-2004, 04-13-2005, 08-30-2007, 05-29-2008. (RX 306, 54;15,577-599).

Reddick provided an affidavit to Petitioner in July of 2005 stating he had witnessed Mr. Young running from the Madison Street Deli on the night of the shooting and had provided this information to the police several days after the incident. (PX 93, 10:2218-2219). After providing this affidavit, Reddick provided contradictory testimony to counsel for Respondent. Specifically, Reddick denied having been near the Madison Street Deli on the night of the shooting and denied seeing Gary Young running from the Madison Street Deli. (RX 294, 53:15,059-060). Reddick went on to testify that he had no "first hand knowledge" regarding the Madison Street Deli and his information was learned from the "street." Id. As confirmed by Reddick's testimony before this Court, counsel for Respondent did not suggest testimony to Reddick. (HT 1:155).

During the evidentiary hearing held before this Court, Reddick changed his story again and denied the accuracy of the affidavit he provided to Respondent. Reddick admitted that he wanted to cooperate with Petitioner and provide information but did not want to speak with anyone representing Respondent. (HT

1:148-149, 152-153). Reddick further stated that Petitioner's investigator, Jeff Walsh, had informed him that Petitioner's current counsel were attempting to overturn Petitioner's death sentence and admitted that he, Reddick, did not believe in the death penalty. (HT 1:161). In order to explain why he had provided the affidavit to Respondent, Reddick testified that the Southwest Detention Center, specifically his counselor, the assistant warden and the warden, forced him to cooperate with Respondent and forced him to sign the affidavit and if he refused he would have been "written" up or received more time on his sentence. (HT 1:153-155). However, neither the Southwest Detention Center nor its employees at the time of Reddick's incarceration had any affiliation with the prosecution of Petitioner's death penalty trial or his current state habeas proceeding. Further, the employees at the Southwest Detention Center were not provided with any details regarding the facts of Petitioner's current state habeas claims but were merely informed that undersigned counsel requested the opportunity to speak with Reddick.[16] (See, PX 207, 23:6136-6143). This Court is not persuaded to believe that a prisoner with Reddick's

[16] Petitioner filed a Brady motion requesting all documentation from the Southwest Detention Center regarding Reddick, which was unopposed by Respondent, following the submission of Reddick's affidavit by Respondent, and discovered no connection between either the State or the Attorney General's Office and the Detention Center.

criminal history who was locked up for a six month probation revocation would be pressured and/or threatened to cooperate on a state habeas case by a detaining facility with no knowledge of the facts of the state habeas proceeding for which he was being questioned.[17]

Additionally, even if Reddick was informed that he had to accept counsel for Respondent's phone call, an allegation for which this Court finds no support, there is no evidence, not even testimony from Reddick, that he was forced to provide false information to counsel for Respondent. As previously stated, Reddick admitted that counsel for Respondent did not suggest to him testimony to be used in his affidavit. (HT 1:153-155). When confronted with his second affidavit, Reddick testified that he did not recall providing this information, then stated that if he did provide this information, he did so because he did not want to have anything to do with Petitioner's case. (HT 1:159). Reddick then claimed he made up his statements in the second affidavit. Id. Consequently, given the overall

[17] Cochran was contacted by counsel for Respondent at the Thomasville Jail/Justice Center and refused to speak with counsel for Respondent. Cochran testified that no one informed him that he had to cooperate with counsel for Respondent and no other prison in which he has been incarcerated would have punished him for refusing phone calls. (HT 2:182, 185). Thus, as the Jail/Justice Center, which housed Petitioner until his death penalty trial, did not force cooperation with Respondent, it defies further logic that a detention center with no affiliation to Petitioner's case would force such cooperation as claimed by Reddick.

inconsistency and lack of credibility generated by Reddick's contradictory testimony, the entirety of Reddick's testimony is disregarded by this Court.

Furthermore, the questionable nature of Reddick's testimony regarding Mr. Young, the Madison Street Deli and the police taints the testimony provided by Cochran. As there is a reasonable likelihood that Reddick's original affidavit is false regarding having seen Mr. Young running from the Madison Street Deli, then Cochran's testimony that he was there with Reddick is also suspect. Further, the Court notes that Cochran was more than willing to cooperate with Petitioner, prior to Petitioner's state habeas evidentiary hearing, but refused to answer any questions asked by counsel for Respondent prior to the evidentiary hearing, thereby, indicating bias on the part of Cochran. (HT 2:178, 182). Further telling of the unreliability of Cochran's testimony is his allegation that Petitioner's defense team contacted him prior to Petitioner's death penalty trial and only questioned him about the strong-armed robbery committed by Mr. Young and Petitioner. As previously stated, trial counsel's testimony and files clearly show that they were aware that Cochran was questioned by the police regarding the Madison Street Deli shooting. (HT 1:72, 89, 93, 95-96; RX 88, 32:8769-771; PX 48, 8:1700). Additionally, there is nothing in the police files or the trial attorney files that links Cochran

to the strong-armed robbery as he was neither a victim nor a witness. (See PX 200(B), 19:4873-881, police reports of strong-armed robbery). Thus, this Court concludes that the only rational topic for which Cochran would have been contacted by defense counsel would be regarding the Madison Street Deli shooting. Consequently, if Cochran had actually seen Mr. Young running from the Madison Street Deli, he would have had no reason not to inform Petitioner's trial counsel of this if he had already informed the police of this information. However, as trial counsel did not present this testimony to support their theory that Young committed the Madison Street Deli shooting, this Court finds Cochran's testimony lacks credibility.

Accordingly, this Court finds the testimony of Cochran and Reddick, Petitioner's only alleged evidence that Mr. Young was near the Madison Street Deli on the night of the shooting, to be unreliable.

ii. Petitioner has Failed to Prove that Gary Young was the Shooter at the Madison Street Deli.

Petitioner asserts throughout his brief that not only was Gary Young the assailant at the Madison Street Deli, but that this information was known and withheld by the State. This Court finds after a review of the evidence upon which Petitioner relies, that Petitioner has failed to present any credible

evidence that Mr. Young shot the clerk at the Madison Street Deli.

In support of his allegation that Mr. Young committed the Madison Street Deli robbery, Petitioner cites to the fact that the victim at the Madison Street Deli, Mr. Wilson, did not identify him as his assailant. However, as Mr. Wilson was shot in the face, without warning, he was unable to identify anyone as the shooter, but was able to provide the police, shortly after being shot, with a description of the individual that shot him. (TT, Vol. 5, pp. 1779-780, 1783; RX 90, 32:8825). Mr. Wilson stated that his assailant was a black male, approximately 5'8", with a "medium" build. Id. Petitioner's description on the Georgia Department of Corrections website lists him as 5'09" and 190 lbs and his "Arrest/Booking Report" lists his height and weight as 5'10", 195 lbs. (RX 213, 44:12,189). Clearly, the description provided by Mr. Wilson fits Petitioner's appearance.

Throughout Petitioner's post-hearing brief, Petitioner makes repeated statements regarding the evidence in his case and Mr. Young, asserting facts which he has failed to prove and cites to references to support these facts which are not evidence. Petitioner alleges Mr. Young lied about providing his gun to Petitioner on the night of the Madison Street Deli shooting. (Petitioner's brief, p. 51). In support of this contention, Petitioner relies upon a pleading that Petitioner

filed with this Court in which he stated his current state habeas investigation had uncovered evidence that Mr. Young lied, but neither this pleading nor Petitioner's post-hearing brief cite to this "uncovered evidence" to prove Mr. Young lied. (PX 173, 13:3305).

This Court finds the evidence presented at trial, which Petitioner has failed to rebut, proves Mr. Young did provide his handgun to Petitioner. At trial, Katina Washington testified that on the night of the Madison Street Deli shooting, Mr. Young asked her for his handgun because she had taken it from him due to her dislike of having it in her home. (TT, Vol. 7, pp. 2259-260). After she returned the gun to Mr. Young, she thought he took the handgun outside of their apartment and gave it to Petitioner. Id. Additionally, Carnell Cooksey testified that he was staying at Ms. Washington's apartment on the night of the Madison Street Deli shooting and *witnessed* Mr. Young give his handgun to Petitioner.[18] (TT, Vol. 5, p. 1850). Most importantly, it was proven that the weapon used to shoot Mr. Wilson was the same weapon that was used to murder Mr. Slysz and Petitioner has failed to present any credible evidence proving

[18] Petitioner submitted an affidavit from Carnell Cooksey alleging Cooksey lied about witnessing Mr. Young giving a handgun to Petitioner on the night of the Madison Street shooting due to police coercion. (PX 92, 10:2216). However, other than Cooksey's self-serving allegations regarding the Thomasville Police Department, there is no proof of coercion in the record before this Court.

he did not shoot Mr. Slysz, therefore he must have obtained the gun from Mr. Young.

Directly following his allegation that Mr. Young lied about providing the murder weapon to Petitioner, Petitioner alleges the evidence presented during his state habeas proceeding has "irrefutably established" that Mr. Young "was the sole perpetrator of the Madison Street shooting." (Petitioner's brief, p. 52; see also Petitioner's brief, p. 59). However, the only evidence Petitioner cites to prove this allegation are the affidavits of Reddick and Cochran, trial counsel's closing argument and the same pleading he cited to attempt to prove Mr. Young lied about providing the gun to Petitioner. (See, PX 91, 10:2212; PX 93, 10:2218; PX 173, 13:3305; TT, Vol. 8, p. 2772). Petitioner also states that the sweatshirt and hat found near the Madison Street Deli, and seen on the shooter at the Madison Street Deli in the surveillance video, belonged to Mr. Young. (Petitioner's brief, p. 59). To support this allegation Petitioner again cites to trial counsel's closing argument during Petitioner's death penalty trial, which does not reference any evidence presented at trial to prove this allegation. (TT, Vol. 8, p. 2772). This Court finds nothing to which Petitioner cites is credible evidence to support his allegations.

Petitioner also alleges the State chose not to prosecute Mr. Young for the Madison Street Deli shooting because it failed to timely pursue its case against Mr. Young. (Petitioner's brief, pp. 58, 69). However, once again, Petitioner cites to a portion of the record, (PX 11, 5:961), which does not support his allegation. Although, Mr. Young did file a motion for speedy trial, he filed his Motion for Discharge and Acquittal because the Court, not the State, "had failed to appoint counsel...in a timely manner." (PX 11, 5:960). Further, the Motion to Enter Nolle Prosequi by the District Attorney's Office clearly states the reason for dismissing the case is for "lack of evidence." Id. at 961. As the *only* evidence in the State's possession that possibly linked Mr. Young to the Madison Street Deli was the handgun and as all other evidence the State had obtained, e.g. the statements of Carnell Cooksey, Corey Clark, Thaddeus Lucas, and Katina Washington, proved Petitioner was the assailant, the State's decision to dismiss the case against Mr. Young for "lack of evidence" does not support Petitioner's allegations.

2. REQUISITE PRONGS OF *BRADY* NOT ESTABLISHED.

In order to establish a violation of a defendant's due process rights in violation of Brady v. Maryland and its progeny, the defendant must show "(1) that the State possessed evidence favorable to the defense; (2) that the defendant did

not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (*citing* United States v. Meros, 866 F.2d 1304 11th Cir. 1989 (cert. denied), 493 U.S. 392 (1989)). Alternatively to this Court's finding this claim to be procedurally defaulted, this Court finds Petitioner has also failed to establish the requisite prongs of Brady.

The petitioner has the burden of showing that the evidence withheld "so impaired his defense that he was denied a fair trial within the meaning of the Brady rule." Wallin v. State, 248 Ga. 29, 33, 279 S.E.2d 687 (1981); Donaldson v. State, 249 Ga. 186, 289 S.E.2d 242 (1982); Dennis v. State, 263 Ga. 257(5) 430 S.E.2d 742 (1993). "Evidence is material only if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985). The mere fact that some undisclosed information might have helped the defense does not establish its materiality in a constitutional sense. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).

Petitioner has failed to establish any of the four prongs of his Brady claim. The first prong of Brady requires that the State actually possessed favorable evidence, however, Petitioner has failed to produce any reliable evidence that the State possessed exculpatory evidence. Despite the extensive discovery including, obtaining documents from every State agency involved and deposing nearly the entire Thomasville police force that was involved in Petitioner's case and the District Attorney's Office, Petitioner has not provided any testimony or documentation from these sources proving the State withheld favorable evidence. The only evidence Petitioner has presented to this Court is the testimony from two career criminals alleging they informed the police that they saw Mr. Young running from the Madison Street Deli on the night of shooting, but could not state that they heard a gunshot, the exact time of this incident, or that Mr. Young was in possession of a weapon. (PX 91, PX 93; HT 1:143-163, 2:174-186). Furthermore, the witnesses to this alleged event have clear motives to be biased against Mr. Young. Reddick was held at gunpoint by Mr. Young a few days after the Madison Street Deli shooting, threatened and robbed and the other individual, Cochran, was Reddick's cousin.[19]

[19] Moreover, Reddick testified before this Court that he knew Petitioner was charged with committing the Madison Street Deli shooting but when called in to testify in a pre-trial proceeding of Petitioner's death penalty trial, regarding the strong-armed

Therefore, as explained in detail above, this Court finds the entirety of Reddick's and Cochran's testimony is lacking in credibility and does not support Petitioner's allegation that the State was in possession of favorable evidence.

Petitioner has also failed to prove the second prong of his Brady claim. Contrary to Petitioner's assertions that trial counsel were unaware of Reddick and Cochran's statements to the police regarding the Madison Street shooting, as stated above and shown through testimony from trial counsel and the trial attorney files, trial counsel were aware that Reddick and Cochran made statements to the police regarding this matter. (HT 1:72, 89, 93, 95; RX 88, 32:8769-771; PX 48, 8:1700). Whether or not trial counsel or their investigators chose to question Reddick and Cochran about these statements is not determinative of Petitioner's Brady claim as testimony presented during this state habeas proceeding proved these individuals were available and questioned by Petitioner's defense team. Furthermore, neither Reddick nor Cochran testified that they would not have informed trial counsel of their alleged knowledge regarding the Madison Street Deli shooting if they had been so questioned. (PX 91, PX 93; HT 1:143-163, 2:174-186).

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robbery, Reddick never mentioned seeing Mr. Young running from the Madison Street Deli on the night of the shooting. (PX 76, 9:2054-2080).

Consequently, this Court finds Petitioner has failed to prove that this evidence was unavailable to trial counsel.

As Petitioner has failed to prove that the State was in possession of favorable evidence or that the evidence Petitioner now claims is favorable was not available to trial counsel by reasonable diligence, this Court finds Petitioner has also failed to show that the State suppressed evidence. Furthermore, as stated above, Petitioner did not present any documentation or testimony from any State agent or entity that they had any knowledge of Mr. Young running from the Madison Street Deli on the night of the shooting. The fact that statements were taken from two possible witnesses is not proof of a conspiracy to withhold information. Further, if the State had been attempting, for some inexplicable reason, to frame Petitioner for Mr. Young's crime, there is no reason the police summary would have mentioned the interviews of the only two witnesses that could provide information that implicated Mr. Young.[20]

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[20] Petitioner also attempts to create a conspiracy between the witnesses at trial and the co-defendants to frame him for Mr. Young's alleged shooting at the Madison Street Deli because Petitioner was new to Thomasville. However, Petitioner is Mr. Young's cousin, whom the State had to have declared a hostile witness at trial because he did not want to testify against Petitioner, and Petitioner's half-brother, Thaddeaus Lucas was his co-defendant, also allegedly part of the conspiracy, with whom he had lived prior to coming to Thomasville. (TT, Vol. 7, pp. 2258, 2302). Moreover, this conspiracy theory was presented to the jury by trial counsel and rejected. (TT, Vol. 8, p. 2777).

Finally, Petitioner has failed to show that had the jury heard the easily impeachable evidence of Reddick or Cochran that there was a "reasonable probability" "that the outcome of" Petitioner's death penalty trial "would have been different." As shown above, there is overwhelming evidence, including eyewitness testimony and physical evidence proving Petitioner shot and murdered Mr. Slysz at the Junior Food Store and Petitioner has failed to present any evidence, other than speculation, to prove otherwise. Likewise, Mr. Wilson was shot in the head, without warning, with the same weapon by an individual attempting to steal money. This Court finds that there is no reasonable probability that the jury would have believed that two different individuals committed such similar crimes within two days of each other despite all credible evidence to the contrary based upon the tenuous testimony of two clearly biased witnesses. There is no precedent to support Petitioner's allegation that the unreliable testimony of Reddick and Cochran would have created a reasonable probability of a different outcome at Petitioner's death penalty trial.

Therefore, this Court finds that this claim is without merit.

3. ***GIGLIO* CLAIM**

Petitioner alleges that the State knowingly presented the false and/or misleading testimony of Corey Clark, Gary Young and

Carnell Cooksey in violation of his due process rights as defined in Giglio v. United States, 405 U.S. 150 (1972). Petitioner further alleges that Clark and Young received promises and immunity from prosecution that was suppressed by the State which is also in violation of Giglio. This Court finds Petitioner has failed to present any reliable evidence to support his Giglio claim that Corey Clark provided inconsistent testimony during Petitioner's trial when compared to his previous statements and has failed to prove cause and prejudice to overcome the procedural default of this claim. With regard to the remainder of Petitioner's Giglio claims, this Court finds Petitioner has failed to present sufficient evidence to prove the merits of his allegations. Accordingly, Petitioner's Giglio claims are **DENIED**.

a. Trial Counsel Were Aware of Corey Clark's Pre-Trial Statements.

Petitioner alleges that Corey Clark's testimony at trial was so inconsistent with his previous statement to the police, his letter to the District Attorney and his testimony at his guilty plea that his testimony at Petitioner's trial was false and misleading. The Court finds Clark's statements and testimony prior to trial were in the possession of trial counsel and therefore available for argument at trial, at Petitioner's motion for new trial and on direct appeal. Consequently, the

Court finds this Giglio claim is procedurally defaulted as Petitioner has failed to provide this Court with an argument showing cause to overcome the procedural bar to this claim.

Cause

This Court found within trial counsel's files: Clark's police statement, (contained within the transcript of the Commitment Hearing, (RX 24, 24:6400-6402)), letter to the District Attorney and Clark's testimony at his guilty plea hearing. (RX 24, 24:6395-6498; 6403-6461). Trial counsel also used Clark's prior statements and testimony during his cross-examination of Clark during Petitioner's death penalty trial. (TT, Vol. 7, pp. 2366-2404). Therefore, as trial counsel and appellate counsel would have been informed of false and/or misleading testimony based upon these sources of information, upon which Petitioner now relies to support his Giglio claim, and as Petitioner has failed to explain why this Giglio claim could not have been raised previously, he has failed to show cause to overcome the procedural default of this claim.

Prejudice

This Court finds Petitioner has also failed to show prejudice. After reviewing each of Mr. Clark's statements, spanning over three years, concerning the events at the Junior Food Store, this Court finds these statements do not contain material inconsistencies and are nearly identical with respect

to the events during the actual crimes. (Petitioner's brief, p. 80).

i. Written Statement of Corey Clark Provided to the Thomasville Police Department on 4-13-1994.

Mr. Clark gave a written confession following the robbery and murder that summarized the events on the night of the crime. (PX 200A, 18:4704). Clark stated that he and Petitioner discussed going to the store and "taking beer" and Thaddeus Lucas drove Clark and Petitioner to the Junior Food Store. Id. Clark did not know Petitioner had a weapon when they entered the convenience store. Id. Petitioner entered the store first and walked down the "candy aisle" and Clark followed and went to the beer side of the store. Id. Clark then "heard two (2) shots," was told by Petitioner to "get the register," and ran "behind the counter" to open it but could not open the register. Id. After Petitioner shot Mr. Slysz, Petitioner retrieved two twelve packs of beer and dropped one of the twelve packs outside, close to a puddle of water. Id. Clark stated he did see one of the shots and that the clerk was sitting on a chair and fell off the chair after being shot. Id. Lucas drove them from the crime scene and later Clark and Petitioner told Gary Young what had happened. Id. A review of this statement reveals that it is not an in depth account of the night of the crime but merely a cursory description of the robbery and murder of Mr. Slysz.

ii. Letter to District Attorney from Corey Clark Written in 1994.

Following his statement to the police, Clark wrote a letter to the District Attorney confessing again to the events at the Junior Food Store.[21] (PX 33, 7:1565). Again he stated he and Petitioner received a ride to the store from Lucas to get beer (in his letter to the District Attorney, Clark states his purpose was to grab some beer and flee), he did not know that Petitioner had a weapon, Petitioner entered first and went down the aisle "closest to the door" and Clark followed and went towards the beer and, as he "approached" the cooler where the beer was located, he heard two shots. Id. Clark turned and no longer saw the clerk sitting on his stool and Petitioner told him to "get the money." Id. Clark went behind the counter and saw the victim while Petitioner removed "two 12-pack Budweiser boxes" and they both "fled" with Petitioner leading. Id. In this statement, Clark does not address what shots he did or did

[21] Clark admitted at Petitioner's death penalty trial that he wrote the letter in hopes to receive help from the District Attorney and did not confer with his counsel prior to writing or sending the letter. (TT, Vol. 7, pp. 2374-375). Additionally, the letter was read to the jury by Clark during Petitioner's death penalty trial. Id. at 2410-412.

not see,[22] what he did behind the counter with the register or what happened after they left the Junior Food Store.

iii. Corey Clark's Guilty Plea Hearing Transcript Held 12-20-1995.

Clark testified at his guilty plea hearing regarding the robbery and murder at the Junior Food Store. Clark testified again that he went to the Junior Food Store to steal beer, however, for the first time he stated that he had not discussed his intention to steal beer with Petitioner prior to entering the convenience store. (RX 24, 24:6412). Clark testified to the following regarding the events in the Junior Food Store:

> So he [Petitioner] went down the candy isle and I went down toward the beer and before I could get to the cooler I heard two gunshots and I turned and I saw him reaching over the counter trying to press the cash register button. So, I peeped around the side of the counter and seen the man lying on the floor and Mr. Cromartie ran and grabbed two twelve packs and we ran out the store. And then we returned to the projects.

Id. at 6410.

Clark was questioned about what statements Petitioner made to the clerk prior to shooting him and Clark stated Petitioner did not speak to the clerk prior to shooting him. Id. at 6415.

iv. Corey Clark's Testimony at Petitioner's Trial on 9-24-1997.

[22] Petitioner states that his statement "implies" that Clark did not see the second shot as he stated he did in his initial statement to the police, however, that is mere speculation on the part of Petitioner and has no basis in support of a legal argument. (Petitioner's brief, p. 82).

Unlike his previous statements and testimony, Clark was questioned in more detail at Petitioner's trial regarding the events at the Junior Food Store and, contrary to Petitioner's assertions that Clark was providing inconsistent testimony, this Court finds Clark was simply providing further details of what occurred in the convenience store. Clark testified that he went to the store to get beer and he and Petitioner were driven there by Lucas. (TT, Vol. 7, pp. 2357-358). Clark went on to testify that Petitioner went down the first aisle and he "went straight for the beer cooler." Id. at 2360. Again he stated the clerk was sitting on a stool and Petitioner did not speak to Mr. Slysz prior to shooting him. Id. at 2360-361. Following the shooting, Petitioner told Clark to "get the money" and when Clark looked over he witnessed Petitioner trying to open the cash register. Id. at 2361. Then as Clark was behind the counter attempting to open the cash register, Petitioner went to the beer cooler and "grabbed two twelve packs" of "Budweiser" and left the store with Clark following behind him. Id. at 2362. Clark further testified that after they left the store, "one of the twelve packs busted open[ed]" that Petitioner was carrying. Id. at 2363.

On cross-examination, defense counsel brought out that Clark was originally indicted for Armed Robbery and Murder but these charges were dropped by the District Attorney's Office and

he was allowed to plead guilty to simple Robbery and Hindering the Apprehension of a Criminal in exchange for his testimony during Petitioner's death penalty trial and, instead of receiving life imprisonment or the death penalty, he received a twenty-five year sentence. Id. at 2367-373. Clark testified that he was friends with Lucas and good friends with Gary Young, but had only met Petitioner a few weeks before the crimes. Id. at 2377-378. Clark also admitted that he had been drinking during the day that led up to the crimes with Petitioner and did not remember "a lot of things about that night" due to his intoxication level. Id. at 2383. Additionally, on cross-examination, Clark admitted that he lied during his guilty plea hearing when he stated he did not go behind the counter in the Junior Food Store after Mr. Slysz was shot and that he had not met Petitioner prior to the night of the crimes because he was "trying to distance" himself from Petitioner. Id. at 2384, 2402-404, 2415-416. In fact, Clark was subjected to a rigorous cross-examination by defense counsel Michael Mears, and never provided inconsistent testimony from his direct examination regarding the events within the Junior Food Store. See id. at 2366-2416.

v. Corey Clark's Testimony at Petitioner's State Habeas Evidentiary Hearing Before this Court.

During his state habeas proceeding, Petitioner submitted an affidavit from Clark in which he provided testimony regarding his interviews with the police following the crime and his plea deal, but then invoked his Fifth Amendment privilege against self-incrimination. (PX 90, Vol. 10:2209-2211). Petitioner attacks Clark for this invocation and speculates that Clark was tired of creating allegedly different stories regarding the night of the crimes. This Court finds this merely speculation, and this argument is without merit. In fact, prior to Petitioner's death penalty trial, Clark signed an "Authorization For Release of Confidential Information And Records" for Petitioner's trial counsel. (RX 24, 24:6472). In this release, Clark granted access to Petitioner's defense team of "any and all information and/or records relating to my prosecution in prior criminal cases" including the Junior Food Store incident and also authorized his "attorneys to discuss their otherwise confidential information" with Petitioner's "legal representatives." Id.

Petitioner attempts to create discrepancies in Clark's statements such as citing to Clark's written police statement in which states he was "standing" by the beer and then comparing it to his letter to the District Attorney in which he states he was "approaching" the beer cooler. The Court finds these to be pedantic arguments which offer no substantive value. Therefore,

as Clark's statements and testimony regarding the events that occurred during the robbery and murder within the Junior Food Store are consistent, this Court finds Petitioner has failed to show that there is a reasonable probability that the outcome of his trial would have been different had trial counsel or the State further questioned Clark about his various statements.

Petitioner also alleges, based upon the affidavit he gathered from Clark, that the police told Clark what to write in his statement. However, Petitioner has not presented any corroborating evidence to support this allegation and as Clark's pretrial statements and trial testimony are consistent with his original statement to the police, the Court finds his new statements to be unreliable. Furthermore, Clark has never stated that his testimony during Petitioner's trial regarding the events of the night of the crimes was false.

Therefore, as Petitioner has failed to prove that Clark's testimony was false and/or misleading or that the State knew his testimony was false or misleading, this Court finds he has failed to prove cause or prejudice of this Giglio claim. Consequently, the Court finds this Giglio claim is procedurally defaulted.

b. Petitioner Has Failed to Show that Corey Clark Was Offered an "Unwritten" Deal by the State.

Petitioner alleges that in addition to the plea deal Corey Clark was given by the State at his guilty plea hearing,[23] he was also informed by his trial counsel, Gail Lane, that his sentence would be further reduced to five years in exchange for his testimony at Petitioner's death penalty trial. The only evidence Petitioner presents to support this claim is the affidavit of Clark in which he states he was told by his attorney, Ms. Lane, that if he "pled guilty and testified" he "would only serve five years in prison." (PX 90, 10:2210). Clark goes on to state in his affidavit that after his guilty plea, in which he received a much lengthier sentence, he was visited in prison by Ms. Lane and informed that once he testified against Petitioner his sentence would be reduced to five years. Id. at 2210-2211. Petitioner presented no further documentation or testimony to support this allegation.

During Petitioner's state habeas evidentiary hearing, Ms. Lane provided testimony that effectively rebutted Clark's testimony that he was promised that he would serve only five years in exchange for his testimony at Petitioner's trial. Ms. Lane testified that Clark's plea deal was a blind plea and the sentence was left to the judge's determination. (HT 3:213).

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[23] As previously stated, Clark's plea deal he received during his guilty plea hearing was communicated to the jury during Petitioner's death penalty trial. (TT, Vol. 7, pp. 2367-373).

The judge sentenced Clark to twenty years on the robbery and Ms. Lane testified that she never informed Clark that he would only serve five years. Id. Ms. Lane testified that she would not have informed Clark of such a short sentence length because it was "outside the realm of possibility." Id. Furthermore, Ms. Lane testified that she neither informed Clark that he would receive a sentence reduction if he testified at Petitioner's trial nor was she informed by the District Attorney of such a deal. Id. at 215.

When cross-examined by counsel for Petitioner regarding whether it was common practice for a defendant's sentence to be reduced after testifying against another individual, Ms. Lane stated she had never heard of this type of deal:

> I've never had a case, nor do I know of a case firsthand, where sentence has been reduced after testimony. Now, I know of a lot of cases where sentence is withheld until after testimony but I don't know of any cases that I've handled or that the office has handled where a sentence was imposed and then a sentence was changed after testimony.

(HT 3:229).

Petitioner alleges that Ms. Lane conferred this deal for his reduction in sentence to Clark when she visited him prior to Clark testifying at Petitioner's trial, however, Ms. Lane denied any such conversation occurred. (HT 3:227-228). Furthermore, Petitioner has not presented any evidence from any source corroborating Clark's testimony that he was given an "unwritten"

deal by the State to reduce his unnegotiated sentence following his testimony at Petitioner's trial.

Petitioner alleges Clark's hesitancy during his guilty plea when asked if he had been promised anything in exchange for his plea proves Clark was promised a different deal, however, this Court finds the transcript proves otherwise:

Judge Horkan: Have there been any promises made to you, threats made against you or agreements made with you to get you to enter these pleas of guilty?

Defendant Clark: I wouldn't -- everything--

Ms. Lane: --Your Honor, Mr. Clark is referring to the nolle pros of the indictment.

Q: It's my understanding there's an indictment pending, Thomas County Superior Court case number 94CR327, which charges you with the offense of felony murder and the offense of armed robbery. It's my further understanding from the District Attorney's Office that upon your successful entry of a plea of guilty to the charges contained in this accusation in case number 95CR520 that the charges in case number 94CR327, that is the charges of felony murder and armed robbery will be nolle prossed or dismissed against you; is that your understanding?

Defendant Clark: Yes, sir.

Q Other than that, have there been any promises made to you, agreements made with you, threats made against you to get you to enter this plea of guilty?

Defendant Clark: No, sir.

Q Is it your own voluntary act?

Defendant Clark: Yes, sir.

(PX 84, 9:2131).

As Petitioner has failed to present any credible evidence that Clark was promised a reduction in his sentence following his testimony at Petitioner's trial, this Court finds Petitioner has failed to prove the necessary prongs of his Giglio claim.

Accordingly, this Giglio claim is DENIED.

c. Petitioner has Failed to Prove that Gary Young Received a Deal in Exchange for his Testimony.

Petitioner alleges the State did not prosecute Gary Young on a drug related offense in exchange for his testimony at trial. The only evidence Petitioner presented to this Court to support this portion of his Giglio claim is an indictment and the unsubstantiated testimony of a witness, Kimberly Bryant, who was involved in illegal drug activities. As none of this evidence would have been admissible during Petitioner's trial, and does not prove the State had promised Young any type of deal in exchange for his testimony, this Court finds Petitioner has failed to prove this Giglio claim.

Three years after Young had provided his statement to the police regarding the crimes for which Petitioner received the death penalty, Young was arrested for selling illegal drugs. (PX 194, 14:3634). Other than the indictment stating Young possessed illegal drugs with the intent to distribute,

Petitioner has failed to present any evidence regarding this alleged crime. Petitioner claims Young was not prosecuted for this crime in exchange for his testimony at Petitioner's trial however, there is nothing in the record before this Court to support this contention. It could just as easily be stated that the State did not pursue this case because it lacked the necessary evidence to support a conviction. In fact, Petitioner has failed to present any evidence that Young has been involved in any criminal activity since this indictment in 1997.[24]

Petitioner also presented the unsubstantiated testimony of Kimberly Bryant that she once informed the police that Young had buried half of a kilogram of cocaine in a neighbor's backyard and the State chose not to arrest Young for this in exchange for his testimony at Petitioner's trial. Petitioner cites to a letter written by an officer in the Thomasville Narcotics and

[24] Petitioner also alleges these pending charges could have been used to impeach Young, however, a witness may not be impeached with an indictment. See Polk v. State, 202 Ga. App. 738, 739, 415 S.E.2d 506 (1992) ("A witness may be impeached by showing conviction of a crime involving moral turpitude. [Cit.] The fact of conviction must be shown by record evidence and not by testimony. [Cit.]" Johnson v. State, 144 Ga. App. 406 (1) (240 S.E.2d 919) (1977). "[E]ven competent proof of an offense not involving moral turpitude, or incompetent proof of an offense involving moral turpitude, such as a mere indictment or a charge or an arrest or a trial and acquittal, are not legal methods of impeachment. [Cits.]" Whitley v. State, 188 Ga. 177, 179 (5) (3 S.E.2d 588) (1939). Accord Strickland v. State, 166 Ga. App. 702 (305 S.E.2d 434) (1983)).

Vice Division as proof that Ms. Bryant informed the police of Young's actions, however, the letter relied upon does not support Petitioner's claim. (PX 201, 20:5005). The letter does state that Ms. Bryant had supplied information regarding individuals in possession of illegal drugs; however, it does not state Young by name. Furthermore, the letter also states that the individuals Ms. Bryant turned in were arrested and prosecuted. Id. Therefore, given the fact that Petitioner has failed to prove that Young was ever in possession of the buried cocaine or that the police actually knew of its existence or that the State offered Young a deal based upon his testimony at Petitioner's trial, this Court finds Petitioner has failed to prove the necessary prongs of this Giglio violation.

Petitioner also alleges that the manner in which Young testified at trial proves he was testifying falsely regarding the crimes committed by Petitioner at the Madison Street Deli and the Junior Food Store. This Court is unwilling to conclude that a witness, who is the first cousin of the individual he is testifying against, who becomes uncooperative as a witness proves that the State knowingly presented false and/or misleading testimony. Additionally, any contention that Young's hostility while testifying at Petitioner's trial proves he was the individual who committed the crimes for which Petitioner was being tried is mere speculation. Moreover, if self-preservation

was the overwhelming motive behind Young's testimony, as Petitioner alleges, then logically Young would have been a much more cooperative witness at Petitioner's trial.

Consequently, as Petitioner has failed to present credible or admissible evidence that Young received any type of deal or incentive for his testimony at Petitioner's trial, or that he testified falsely, the Court DENIES this Giglio claim.

d. Petitioner has Failed to Prove that Carnell Cooksey's Trial Testimony was False.

Petitioner alleges the Thomasville Police Department coerced Carnell Cooksey into providing false testimony regarding Petitioner's involvement in crimes that occurred at the Madison Street Deli and the Junior Food Store. Mr. Cooksey provided testimony during Petitioner's state habeas proceeding that he lied when he testified that he witnessed Young giving Petitioner the murder weapon on the night of the Madison Street Deli shooting and, when he testified that Petitioner confessed in his presence to shooting the clerk in the Junior Food Store. (PX 92, 10:2214-2217; HT 1:119-132). Once again, Petitioner failed to present any corroborating evidence to support his allegations and, more importantly, failed to show that the State was aware that Cooksey allegedly testified falsely during Petitioner's trial. Accordingly, this Court DENIES this Giglio claim.

In the affidavit submitted by Petitioner on behalf of Cooksey, Cooksey stated the police informed him he was "being charged with murder" and accused him of being the shooter at the Madison Street Deli and the Junior Food Store. (PX 92, 10:2214). Cooksey also alleged that the police kept questioning him about Gary Young's involvement in these crimes and how long Young had possessed his gun. Id. at 2215. Cooksey then alleged that due to fear, he informed the police that Petitioner was the individual that committed the crimes at the convenience stores and he gave them information he had gathered from talking with Gary Young and Corey Clark. Id. He also claimed he fabricated his version of the events in which he told the police that he and Young had been together on the night of the Madison Street Deli, specifically that he had seen Young give the gun to Petitioner, and that Petitioner had confessed to him about shooting Mr. Slysz at the Junior Food Store. Id. at 2216. However, Cooksey did not state in his affidavit that the police told him what to say during his taped police interview, but instead stated he merely repeated what he had heard from Young and Clark. Additionally, he did not state that Petitioner did not commit the crimes for which he was convicted.

During his testimony before this Court, Cooksey contradicted his affidavit testimony and told a new story that the police were turning off the tape recorder and implying to

him what to say, i.e. accusing Petitioner of committing the crimes, when they turned on the machine throughout questioning. (HT 1:126-127, 134). This is directly at odds with Cooksey's affidavit testimony that the police were interested in information regarding Young and Cooksey was providing information that would take the focus from Young. (PX 92, 10:2215).

Additionally, Det. Winkelmann, one the officers who interviewed Cooksey, provided testimony that also refuted Cooksey's rendition of his police interview. Det. Winklemann testified that Cooksey was arrested for the shooting in the Cherokee Projects and the strong-armed robbery of Keith Reddick, and when Det. Winklemann began his interview of Cooksey regarding these crimes, Cooksey began talking about the murder at the Junior Food Store. (RX 290, 52:14,811, 14,814). In fact, neither officer, Det. Winkelmann nor Det. Weaver, ever testified that Cooksey was accused of committing the crimes at the Madison Street Deli or the Junior Food Store. Furthermore, Petitioner failed to cite to any source that shows that the police accused Cooksey of committing the crimes at the Madison Street Deli and the Junior Food Store. (See, PX 200(A), 18:4670-4691, transcript of Cooksey's police interviews).

Moreover, this Court's review of the police interrogation transcripts do not yield evidence of coerced testimony and

provide no proof that the State knew or should have known that Cooksey was allegedly fabricating any part of his story. A review of the transcript of the statements given by Cooksey to the police also reveals that he was not coerced or instructed as to the content of his statement. For example, the interview begins:

> Weaver — Todays (sic) date is 4-13-94. The time is 1130 hours. Present, myself, (DET. SGT. Chuck Weaver), Det. Guy Winkelmann and Cornell Cooksey, aka Junior. We're interviewing in reference to a statement that he talked to Det. Winkelmann with Early, concerning the robbery and shooting at the Madison Street Deli on 04-07-94 and the Homicide and Robbery of the Junior Store on 4-10-94.
>
> Weaver — Cornell, you were advised earlier of your rights, uh, by Det. Winkelmann and you signed here the statement. Is that your signature there?
>
> Cooksey — Yes sir.
>
> Weaver — Okay. Are you giving this statement freely or your own free will. You haven't been force, coerced or promised anything to this statement.
>
> Cooksey — No sir.

(PX 200(A), 18:4670). Additionally, throughout the two taped interviews, Cooksey is never threatened with prosecution of the crimes at the Madison Street Deli or the Junior Food Store. Id. at 4670-4691. Moreover, Cooksey's statements do not read as if this was coaxed testimony, for example, when he was questioned

about Petitioner's planning prior to the Junior Food Store robbery and murder, his statement contained details that belie the notion of coercion:

> Spencer So, so, Cory, Gary and Jeff were talking about this robbery. Did they say what store.
>
> Cooksey They didn't they didn't say (inaudible). Because it was like this: Jeff come to me and say, I (inaudible), you know, he wasn't really talkin (sic) exactly to me. He was...we was all out there. You know, cause he was talkin (sic) what we can rob, you know. So, he say, I know exactly place we can do it. It's, it's like goin (sic) to Tallahassee. The Junior Food Store. It's a (sic) old man. That's exactly what he said. Old man workin (sic) there by hisself (sic). No camera or nothin (sic). He says, so apparently he, you know, went and scoped it out and everything. And he say, oh, stay open all night. (Inaudible). I told him like this, I say, I'm outta this. You all can have it. You know, and I left and went about my business.

(PX 200(A), 18:4682). Also, his statement regarding what happened in the Junior Food Store does not read as if this was information he overheard from another source, and clearly contradicts his state habeas testimony before this Court that he was too drunk to know what happened when Petitioner returned from the Junior Food Store to the apartment where Cooksey was staying:

> So I'm not gonna (sic) say who went with him. I'm not gonna(inaud). So, he, uh, they come back with some beer. I woke up bout (sic) round four or five and they had some beer in the refrigerator. And it was

> busted. It was a case of Budweiser. Twelve ounce cans. It was busted and some of it had mud on it. And so, after that, you know, I asked them where'd they get it from. Then, you know, Jeff, called me and Gary out the door and told us. You know, what went on. Say he shot the clerk in the face twice. Then he tried to open the cash register. He got the beer first. He tried to open the cash register and he couldn't. So, he grabbed the beer and ran out the store. And he say he was droppin (sic) it and he was runnin (sic), pickin (sic) it up and he said he dropped two of em (sic) that he hadn't picked up. They was in a mud puddle. And he left those two there. And that was basically what happened. And he say he didn't have any more shells. Say he didn't have but two shells when he went.

Id. at 4677.

The Georgia Supreme Court held in Norwood v. State, 273 Ga. 352, 353, 541 S.E.2d 373, 374 (2001):

> "That a material witness for the State, who at the trial gave direct evidence tending strongly to show the defendant's guilt, has since the trial made statements even under oath that his former testimony was false, is not cause for a new trial. Declarations made after the trial are entitled to much less regard than sworn testimony delivered at the trial. ...The only exception to the rule against setting aside a verdict without proof of a material witness' conviction for perjury, is where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication." Cit. A recantation impeaches the witness' prior testimony. Cit. However, it is not the kind of evidence that proves the witness' previous testimony was the purest fabrication.

See also Johnson v. State, 236 Ga. App. 764 (1), 513 S.E.2d 291 (1999); Peppers v. State, 242 Ga. App. 416, 530 S.E.2d 34 (2000); Askew v. State, 254 Ga. App. 137, 564 S.E.2d 720 (2002).

This Court finds Petitioner has failed to present any evidence,

other than Cooksey's testimony, that proves Cooksey's statements to the police or his testimony at Petitioner's trial was "the purest fabrication." Furthermore, even if Cooksey had recanted his testimony at trial his prior inconsistent statement to the State "would have been admissible as substantive evidence" of Petitioner's guilt. Johnson, 236 Ga. App. at 765.

The United States Supreme Court in Giglio stated, "As long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio, 405 U.S. 150, 153. In the instant case, Petitioner has failed to show that there was a "deliberate deception" perpetrated on the trial court by the State at Petitioner's trial regarding the testimony of Carnell Cooksey.

Accordingly, the Court finds the following regarding Petitioner's Giglio claims: 1) Petitioner's claim that the State presented false and/or misleading testimony from Corey Clark at Petitioner's trial when compared to his previous statements and testimony is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome this default; 2) Petitioner's claim that the State presented false and/or misleading testimony from Corey Clark regarding his plea deal is without merit and is **DENIED**; 3) Petitioner's claim

that the State presented false and/or misleading testimony from Gary Young regarding the crimes and an alleged deal with the State in exchange for his testimony is without merit and is **DENIED**;

4) Petitioner's claim that the State presented false and/or misleading testimony from Carnell Cooksey is also without merit and is **DENIED**.

In the alternative, were this Court to consider all of the aforementioned alleged State misconduct cumulatively, this Court would find that the "cumulative effect" of this evidence would still fail to establish a Giglio violation.

Accordingly, Petitioner's Giglio claims are **DENIED**.

C. ISSUES WHICH FAIL TO ASSERT A CONSTITUTIONAL VIOLATION ARE PRECLUDED FROM REVIEW AS NON-COGNIZABLE

The following allegations raised by Petitioner fail to allege grounds which would constitute a constitutional violation in the proceedings which resulted in Petitioner's convictions and sentences and are therefore barred from review by this habeas corpus court as non-cognizable under O.C.G.A. § 9-14-42(a).

1. The Following Claims are Non-Cognizable:

That portion of Claim VII, wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment.

Claim XII, wherein Petitioner alleges general cumulative error.[25]

a. AS PETITIONER CANNOT ESTABLISH A CONSTITUTIONAL CLAIM TO ASSERT HIS ACTUAL INNOCENCE CLAIM OR NEW RELIABLE EVIDENCE OF THAT CLAIM, IT IS NONCOGNIZABLE.

Petitioner alleges in **Claims V** and **VI**, that he is actually innocent of the crimes for which he received the death penalty. 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). As held by the United States Supreme Court, a finding of actual innocence does not entitle a petitioner to habeas corpus relief, as the purpose of habeas corpus is not to review or correct errors of fact, but to address the question of whether a petitioner's constitutional rights have been violated. See Herrera v. Collins, 506 U.S. 390, 400-401 (1993). This bedrock principle of law has not been eroded. See, e.g., Brownlee v. Haley, 306 F.3d 1043, 1065 (11th Cir. 2002); Fortenberry v. Haley, 297 F.3d 1213, 1222 (11th Cir. 2002); High v. Head, 209 F.3d 1257, 1273 (11th Cir. 2000).

[25] There is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70, 538 S.E.2d 416 (2000). However, this Court has looked at Petitioner's Brady/Giglio claims using a cumulative analysis.

Thus, this Court finds this claim is not properly before this Court for review and is **DENIED**.

Insofar as Petitioner is attempting to couple his actual innocence claim with allegations of prosecutorial misconduct, Petitioner's actual innocence claim remains noncognizable as he has failed to establish constitutional error with regard to his Brady and Giglio claims and has failed to present new reliable evidence supporting his actual innocence claim, both of which are required for the cognizability of this allegation. See Schlup v. Delo, 513 U.S. at 324 (1995).

As the United States Supreme Court has noted "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. [] To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence [] that was not presented at trial." Schlup v. Delo, 513 U.S. at 324.

To establish the requisite probability that a constitutional violation has probably resulted in the conviction of one who is actually innocent, Petitioner must show more than a reasonable doubt exists in light of the new evidence. He must establish:

> [T]hat no reasonable juror would have found the defendant guilty. It is not the [] court's independent judgment as to whether reasonable doubt

> exists that the standard addresses; rather the standard requires the [] court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the [] court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Schlup v. Delo, 513 U.S. at 329. (Citations omitted).

Petitioner thus is required to make a stronger showing than that needed to establish prejudice. Schlup v. Delo, 513 U.S. at 327.

Further, as twelve jurors have found Petitioner guilty beyond a reasonable doubt, he "no longer has the benefit of the presumption of innocence. [] To the contrary, [Petitioner] comes before the habeas court with a strong -- and in the vast majority of the cases conclusive -- presumption of guilt." Schlup v. Delo, 513 U.S. at 326. (Citations omitted).

As found above, Petitioner has failed to prove that the State suppressed any information, coerced any witness, or made any deals in exchange for testimony that were not revealed to the jury. Consequently, Petitioner has failed to present to this Court a constitutional violation to accompany his claim of actual innocence and without a viable constitutional claim, Petitioner's claim of actual innocence is not properly before this Court as a cognizable claim.

In the alternative, this Court finds Petitioner has also failed to present any "reliable new evidence" to prove he is

"actually innocent" of the crimes for which he was convicted. The only "new evidence" presented by Petitioner are the less than credible affidavits of Keith Reddick, Terrell Cochran and Carnell Cooksey, none of which state Petitioner is actually innocent or that Gary Young committed any crime in conjunction with the Madison Street Deli shooting and the Junior Food Store robbery and murder. Further, even assuming, *arguendo*, that the testimony of Reddick and Cochran was credible and they saw Young near the Madison Street Deli on the night of the shooting, it does not prove that Petitioner was not also at the Madison Street Deli and Petitioner's assertion that he has always maintained his innocence is not "new reliable evidence" of his innocence.

Additionally, assuming Cooksey's recantation of his trial testimony is deserving of credit, this is not evidence that Petitioner was innocent of the robbery and murder committed at the Junior Food Store. Petitioner has failed to present any evidence other than speculation and unsupported conjecture regarding the believability of Corey Clark's testimony regarding how the crime occurred. Moreover, the other eyewitness testimony of the Junior Food Store crimes corroborated Clark's testimony. Clark testified that he and Petitioner entered the store and Petitioner went to the front of the store and Clark went to the back of the store to the beer coolers. (TT, Vol. 7,

pp. 2360). Clark heard the gunshots and ran to the front of the store where Petitioner had shot the clerk and Petitioner ran to the back of the store and grabbed the beer. Id. at 2361-362. Petitioner then exited the store followed by Clark, dropped a portion of the beer and continued moving. Id. at 2362-363.

Walter Seitz, the eyewitness from the Jack Rabbit Foods which sat across a well-lit street from the Junior Food Store, corroborated Clark's testimony when he testified he heard the gunshots, then witnessed a "light skinned black" person, which testimony and evidence presented at trial proved to be Petitioner, (TT, Vol. 7, pp. 2246, 2362; Vol. 8, pp. 2697-698), run from the front of the store "where the clerk was to the back of the store," then run from the store with "two twelve packs of beer." (TT, Vol. 7, pp. 2246-2247). Following this individual, Mr. Seitz saw another male, "darker in complexion and thinner" exit the store in the same direction as the first male. Id. at 2248-249.

William Taylor also corroborated Clark's testimony when he testified that, on the night of the crime, he was driving by the Junior Food Store and saw two black individuals come out of the Junior Food Store, run to the left of the store, "drop something perhaps and go back to pick it up." (TT, Vol. 5, 1876). Mr. Taylor stated he thought the item the individual was carrying was beer. Id. at 1877. On the same side of the store in which

Mr. Taylor testified he saw the individuals drop what he thought was beer, the police found a footprint, which was identified as a possible match for Petitioner's shoes but not Young's, Clark's or Lucas', (TT, Vol. 6, pp. 2027-2028, 2035-2036), a couple of beers, and a portion of a Budweiser beer carton with Petitioner's fingerprint, (TT, Vol. 8, pp. 2599-2600). (See also TT, Vol. 6, pp. 1905, 2088-2090; Vol. 7, pp. 2427-430, 2437-438).

Accordingly, as Petitioner has failed to present a constitutional claim to accompany his "actual innocence" claim in order to present a cognizable claim to this Court or any "new reliable evidence" that actually proves Petitioner is innocent of the crimes for which he was convicted, the Court finds this claim is non-cognizable and, in the alternative, **DENIED** as it is without merit.

Summary of Findings - Non-cognizable Claims

Claims VII, XII and portions of **Claims, V and VI** are not proper claims for this Court's review and are **DENIED**.

D. CLAIMS PROPERLY BEFORE THIS COURT FOR REVIEW

The only claims that are properly before this Court for review are Petitioner's **Claim II** alleging ineffective assistance of trial and appellate counsel, and **those portions of Claims IV and X**, wherein Petitioner alleges the sentencing decision was based upon erroneous and inadequate instructions.

1. PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.

a. *Strickland v. Washington* Is The Applicable Standard To Be Applied By This Court.

It is undisputed that 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. To establish his ineffectiveness claims, Petitioner must show the following:

> 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" 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).[26]

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[26] The Strickland standard was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783 (1985) and therefore, the Strickland standard is applicable under state and federal jurisprudence.

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, 689 (1984).

As Petitioner has failed to brief this claim or otherwise present evidence in support thereof, and as he carries the burden of proof, this claim is **DENIED**.

2. PETITIONER HAS FAILED TO PROVE HIS SENTENCING PHASE INSTRUCTIONS WERE IMPROPER.

In a portion of **Claims IV** and **X**, Petitioner alleges the sentencing decision was based upon erroneous and inadequate instructions.[27] This Court finds that the trial court's charges to the jury were proper. Furthermore, Petitioner failed to present any evidence at the evidentiary hearing or argument in his post-hearing brief in support of this claim. Petitioner has also failed to provide any legal support for his claim. As

[27] To the extent that these claims were raised and decided adversely to Petitioner on direct appeal, they are *res judicata*. Cromartie v. State, 270 Ga. at 789(22).

such, Petitioner has failed to meet his burden of proving that he is entitled to habeas relief.

Accordingly, this claim is **DENIED**.

IV. DISPOSITION

Based upon the findings of fact and conclusions of law, this Court hereby orders that the writ of habeas corpus is **DENIED** as to the conviction and to the sentence. The Clerk for the Superior Court of Butts County, Georgia, is directed to serve a copy of this Order on the Petitioner, Counsel of Record for the parties, and the Council of Superior Court Judges of Georgia.

IT IS SO ORDERED this 8 day of Feb., 2012.

HONORABLE GEORGE F. NUNN, JR.
Superior Court of Butts county
Sitting by Designation