No. 18-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

SCOTTY GARNELL MORROW,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

APPENDIX

Capital Case

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10311

D.C. Docket No. 2:12-cv-00051-WBH

SCOTTY GARNELL MORROW,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

(March 27, 2018)

Before WILSON, WILLIAM PRYOR, and NEWSOM, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

Scotty Garnell Morrow, a Georgia prisoner convicted and sentenced to death for the murders of Barbara Young and Tonya Woods, appeals the denial of his petition for a writ of habeas corpus, 28 U.S.C. § 2254. Morrow contends that we should vacate his sentence on the grounds that his trial attorneys provided ineffective assistance when they failed to uncover and introduce mitigating evidence from Morrow's childhood and when they failed to hire an independent crime-scene expert to corroborate Morrow's account of the murders. We disagree. The Supreme Court of Georgia reasonably concluded that Morrow's attorneys were not deficient for failing to uncover mitigating evidence and that the attorneys' failure to hire an independent crime-scene expert did not prejudice Morrow. We affirm.

I. BACKGROUND

We divide this background in four parts. We begin with the facts of the crime. Next, we explain counsel's preparations for trial. Then, we describe Morrow's trial and sentencing. We then provide an overview of the state and federal habeas proceedings.

A. The Crime

On December 29, 1994, Scotty Garnell Morrow murdered Barbara Young and Tonya Woods, and he severely injured LaToya Horne. *Humphrey v. Morrow* ("*Morrow III*"), 717 S.E.2d 168, 171–72 (Ga. 2011). Young was Morrow's

girlfriend, and Morrow repeatedly abused her. *Id.* at 171. On December 6 of the same year, Morrow struck Young; on December 9, he abducted, beat, and raped her twice; and on December 24, Young told a neighbor that "Morrow was going to kill her." *Id.*

On the day of the murders, Morrow and Young argued over the telephone before Morrow, armed with a handgun, went to Young's house, *id.* at 172, which was occupied by Young, Woods, Horne, and two children, *id.* at 171–72. Morrow entered the house and found the three women in the kitchen. *Id.* at 172. He argued with Woods before shooting her "in her abdomen, severing her spine and paralyzing her." *Id.* He then shot Horne in the arm. *Id.* Young fled into the bedroom, but Morrow pursued her and kicked open the bedroom door. *Id.* As they struggled, the gun discharged and "likely injur[ed]" Young. *Id.* She then ran into the hallway, but Morrow again caught her. *Id.* Forensic evidence presented by the state, *id.* at 177, suggested that Morrow "smashed her head into the bedroom's doorframe, leaving behind skin, hair, and blood," before he executed her with a single shot to the head, *id.* at 172. The bullet passed through Young's left palm, suggesting that she was "attempt[ing] to shield her head." *Id.* Morrow disputes this account and argues that "the blood and hair found on the doorframe in the hallway were deposited there by . . . Young's wounded hand, not by Morrow striking her head against the door jamb." Regardless, after Young died, Morrow returned to the

kitchen and either reloaded or unjammed his pistol. *Id.* He murdered Woods by shooting her in the "head at close range, and he shot . . . Horne in the face and arm." *Id.* Horne survived, but suffered permanent injuries. *Id.* Morrow then fled the scene after cutting the telephone line. *Id.*

B. The Attorneys' Pretrial Preparations

In 1995, the trial court appointed Harold Walker Jr. and William Brownell Jr. to represent Morrow, and in March of the same year a grand jury indicted Morrow for two counts of malice murder and several lesser offenses. Walker and Brownell decided to pursue mitigating evidence to support their theory that the crime was an out-of-character outburst by an otherwise "good man." They met with Morrow "almost right away" and probed "his general life history." They repeatedly discussed Morrow's childhood with Morrow's sister and mother. And they hired an investigator, Gary Mugridge, who interviewed, among others, Morrow's sister, mother, father, former girlfriend, former co-workers, and bishop. Although Mugridge lacked specific experience with capital investigations, he had 40 years of investigative experience and "literally reported everything he did back to [counsel]."

The attorneys hired two psychologists. The first, Dr. Dave Davis, interviewed Morrow about his personal and family history. Davis learned that Morrow's father "battered" his mother, that Morrow "[got] in trouble with school,"

and that Morrow had been in several "serious [romantic] relationships," "ha[d] always been heterosexual, [had] beg[u]n intercourse at age 16, and ha[d] had sexual relations with about thirty women." Davis reported that Morrow was "cooperative," that a "[g]ood rapport was established," and that Morrow was "responsive and spontaneous." The second psychologist, Dr. William Buchanan, saw Morrow four times, and the attorneys met several times with Buchanan. Buchanan testified that "Morrow was cooperative and honest" in their sessions. Morrow shared other sexual details with Buchanan, including that he "was picked up with a transvestite" in 1992 and that his son had been molested. But Morrow never told Buchanan that he had been sexually abused.

The attorneys' investigation revealed that Morrow had spent "a lot of [his] youth . . . in the New York [and] New Jersey area" before moving to the south as an older teenager. They learned that Morrow had struggled in school, had undergone psychological testing, had experienced "blackouts as a child," and had a "big brother mentor through the school." And they discovered that "Morrow's childhood life was not ideal" because "he saw his mother physically abused, saw his family members emotionally abused . . . [and] was made fun of by . . . other children."

This investigation led the attorneys to "believ[e] [they] had [found] everything" and that Morrow had not experienced sexual or extreme physical

abuse in the light of his and his family's statements. They also saw little reason to doubt the truthfulness and completeness of these accounts because the family offered candid responses to their questions. For example, Morrow's mother freely discussed "how her husband beat her in front of [the] children," and counsel learned that Morrow was subject to "some physical abuse" such as "intense spanking[s]." Although the attorneys found the mother "difficult in terms of providing information" and perceived that she gave "the same answers over and over again," they determined that she was honest and never "hostile or unwilling to help." And Walker later testified that he "never got the feeling [Morrow] was trying to mislead [them]."

The attorneys encountered a few "dead ends," such as when they unsuccessfully attempted to reach out to officials at Morrow's childhood school and Morrow's childhood mentor. They also declined to send Mugridge to New York and New Jersey to further explore Morrow's childhood. And the attorneys did not hire a social worker to help with the investigation because they concluded that doing so was unnecessary in the light "of what . . . Buchanan was doing and the mitigation evidence that . . . Mugridge was finding." They also did not retain a forensic expert to rebut the state investigator's forensic account of the crime.

C. The Trial and Sentencing

At trial, Morrow testified that his victims had verbally provoked the assault and gave a less-brutal description of the murders. He asserted that Woods was standing upright and taunting him when he fired the first shot. He also gave an account of his struggle with Young that conflicted with evidence presented by the state that "Young's forehead likely was injured when her head struck a doorframe." *Id.* at 177. And he disputed that he reloaded his gun mid-rampage. The prosecutor underscored the discrepancies between Morrow's testimony and the physical evidence and repeatedly accused Morrow of lying to evade responsibility.

By all accounts, Morrow was a poor witness. Walker later recalled that the "cross-examination was a disaster" because Morrow failed to show "remorse and shame" and "was as flat on the stand as [he had] ever seen him." The jury convicted Morrow on all charges.

At sentencing, trial counsel depicted Morrow as an otherwise peaceful man who "snapped" after a lifetime of "rejection" and "emotional difficulty." Morrow did not testify because he "was firm in . . . not wanting to testify again" and his attorneys thought his earlier trial testimony "was a disaster." They instead presented fourteen witnesses, including Morrow's mother and sister, who testified that Morrow had seen his father abuse his mother, that he had visited psychiatrists, that he "was a little slow in some things," that he "was picked on in school," and

that he was spanked as a child "with a strap in front of his classmates." Buchanan testified that Morrow suffered from several emotional disorders and frailties and that Morrow had "a suspicious, mistrustful[,] . . . [and] impulsive" nature. The jury recommended a sentence of death after finding five aggravating factors, including that the murders were "outrageously vile, horrible[,] or inhuman in that [they] involved torture and depravity of mind." *Morrow v. State* ("*Morrow I*"), 532 S.E.2d 78, 82 (Ga. 2000). The Supreme Court of Georgia affirmed on direct appeal, *id.* at 89, and the Supreme Court of the United States denied certiorari, *Morrow v. Georgia* ("*Morrow II*"), 532 U.S. 944 (2001).

D. The State and Federal Habeas Proceedings

On post-conviction review in the Superior Court of Butts County, Georgia, Morrow raised two claims for relief relevant to this appeal. First, he argued that trial counsel was ineffective for failing to uncover evidence of childhood abuse. Second, he contended that trial counsel was ineffective for failing to retain an independent crime-scene expert who would have confirmed his version of the murders and rebutted aggravating details that the prosecution highlighted.

Morrow introduced new evidence of childhood trauma that trial counsel failed to uncover. He asserted that he had been raped by an older youth who often visited Morrow's family. In support of this allegation, Morrow introduced new statements he made to a different psychologist and evidence that he began to wet

the bed and have behavioral problems at school around that time. And other children from Morrow's childhood, whom trial counsel had failed to interview, submitted affidavits declaring that the rapist had sexually assaulted another child. But these affidavits did not allege that Morrow had been raped.

Morrow also asserted that he was bullied and tormented by other children, and he submitted supporting affidavits from his sister and from Lemon Green Jr., a child who lived with his family. Morrow's sister asserted that Morrow "got beat up a lot by [older children]" and that Morrow was frequently bullied at school. Green recalled only that the older children "pick[ed] on" and "push[ed] . . . around" Morrow and that Morrow "took the treatment he got ok most of the time."

Morrow alleged that his mother's boyfriend frequently beat Morrow with a belt when Morrow was ten years old, and he introduced new statements from himself and his sister about these facts. He also offered new affidavits from friends and extended family members whom trial counsel had failed to interview: Morrow's aunt corroborated that Morrow reported the beatings to her, the boyfriend's son asserted that Morrow "t[old] [him] about how [the boyfriend] would beat him," and Morrow's cousin stated that the boyfriend "used to hit" Morrow.

Morrow faulted trial counsel for failing to uncover this mitigating evidence. He asserted that known "red flags," such as the domestic violence experienced by

his mother, his childhood visits to a psychologist, and his troubles in school and with bullies should have alerted counsel to the existence of more evidence. Morrow concluded that this information would have come to light had counsel obtained his school records, interviewed his childhood mentor, sent Mugridge to New York and New Jersey, and hired a social worker to help with the investigation. And Buchanan, one of the original psychologists, averred that, had he "been provided even some fraction of [the new evidence], [he] would have elicited much of the remainder of the information from . . . Morrow himself."

Morrow also presented testimony from a crime-scene expert who corroborated Morrow's marginally less gruesome account of the murders. The expert testified that Woods was standing, not sitting, when Morrow first shot her, that Morrow did not strike Young's head against a doorframe, and that Morrow did not reload his gun mid-rampage. Morrow argued that this evidence would have convinced the jury that the crime was less aggravated and that Morrow's testimony was honest.

The superior court granted relief on both claims and vacated Morrow's death sentence, but the Georgia Supreme Court reversed and reinstated the sentence. *Morrow III*, 717 S.E.2d at 171, 179. On the question of inadequate investigation, the Georgia Supreme Court determined that the attorneys were not deficient because "they reasonably relied on Morrow and his immediate family members to

reveal . . . information" about Morrow's past. *Id.* at 175. It underscored that "counsel met repeatedly with Morrow, his mother, and his sister, and [that] the record makes clear that counsel discussed Morrow's childhood background with [his family] extensively." *Id.* at 173. "Contrary to Morrow's argument . . . that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New Jersey," the Georgia Supreme Court ruled that counsel made reasonable inquiries about this period of Morrow's life. *Id.* It gave particular attention to the new assertion of rape and "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history." *Id.* at 176. The Georgia Supreme Court also explained that the attorneys hired an investigator, "closely monitored the investigator's progress," and "had Morrow examined by a psychiatrist" whose "report indicated a sexual history that was unremarkable, except perhaps for the fact of Morrow's promiscuity with women." *Id.* at 173. And it determined that "[c]ounsel and their investigator made reasonable attempts to contact [Morrow's childhood mentor]." *Id.* at 174.

The Georgia Supreme Court also reversed the superior court and held that the failure to uncover mitigating evidence did not prejudice Morrow because the new evidence was duplicative or unpersuasive. *Id.* at 173, 175–77. Regarding Morrow's assertion that his extended family was "unkind to him and his sister and

disciplined them harshly and that the other children in the home bullied him," it found "this new testimony to be less than compelling . . . because testimony was actually presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 175. Regarding Morrow's assertion of rape, the Georgia Supreme Court reasoned that "recent allegations about the rapes would not have been given great weight by the jury" because the "only direct evidence . . . was [Morrow's] own statement to a psychologist." *Id.* at 176. And regarding Morrow's allegation that he was beaten by his mother's boyfriend, the Georgia Supreme Court explained that "testimony at trial . . . show[ed] that the boyfriend had been abusive to Morrow's mother and had once cruelly mocked Morrow when he attempted to defend his mother with a baseball bat." *Id.* at 176. And it pointed out that the new evidence "was somewhat inconsistent regarding the degree of harshness involved." *Id.* at 176 n.4.

The Georgia Supreme Court also held that Morrow suffered "no substantial prejudice" from counsel's failure to hire a forensic expert. *Id.* at 177. Although it acknowledged that the new "evidence . . . [that] Woods was standing rather than sitting when Morrow shot her" "would have tended at trial to confirm Morrow's version [of events]," it concluded that this information "would not have had a significant impact on the jury in light of the fact that the evidence was clear that

Morrow began shooting simply because he was upset by what [she] had said to him rather than because of any threat he sensed." *Id.* The Georgia Supreme Court also underscored that the surviving victim's testimony at trial was "consistent with Morrow's" version of events, leading it to doubt the marginal value of an additional expert account. *Id.* Regarding Morrow's contention that the expert would have testified that Young's head wound occurred not "when her head struck a doorframe during the struggle" but when a bullet "grazed her forehead," the Georgia Supreme Court determined that the jury would "favor the testimony of the State's experts" and that, "even if the jury chose to believe . . . Morrow's new expert, that version would not be significantly mitigating[] because it still depicts Morrow as having struggled with [Young] for the gun in the bedroom, chasing her as she fled into the hallway, grabbing her by her hair as she lay helpless on the floor, and shooting her in the head." *Id.* Regarding Morrow's argument that the expert would have testified that Morrow unjammed instead of reloaded his gun before executing Woods, the Georgia Supreme Court determined that "the testimony would have been essentially cumulative of similar testimony from an expert for the State" and that, "regardless of whether Morrow was clearing a jam in his gun or reloading, it is clear that he was taking active steps to prepare his gun to continue his murderous rampage." *Id.*

The district court denied Morrow a writ of habeas corpus, but it granted a certificate of appealability on the question of mitigating evidence. And we granted a certificate of appealability on the failure to hire an independent expert.

II. STANDARD OF REVIEW

"We review *de novo* the denial of a petition for a writ of habeas corpus." *Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009, 1016 (11th Cir. 2015). We may not grant relief on "any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" either "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "When deciding that issue, we review *one decision*: 'the last state-court adjudication on the merits.'" *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1232 (11th Cir. 2016) (en banc) (emphasis added) (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)). This narrow evaluation is highly deferential, for "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). We also must presume that "a determination

of a factual issue made by a State court [is] correct," and the petitioner "ha[s] the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III. DISCUSSION

Morrow raises two issues for our review. First, he argues that the Georgia Supreme Court unreasonably determined that his attorneys were not deficient for failing to uncover mitigating evidence of childhood hardships and that he suffered no prejudice. Second, he argues that the Georgia Supreme Court unreasonably determined that the attorneys' failure to retain an independent crime-scene expert did not prejudice Morrow. We consider and reject each argument in turn.

A. The Georgia Supreme Court Reasonably Determined that Trial Counsel Was Not Deficient for Failing To Uncover Mitigating Evidence and that Morrow Suffered No Prejudice.

When a petitioner alleges that he received ineffective assistance of trial counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), he must first establish "that counsel's performance was deficient" by "showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment . . . [and] fell below an objective standard of reasonableness." *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000) (internal citations and quotation marks omitted). Counsel's failure to "conduct an adequate background investigation," *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1351 (11th Cir.

2011), or to pursue "all reasonably available mitigating evidence" can satisfy this standard, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (emphasis omitted) (citation omitted). For example, we have identified deficient performance when counsel failed to "thoroughly question[] [the petitioner] about his childhood and background" and spoke with only one family member immediately before the sentencing stage despite knowing that the petitioner "had a bad childhood." *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 932 (11th Cir. 2011). Counsel also performs deficiently when he briefly investigates tales of abuse only to believe the abuser's "denial without checking with any other family member[s] [who are] ready, willing, and able to testify that [the petitioner is] telling the truth about his abusive upbringing." *Id.*; *see also Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1263–64 (11th Cir. 2016) (explaining that a deficient attorney "had almost no meaningful contact with [the petitioner] or his family" and had brushed off "a series of attempts [by the petitioner's mother] to contact [counsel]"). And counsel must not overlook "evidence of . . . abuse" that "was documented extensively in [available] records." *Newland v. Hall*, 527 F.3d 1162, 1206 (11th Cir. 2008) (quoting *Callahan v. Campbell*, 427 F.3d 897, 935 (11th Cir. 2005)); *see also Rompilla v. Beard*, 545 U.S. 374, 383–84 (2005).

Nevertheless, "omissions are inevitable." *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (quoting *Chandler v. United States*, 218 F.3d

1305, 1313 (11th Cir. 2000) (en banc)). And "the reasonableness of a defense attorney's investigation . . . [depends] heavily [on] the information provided by the defendant" because "[c]ounsel's actions are usually based . . . on informed strategic choices made by the defendant and on information supplied by the defendant." *Newland*, 527 F.3d at 1202 (quoting *Strickland*, 466 U.S. at 691). Indeed, "when a petitioner (or family members petitioner directs his lawyer to talk to) does not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as mitigation." *Stewart*, 476 F.3d at 1211 (alterations adopted) (quoting *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1325 (11th Cir. 2002)); *see also Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) ("An attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him."). Counsel also need not interview every conceivable witness because "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009); *see also id.* ("[I]t [is] not unreasonable for . . . counsel not to identify and interview every other living family member . . . ."). And even if counsel is aware of some childhood hardships, he is not automatically deficient for failing to discover other abuse that his client conceals. *See, e.g.*, *id.* at 11; *Anderson v. Sec'y, Fla. Dep't of*

Corr., 752 F.3d 881, 906 (11th Cir. 2014); *Stewart*, 476 F.3d at 1197–98, 1211, 1215–16.

Morrow contends that his counsel failed "to learn about Morrow's life during [his] formative years" and overlooked evidence that he was raped, beaten, bullied, and mistreated as a child. He underscores that counsel "*exclusively*" relied on "[i]nterviews with Morrow, his mother[,] and his sister," failed "to obtain school records that documented, *inter alia*, Morrow's visit to a child psychiatrist," and failed to interview "Morrow's 'big brother' figure in New Jersey . . . [after] Morrow's sister could not provide a telephone number." And he contends that counsel ignored "glaring red flags," such as the abuse suffered by Morrow's mother, his troubles at school, his "personality disorder," his childhood visits to a psychologist, and evidence that he was "beat up" at school. Morrow also complains that his counsel failed to "retain a licensed clinical social worker" despite having the funds to do so.

The Georgia Supreme Court reasonably concluded that trial counsel conducted an adequate investigation. Counsel made inquiries that would have uncovered the new mitigating evidence were it not for the silence of Morrow and his family. On the issue of rape, the Georgia Supreme Court found "that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history."

Morrow III, 717 S.E.2d at 176. Walker later testified that he "certainly" knew that sexual abuse "is of such [a] crucial nature to a defense that you want to move heaven and earth to go find it" and that this was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow]." But Morrow and his family failed to mention the rape. And counsel subjected Morrow to several psychological interviews that extensively probed Morrow's family and sexual history but turned up no evidence of abuse. *Cf. Wiggins*, 539 U.S. at 523 (pointing out that deficient counsel arranged for an incomplete psychological interview that "revealed *nothing* . . . of [the] petitioner's life history" (emphasis added)).

We fail to understand what else counsel could have done to uncover the rape. Morrow and the alleged rapist are the only witnesses to the rape, and Morrow does not contend that he reported the assault, so any further inquiry would have been fruitless without Morrow's cooperation. And counsel had no reason to doubt Morrow's honesty. Morrow shared intimate details about his sexual history and even revealed that his son had been molested. Walker later testified that he "never got the feeling [Morrow] was trying to mislead [the attorneys]," and Buchanan averred that "Morrow was cooperative and honest." Morrow's "forthcoming description[]" of his personal history entitled his "attorney[s] to believe that

[Morrow] was not withholding any potentially mitigating circumstances." *Anderson*, 752 F.3d at 906.

The same analysis applies to the new evidence that Morrow was bullied in school and beaten by his mother's boyfriend. Counsel made reasonable inquiries about this kind of information only to meet dead ends. As the Georgia Supreme Court found, "counsel met repeatedly with Morrow, his mother, and his sister" and "discussed Morrow's childhood background with them extensively." *Morrow III*, 717 S.E.2d at 173. Indeed, the witnesses who later provided the majority of the new evidence—Morrow and his sister—were the *same witnesses* relied on by trial counsel. True, new witnesses mentioned the torment in their affidavits, but Morrow's attorneys were entitled to focus their investigation on Morrow and his immediate family because "it [is] not unreasonable for . . . counsel not to identify and interview every other living family member." *Van Hook*, 558 U.S. at 11. And counsel had little reason to suspect that Morrow and his family had failed to reveal the full details of Morrow's childhood in the light of their "forthcoming descriptions." *Anderson*, 752 F.3d at 906. Brownell later averred that Morrow's sister "offered up responses to anything [he] asked" and was open about relevant information, such as "that her father was abusive to her mother." Although Morrow's mother was more "difficult in terms of providing information," she "was never difficult in the sense of being hostile or unwilling to help." She also honestly

related instances of childhood trouble, telling the attorneys "how her husband beat her in front of her children" and that Morrow was subjected to "intense spanking[s]," including a spanking in front of his classmates. The Georgia Supreme Court was entitled to find that "trial counsel [did not] ignore[] information from the [early] years [of] Morrow's childhood." *Morrow III*, 717 S.E.2d at 173.

We also disagree with Morrow that the fragments of mitigating evidence provided by Morrow and his family were "red flags" that automatically obligated counsel to uncover every detail of Morrow's childhood. To the contrary, we have explained that counsel who knew that the petitioner had a "violent early childhood with his biological mother and her family," *Stewart*, 476 F.3d at 1197, was not deficient for failing to discover later abuse by a stepfather that the petitioner "never informed [counsel] about," *id.* at 1210; *accord id.* at 1215–16, and that "a reasonable attorney" need "not necessarily . . . assume that [a petitioner is] hiding a history of sexual abuse" based on a petitioner's reports that he "experienced '[e]xtreme [f]ears,' was '[a]ccident [p]rone,' and got '[s]ick a [l]ot'" as a child, *Anderson*, 752 F.3d at 905 (quoting Pet'r's Br. at 31–32). Morrow's pretrial evidence that revealed a history of corporal punishment, bullying, struggles in school, and abuse directed against his mother gave counsel little reason to disbelieve Morrow and his family and to conduct a scorched-earth investigation,

especially because Morrow's sister also stated that Morrow's life was "pretty good." *Morrow III*, 717 S.E.2d at 174. And counsel took additional steps to shore up their knowledge. Mugridge interviewed dozens of potential witnesses, and the attorneys—admittedly unsuccessfully—sought out Morrow's school records and childhood mentor. This "extensive preparation" suggests diligence. *Stewart*, 476 F.3d at 1216. Although Mugridge failed to travel to New York and New Jersey, we are not convinced that further investigation of peripheral information would have uncovered details of Morrow's childhood that came to light only by virtue of Morrow and his family's untimely willingness to "mention [the] history of . . . abuse." *Id.* at 1211 (quoting *Van Poyck*, 290 F.3d at 1325).

Morrow's complaint that counsel failed to hire a social worker fails for similar reasons. A social worker would have been of little use in the light of the primary witnesses' refusals to talk, and we have explained that a "failure to utilize a social worker [is not] per se ineffective." *Newland*, 527 F.3d at 1206. Indeed, counsel was entitled to determine that extra help was unnecessary because "of what . . . Buchanan was doing and the mitigation evidence that . . . Mugridge was finding." *See Van Hook*, 558 U.S. at 19 ("[G]iven all the evidence [counsel] unearthed from those closest to [the petitioner's] upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member . . . ."). Morrow underwent five

psychological interviews, and Mugridge spoke with dozens of witnesses. Morrow also fails to establish that contemporary "prevailing professional norms" in Georgia dictated hiring a social worker for capital cases. *Newland*, 527 F.3d at 1184 (quoting *Strickland*, 466 U.S. at 688).

Even if counsel performs deficiently, a petitioner also must establish that he suffered prejudice by showing "that counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. In circumstances where counsel failed to present mitigating evidence, the petitioner must establish "a reasonable probability that at least one juror would have struck a different balance," *Wiggins*, 539 U.S. at 537, in the light of "the totality of the [old and new] mitigation evidence . . . [and] evidence in aggravation," *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (alteration adopted) (quoting *Williams*, 529 U.S. at 397–98). A petitioner cannot satisfy this burden simply by pointing to new evidence that is "weak or cumulative of the testimony presented at trial." *Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1296 (11th Cir. 2012); *see also Cullen v. Pinholster*, 563 U.S. 170, 200–01 (2011) (finding "no reasonable probability that . . . additional evidence . . . would have changed the jury's verdict" when the evidence "largely duplicated the mitigation evidence at trial" and was "of questionable mitigating value").

Morrow argues that his new evidence of childhood trauma establishes a "reasonable probability that at least one of [the] jurors would have chosen a life sentence." He underscores that "evidence of repeated childhood sexual assault" is the kind of evidence that is likely to "move[]" a jury, and he contends that the Georgia Supreme Court unreasonably discounted his evidence of "physical, sexual[,] and emotional abuse." Morrow also argues that the Georgia Supreme Court "failed to engage with [the] complete evidentiary picture" because it failed to consider the new evidence in combination with the old mitigating evidence. We disagree.

The Georgia Supreme Court reasonably held that Morrow was not prejudiced by the alleged shortcomings in his attorneys' investigation. It began by considering the new "testimony that, when Morrow was living in [New York], his [family was] unkind to him and his sister and disciplined them harshly and that the other children in the home bullied him." *Morrow III*, 717 S.E.2d at 175. It determined that "this new testimony [was] less than compelling . . . particularly because testimony was actually presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* The record establishes that the jury heard evidence that Morrow "was picked on in school" and spanked as a child, and the Georgia Supreme Court was entitled to conclude that "cumulative" evidence on

these points had no reasonable probability of changing Morrow's sentence. *Ponticelli*, 690 F.3d at 1296.

The Georgia Supreme Court also reasonably determined that the new "allegations about the rapes would not have been given great weight by the jury." *Morrow III*, 717 S.E.2d at 176. It pointed out "that Morrow's only direct evidence of the alleged rapes . . . was his own statement to a psychologist" and that the psychologist's testimony" carried less weight "in light of the weaker evidence upon which that testimony, in part, relied." *Id.* (alteration adopted) (quoting *Whatley v. Terry*, 668 S.E.2d 651, 659 (2008)). The Georgia Supreme Court was entitled to give less weight to secondhand testimony. True, Morrow could have personally testified about the rape. But the record establishes that Morrow did not want to testify and was a poor witness, and Walker explained that Morrow's testimony was so "disaster[ous]" at trial that counsel declined to put him on the stand again during sentencing. And Morrow offers no direct evidence of rape to bolster his allegations.

The Georgia Supreme Court also reasonably determined that Morrow's new evidence of abuse by his mother's boyfriend would not have changed the sentence. *Id.* It explained that the jury had already heard "that the boyfriend had been abusive to Morrow's mother" and that "Morrow [once] attempted to defend his mother with a baseball bat." *Id.* And it underscored "that the testimony in the

habeas court was somewhat inconsistent regarding the degree of harshness involved." *Id.* at 176 n.4. Morrow fails to rebut these factual findings with "clear and convincing evidence," 28 U.S.C. § 2254(e)(1), and the Georgia Supreme Court was entitled to discount new evidence that "largely duplicated the mitigation evidence at trial" and was "of questionable mitigating value." *Pinholster*, 563 U.S. at 200–01.

B. The Georgia Supreme Court Reasonably Determined that Counsel's Failure To Retain an Independent Forensic Expert Did Not Prejudice Morrow.

Morrow asserts that the Georgia Supreme Court unreasonably determined that he was not prejudiced by his counsel's failure to hire a crime-scene expert. He contends that this expert would have both "independently corroborate[d]" Morrow's slightly less vicious account of the crime and rebutted "[t]he State's theme . . . that Morrow was a self-serving liar" "who was trying to minimize his responsibility." We again disagree.

The Georgia Supreme Court reasonably determined that three pieces of supposedly new evidence were cumulative and unpersuasive. First, Morrow had asserted that "the evidence at the crime scene shows that . . . Woods was standing rather than sitting when Morrow shot her . . . [,] confirm[ing] Morrow's version of how the three victims were arranged in the room." *Morrow III*, 717 S.E.2d at 177. But the Georgia Supreme Court explained that this "new" evidence was redundant because "Horne herself testified at trial in a manner consistent with Morrow's new

expert testimony, as she claimed that she 'remembered [Woods] falling back in the chair.'" *Id.* (alteration adopted). Second, Morrow had contended that new evidence established that "Young's forehead likely was [not] injured when her head struck a doorframe during the struggle," but instead when a "shot . . . grazed her forehead." *Id.* But the Georgia Supreme Court determined that "the jury would . . . favor the testimony of the State's experts upon reviewing the two contrasting accounts," and it explained that "Morrow actually relied on the State's testimony showing that the injury . . . was not from a gunshot." *Id.* Third, Morrow had argued "that the clicking sound heard by [the surviving victim] and the unspent bullet on the floor . . . could have been the result of Morrow's clearing a jam in his gun rather than . . . reloading [the gun]." *Id.* But the Georgia Supreme Court reasoned that this evidence was "essentially cumulative of similar testimony from an expert for the State, which the State even highlighted in its closing argument." *Id.*

We see no reason to disturb the determination that this "cumulative" and "weak" evidence would not have influenced the jury's assessment of Morrow. *Ponticelli*, 690 F.3d at 1296. Indeed, Morrow fails to contest that the evidence was cumulative, let alone rebut the findings with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In the light of these findings, the Georgia Supreme Court reasonably concluded that Morrow had not suffered prejudice.

Morrow's poor performance on the stand also supports the conclusion that further corroboration was unlikely to bolster his credibility. Walker later testified that Morrow's "cross-examination was a disaster," that his "remorse and shame" did not "come through," and that "he was as flat on the stand as [Walker had] ever seen him." Walker also recalled that Morrow "apparently felt threatened[and] crossed his arms across his chest and his face turned to the hardest scowl" so that "[h]e looked precisely the way [the prosecutor] was hoping to portray him." Indeed, Morrow's poor performance influenced the attorneys' conclusion that they "couldn't risk having [Morrow testify] before the jurors again" at the penalty phase. We fail to understand how minor corroboration of peripheral details of a brutal crime would have influenced the jury's assessment of Morrow.

The Georgia Supreme Court also reasonably concluded that new forensic evidence that downplayed the brutality of the crime would have carried little weight in mitigation and that Morrow's new evidence would not have shifted "the balance of aggravating and mitigating circumstances." *Strickland*, 466 U.S. at 695. The Georgia Supreme Court explained that the dispute over whether Woods "was standing rather than sitting . . . would not have had a significant impact on the jury in light of the fact that the evidence was clear that Morrow began shooting simply because he was upset." *Morrow III*, 717 S.E.2d at 177. It also concluded that evidence that Morrow did not strike Young's head against the doorframe "would

not be significantly mitigating[] because it still depicts Morrow as having struggled with . . . [Young] for the gun[,] . . . chasing her . . ., grabbing her by her hair as she lay helpless . . ., and shooting her in the head." *Id.* And it reasoned that evidence that Morrow unjammed, instead of reloaded, his gun was "not . . . mitigating" because "it [was] clear [in either scenario] that he was taking active steps to prepare his gun to continue his murderous rampage." *Id.* We cannot say that the conclusion that the jury would have been unimpressed by a slightly different, but similarly brutal, version of events was unreasonable.

IV. CONCLUSION

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

WILSON, Circuit Judge, concurring:

In light of our mandatory deference to the Supreme Court of Georgia's decision under the Antiterrorism and Effective Death Penalty Act, I concur with the result in this case. But in my estimation, the Superior Court of Butts County's resolution of the issues presented here was far more thorough and considerate than the resolution reached by the Supreme Court of Georgia in its reversal of the Superior Court's opinion. The Superior Court undertook a searching inquiry into Morrow's childhood, and unequivocally found that Morrow was "the victim of a series of rapes" while he was growing up in the New York area. It in turn concluded that trial counsel's failure to conduct a proper investigation into his life there rendered their performance deficient and prejudiced the outcome of Morrow's case. The Superior Court also found, after a careful examination into testimony and details about the crime scene, that trial counsel's failure to hire an independent crime scene expert was deficient and prejudicial to Morrow.

We should not subject a habeas petitioner to death if he has not been accorded the thorough review of an ineffective assistance of counsel claim that is contemplated under our Constitution. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). I fear that, in Morrow's case, the result we have reached is based on the Supreme Court of Georgia's unwillingness to grapple with

the intricacies of his case. Namely, here we are faced with the short shrift trial counsel gave not only to Morrow's time in New York and New Jersey and the sexual abuse that occurred there, but also to the thought of hiring a crime scene expert that supported Morrow's version of the crimes. It is hard to ignore that there could have been a recognizable impact on at least one member of the jury. Therefore, I concur in the result only.

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

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March 27, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-10311-P
Case Style: Scotty Morrow v. Warden, GDP
District Court Docket No: 2:12-cv-00051-WBH

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David Thomas
Phone #: 404-335-6171

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10311-P

SCOTTY GARNELL MORROW,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

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

BEFORE: WILSON, WILLIAM PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

In the Matter Of:

SCOTTY GARNELL MORROW vs WARDEN

17-10311-P

HEARING

March 07, 2018

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

NO. 17-10311-P

CAPITAL CASE

_____

SCOTTY GARNELL MORROW,

Petitioner-Appellant,

v.

WARDEN, GEORGIA DIAGNOSTIC
AND CLASSIFICATION PRISON,

Respondent-Appellee

* * * * * *

TRANSCRIPT OF HEARING OF MARCH 7, 2018

* * * * * *

Transcribed by:

Kristen A. Houk, RPR, FPR
Esquire Deposition Solutions
Job #J2077447

* * * * * *

(Start of Recording 17-10311)

* * * * * *

JUDGE WILSON: Good afternoon, where we are here on an appeal from the denial of a petition for a writ of habeas corpus by a death row inmate.

And before we begin, I'd like to welcome Judge Morey to the 11th Circuit. Judge Fumiya Morey [phonetic] is on the Nagoya District Court in Japan, and he's here pursuant to a judicial exchange program and came all the way from Japan and is sitting in on various judicial proceedings.

So Judge, welcome to Atlanta and welcome to the 11th Circuit.

JUDGE MOREY: Thank you, your Honor.

JUDGE WILSON: And so I see that counsel are ready to proceed. This is Scotty Morrow v. Georgia. And Miss Benton is here for Mr. Morrow; Miss Graham is here for the State of Georgia.

And Miss Benton, you may begin.

MS. BENTON: Good afternoon.

JUDGE WILSON: Good afternoon.

MS. BENTON: May it please the Court? My name is Jill Benton, and I'm here on behalf of the

appellant in this case, Scotty Morrow.

The state court that heard the evidence found that as a second grader Scotty Morrow was repeatedly raped in the basement of the home where he lived. He was seven. That little boy could neither escape nor cope with the consequences of being sexually assaulted because there were no caring adults available to him. The other children in the home beat him up, tormented him. The other children at school, which is normally a safe place for sexually assaulted children, also bullied and teased him. As the state court found, he was chased home from school by those bullies every day. As one expert observed, for seven-year-old Scotty Morrow, there was no refuge.

JUDGE NEWSOM: Can I ask you a quick question. So what do you do with the line of cases that we've got beginning before Wiggins but -- but running through and past Wiggins that basically say time and time again that when the -- you know, the -- the petitioner or his family members don't mention -- that's the language in the cases -- don't mention the sexual abuse then the lawyer can't be found ineffective for having failed to investigate it?

MS. BENTON: Well, a couple of things there: Let's parse that out a little bit. The client didn't deny it, which is the case in some of those cases. What the Georgia Supreme Court finds is that he didn't reveal it. The state -- there's clear testimony in this record that if the very expert, the trauma expert that trial counsel has retained, had been given the information that an adequate background investigation would have uncovered, that expert would have gotten the evidence of sexual abuse. Mr. Morrow was not actively denying or covering up that abuse. And I think --

JUDGE NEWSOM: Well, but -- so that's fine. I'm sorry, wow, that's allowed.

MS. BENTON: Sure, sure.

JUDGE NEWSOM: So but the cases -- I mean, so just to read you from Stewart, I mean it says, you know:

When a petitioner or a family member -- the petitioner directs his lawyer to talk to does not mention a history of physical abuse, the lawyer is not ineffective for failing to discover it.

MS. BENTON: Well, this --

JUDGE NEWSOM: So it's not about active denial; it's just did he mention it or didn't he.

MS. BENTON: A couple of things: This -- this family and this client mentioned violence and instability and abuse over and over and over again.

JUDGE NEWSOM: Right.

MS. BENTON: And trial counsel did not explore the full extent of it. As to the sexual abuse, I think that you bringing up the Wiggins case is particularly instructive here. In that case where you have Wiggins' self-disclosure to a social worker who is retained by post-conviction counsel of multiple instances of sexual violence in his childhood, Wiggins is -- the evidence presented at trial is that Wiggins is a serial liar, that he's lied about his criminal history, he has lied about his aspects of his crime. And yet the U.S. Supreme Court says that evidence is powerful evidence of -- in mitigation, even with the -- the credibility problems that Wiggins has, that's self-disclosure, and, moreover, that trial counsel was unreasonable and deficient in failing to -- on the basis of the minimal red flags they had in front of them, failing to follow up to get to the point of that disclosure. Our case tracks that pretty precisely.

JUDGE NEWSOM: But have you gotten beyond -- I mean I guess Stewart? Have you gotten beyond Stewart that says where he fails -- or either he or one of his family members fails to mention the abuse that you think is the lynchpin here, which is the sexual abuse, then the counsel can't be deemed ineffective for having failed to investigate it? And then further here at least the Georgia Supreme Court at least to me seems to have said that there was a question.

You know, the trial counsel testified -- I think this is in the -- the habeas court decision below, the Federal habeas court decision below:

Trial counsel testified that's the sort of question I would have asked.

The Georgia Supreme Court likewise finds that he was asked and must have said no. And isn't that a 2254(e) kind of finding that we have to defer to?

MS. BENTON: There's a couple of different issues here, one being the district court order's finding that Mr. Walker testified that he would have asked and probably gotten a no. The Georgia Supreme Court decision just says he did not reveal it.

JUDGE NEWSOM: Well, is that right?

MS. BENTON: It doesn't --
JUDGE NEWSOM: So -- so the -- the quote I'm reading out of my notes says:
However, we note that Morrow never reported any such rapes pretrial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.
MS. BENTON: I got you.
JUDGE NEWSOM: So they asked him.
MS. BENTON: That --
JUDGE NEWSOM: He said no.
MS. BENTON: That reference I believe is to Dr. Davis who did the early screening for competency and IQ. Dr. Davis' report includes --
JUDGE PRYOR: It says to his counsel or to the mental health experts.
MS. BENTON: Or to the mental health experts.
JUDGE PRYOR: Right.
MS. BENTON: So -- so as to the mental health experts, they talk about his sexual history with women, in other words, his adult sexual history. And there's some information in Dr. Davis' report where he's talking about his history of relationships with women, which is particularly

salient here. There's no evidence that Dr. Davis asked him specifically: Were you sexually abused?

Dr. Buchanan says: No, I didn't explore that with him; but I would have if I had known anything about his history, particularly some of these markers of sexual abuse.

JUDGE WILSON: Well, what about the Superior Court -- what is it -- of Butts County? I read the opinion. And the judge -- the judge seems to suggest that there may have been some I think he uses the word red flags with respect to the abuse that took place in New York and New Jersey, there were some leads and that counsel just failed to pursue those leads? Now, is that what you are relying upon primarily, principally, in support of your argument that he was denied the effective assistance of counsel?

MS. BENTON: Absolutely.

JUDGE WILSON: Okay.

MS. BENTON: There are things here that reasonable counsel would have inquired further about. Inquiring further about those things may not have led to some other witness revealing the sexual abuse because no one else was -- was privy

to the information about the sexual abuse but Mr. Morrow and his assailant. But it would have led to a lot of other information that would have allowed the mental health expert to get there. And in fact, the unrebutted testimony of the mental health expert is:

> I would have gotten there. He wasn't deliberately hiding anything. He just had no insight. He was emotionally completely shut down. He was overwhelmed with remorse and shame about the crime, and so he was difficult to draw out. But he was not uncooperative. If I had really known what to explore and the timeframe around which to explore it, I would have gotten there.

Now, as to the red flags about their lives in New York and New Jersey area, certainly they had many. There is trial testimony that -- that at some point one of the mother's boyfriends is coming after her and Scotty has to -- Mr. Morrow has to defend her with a baseball bat and that the man laughs at him. Trial counsel doesn't know so much as that man's name.

They didn't ask: Did this boyfriend live

with you? How long did your mother date him? Were they married? What was he like and, most essentially, was he ever violent to anyone else, including Mr. Morrow?

None of those questions get asked. Those are pretty basic questions that once you hear about another violent man in this family's life...

JUDGE WILSON: How much can we take into consideration the superior court's decision? It was a pretty long and thorough and comprehensive opinion. How much of that can we take into consideration when we have the Georgia Supreme Court's decision which pretty much just contradicts everything the superior court says? How do you get around AEDPA deference? How do you get around that?

MS. BENTON: The Georgia Supreme Court says that it is adopting the findings of fact of that superior court. It does not explicitly say that we are reversing one of those findings of fact because they're unsupported by the evidence. Everything that's a finding of fact in that order is in front of this court undisturbed and supported by the evidence. The only --

JUDGE NEWSOM: Did -- do I remember though

correctly -- and please feel free to correct me if I've got this wrong -- that the Georgia Supreme Court says something like, "We're adopting the findings of fact except where we conclude to the contrary," or something like that?

MS. BENTON: They never conclude to the contrary. They do --

JUDGE PRYOR: Well, insofar as their conclusions would be there was no ineffective assistance of counsel and that's incompatible with the finding of the state habeas trial court, then we'd have to read that as being to the contrary. Wouldn't we?

MS. BENTON: Well, that's an application of the clearly-established law to the facts that were found. They're concluding that what trial counsel did was --

JUDGE PRYOR: I think the Georgia --

MS. BENTON: I'm sorry.

JUDGE PRYOR: Nothing the Georgia Supreme Court did is clearly established Federal law. I don't understand that.

MS. BENTON: I'm saying that what the Georgia Supreme Court did was unreasonably apply the Federal law to the facts. That's where it parted

ways with the superior court is in its findings with respect to the way the law applied. It adopted, for instance, what the superior court found that trial counsel did and did not do. It adopted what the trial court -- at least on the face of the order, what the trial court said was the mitigation evidence. So --

JUDGE NEWSOM: So can I ask you about a couple of what seem to me to be factual assertions at least in the Georgia Supreme Court's decision. You can tell me whether you agree or disagree with these.

So (1): Trial counsel met repeatedly with Morrow, his mother and his sister.

True?

MS. BENTON: The superior court says that he -- they did meet with him repeatedly, but most of that contact was non-substantive updates about the status of the case.

JUDGE NEWSOM: Okay.

So (2): Counsel discussed Morrow's childhood background with them extensively.

True? This is what the Georgia Supreme Court says.

MS. BENTON: This case doesn't turn on whether it was extensive or not. They discussed his background with them. You know, whether or not you could call it extensive when they don't know what happened during a 13-year period in the client's life is up for debate. What is not up for debate is whether or not that is a proper place to stop pursuant to Strickland.

JUDGE NEWSOM: Okay. So then the third and I think sort of the most pointed, going back to a question I asked you earlier:

> Morrow presented evidence in the habeas court, the state habeas court, suggesting that he had been raped by his cousin as a child. However, we note that Morrow never reported any such rapes pretrial to counsel or to the mental health experts who questioned him about his background, including his sexual history.

True?

MS. BENTON: The state habeas court found those rapes happened. If the Georgia Supreme Court says that not one of any 12 reasonable jurors would have been persuaded by the evidence of rapes that the superior court finds happened based on the

evidence in front of them, that is an unreasonable application of Wiggins, Porter, Strickland.

JUDGE NEWSOM: I guess my -- my point is not so much whether the rapes happened or didn't happen, awful, if they happened, but whether counsel was ineffective for having failed to find them, and here the Georgia Supreme Court says he -- the state habeas court found that they happened. However, we note that trial counsel discussed this period of history, of his history, with Morrow and his family and talked to them about the sexual history and he said nothing.

MS. BENTON: Let me briefly go back to trial counsel talking to him about his sexual history and that quote from Mr. Walker about: I'm sure I would have asked about that at some point.

That piece of the testimony, he's discussing his conversations with Mrs. Bowles and Samantha, the client's sister. And so if he had asked one of those two women, they would not have known about the -- the sexual abuse.

So he says: Oh, I'm sure that's something I would have asked about and probably, probably, gotten a no.

That's the quote from Mr. Walker.

But more to your point, what trial counsel didn't do was go collect the evidence that their experts needed.

JUDGE PRYOR: I'm reading his testimony:

That is the type of question that I'm sure I would have asked --

MS. BENTON: Sure, I would have asked at some point.

JUDGE PRYOR: -- of his family or of him.

MS. BENTON: And probably gotten a no. But the testimony above is him talking with Samantha and Betty.

JUDGE PRYOR: Yeah. But -- but -- but the testimony says him too.

MS. BENTON: Probably gotten a no. In any event, the Georgia Supreme Court says, you know, that he didn't reveal it, not that he was asked and failed to disclose.

JUDGE NEWSOM: And then even if that is so, although I think frankly there's a debate -- there could be a debate about what the Georgia Supreme Court actually concluded, how does that get you beyond Stewart, Callahan, Chandler, Williams, all of these cases pre-Wiggins, post-Wiggins, that say where he or his family members failed to mention it

counsel can't be deemed ineffective? I mean we can have a debate about whether he -- whether he affirmatively rejected the suggestion that this happened. I think the Georgia Supreme Court may be suggesting that he did.

But whether that's true or not, our case law doesn't require so much. Our case law says did he mention it or didn't he; and if he didn't, trial counsel can't be deemed ineffective.

MS. BENTON: But trial counsel can be deemed ineffective for not asking the obvious follow-up questions of Mr. Morrow and his family when they reveal that they're living in unstable and violent conditions surrounded by people who are violent, when they know that Mom has a history of choosing unsavory and violent partners and bringing them into the home. The idea that they didn't ask anything about their living situation in New York or New Jersey or -- or identify a single other witness in New York or New Jersey to give them that information is where the deficiency lies, not with Mr. Morrow.

If the mental health expert had that information, knew about his adjustment problems in the second grade, knew his living conditions, knew

that he began wetting the bed suddenly as a seven year old with no prior history of that and then wet the bed thereafter for the remainder of his childhood, the unrebutted testimony is that that mental health expert would have known to explore sexual abuse and that he would have gotten it from Mr. Morrow. And we know that because that's precisely what happened in post-conviction is that we armed an appropriately qualified expert in trauma with the information we knew and said: What do you think?

And he asked Mr. Morrow about his time in that house in New York. There is no reason to think that trial counsel wouldn't have proceeded the same.

What isn't unreasonable is them not knowing about sexual abuse. What's unreasonable is them not knowing really anything about his time in New York and New Jersey.

JUDGE WILSON: Which he would have known had he hired Dr. Buchanan initially?

MS. BENTON: Well, if he had hired Dr. Buchanan earlier, certainly that is one of the factors here. But -- but I think more problematic is they don't give Dr. Buchanan any sources. They

are by their own admission giving him a client who is emotionally shut down, who can't talk about his own background or the crime, is, you know, limited and has to be drawn out. That's part of Dr. Buchanan's task is draw him out. He's emotionally...

And they give him no other source of information besides the client who they know is having these difficulties. They don't have him talk to a single other witness. They give him no other witness statements, no single record about Mr. Morrow's background, no school records. They give him only information about the crime. It's amazing that Dr. Buchanan got as far as he did, you know, to say:

> Oh, here, kind of figure out my client and, oh, by the way, counsel him to be a good witness in his own defense, and you have, you know, a month to do it.

You know, Dr. Buchanan is first retained and does the initial testing and the intake and review on March 29th. It is not until May 17th that he gets a chance to dig in with this client. His first substantive discussions with Dr. Buchanan are on May 17th with a trial that starts the first

Monday in June.

Even if Dr. Buchanan had -- had found out some -- in fact, Dr. Buchanan finds out that there's this other abusive boyfriend in New Jersey.

Trial counsel says: You have two months.

Do what you can, like, you know, the trial is coming.

And Dr. Buchanan's testimony is: I knew that we -- we needed more. The trial lawyers knew that we needed more. And if I had had more time, I would have said I need his past history.

But that wasn't an option under the circumstances, and that's unreasonable under Strickland.

JUDGE NEWSOM: Can you I guess pivot to your prejudice point to explain to us how exactly this discovery, this investigation or lack thereof prejudiced your client.

MS. BENTON: Absolutely.

JUDGE NEWSOM: What's sort of the theory of prejudice here? What would it have done to the case?

MS. BENTON: Well, what it would have done is given trial counsel the support for the theory they

put forward. You know, just as in the Ferrell case, trial counsel here explicitly raised for the jury the question looming over this entire case, which is: Why did this happen? We have this mountain of evidence that this is an otherwise nice, affable guy, that he's responsible, that he has all of these great qualities. So how was it that he was so provoked by these -- you know, why did this happen?

That was what they flagged for the jury and yet didn't answer that question. The notion that he was sexually assaulted as a seven year old and then from there moved into the home of -- Judge Wilson, shall I?

JUDGE WILSON: No. Go ahead.

MS. BENTON: That he was then moved into the home of someone who is beating him while he's naked and the confusion and disregulation that that caused, the problems in interpersonal relationships that that caused, his inability to navigate a successful relationship as Dr. Buchanan testified to.

In Porter v. McCollum, the U.S. Supreme Court says:

This kind of childhood has particular

salience -- that's the Supreme Court's language -- particular salience with respect to the defendant's treatment of a victim, meaning in Porter it's, as in Mr. Morrow's case, his ex-girlfriend who -- who is the victim and his -- his abusive behavior leading up to the crime -- that this informs the jury's evaluation.

Porter was 54 years old.

JUDGE NEWSOM: So just so I understand, I mean like how exactly does it inform the jury's evaluation? Is that because it sort of feeds, as you said, the sort of snapped theory? So I guess here's the difficulty I have with that, and I'm interested in what you have to say about it. I mean, there is a snapped theory I suppose.

But then he did kill not just one person but two, plus a half, an attempted third. There's evidence I think that he either reloaded or cleared a jam in his gun. He severed the wires of the house when he left. That just doesn't sound like snapping to me.

MS. BENTON: Well, there are certainly aggravating circumstances in this case; and once he

was unhinged, certainly more aggravation accrued. That in light of the -- the clearly established Supreme Court law --

JUDGE WILSON: Well --

MS. BENTON: -- doesn't necessarily preclude a finding of prejudice. In fact, the same finding of prejudice that was made in Porter is appropriate here. In fact, it was required here, and it was unreasonable to find anything else. Porter's case in many ways was more aggravated than Mr. Morrow's. His crime was more premeditated. He was stalking the victim. He, too, killed a second person who was there with his girlfriend.

JUDGE WILSON: Well, now, you make the argument in your brief that maybe his theory of defense would have been supported had counsel retained a forensic science expert. You haven't talked too much about that. That seems at least to me to be probably your strongest argument. Do you want to address that?

MS. BENTON: Well, are you talking about a forensic social worker or the forensic crime scene specialist? I just want to make sure.

JUDGE WILSON: No, crime scene expert.

MS. BENTON: What the forensic crime scene

expert could have done was allow trial counsel to show that Mr. Morrow's account of the crime, which they -- they put him on the stand to explain the provocation. At every turn the DA impeached what Mr. Morrow said happened during the crime with evidence from their own crime scene examiner saying:

> No, the physical evidence shows that you had to have done this more aggravated thing, not the less aggravated thing that you're saying that you've done. This -- the evidence shows that Ms. Woods was seated at the table passively, not standing up like you say. The evidence shows that you pistol whipped and beat Miss Young around the head. You deny that.

If trial counsel had gotten a forensic crime scene expert, a forensic expert of any kind, they could have argued, no, his account of the crime is supported by the physical evidence. And the reason that matters here is because such a big piece of their argument was that Mr. Morrow's remorse is overwhelming, that he's accepted complete responsibility for this crime, that he is not

shirking any responsibility for the things that he's done. And --

JUDGE PRYOR: Although his trial counsel said that his -- his cross-examination was a disaster and that his remorse and shame did not come through.

MS. BENTON: Everyone says that his cross-examination was a disaster, even Dr. Buchanan, that all of the things they feared about Mr. Morrow's emotional flat affect happened and, you know, this -- that you could have had an expert who testified to some of the things that Mr. Morrow -- you know, that they put Mr. Morrow up for.

JUDGE WILSON: But what did the -- what did the Superior Court of Butts County say about that though? I mean I thought the superior court said that had counsel retained a mental health expert that -- who had knowledge about his background that mental health expert would have been able to explain why he appeared cold and remorseless when he testified? Is that in the record?

MS. BENTON: That is in the record.

Dr. Buchanan says: I could have explained that to the jury. I could have explained

a long-term pattern of emotional detachment because he just can't handle it, and sexually abused children, physically abused children learn very early on to disassociate. Then it becomes imbued. Then they can't make it not happen when they're overwhelmed by emotion.

JUDGE PRYOR: Failure to retain a mental health expert is not an issue before us.

MS. BENTON: They -- they retained an appropriate expert. They just hamstrung that expert with -- with too little time and too little information.

JUDGE WILSON: Okay.

MS. BENTON: I see that my time is up.

JUDGE WILSON: I think we have your argument, and you've reserved some time, Miss Benton, and we'll hear from Miss Graham.

MS. BENTON: Thank you.

JUDGE WILSON: Thank you.

MS. GRAHAM: May it please the Court? My name is Sabrina Graham. I'm here on behalf of the respondent. I'd like to go over a couple of things that the Court questioned about the crime scene.

Miss Benton stated that at -- at the time of the crime and at trial that the state had argued that Tonya Woods was standing -- was seating instead of standing and that that would have supported, if they put up their own -- if petitioner put up his new forensic expert, that would have supported their theory that she was instead standing.

But that wasn't a point of real contention there at -- at -- at trial. And in fact, LaToya Horne testified that Miss Woods fell over in the chair. I don't think there was any specific testimony that she was seated or standing. So that wasn't a real point of contention. And whether she was standing or seating, she was unarmed, and his forensic expert in state habeas does not prove that she did anything that was aggressive towards petitioner to cause him to pull his weapon and shoot her.

Regarding Miss Woods, him chasing her down the hallway and whether or not he actually took her head and slammed it into the doorframe or whether or not he shot her in the hand, as his state habeas expert testified, and that bullet grazed off her head and went into the ceiling, I mean, again,

that's not mitigating and it doesn't support the theory that -- that what he said was true or not.

So I'd like to point that out to begin with.

JUDGE WILSON: Superior -- Superior Court of Butts County disagrees with you. The judge who conducted the evidentiary hearing disagrees with everything you've said.

MS. GRAHAM: I agree, Judge Wilson. But I will say this: That was all on a cold record. There were no live witnesses regarding that particular information. And the Georgia Supreme Court then reviewed that information and said:

You know, we're looking at it. Even assuming that their crime scene expert is telling the truth, we still find that you haven't shown prejudice here.

JUDGE NEWSOM: Can I ask you I guess the same series of questions that I asked your adversary about sort of factual assertions in the Georgia Supreme Court's opinion and to what extent those are entitled to 2254(e) treatment. So the first -- and I'll just -- you know, they're -- they're all the same ones:

Trial counsel met repeatedly -- repeatedly with Morrow, his mother and sister.

Counsel discussed Morrows's childhood background with him extensively. Morrow presented evidence in the habeas court suggesting that he had been raped by his cousin as a child. However, we note that Morrow never reported such rapes pretrial to his counsel or to the mental health experts who questioned him about his background, including his sexual history. Are those 2254(e) statements?

MS. GRAHAM: I would say absolutely, yes, they are. I understand that the Georgia Supreme Court stated that it was adopting the findings of fact of the state habeas court, unless they were clearly erroneous. Now, while the Georgia Supreme Court didn't specifically say, We find this to be clearly erroneous, certainly in their findings it suggests that they did.

And in this particular instance, certainly, yes, trial counsel did discuss with petitioner and his family his background. And I know that it's been stated that Dr. Buchanan did not ask petitioner about the sexual abuse, but I did not read Dr. Buchanan's testimony in that manner.

I read it in the manner that he stated:

Well, if I had been able to confront him with a specific incident of him being sexually abused, then maybe he would have told me.

But he did not state, Dr. Buchanan did not testify, that he did not question the petitioner about sexual abuse.

JUDGE WILSON: I guess one of the problems that I have with this case is, when I read the Georgia Supreme Court's opinion, I see facts in that opinion that are inconsistent with facts determined by the Superior Court of Butts County. So if I go look at the record myself and I see that there's an unreasonable determination of the facts by the Georgia Supreme Court, that's -- AEDPA deference can be overcome. Can't it?

MS. GRAHAM: Sure, yes, if you did find that, yes.

JUDGE PRYOR: Has there been an argument that there's been an unreasonable determination of the facts?

MS. GRAHAM: Yes. I do believe that they make several arguments in their brief.

JUDGE PRYOR: What -- what's the unreasonable determination of fact?

MS. GRAHAM: I think one of the arguments was regarding the sexual abuse. And in the Georgia Supreme Court's opinion, they state that, you know, petitioner only informed trial counsel -- did not inform trial counsel of the sexual abuse and this did not come out until state habeas. And they explained in their opinion when they were looking at it, under the reasonable probability of a different outcome, that the jury would not have given as much weight to that information. So they did a mixed, you know, I think it was fact and law analysis there.

And they dispute that saying that there was evidence corroborating it in the fact that he had wet the bed and he had trouble in school, therefore, they should have abided by -- the Georgia Supreme Court should have abided by the state habeas court's credibility determination.

But the state -- the Georgia Supreme Court did not state that it was not defining that it wasn't credible. It just said it would not have given it the same amount of weight that petitioner was advocating for. That was one of the instances that I think they said was --

JUDGE PRYOR: So -- but insofar as counsel

questioning his client and family about his background and sexual history, is there a determination -- is there an argument that that was an unreasonable determination of fact?

MS. GRAHAM: I do not see that as an unreasonable determination -- there is certainly fair support --

JUDGE PRYOR: Is there an argument that there was an unreasonable determination of fact? I didn't remember there being one.

MS. GRAHAM: I don't think there is, but I could be wrong. There were several arguments.

JUDGE PRYOR: That -- and if that's true, that that was asked, then that's the end of that claim. Isn't it?

MS. GRAHAM: I would certainly agree that it is. As long as they have --

JUDGE PRYOR: It can't be deficient performance if that -- if the question was asked.

MS. GRAHAM: I agree. Yes, your Honor. And as far as -- I know there was a lot of mention regarding the red flags. There actually -- the Georgia Supreme Court made finding -- I think a finding of fact and law regarding the two red flags, and the two red flags were that he wet the

bed when he was a child I think around the age of seven. But there's no evidence in this record that petitioner or his family told trial counsel that he wet the bed, so that's not a red flag that trial counsel would have known about.

JUDGE WILSON: Well, that's -- that's one fact. But I'm looking at the Georgia Supreme Court's opinion on page 173, and the Georgia court says:

> It is simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New Jersey, although we acknowledge that they relied heavily on Morrow, his mother and his sister to provide information about that portion of Morrow's life.

And then I go to the decision by the Superior Court of Butts County. And the Superior Court of Butts County, the judge there conducted an evidentiary hearing. And he says:

> There is no question that at the time of trial counsel was unaware of the rapes, beatings and other developmental insults that petitioner suffered while living in

the New York and New Jersey area.

And he goes on to say:

In short, counsel knew that petitioner was raised in the New York area from the age of seven, yet did little to investigate his life there.

Then he says:

That admission constitutes deficient performance and satisfaction of the Strickland standard.

And so I guess what I'm struggling with is the Georgia Supreme Court and the Superior Court of Butts County have completely different versions of the record. If I go to the record myself and look at the testimony and I see that the Superior Court of Butts County correctly -- correctly states the record and the Georgia Supreme Court doesn't, I'm not required to give AEDPA deference to the Georgia Supreme Court, am I, because I can make a determination that there is an unreasonable determination of the facts?

MS. GRAHAM: Yes, Judge Wilson, that is true. Can I speak to what the Georgia Supreme Court found? They said that trial counsel did not ignore his time in the northeast. That is a fair

assessment of the record. There's no evidence that trial counsel did not question petitioner, his sister and his mother who both give almost all of the information that they're relying upon here regarding his background in state habeas. So they did question them about that period. What information --

JUDGE PRYOR: Miss Graham, before you too quickly concede something in the hypothetical that Judge Wilson granted, I want to make sure I understand the law in this area.

MS. GRAHAM: Sure.

JUDGE PRYOR: I thought that if the state trial habeas court made certain findings of fact based on a record and the state supreme court reversed the finding that what AEDPA requires us to do is to review the final decision. That would be the decision of the Georgia Supreme Court. And if there's evidence to support that finding, we have to -- if that's not an unreasonable finding, we have to defer to it, even if we thought, after looking at all the record, we thought the record better supported the finding of -- of the state habeas trial court. It's not its decision that we're really reviewing; it's the final decision of

the state supreme court. And if there's -- if there's evidence to support it, it's not an unreasonable finding. We have to -- we have to defer to it. Is that not right?

MS. GRAHAM: That is absolutely correct, and I was inarticulately trying to get to that point by saying that there was support in the record for the Georgia Supreme Court's decision; therefore, it would -- it would have AEDPA deference.

JUDGE WILSON: But if we look and we see there's no support for the Georgia Supreme Court's findings of fact, then we're not required to give AEDPA deference. Are we?

MS. GRAHAM: That is the standard, if -- if by clear and convincing evidence there is no support for the Georgia Supreme Court's factual finding. But, again, I was --

JUDGE PRYOR: That's how tough the standard is.

MS. GRAHAM: Yes. Yes. Yes. As I was stating though, there is support for the Georgia Supreme Court's finding. They did not ignore that particular area. I think it's fair to say that when trial counsel spoke with petitioner and his family -- and they also hired two mental health

experts. The first, Dr. Davis, they sent him a letter. And it was -- it was a three-page letter.

In it they said:

Can you please tell us why petitioner committed this crime?

And in it he does go through a social history. So they did have an expert to go through the social history. And in it -- I know my opposing counsel keeps stating that petitioner didn't open up to the mental health experts. But if you look at those -- if you look at the report of Dr. Davis and if you look at the testimony of Dr. Buchanan at trial, it's clear that he did open up to these experts about his background. He wasn't closed off telling them absolutely nothing about what happened. He did.

JUDGE WILSON: Well, how soon after counsel was appointed to represent Mr. Morrow were these experts retained?

MS. GRAHAM: Dr. Davis was appointed within I think a month or two after trial counsel was appointed. And --

JUDGE WILSON: And does the record reflect when he actually evaluated --

MS. GRAHAM: Yes.

JUDGE WILSON: -- Morrow?

MS. GRAHAM: Yes. There is a -- there is a report from Dr. Davis in there. That report was sealed, and the state did not have that at trial. But that -- that is in there. It shows that.

And Dr. Buchanan, yes, he was hired two months before trial. But at that time they had spent four years with petitioner's mother and sister who knew all of his history, and they were not giving them the type of information that suggested to counsel that they needed to go to the New York or New Jersey area and look for more information.

JUDGE WILSON: Well, two -- two months before trial when you've been retained to represent him for four years, that's not a long period of time to give them an opportunity to conduct the type of evaluation that you need to prepare for a case like this. Is it?

MS. GRAHAM: I -- the Georgia Supreme Court said that was plenty of time. I mean it's two months.

JUDGE WILSON: And I know --

MS. GRAHAM: There's no Supreme Court precedent that states that you -- any specific amount of time has to be given to the mental health

expert in order to conduct a reasonable investigation. And again, Dr. Buchanan, while --

JUDGE WILSON: And I know we look at the Georgia Supreme Court's decision. But -- and I hate to keep going back to the Superior Court of Butts County, but Butts County disagrees with that. And we -- we just have to ignore Butts County --

MS. GRAHAM: I think it said where --

JUDGE WILSON: -- altogether even though --

MS. GRAHAM: Where --

JUDGE WILSON: -- the record supports Butts and not the Georgia Supreme Court?

MS. GRAHAM: But I think the record does support the Georgia Supreme Court's opinion. I haven't seen an instance here where -- where they have made a finding of fact or conclusion of law that wasn't supported by the record.

JUDGE NEWSOM: So can I ask you a quick question? And I too hate to be sort of a one-trick pony. But this statement in the Georgia Supreme Court's opinion that says, in effect, trial counsel asked of the question were you sexually abused as a child and he said no. Is there -- to Judge Wilson's question, is there support in the record for that we'll call it a finding? I'm not

accustomed to thinking of appellate courts making findings, but we'll call it a finding. Is there support for that finding?

MS. GRAHAM: Yes, there is. I think the testimony that Judge Pryor read directly supports that.

JUDGE NEWSOM: Got it. Okay. So I just wanted to be clear that -- I mean that's what I thought you would say. But that's -- that is the record support that -- for that specific finding?

MS. GRAHAM: Yes.

JUDGE NEWSOM: Okay. Thanks for nailing that down.

MS. GRAHAM: And I'd like to go back again to the -- to the red flag. So you -- there are only -- there were only two red flags here. It was the bedwetting, which there's no evidence that trial counsel or the mental health experts were told that. Secondly, it was the fact that he had some behavioral problems in school. However, Dr. Buchanan and petitioner's mother both testified at trial that she had him evaluated and he had a learning disability and he was in special education classes for that from I think -- I believe it was fourth to ninth grade. So they were aware that he

had the behavior, but that was explained by the fact that he wasn't doing well in school because he had a learning disability.

So the only two red flags -- there aren't glaring red flags that a layperson is going to notice in order to say to them: Oh, we need to go and investigate further this line of -- it's not even identifiable at that point -- this line of evidence.

I think even if this court -- and I think if you look at the Georgia Supreme Court's opinion -- and they say:

> Let's assume -- we think they did an adequate investigation but assume there was deficiency here; we still do not find prejudice.

And you can't say under Supreme Court precedent that's an unreasonable application of Supreme Court precedent or contrary to any Supreme Court precedent.

They keep analogizing their case to those of Wiggins and Rompilla and Porter, but those are extremely different. They have to be exactly the same set of facts, and you do not have that in this particular case.

JUDGE PRYOR: Yeah. One of the things I was struggling with is how that evidence would have come in. So if -- if there was a failure on the part of trial counsel, if there was ineffective assistance, how would the evidence that counsel should have discovered come in? And -- and as I understood it, the Georgia Supreme Court says: Look, you can't use an expert to serve as a conduit for hearsay.

MS. GRAHAM: I think -- and -- and I agree with you that's exactly what they were relying upon, their Whatley case in the Georgia Supreme Court opinion. They may have been able to put it in through their mental health expert. However, I think what the Georgia Supreme Court is saying is that: Yeah, we're not going to let you just get up there and testify to hearsay and assume that everything you say is correct; we're going to filter that through another -- you know, because it is hearsay and say that, Well, then we can't give it maybe as great a weight; it doesn't get weighed out as much as if it comes through directly.

JUDGE PRYOR: Of course, but -- but he could have testified to it, right?

MS. GRAHAM: I'm sorry?

JUDGE PRYOR: The client could have testified to it?

MS. GRAHAM: Yes. The client could have provided the testimony, yes. But they decided during the sentencing phase that petitioner would not testify.

JUDGE NEWSOM: Yeah, because he had been -- his cross-examination had been a disaster in the guilt phase.

MS. GRAHAM: Correct. And to get back to the prejudice analysis, in this particular case, when the Georgia Supreme Court looked at the actual affidavits, the evidence here of the abusive background, they did not find it that compelling. And I think, when you actually look at the affidavits, you can see why that is.

When you take away the exaggerations of he was beaten every day, he was bullied every day, which isn't borne out in the affidavits from the people who were in his life, when you take all of that out and that dramatization, it's not the level of abuse and neglect that you have in Wiggins, Williams and Rompilla.

What you have is a single mother who worked three jobs, and she -- they were never -- they

never lacked clothing, food or anything of that nature, you know. So his -- his background just wasn't as aggravated as those other cases. And his --

JUDGE WILSON: Of course -- of course, those cases also say -- there's a ton of cases out there saying that counsel has to ask the right questions too. I mean you have to explain the scope of mitigating information. You've got to thoroughly sift the questions to make sure that you get the right information.

MS. GRAHAM: And trial counsel --

JUDGE WILSON: You've got to ask -- there's a -- you know, trial counsel has to ask the right questions in order to get the information that he needs in order to represent his client. And the Superior Court of Butts County said counsel didn't do that in this case.

MS. GRAHAM: Well, trial counsel testified that they asked petitioner.

We said: We need to know the good and the bad.

They -- they asked him. They said they would have asked these questions. I don't know --

JUDGE PRYOR: Which is why the Georgia Supreme

Court found that the questions were asked.

MS. GRAHAM: Correct, your Honor. Yes.

JUDGE NEWSOM: So can you respond briefly, when I was asking Miss Benton the question about sort of how exactly is it that this evidence would have been mitigating for prejudice purposes, and I think she said, you know, it would have fed the theory that he snapped, that sort of the underlying childhood abuse would have fed the theory, the trial theory, that he snapped. Why doesn't that work?

MS. GRAHAM: I don't think it provides much of an explanation for his crimes. First of all, fed the theory that he snapped supposes that a jury only believes petitioner's versions of the crime and it doesn't believe any of the evidence presented by the state that he abused this lady, that he called her up on the phone the day of -- of the crime, she told him to stay away, that he came over, that her son testified not once, not twice but I think three times that he busted in and kicked in the door, and the fact that Miss LaToya Horne, the surviving victim, stated that only a few words were exchanged between him and Miss Woods and he immediately pulled out his

weapon and he began shooting. And he began shooting these women, and he chased Ann down the hallway, and he came back, and he shot them again at point-blank range. He goes outside. He cuts the -- he cuts the wires, and then he goes home. He takes his clothes off. He hides them. He takes his weapon. He wipes all the fingerprints off, and he hides that too.

I don't see how the fact that he was abused ten years before provides much of an explanation for his crimes on that particular day. I don't think that it fits into that.

Well, we would ask that the court affirm the district court's denial of relief. And unless this court has any other questions, I will sit down.

JUDGE NEWSOM: Thank you.

JUDGE PRYOR: Thank you.

JUDGE WILSON: Thank you, Miss Graham.

MS. GRAHAM: Thank you.

JUDGE WILSON: Miss Benton, you have reserved some time for rebuttal.

MS. BENTON: First, just briefly with regard to prejudice and the way in which the childhood evidence explains the crime, the -- the trial expert gives complete testimony that's credited by

the state habeas court about how this childhood background explains his crime. And maybe jurors -- reasonable jurors would have considered that, but you don't have to believe that this childhood evidence explains his crime or that this childhood evidence is the reason that he snapped in order to find that it's substantially mitigating.

Reasonable jurors would understand that the rape of a seven year old, that the repetitive beating of a child over the course of his life is substantially mitigating. You -- they probably would have understood it intuitively, even without the expert. The expert carries the ball across the line, but it's mitigating in its own right.

If the Court doesn't have any more questions about the prejudice piece, I want to turn back to trial counsel's handling of the family because I think that our argument has been misapprehended a bit here, both by the Georgia Supreme Court and by respondent.

The bedwetting, the school adjustment problems, the other things that would have led Dr. Buchanan to ask about sexual abuse in a pointed way and gotten the information are not the red flags that we are saying that trial counsel missed.

Trial counsel had ample red flags from this family that they missed, and they didn't follow up and get the information that would have led Dr. Buchanan to have the bedwetting, the school adjustment and the other issues.

For instance, they knew that their client had blackouts as a child. They didn't explore any other medical symptomology. They know he has blackouts and headaches.

They don't say: Did he have any other developmental problems? Did he have any developmental delay?

They know that he moves around a lot once he gets to New Jersey.

They don't say: Why are you moving around a lot and who are you living with?

They know that there's violence in the home over the course of the client's life, and they don't go find out the details of his life in New York or New Jersey. They just leave it blank.

Mr. Brownell says, We weren't even really looking in that direction, meaning New York and New Jersey.

So I want to be clear that we're not saying that the bedwetting and things are the -- the red

flags. Those are not. It's trial counsel's failure to run with the information they had. And relying exclusively, solely on Mrs. Bowles and Samantha Morrow is -- they know that it's unreasonable because they know that Mrs. Bowles is self-conscious about her role in the outcome here, that she's worried about the impact that the publicity surrounding this trial will have on her business, that she wants everything to look okay, and so she tends to minimize the impact of the bad things in their past.

They testify to that they know it. They know she's not around because she's working three jobs. And they know that Samantha Morrow is less than nine months older than their client, so she's a child herself. And yet they don't talk to a single other adult or family member who knew them while they were in New York or New Jersey.

Moreover, they don't ask Mrs. Bowles and/or Samantha the obvious follow-up questions.

JUDGE PRYOR: Weren't those witness -- weren't those witnesses though, the mother and the sister, the very witnesses who later told habeas counsel what they needed to know?

MS. BENTON: They were among the other

witness -- they are among the witnesses who tell habeas counsel what they need to know. And that goes to my last point, which is they're not asking the obvious and relevant follow-up questions of Samantha Morrow and Mrs. Bowles. And the reason they're not doing that is nobody on this trial team has the relevant skill set or knows how to identify and gather mitigation.

Mr. Brownell is a career prosecutor. Mr. Walker has never tried a capital case to verdict. He's been involved in one or two where the death notice was withdrawn or the client entered a plea. He doesn't know.

He tells the trial court in September of 1995, at the ex parte hearing on the motion for their funds, that they need a social worker because he doesn't have the skills to get the mitigation.

He says: There's simply a need in a case like this for somebody who's trained and knows how to look for the factors that the attorneys don't know to look for that become very important in a death case.

The trial court says okay and gives him the money. And for the remainder of 1995, for all of 1996, for all of 1997, for all of 1998 and for the

first three months of 1999, they do nothing. They say that:

> The reason we didn't get a social worker is because, between the combination of what Mr. Mugridge was doing and what Dr. Buchanan was doing, we thought we would cover it that way.

That didn't happen until May of 1999, right before trial. That explains nothing about why you didn't employ someone. And somebody who knew to ask the right follow-up questions would have gotten at the evidence of what Mr. Morrow's behavior and what his living circumstances were like in -- in New York and New Jersey. And once you get that information, then you get all of it through your expert.

And that is what makes this case different, to your point, Judge Newsom, than the line of cases where trial counsel asks and gets a denial. In those other cases, trial counsel is asking and getting information that either indicates that all is well or -- or relatively unremarkable in -- in the client's home or is visiting the places that the client lived and talking to the relatives and they say, "Things were fine," or they say, "I'm not

talking to you," or, "Don't talk to this relative."

That is a different thing than where you have relatives who are not even being told because neither the investigator nor trial counsel has the relevant skills what constitutes the full scope of mitigating evidence. They're not even being told that, who are trying their best and who are volunteering information that would lead any reasonable lawyer to keep going.

And, in fact, the 6th Amendment requires it. That's the clearly established Federal law.

JUDGE NEWSOM: Do I recall -- and again, correct me if I'm wrong. I don't have the notes in front of me -- but that the sister said, when asked about the period in New York, that it was pretty good?

MS. BENTON: During her direct testimony at the guilt phase of Mr. Morrow's trial, he says:

Okay. So you leave your abusive father and move to New Jersey. How was that?

And she says: Oh, pretty good.

And then she goes on to describe in a very general way where they lived. That is not consistent with either her or Mr. Morrow's earlier description of their living circumstances in

New York or New Jersey. Whether she thinks that they were pretty good or not, an objective person hearing what they knew, the little they knew about New Jersey, would not say: Oh, it sounds pretty good.

And maybe it was pretty good for Samantha. That doesn't answer the question of what it was like for Mr. Morrow, and that's the relevant question.

If the Court has any further questions...

JUDGE WILSON: I think we have your argument, Counsel. Thank you.

MS. BENTON: Thank you.

JUDGE WILSON: Court is adjourned.

THE BAILIFF: All rise.

(End of recording 17-10311.)

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF INDIAN RIVER)

I, Kristen A. Houk, Registered Professional Reporter and Florida Professional Reporter, do hereby certify that I was authorized to and did listen to the foregoing recording and stenographically transcribed from said recording the foregoing recording and that the transcript is a true and accurate record to the best of my ability.

Dated this 12th day of April, 2018.

Kristen A. Houk

Kristen A. Houk, RPR, FPR
Job #J2077447

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

SCOTTY GARNELL MORROW,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	2:12-CV-0051-WBH
v.	:	
	:	DEATH PENALTY
WARDEN OF THE GEORGIA	:	HABEAS CORPUS
DIAGNOSTIC PRISON	:	28 U.S.C. § 2254
Respondent.	:	

ORDER

I. Background and Factual Summary

Petitioner, a prisoner currently under a sentence of death by the State of Georgia, has pending before this Court his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties have filed their final briefs, and this matter is ready for disposition.

On June 26, 1999, following a jury trial, Petitioner was convicted of two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary and possession of a firearm during the commission of felonies. The felony murder and aggravated assault convictions merged into other convictions. After a penalty phase trial, the jury sentenced Petitioner to death after finding ten aggravating circumstances, which was reduced to five by virtue of the merger of convictions. The Georgia Supreme Court affirmed Petitioner's

convictions and sentences. Morrow v. State, 532 S.E.2d 78 (Ga. 2000). The United States Supreme Court then denied Petitioner's petition for a writ of certiorari. Morrow v. Georgia, 532 U.S. 944 (2001).

Petitioner then filed his state court petition for a writ of habeas corpus. The state habeas corpus court granted relief as to Petitioner's sentence, but, on appeal, the Georgia Supreme Court reinstated Petitioner's death sentence. Humphrey v. Morrow, 717 S.E.2d 168 (Ga. 2011).

In reversing the state habeas corpus court, the Georgia Supreme Court provided the following description of Petitioner's crimes:

> The evidence at Morrow's trial showed that [Petitioner] dated and lived with Barbara Ann Young but that, beginning at least by early December of 1994, Ms. Young was beginning to lose interest in [Petitioner]. On December 6, [Petitioner] slapped Ms. Young and dragged her by her arm in her own home. On December 9, [Petitioner] was giving a ride to Ms. Young, but he refused to drop her at the college that she was attending and, instead, beat her and raped her twice. After this incident, Ms. Young made [Petitioner] move out of her home. On December 24, Ms. Young fled her home, where [Petitioner] had been visiting, and ran to a neighboring home seeking refuge and saying that [Petitioner] was going to kill her.
>
> Finally, on December 29, 1994, Tonya Woods and LaToya Horne were visiting Ms. Young, and two of Ms. Young's children were also present in the home as witnesses to the events that transpired there. [Petitioner] and Ms. Young argued over the telephone. Later, [Petitioner] entered Ms. Young's home, stood at the entrance to the kitchen, argued with Ms. Woods, and began shooting the nine-millimeter handgun he had brought. [Petitioner] shot Ms. Woods in her abdomen, severing her spine and paralyzing her, and Ms. Woods fell backwards to the floor over a chair.

> [Petitioner] then shot Ms. Horne in her arm, and he also possibly fired at Ms. Young as she fled from the kitchen. [Petitioner] pursued Ms. Young down a hallway and kicked open her bedroom door. [Petitioner] and Ms. Young struggled in the bedroom. A shot was fired inside the bedroom, likely injuring Ms. Young's back from the action of the gun and burning Ms. Young's hand. The bullet passed through the closed bedroom door and into the ceiling in the hallway outside. Ms. Young fled the bedroom, but [Petitioner] pursued her into the hallway. [Petitioner] likely smashed her head into the bedroom's doorframe, leaving behind skin, hair, and blood. [Petitioner] then grabbed her by her hair as she lay on the floor, and he fired a fatal shot into her head above her right ear. This fatal shot was likely fired as she attempted to shield her head with her left hand, which was shot through the palm. [Petitioner] then returned to the kitchen, where he either cleared a jam in the gun or reloaded it. He fired a fatal shot under Ms. Woods' chin and into her head at close range, and he shot Ms. Horne in the face and arm. [Petitioner] left the home, cut the telephone line outside, and then fled. Ms. Young and Ms. Woods died of their wounds. Ms. Horne was badly injured, but she managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear.

Id. at 171-72.

II. Discussion

A. Habeas Corpus Standard of Review

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

been "adjudicated on the merits in State court proceedings." Under § 2254(d), a habeas corpus application

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

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

> that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a

> decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

Pinholster, 131 S. Ct. at 1398; see also Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (noting that state court decisions are measured against Supreme Court precedent at "the time the state court [rendered] its decision.").

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406 (2000). If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law.").

An application of federal law is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington, 562 U.S. at 102 (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015).

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

B. Discussion of Petitioner's Claims

1. Ground 1: Ineffective Assistance of Counsel

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

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

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

a. Petitioner's Claim that Trial Counsel Failed to Properly Investigate and Present Mitigation Evidence

Petitioner first argues that trial counsel failed to sufficiently investigate and properly present mitigation evidence during the penalty phase of the trial. From the age of seven until he was twenty, Petitioner lived with his family in the New York area, but, according to Petitioner, trial counsel's investigation of what occurred during this period and his presentation of evidence about it at the penalty phase of Petitioner's trial was inadequate. Petitioner contends that, during that period he was growing up in the New York area, his mother neglected him, he was raped repeatedly by a teenage boy, and he was physically and mentally abused by one of his mother's boyfriends. For a while, Petitioner and his mother and sister lived with Petitioner's aunt and the aunt's boyfriend. Petitioner claims that the aunt and the boyfriend mistreated him and that the boyfriend's sons bullied him (one of the boyfriend's sons, Earl, is the one who allegedly raped Petitioner). Petitioner also claims that trial counsel also failed to discover that Petitioner's sister had been molested by a drunk, drug-addicted relative. Petitioner claims that he was also a target of bullies at the schools that he attended in the New York area and that Petitioner's mother got mad at Petitioner because he would not fight back when bullied.[1]

[1] Petitioner also provides a lengthy personal history beginning from the birth of his parents. Little of this narrative, however, is particularly compelling or implicates the matters at issue in this case.

Petitioner contends that there were numerous "red flags" in the information that trial counsel had, most notably the report of a psychologist, which should have spurred them to investigate Petitioner's years in the New York area more closely. According to Petitioner, as a result of these red flags, trial counsel should have hired a social worker who could have performed family interviews with a better eye at developing mitigating information. Petitioner also claims that trial counsel failed to provide the psychologist with the information necessary to complete an accurate assessment of Petitioner's mental health.

The state habeas corpus court granted relief on this claim, holding that "[t]rial counsel failed to conduct an adequate background investigation and failed to prepare and present an adequate mitigation case." [Doc. 20-5 at 27]. In reversing the trial court's grant of relief, the Georgia Supreme Court, after correctly identifying the Strickland standard, discussed its reasoning as follows:

> We begin our analysis of the assistance trial counsel rendered by summarizing their pre-trial preparations. Counsel focused much of their efforts on supporting a possible defense theory that was based on the allegedly-spontaneous nature of the murders, and they attempted to prepare evidence of [Petitioner]'s background and mental state that would support their theory that he had acted impulsively and out of character. Counsel testified that they believed that the "domestic circumstances of the case" could possibly support a verdict of voluntary manslaughter, and they pressed the State to consider a plea bargain to life without parole based on this characterization of the murders.

Trial counsel met repeatedly with [Petitioner], his mother, and his sister, and the record makes clear that counsel discussed [Petitioner]'s childhood background with them extensively, despite the fact that counsel believed that a sound strategy would be to focus on [Petitioner]'s character as an adult. Counsel found [Petitioner]'s sister to be a more-reliable source of information than his mother. Contrary to [Petitioner]'s argument, it is simply not correct that trial counsel ignored information from the years during [Petitioner]'s childhood when he lived in New York and New Jersey, although we acknowledge that they relied heavily on [Petitioner], his mother, and his sister to provide information about that portion of [Petitioner]'s life. Counsel testified that they also contacted jail staff, [Petitioner]'s former co-workers, and numerous other potential witnesses. Counsel obtained funds for a private investigator, and counsel testified that they closely monitored the investigator's progress and that the investigator "concentrated about 65 percent of his efforts on mitigation witnesses." The investigator testified that he was relatively inexperienced in mitigation investigations; however, we note that trial counsel retained ultimate responsibility for the defense strategy.

Counsel had [Petitioner] examined by a psychiatrist. The psychiatrist's report stated that [Petitioner]'s mother had been "battered" by [Petitioner]'s father and that [Petitioner] had been "abandoned" by his father, had been "picked on" as a child because he was on welfare, and was currently depressed and remorseful. However, the psychiatrist's report also unflatteringly indicated that [Petitioner] had been suspended from school numerous times for fighting, that [Petitioner] had battered his ex-wife and his girlfriend, and that [Petitioner] had a diagnosis of alcoholism, polysubstance abuse, and a personality disorder that included "antisocial" features. The psychiatrist's report indicated a sexual history that was unremarkable, except perhaps for the fact of [Petitioner]'s promiscuity with women. After concluding that the psychiatrist's report was potentially harmful to the defense on the whole, counsel eventually arranged for [Petitioner] to be examined repeatedly by a psychologist in an effort to get [Petitioner] to open up more about his background, to prepare [Petitioner] emotionally to testify well, and to prepare the psychologist's possible trial testimony, which is outlined below. Before having [Petitioner] examined, counsel briefed the psychologist on what their investigation had revealed about [Petitioner], and the psychologist

never expressed to counsel any concern that additional information was necessary to his conclusions.

Counsel and their investigator made reasonable attempts to contact a person who reportedly had served as a personal mentor to [Petitioner] when he lived in the Northeast, to contact members of [Petitioner]'s extended family through [Petitioner]'s mother, and to obtain [Petitioner]'s school records and childhood psychological records. Counsel considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing.

At trial, counsel presented the following evidence: In the guilt/innocence phase, counsel presented testimony from an investigator to explain that Ms. Young had not referred to the incident where [Petitioner] kidnapped her and had sex with her as a "rape" and that [Petitioner] had beaten her with his fist rather than with a gun during that incident. [Petitioner]'s sister testified about [Petitioner]'s background in an effort to show [Petitioner]'s good character, his past good treatment of Ms. Young, and his distress at the time of the murders. Trial counsel then concluded the guilt/innocence phase with testimony from [Petitioner] himself, in which he described his history with Ms. Young, gave explanations about his alleged past abuse of her that were more favorable to himself than the State's evidence about those incidents, and explained how he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him. At the conclusion of the guilt/innocence phase, counsel argued to the jury that [Petitioner] had "snapped."

In the sentencing phase, trial counsel attempted to carry forward their theme about [Petitioner]'s good character through the following witnesses: several of [Petitioner]'s former co-workers; a detention officer who had formed a favorable opinion of [Petitioner]; a volunteer minister who explained [Petitioner]'s good behavior in the jail and his potential to minister to other inmates; a pastor who described [Petitioner] as "dependable" and "sincere" and as being remorseful for his crimes; a friend who had known [Petitioner] for ten years who spoke favorably of [Petitioner]'s lack of a bad temper, his involvement with his children, and

his respect for his mother; [Petitioner]'s ex-wife who described [Petitioner] as being quiet, rarely abusive, and involved with his children; [Petitioner]'s ex-wife's new husband who described [Petitioner] as being "the perfect father"; [Petitioner]'s half-sister who described him as being "a kind, loving person" who did not lose his temper; and a former girlfriend who described [Petitioner] as not being abusive and as being fearful of getting hurt emotionally. [Petitioner]'s sister testified about her father's abuse of [Petitioner]'s mother, including stomping on her and causing her to miscarry, and about how [Petitioner] had attempted to protect her. Contrary to [Petitioner]'s current description of the portion of his life he spent in the Northeast after [Petitioner]'s mother's divorce, [Petitioner]'s sister described her memories of that time period as "pretty good." However, she explained that [Petitioner] was bullied in school and that his mother "tried to make him be a man." She also outlined [Petitioner]'s life in general terms, including things such as how he had helped his mother with her nursing care business, was close to his mother, and was involved in church as a child. She explained that [Petitioner] had been under stress because he feared that he was losing his children and because his aunt had recently died.

Counsel presented the testimony of a psychologist who had evaluated [Petitioner] repeatedly. The psychologist testified that [Petitioner] showed elevated scores for "paranoia," "hysteria," poor impulse control, exaggerated masculinity, depression, and anxiety. He stated that [Petitioner] had been in special education classes since the fourth grade for reasons other than his behavior. He explained that [Petitioner] had suffered from a sense of helplessness because he had been unable to protect his mother from abuse first by his father and later by his mother's boyfriend. He described how [Petitioner] had reacted to being belittled by Ms. Woods on the day of the murders and had gone into a dissociative state as a result of the incident.

Finally, trial counsel presented testimony from [Petitioner]'s mother. She explained that her ex-husband had abused her severely, even stomping on her and causing her to miscarry, and that [Petitioner] had tried to protect her. She outlined her and [Petitioner]'s life histories, and she included some discussion of the period during which [Petitioner] lived in the Northeast. She explained how she had once spanked [Petitioner] in front

> of his friends at school, and she discussed [Petitioner]'s academic problems. Her testimony concluded with a plea as a mother for [Petitioner]'s life to be spared.
>
> In light of the summary of trial counsel's efforts outlined above and in light of our plenary review of the trial and habeas records, we conclude that it is simply not correct that trial counsel failed to investigate [Petitioner]'s background, including the period he spent in the Northeast. Counsel did such an investigation, but they reasonably relied on [Petitioner] and his immediate family members to reveal that information.
>
> We now turn to the evidence that trial counsel allegedly should have discovered that they did not. The habeas court concluded that trial counsel performed deficiently in preparing for the sentencing phase. [Petitioner] argues that trial counsel failed to discover evidence falling mainly into two categories,[2] information about the portion of [Petitioner]'s life that he spent in the Northeast and information available through an independent forensic expert. As we explained above in our general discussion of the applicable standards of review, our assessment of how a jury might have reacted to the additional evidence that [Petitioner] has presented in the habeas court is an assessment of the legal question of prejudice, which we perform de novo.
>
> The habeas court found that trial counsel performed deficiently in their efforts to discover "testimony and records documenting Petitioner's childhood in the New York City area." The habeas court assumed that [Petitioner] was psychologically harmed by being sometimes left by his mother unsupervised or in the care of unreliable or unsavory persons,

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> [2] In a footnote, the Georgia Supreme Court stated:
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> We also note the evidence that [Petitioner] was born prematurely; however, like the habeas court apparently did, we find nothing compelling about this evidence and the speculative possibility that it could have had lasting effects on his mental state.

Morrow, 717 S.E.2d at 175 n.2.

including [Petitioner]'s blind grandfather together with another man who was known to drink. However, our review of the record reveals that a jury would have found this characterization of how [Petitioner] himself[3] was ever harmed to be overstated, and we also note that the jury actually did hear testimony at trial about how [Petitioner] and his sister would sometimes be left alone while their mother was away. The habeas court noted that testimony at trial indicated that [Petitioner]'s mother moved to the Northeast to escape her badly abusive husband, but it found that new evidence suggested that the move was also partly motivated by sexual abuse [Petitioner]'s sister had suffered. However, [Petitioner]'s sister testified that she did not tell [Petitioner] about the abuse until after he was arrested, meaning it could not have affected his conduct during the murders. The habeas court notes testimony that, when [Petitioner] was living in his aunt's home in Brooklyn, his aunt and her boyfriend were unkind to him and his sister and disciplined them harshly and that the other children in the home bullied him. We find this new testimony to be less than compelling as alleged proof of trial counsel's failings and resulting prejudice, particularly because testimony was actually presented at trial about how [Petitioner] had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving.

[Petitioner] presented evidence in the habeas court suggesting that he had been raped by his cousin as a child. However, we note that [Petitioner] never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history. We disagree with the habeas court's suggestion that trial

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[3] In a footnote, the Georgia Supreme Court stated:

[Petitioner]'s sister testified in the habeas court that the sighted man once molested her. However, there is no evidence that she ever disclosed this to trial counsel pre-trial during their numerous consultations with her, and there is no evidence that [Petitioner] had any knowledge of the incident prior to his crimes.

Morrow, 717 S.E.2d at 175 n.3.

counsel should have been alerted to the alleged rapes simply because [Petitioner] was known to wet the bed and to have some adjustment problems as a child or because the alleged perpetrator had once allegedly attempted to molest another cousin on a dare. Finally, although we do not find that counsel performed deficiently in failing to discover [Petitioner]'s alleged rapes, particularly because [Petitioner] himself never made such allegations pre-trial, we also note with regard to any resulting prejudice that [Petitioner]'s only direct evidence of the alleged rapes even in the habeas court was his own statement to a psychologist. We have said the following about such circumstances:

> Although an expert witness may rely on the statements of others in forming his or her expert opinions, those opinions should be given weight only to the extent that the statements upon which they rely are themselves found to have been proven reliable. An expert witness must not be permitted to serve merely as a conduit for hearsay. Therefore, in considering whether a jury in reasonable probability would have been swayed by additional testimony not presented by counsel, we do not assume the correctness of the facts alleged in the experts' affidavits but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.

Whatley v. Terry, 668 S.E.2d 651 (Ga. 2008) (footnotes omitted). Thus, we conclude that the testimony of [Petitioner]'s expert about [Petitioner]'s recent allegations about the rapes would not have been given great weight by the jury.

The habeas court highlighted [Petitioner]'s evidence suggesting that his mother had dated a man who was "cruel and controlling," would force [Petitioner] to help him do his janitorial work, would punish [Petitioner] with a belt, and would abuse [Petitioner]'s mother. We note, however, that trial counsel did present testimony at trial from a psychologist showing that the boyfriend had been abusive to [Petitioner]'s mother and had once cruelly mocked [Petitioner] when he attempted to defend his mother with a baseball bat.

> The habeas court notes evidence presented in the habeas court suggesting one of [Petitioner]'s mother's later boyfriends might have sexually abused [Petitioner]'s sister. However, our review of the record does not reveal that [Petitioner] was ever aware of this alleged abuse; therefore, it would not have affected the jury's assessment of his moral culpability in the murders if it had been presented at trial.
>
> Although we do not enumerate all of the examples here, we note that much of the habeas court's order is simply a recitation of the same basic life history that was outlined for the jury at trial.
>
> Finally, the habeas court discusses the new testimony presented by the psychologist who testified at [Petitioner]'s trial. The habeas court found that the psychologist's testimony would have been enhanced if the psychologist had been aware of the additional alleged emotional traumas that [Petitioner] had faced as a child. As we have outlined above, the psychologist's trial testimony reveals that his pre-trial evaluation of [Petitioner] through repeated interviews with him was thorough, and his trial testimony set forth a compelling picture for the jury. We find that the additional matters discussed above, including such things as [Petitioner]'s having been treated badly in his aunt's home and the additional evidence of his having been mistreated by his mother's boyfriend, would not have significantly enhanced the psychologist's trial testimony in the eyes of the jury. As to [Petitioner]'s essentially-unsubstantiated claim of rape, our discussion above demonstrates that trial counsel did not perform deficiently regarding those allegations because [Petitioner] never revealed them pre-trial and that those allegations, which are based essentially on only [Petitioner]'s own report, would have been regarded as suspect by the jury even if we were to assume that they should have been discovered pre-trial.

Morrow, 717 S.E.2d at 173-77 (headings omitted, footnotes 4 and 5 omitted).

In attempting to demonstrate that this Court should not defer to the state court ruling under § 2254(d), Petitioner argues extensively about what trial counsel failed to do and how the Georgia Supreme Court glossed over these failures. Petitioner first

focuses on the report of Dr. Dave Davis, the psychiatrist who wrote the report that the Georgia Supreme Court discussed in the passage quoted above. According to Petitioner, that report contained numerous "red flags" that should have alerted counsel to investigate Petitioner's life while he was living in the New York area.

Petitioner contends that trial counsel should have hired a social worker, that counsel started their investigation into penalty phase evidence too late, and that counsel should have extended their investigation into Petitioner's childhood beyond merely talking to Petitioner's mother and sister. Petitioner further argues that the discussions with the mother and sister were not as extensive as the state court made them out to be.

Solely for the purpose of this discussion, this Court is willing to concede that there were lapses in trial counsel's investigation of Petitioner's life in the New York area. Trial counsel was not, however, at fault for these lapses, and this Court disagrees with Petitioner's argument that the Georgia Supreme Court's decision as it relates to whether Petitioner has demonstrated that he was prejudiced is not entitled to deference under § 2254(d). Presumably, the most powerful evidence that trial counsel purportedly missed is the fact that Petitioner was raped by a teenage boy. As quoted above, the Georgia Supreme Court found that Petitioner "never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about

his background, including his sexual history." Morrow, 717 S.E.2d at 176. Indeed, trial counsel, the investigator and the psychologist all testified that Petitioner never told them about being raped. Trial counsel specifically testified that he asked about sexual abuse and was told that it did not happen, [Doc. 16-24 at 109], and that he knew nothing about sexual abuse, and if they had learned about it, they would have moved "heaven and earth to go find it." [Id. at 108]. Moreover, as Petitioner and the boy who raped Petitioner were the only two people who knew about the rape, no amount of investigation by trial counsel would have uncovered the rape unless Petitioner had told trial counsel about it.

Petitioner has presented no argument or evidence to overcome the presumption of correctness that the Georgia Supreme Court's findings enjoy under § 2254(e)(1). As such, this Court is bound by the finding that Petitioner never told his trial counsel or the psychological expert about any sexual abuse. According to the Eleventh Circuit, "[b]ecause information about childhood abuse supplied by a defendant is extremely important in determining reasonable performance, when a petitioner does not mention a history of physical abuse, a lawyer is not ineffective for failing to discover or to offer evidence of abuse as mitigation." Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1211 (11th Cir. 2007) (citation, quotations and alterations omitted). This Court is thus bound by the state court's decision that trial counsel was not ineffective for failing to

discover, investigate and present evidence regarding the fact that Petitioner was raped when he was a boy.

Regarding the rest of the evidence that Petitioner presented in the state habeas corpus proceeding, it is clear that Petitioner had a difficult childhood. However, the evidence of abuse that Petitioner suffered as a child was presented at Petitioner's trial, and the additional evidence that Petitioner points to that he claims would have made a difference at the trial was hidden from trial counsel by Petitioner, his mother and his sister. Trial counsel testified that he knew that Petitioner had been beaten as a child and that he had questioned Petitioner and his family about that abuse, but they indicated that the abuse was more along the lines of a spanking, and hid "the degree of the abuse" Petitioner suffered, [Doc. 16-29 at 64-65], and they did not mention any abuse by Petitioner's aunt's boyfriend. While, Petitioner decries the supposedly inadequate investigation that trial counsel undertook to find mitigation evidence, it is clear that Petitioner and his family bear significant responsibility for the fact that trial counsel did not learn about the episodes (or he did not learn about the severity of the episodes) that Petitioner presented in the state habeas corpus court. Trial counsel asked about abuse, and the abuse that Petitioner described, other than that inflicted upon Petitioner's mother by Petitioner's father, was fairly minor. As such, trial

counsel cannot be faulted for failing to assign limited resources and limited time to an investigation that did not appear to be likely to produce useable or helpful evidence.

> Because the reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. An inquiry into counsel's conversations with the petitioner may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Chandler v. United States, 218 F.3d 1305, 1318-19 (11th Cir. 2000) (quotations, alterations, and citations omitted).

Trial counsel did present evidence that Petitioner had been bullied at school, [Doc. 15-9 at 76], and the evidence that Petitioner's sister had been sexually molested as a young girl is irrelevant because Petitioner was not aware of it until after he committed his crimes.

Petitioner takes exception to the Georgia Supreme Court's statement that trial counsel concluded that a social worker was not necessary. Rather, according to Petitioner, trial counsel fully intended to hire a social worker, and they simply botched the effort. Trial counsel specifically testified, however, that the reason that they did not hire a social worker was because, "with a combination of what [the psychologist] was doing and the mitigation evidence that [the investigator] was finding, we didn't

know how much more a social worker or a mitigation expert would be able to provide." [Doc. 16-23 at 22]. This Court also points out that Petitioner discusses at length the fact that trial counsel failed to hire a social worker or mitigation specialist and instead relied on their investigator to develop the penalty phase evidence. Even if this Court were to concede that a social worker would have been better at investigating and developing mitigating evidence, however, that fact is irrelevant to the ineffective assistance claim because the inquiry is focused on the evidence that was and was not presented at the penalty phase, not the manner in which the evidence was or was not gathered,[4] and Petitioner has failed to establish the unreasonableness of the Georgia Supreme Court's conclusion that the investigation and presentation of evidence at the penalty phase was constitutionally adequate.

In several passages of his final brief, Petitioner argues that his crimes were not serious enough to merit the death penalty. According to Petitioner, his crimes were not premeditated and did not involve torture or monetary gain. Rather, he contends that his crimes were emotionally fueled, resulting from his anguish at losing Ms. Young's affections and his rage at Ms. Woods' taunting. Petitioner uses terms like "immediate

[4] This same rationale applies to Petitioner's extended argument that trial counsel waited too long to begin collecting mitigation evidence and preparing a case to present at the penalty phase.

reaction" and "spontaneous" to describe his crimes and asserts that his mental state was "compromised."

Petitioner relates these arguments to his claim that trial counsel failed to properly present his case in mitigation by noting that, because his crimes were not particularly serious on the spectrum of death-eligible murders, the jury would have been much more likely to opt for a life sentence if it had been exposed to just some of the mitigating evidence purportedly overlooked by trial counsel, lessening his burden to show prejudice.[5] This Court would agree with Petitioner's characterizations of his crimes if he had stopped after shooting Ms. Woods. He did not, however, stop.

It is clear that, at some point, Petitioner made the decision that he was going to kill all three women in the home, and the evidence presented at Petitioner's trial would support a jury finding that Petitioner had planned to kill at least Ms. Young even before he arrived. The evidence at Petitioner's trial indicated that Ms. Young believed that Petitioner was a threat to kill her. After a phone conversation during which Ms. Young told Petitioner to leave her alone, Petitioner went to Ms. Young's home, kicked down the door and entered carrying a loaded gun. Although Petitioner may have had a plausible explanation for having the gun for his own safety, the jury was not bound

[5] As is discussed below, Petitioner also relates these arguments to his claim that his sentence was constitutionally disproportionate.

to believe him. Moreover, even if Petitioner had no intent to harm anyone when he arrived at Ms. Young's home, the evidence strongly supports the conclusion that, as soon as he shot Ms. Woods, he formed the intent to kill the women. As described by the Georgia Supreme Court, after he shot Ms. Woods, he shot Ms. Horne, chased down Ms. Young, bashed her head against a doorframe to disable her, killed Ms. Young by shooting her in the head, and then returned to the kitchen to kill Ms. Woods by shooting her in the head and to attempt to kill Ms. Horne by shooting her in the face. When Petitioner went back into the kitchen and shot Ms. Woods in the head and Ms. Horne in the face, both women were conscious but lying prone because he had disabled them by shooting them earlier. Petitioner first shot Ms. Woods in the head. It is not clear whether Ms. Woods was pleading for her life or simply cowering in fear when Petitioner killed her. Petitioner then went to shoot Ms. Horne, who was just a high school student at the time. She attempted to shield herself with her arm, and Petitioner shot her in the arm. Petitioner then shot her in the side of her face, just in front of her ear. This Court thus finds that terms like cold-blooded, methodical and designed better describe Petitioner's actions that day, and that Petitioner was in a compromised mental state is self-evident from his actions but does nothing to mitigate his behavior. The fact that Ms. Young's two children were present at the time of the murderous rampage only adds to the horrific nature of Petitioner's crimes. Accordingly, this Court

disagrees with Petitioner's contention that the jury would have viewed Petitioner as less deserving of a death sentence based on the nature of his crimes.

In summary, this Court concludes that Petitioner has failed to establish that this Court should not defer under § 2254(d) to the state court conclusion that Petitioner failed to demonstrate that his trial counsel was ineffective in investigating and presenting his case in mitigation at the penalty phase of the trial.

b. Trial Counsel's Failure to Retain a Forensic Expert

In his next enumeration of trial counsel ineffectiveness, Petitioner claims that he was prejudiced by his counsel's failure to obtain a forensic expert. At his state habeas corpus hearing, Petitioner presented an expert who testified (1) that Ms. Woods was standing when Petitioner shot her in contrast to the state's evidence indicating that all three women were seated when Petitioner opened fire, (2) that certain nonlethal injuries to Ms. Young's head occurred when Petitioner shot Ms. Young rather then when he pistol whipped her or bashed her head into a door frame, and (3) that Petitioner did not reload his gun, countering the state's evidence to the contrary.

In rejecting these claims, the Georgia Supreme Court discussed Petitioner's claims as follows:

> We find that, even assuming the correctness of this expert's new testimony, there is no substantial prejudice as to either phase of

[Petitioner]'s trial arising out of trial counsel's failure to present similar testimony.

First, the expert claims that the evidence at the crime scene shows that Ms. Woods was standing rather than sitting when [Petitioner] shot her, causing her to fall backwards over a chair. Although this testimony would have tended at trial to confirm [Petitioner]'s version of how the three victims were arranged in the room when he started shooting them, it would not have had a significant impact on the jury in light of the fact that the evidence was clear that [Petitioner] began shooting simply because he was upset by what Ms. Woods had said to him rather than because of any threat he sensed. In fact, Ms. Horne herself testified at trial in a manner consistent with [Petitioner]'s new expert testimony, as she claimed that she "remember[ed] Tonya falling back in the chair." Thus, we conclude that trial counsel's failure to obtain expert testimony like this was not prejudicial.

Second, [Petitioner]'s new expert has testified, contrary to the extensive expert testimony at trial, that Ms. Young's hand was shot through during the struggle in her bedroom and that the shot then grazed her forehead. This contrasts with the State's evidence at trial showing that a shot was fired inside the bedroom but did not strike Ms. Young, that Ms. Young's forehead likely was injured when her head struck a doorframe during the struggle, and that [Petitioner] then injured Ms. Young's hand when he shot through it and into the side of her head as she shielded herself. [Petitioner] actually relied on the State's testimony showing that the injury to Ms. Young's forehead was not from a gunshot to argue to the jury that the injury could have been simply the result of a fall. Our review of [Petitioner]'s new expert testimony leads us to conclude that [Petitioner] cannot show prejudice for two reasons. First, we believe that the jury would, like us, favor the testimony of the State's experts upon reviewing the two contrasting accounts of precisely how the struggle with Ms. Young transpired prior to the final shot to her head. Second, even if the jury chose to believe the version of events set forth by [Petitioner]'s new expert, that version would not be significantly mitigating, because it still depicts [Petitioner] as having struggled with Ms. Woods [sic] for the gun in the bedroom, chasing her as she fled into the hallway, grabbing

> her by her hair as she lay helpless on the floor, and shooting her in the head.
>
> Finally, [Petitioner]'s new expert testified that the clicking sound heard by Ms. Horne and the unspent bullet on the floor next to Ms. Woods' feet could have been the result of [Petitioner]'s clearing a jam in his gun rather than his reloading. We find this testimony not to be mitigating for two reasons. First, the testimony would have been essentially cumulative of similar testimony from an expert for the State, which the State even highlighted in its closing argument. Second, regardless of whether [Petitioner] was clearing a jam in his gun or reloading, it is clear that he was taking active steps to prepare his gun to continue his murderous rampage.

Humphrey v. Morrow, 717 S.E.2d 168, 177 (Ga. 2011) (footnote omitted).

At the outset, this Court finds that the forensic evidence that Petitioner claims that trial counsel should have presented at his trial to be wholly underwhelming. Whether Ms. Woods was sitting or standing when Petitioner shot her, whether Petitioner hit or shot Ms. Young in the head, and whether Petitioner reloaded his gun during his rampage does nothing to change the nature of his actions in a significant manner, and it certainly does nothing to mitigate his guilt.

Petitioner argues that his forensic expert's testimony would have corroborated his own testimony that differed from the description of events provided by the state's evidence thus making his overall testimony more believable to the jury. The discrepancies between Petitioner's testimony and the state's evidence that would have

been addressed by the forensic expert's testimony, however, are not material when compared to other, more significant discrepancies.

For example, Petitioner testified that he did not hit Ms. Young during two arguments that he had with her prior to the murders, but the evidence demonstrates that he did hit her on these occasions. Additionally, on the morning of the murders, Petitioner called Ms. Young before he arrived at her home. He testified that the conversation was pleasant – that he had asked her whether they could get back together as a couple and that Ms. Young responded that they could discuss it. Based on the evidence at Petitioner's trial, however, it is clear that during that phone call Petitioner shouted at Ms. Young and that she hung up on him. Petitioner further testified that when he arrived at Ms. Young's home that morning, he knocked on the door and Ms. Young let him in when the evidence shows that he kicked in the door and entered the home without an invitation. Petitioner testified that after he shot Ms. Young, he left the house, while the evidence demonstrated that he returned to the kitchen and shot Ms. Woods and Ms. Horne. Indeed, at one point during his testimony, Petitioner indicated that he shot Ms. Woods and Ms. Horne only once each, when it was clear that the women had been shot multiple times. Finally, Petitioner also testified that at the time he did not believe that Ms. Young wanted to leave him, but if that was the case, killing her was entirely senseless.

This Court finds that Petitioner's testimony on these points is much more likely to have left negative impressions with the jury in comparison to the three issues to which the forensic expert's testimony relates. As such, Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to use a forensic expert during Petitioner's trial.

This Court is further not swayed by Petitioner's arguments that the Georgia Supreme Court's conclusion was unreasonable. Petitioner first faults the state court for failing to consider in its prejudice analysis the fact that during closing argument the prosecutor repeatedly pointed out that Petitioner had lied. In response, this Court notes that the testimony of a forensic expert for the defense would not have changed the state's closing argument. Rather, the state would have attacked the expert testimony along with Petitioner's testimony. Moreover, as discussed above, Petitioner's testimony was subject to challenge regarding matters that were much more material than what the expert would have addressed. As such, this Court's confidence in the outcome of Petitioner's trial is not undermined by the expert testimony Petitioner presented in the state habeas corpus proceedings.

c. Trial Counsel's Failure to Object to Purported Prosecutorial Misconduct

During the state habeas corpus hearing, Petitioner's trial counsel testified that during his closing argument for the penalty phase of the trial, the prosecutor did something unusual:

> At one point during his closing argument, and it almost wasn't even in context, but at one point he stood in front of the jury and stood straight up, stretched his arms out like this. I will stand up and demonstrate. He just stretched out like this. And I was sitting behind him, but it was almost, I mean the impression that I got was that it was like Christ on the cross, and didn't say anything. And then just stood there for ten, fifteen seconds. I noticed several of the jurors looking extremely uncomfortable, most of them turned away, most of them crossed their arms. It was like something I had never seen before and it was like no closing argument I had ever done as a prosecutor. It was just strange.

[Doc. 16-23 at 21].

The judge at the hearing then asked trial counsel, "And then did he ever say anything to put that in context or – ?" Trial counsel responded, "To connect it up, no." Nothing appears in the trial record to document that this happened, and despite the fact that Petitioner raised this claim in his state habeas corpus petition, neither the state habeas corpus court nor the Georgia Supreme Court discussed the matter, and Respondent agrees that this claim is before this Court for *de novo* review.

In the Eleventh Circuit,

> habeas relief is due to be granted for improper prosecutorial argument at sentencing only where there has been a violation of due process, and that occurs if, but only if, the improper argument rendered the sentencing stage trial fundamentally unfair. An improper prosecutorial argument has rendered a capital sentencing proceeding fundamentally unfair if there is

> a reasonable probability that the argument changed the outcome, which is to say that absent the argument the defendant would not have received a death sentence. A reasonable probability is one that is sufficient to undermine confidence in the outcome. The first step in analyzing any sentence stage prosecutorial argument is to determine if it is improper, because no matter how outcome-determinative it is a proper argument cannot render the proceedings fundamentally unfair and therefore cannot be the basis for a constitutional violation.

Romine v. Head, 253 F.3d 1349, 1366 (11th Cir. 2001)

In Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991), the Eleventh Circuit recounted a number of closing-remark improprieties the prosecutor had made, including "numerous appeals to religious symbols and beliefs, at one point even drawing an analogy to Judas Iscariot." From a review of the case law, it appears that religious references in closing arguments at a penalty-phase closing argument are improper when they are used to indicate a biblical or religious mandate for a death sentence. E.g., Romine, 253 F.3d at 1366.

In this instance, we have what could be considered, *at most*, an oblique religious message of unclear meaning. As there is no reference to the prosecutor's gesture in the trial record, there is no way to determine what he said before and after the gesture. The only evidence we have regarding that is trial counsel's statement that the prosecutor did not say anything to put the gesture in context or connect it to his argument. Accordingly, the most that could be said about the gesture is that, completely out of context, the prosecutor invoked the image of Jesus Christ on the crucifix, but it is

entirely unclear what message the prosecutor intended to convey or how a particular juror might interpret the gesture. In Christian dogma, the story of Christ on the Cross is one of mercy, forgiveness and redemption, and if jurors did interpret the gesture to be a reference to Christ – which is by no means certain – there is an equal chance that the meaning that they attached to that gesture was to consider mercy. This Court thus concludes that there is no reasonable probability that the prosecutorial argument (or posturing) changed the outcome of the proceeding. As a result, trial counsel cannot be faulted for failing to raise an objection to the prosecutor's antics.

d. Trial Counsel's Failure to Move for a New Trial

In response to Petitioner's argument that his trial counsel was ineffective for failing to file a motion for a new trial, this Court credits Respondent's argument that trial counsel failed to file such a motion for strategic reasons, knowing that the trial judge would deny the motion. Moreover, Petitioner cannot demonstrate that he was prejudiced by trial counsel's failure to file the motion. If the motion would have succeeded, Petitioner would have had a successful claim to raise in his appeal, in his state habeas corpus proceeding, or in this action which he has not demonstated. In other words, the failure to file a motion for a new trial is not a separate claim but relies

on a valid underlying claim for which Petitioner would separately be entitled to relief, and Petitioner has failed to demonstrate such a claim.

e. Trial Counsel's Failure to Properly Assert Petitioner's Jury Composition Claim

Petitioner additionally faults his trial counsel for failing to demonstrate that the grand jury that indicted him and the petit jury that convicted and sentenced him were not drawn from a fair cross-section of the community. The underlying fair cross-section claim is raised in Petitioner's Ground 3, and this Court discusses that claim in more depth below, ultimately determining that Petitioner has failed to establish that he is entitled to habeas corpus relief with respect to the claim. As a result, this Court must conclude that Petitioner cannot demonstrate that he suffered prejudice as a result of trial counsel's failure to establish the claim.

f. Petitioner's Unsupported Claims of Ineffective Assistance

Part IV of Petitioner's discussion of his ineffective assistance claims in his final brief is simply a laundry list of eight claims that are wholly unsupported by citation to the record, factual description, or argument. For example, in the first of these eight claims, Petitioner argues that

> Petitioner's trial counsel failed to ask appropriate and necessary questions during voir dire to determine if some of the jurors would have automatically voted for the death penalty and thus should have been excluded from the jury, and failed to move to strike certain prospective jurors whose answers indicated that they were biased in favor of the death penalty.

[Doc. 36 at 174].

Petitioner fails, however, to even mention what "appropriate and necessary questions" trial counsel failed to ask or explain how that purported failure caused him prejudice. Petitioner also fails to identify jurors who indicated bias. Moreover, this Court's review of the record indicates that the jury selection process was quite thorough and that, in his claims related to purportedly biased jurors – discussed below – Petitioner has failed to demonstrate that biased jurors served on his jury. All of the claims of ineffective assistance that appear in Part IV suffer the same infirmities.

In this Court's order of May 1, 2012, this Court ordered that Petitioner, in his final brief must include "all claims, issues, and arguments that he wishes this court to consider, including all claims raised in the petition. If a matter is not in the final brief, this Court will not consider it." [Doc. 23 at 3]. Further, it is not this Court's job to comb the record and sift for facts that may or may not exist to support Petitioner's bare allegations in an attempt to concoct a potential claim on his behalf. This Court thus concludes that Petitioner has failed to demonstrate that he is entitled to relief with

respect to his ineffective assistance claims asserted in Part IV of his ineffective assistance discussion in his final brief.

2. Ground 2: Petitioner's Death Sentence Unconstitutional

Petitioner's Ground 2 is rather convoluted. Stated simply, he murdered two people, and the verdict form used at his trial did not require the jury to specify which murder they imposed the death penalty for. Therefore, according to Petitioner, there was not a unanimous decision to impose the death penalty.

This Court agrees with Respondent that this claim is procedurally defaulted because the last state court to rule on the claim stated clearly and explicitly that the claim is barred because the petitioner failed to follow state procedural rules, and where a procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. See Cone v. Bell, 556 U.S. 449, 465 (2009). This Court further agrees with Respondent that Petitioner has failed to establish his trial counsel's ineffectiveness for failing to object to the verdict form so as to demonstrate cause and prejudice to excuse the procedural default.

More significantly, this Court concludes that Petitioner's Ground 2 fails to state a cognizable claim for relief. Petitioner has failed to cite to case law that stands for the

proposition that, where a death penalty trial concerns multiple murders, the trial court must require the jurors to determine and specify for which of the murders they impose the death sentence. This Court further concludes that the Constitution does not require jurors to be unanimous as to appropriateness of the death penalty for each murder in a multiple-murder trial; they need only be unanimous that the death penalty is appropriate because of all of defendant's crimes. See, e.g., Jeffries v. Blodgett, 5 F.3d 1180, 1195 (9th Cir. 1993) (favorably quoting a state court opinion for the proposition that "[i]n a capital case, the jury is to consider not each count separately but all crimes the defendant has been convicted of in deciding whether death is the appropriate punishment.") (quoting State v. Jeffries, 717 P.2d 722, 735 (Wash. 1986)).

3. Ground 3: Grand and Traverse Jury Arrays Used for Petitioner's Indictment and Trial Underrepresented Hispanics

In his Ground 3, Petitioner argues that his rights were violated by the fact that the grand jury that indicted Petitioner and the traverse jury that convicted and sentenced Petitioner were selected from a pool that underrepresented Hispanic residents in Hall County. Prior to his trial, Petitioner's counsel spent a considerable amount of time litigating this issue, but the trial court ultimately concluded that Petitioner had failed to demonstrate that Hispanics were underrepresented on the panel.

In its opinion affirming Petitioner's convictions and sentences, the Georgia Supreme Court provided the following description of what happened in the trial court and its reasoning in affirming the trial court.

> [Petitioner] claims that Hispanics were underrepresented in the composition of the 1994 grand jury pool, and the 1999 traverse jury pool in violation of the Sixth Amendment, the Fourteenth Amendment, O.C.G.A. § 15-12-40, and the Unified Appeal Procedure. To prevail on a Sixth Amendment jury pool composition challenge, [Petitioner] must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in jury pools is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979); Bowen v. Kemp, 769 F.2d 672, 684 (11th Cir. 1985). To prevail on a Fourteenth Amendment challenge to the composition of a jury pool, [Petitioner] must show: (1) the group is one that is a recognizable, distinct class; (2) the degree of underrepresentation, by comparing the proportion of the group in the total population to the proportion called to serve as jurors over a significant period of time; and (3) a selection procedure that is susceptible of abuse or is not racially neutral which supports a presumption of discrimination raised by the statistics. Castaneda v. Partida, 430 U.S. 482, 494 (1977); Bowen, *supra*. Generally speaking with regard to the second prong of both tests, an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5 and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional. See Cook v. State, 340 S.E.2d 843 (Ga. 1986) ("As a general proposition, absolute disparities under 10% usually are sufficient to satisfy constitutional requirements."). A violation of O.C.G.A. § 15-12-40 is proven by showing a wide absolute disparity between the percentage of the group in the population and its percentage in the jury pool. West v. State, 313 S.E.2d 67 (Ga. 1984) (17% absolute disparity for females in jury pool from females in county population violates O.C.G.A. § 15-12-40); Devier v. State, 300 S.E.2d 490 (Ga. 1983) (36%

absolute disparity for females in jury pool violates statute). The Unified Appeal Procedure states that there should be no imbalances for cognizable groups greater than 5%, UAP § E, but this Court has stated that the 5% rule is a prophylactic rule designed to ensure "to the extent possible that disparities would be kept well below the constitutional minimum." Parks v. State, 330 S.E.2d 686 n.4 (Ga. 1985).

The defendant has the burden of proving a prima facie case of constitutional error in the composition of the jury pool. Berryhill v. Zant, 858 F.2d 633, 638 (11th Cir. 1988); Machetti v. Linahan, 679 F.2d 236, 241, n.6 (11th Cir. 1982) (the standard for proving a prima facie jury pool composition violation is virtually identical under the Sixth and Fourteenth Amendment tests). With regard to the second prong of the Sixth and Fourteenth Amendment tests, the extent and effect of any alleged underrepresentation is a mixed question of fact and law. Berryhill, *supra* at 638, n.8. The degree of underrepresentation is a question of fact to be determined by the trial court sitting as fact-finder. Id.; United States v. Esle, 743 F.2d 1465, 1472, n.12 (11th Cir. 1984). The sufficiency of the disparity, once its extent has been determined, to show a constitutional violation is a question of law. Berryhill, *supra*; Esle, *supra*. With mixed questions of fact and law, this Court accepts the trial court's findings on disputed facts and witness credibility unless clearly erroneous, but independently applies the legal principles to the facts. Linares v. State, 471 S.E.2d 208 (Ga. 1996).

[Petitioner] claimed that the official 1990 Census was not reliable in determining the percentage of Hispanics in Hall County in 1994 and 1999 because there had been a large influx of Hispanics into the county since 1990 and a significant undercount of Hispanics during the 1990 Census. Instead of using the 1990 Census, [Petitioner] presented an expert who had conducted a test census in 1996 of the Census block in Hall County that had reported the highest number of Hispanics in 1990. Overall, there are 86 Census blocks in the county. Respondents in the door-to-door survey of the 359 households in that Census block were told that no names were needed and that the survey responses would be shared with the Hispanic community to benefit the entire community. [Petitioner]'s expert then determined that, based on the test census and published estimates like the Georgia County Guide, there were approximately 2.5

times the number of Hispanics in Hall County than reported in the 1990 Census. She estimated that Hispanics who were over 18 and, therefore, jury-eligible, comprised 14.1% of the total jury-eligible Hall County population and, when compared with the .8% of Hispanics she found on the grand jury list, this amounted to an absolute disparity of 13.3%. She also used the 1996 test census and similar documentary sources to estimate that the absolute disparity for Hispanics was 12.7% when comparing the 1999 traverse jury list with the total jury-eligible Hispanic population.

Although the trial court found persuasive evidence that Hall County Hispanics were a cognizable group, the trial court found that the second prong of the Sixth and Fourteenth Amendment tests was not met because [Petitioner]'s expert's estimate that jury-eligible Hispanics comprised approximately 2.5 times their numbers reported for Hall County in the 1990 Census was unreliable. The trial court was critical of the expert's test census because the respondents were told that the survey was intended to benefit the Hispanic community and this may have affected the responses. See Esle, *supra* at 1474-75 (Dade Latin Market Survey used by defendant to estimate the number of Latinos in Dade County, Florida, was found to be unreliable because the survey was created by Spanish language radio stations to recruit sponsors and they therefore had an incentive to inflate the numbers). The trial court also noted that it was conducted in a 1/86th section of the county picked specifically for having the highest number of Hispanics with the results extrapolated to the entire county. The State also pointed out several errors [Petitioner]'s expert made in her supporting data and that she had assumed a constant growth rate for the entire county population. Accordingly, the trial court refused to adopt [Petitioner]'s expert's Hispanic population percentage instead of the official 1990 Census statistics and we find that this decision was not clearly erroneous. See Linares, *supra*; Esle, *supra* (the trial court is not required to accept the defendant's figures if unreliable, even if unrebutted by the government); Reynolds v. State, 406 S.E.2d 553 (Ga. Ct. App. 1991) (the weight to be given expert testimony, like that of any other witness, is to be determined by the trier of fact, and the trier of fact is not bound by expert testimony). See also UAP § E (jury certificate population numbers to be drawn from the "most recent decennial census"). It was not unreasonable for the trial court to refuse to credit [Petitioner]'s

> expert's Hispanic population estimates when [Petitioner]'s test census was based on a 1/86 section of the county picked for its high number of Hispanics and extrapolated to the county as a whole. It was also reasonable for the trial court to note that the 1990 Census was a federally-funded county-wide head count conducted by the U.S. Census Bureau with help from local Hispanics, including one of [Petitioner]'s Hispanic witnesses. [Petitioner] attacks the ethnic percentages shown by the 1990 Census as being unreliable, but the 1990 Census was clearly more comprehensive than the 1996 survey of a single Census block. Since the trial court found [Petitioner]'s overall Hispanic population statistics to be unreliable, we need not address whether his jury-eligible population numbers are affected by evidence that less than half of Hall County Hispanics have U.S. citizenship, which is a requirement for jury service. O.C.G.A. § 15-12-40.1; Esle, *supra* at 1474.
>
> When the 1990 Census numbers for Hispanics in Hall County are compared with the percentage of Hispanics on the jury lists, the absolute disparities are within the legal limit. The 1990 Census reported that there were 3,252 Hispanics over the age of 18 in Hall County out of a total jury-eligible population of 70,969, approximately 4.6% of the total. [Petitioner]'s expert examined the 1994 grand jury list and determined that .8% of the people on the list were Hispanic. The resulting absolute disparity of 3.8% is not a violation of law. See Cochran v. State, 344 S.E.2d 402 (Ga. 1986) (6% absolute disparity of blacks and 7.1% absolute disparity of women on grand jury list not a violation of O.C.G.A. § 15-12-40); Cook, *supra* (general rule is that absolute disparities under 10% are not unconstitutional) . . . . [Petitioner]'s expert estimated that 1.6% of the people on the 1999 traverse jury list were Hispanic and, when compared with the 1990 Census statistics, this results in an absolute disparity of 3%, well within the legal limit. The trial court did not err by ruling that the composition of the grand and traverse jury pools did not violate the Constitution, O.C.G.A. § 15-12-40 and the Unified Appeal Procedure.

Morrow v. State, 532 S.E.2d at 82-84.

By the time of the state habeas corpus proceeding, the 2000 census data were available, and those figures indicated that Hispanic residents as a percentage of overall population in Hall County had risen from 5% in 1990 to 20% by 2000. Petitioner contends that his claim in the state habeas corpus petition was "factually different" from the claim on appeal because of the new census data evidence. However, the Georgia Supreme Court on habeas corpus review, concluded that Petitioner's jury composition claims were barred under the doctrine of *res judicata*. Petitioner thus contends that the claim is before this Court for *de novo* review.

Pursuant to § 2254(d), this Court may not grant relief on the version of the claim that Petitioner raised before the trial court and the Georgia Supreme Court on appeal because Petitioner does not dispute that, in the passage quoted above, the Georgia Supreme Court identified the correct legal standard to evaluate his claim, and he does not argue that the state court erred in affirming his convictions and sentence with respect to the claim.[6] Rather, he briefly contends that the data from the 2000 census had the effect of retrospectively proving his claim, and that, as noted, adding the census data makes it an entirely new claim. As Respondent points out, the

[6] Petitioner does raise a number of factual and analytical errors that the trial court made, but he makes no effort to demonstrate that the Georgia Supreme Court adopted those errors, and it is clear that the Georgia Supreme Court reasoning differed from that of the trial court.

Georgia Supreme Court did rule in the alternative that Petitioner's claim regarding the 2000 census data "would lack merit in light of our holding that jury commissioners properly rely on the most-recent Decennial Census that is available at the time jury lists are constructed." Humphrey v. Morrow, 717 S.E.2d at 178. The court then cited to Williams v. State, 699 S.E.2d 25, 27 (Ga. 2010), a case in which the criminal defendant raised a Fourteenth Amendment claim that the Clayton County, Georgia, traverse jury source list – based on 2000 census data – underrepresented African Americans because of the significant changes in the county's demographics since the census. The Georgia Supreme Court disagreed, concluding that

> [b]ecause use of the Decennial Census as a benchmark has been adopted by this Court for the very purpose of promoting adequate representation of cognizable groups and because the demographic changes at issue in appellant's case were obviously beyond the control of the county's jury commissioners, we conclude that appellant has failed to show that the jury selection procedure in his case was susceptible of abuse or was not racially neutral.

Id.

Obviously, the demographics of many areas will change from census to census, sometimes dramatically. Permitting the use of a census completed after a trial to challenge the racial makeup of the jury pool at the time of that trial would create havoc as trials completed at the end of each decade would be overturned on a regular basis. Moreover, Petitioner has not demonstrated error on the part of the trial court in

denying Petitioner's motion. That court's conclusion was based on a reasonable – and thus unassailable – credibility determination. That the data from the new census, produced after the fact and not available to the trial court, might confirm Petitioner's expert's testimony does not establish that the trial court erred. See Pinholster, 131 S. Ct. at 1398 (noting that review under § 2254(d) is limited to the record that was before the state court).

In addition, and ultimately fatal to Petitioner's jury pool claim, is the fact that Petitioner has failed to provide any evidence or argument regarding the third prong of the Duren test that the underrepresentation in the jury pool is due to systematic exclusion of the group in the jury-selection process. See Duren, 439 U.S. at 364. Petitioner incorrectly conflates the second and third prong by arguing that any disparity between the percentage of a distinctive group in the population and its percentage in the jury pool of greater than 10% is "probably unconstitutional," indicating that no separate showing on a systematic exclusion is necessary. This Court disagrees.

In United States v. Clarke, 562 F.3d 1158, 1163 (11th Cir. 2009), the Eleventh Circuit held that in a case where a criminal defendant established that African-Americans made up under eight percent of the jury panel while African-Americans represented approximately twenty-one percent of the population of the court district,

the defendant nonetheless failed to establish his claim because he "presented no evidence showing that the under-representation in this case was due to systematic exclusion of African–Americans."

Systematic exclusion means that "the cause of the underrepresentation ... [was] inherent in the particular jury-selection process utilized." Duren, 439 U.S. at 366. For example, in Duren, both the questionnaires and the summonses mailed to prospective jurors specifically allowed women but not men to claim automatic exemptions from jury service, 439 U.S. at 361, a system that all but guarantees that women would be underrepresented. See also Taylor v. Louisiana, 419 U.S. 522, 523 (1975) (Louisiana law requiring women but not men to file written declaration of their desire to serve before they could serve on a jury).

In this case, the only evidence of a cause of the underrepresentation was the fact that socio-economic factors independent of the system used to construct the jury pool caused a significant number of Hispanics to move to Hall County. The influence of such factors on juror participation cannot demonstrate the systematic exclusion of a distinctive group. See, e.g., United States v. Purdy, 946 F. Supp. 1094, 1103 (D. Conn. 1996) ("[U]nder the systematic exclusion requirement the assessment of jury representativeness should take into account only 'affirmative government action' and not 'private sector influences.'").

4. Ground 4: Petitioner's Death Sentence was Arbitrary and Disproportionate

In his Ground 4, Petitioner contends that the Georgia Supreme Court failed to properly carry out its duty to perform a proportionality review, that his crimes were not severe enough to support the imposition of the death penalty, that prosecutors in Georgia are afforded too much discretion in deciding whether to seek a capital sentence, and that the Hall County district attorney was motivated by personal animus toward Petitioner in pursuing the death penalty.

a. Georgia Supreme Court's Proportionality Review

As with each case in which a death penalty was imposed, the Georgia Supreme Court performed a statutorily-mandated proportionality review by comparing Petitioner's crimes to those in which the death penalty has been imposed in other Georgia cases. In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court struck down Georgia's system of imposing the death penalty in part because of the random nature

> in which the death penalty was imposed. The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant.

> Left unguided, juries imposed the death sentence in a way that could only be called freakish.

Gregg v. Georgia, 428 U.S. 153, 206 (1976).

The main focus of Furman was the fact that the decisionmakers – juries or judges – in various state statutory death penalty schemes were not given adequate guidelines under which to impose death. See Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

The Georgia legislature then passed a new death penalty statute that the Supreme Court evaluated and approved in Gregg. Part of Georgia's death penalty scheme is a proportionality review, O.C.G.A. § 17-10-35(c)(3), pursuant to which the Georgia Supreme Court is required to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

This Court stresses, however, that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate. Collins

v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted). As the proportionality review is not required by the Constitution, Petitioner cannot claim relief under § 2254 for the Georgia Supreme Court's failure to properly carry out its statutory mandate. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons."). Accordingly, Petitioner's arguments that the Georgia Supreme Court's proportionality decision in this case violates constitutional principles announced by the Supreme Court or that the Georgia Supreme Court fails to properly carry out the statutory mandate in performing the proportionality review are unavailing.

b. Petitioner's Claim that his Death Sentence is Disproportionate

As discussed above in relation to Petitioner's claim of ineffective assistance of counsel, this Court has determined that, contrary to Petitioner's arguments, his crimes were clearly severe enough to count among that narrow set of crimes that render him eligible for death penalty consideration. See discussion *supra* pp. 22-24. This Court

further notes that the state proved beyond a reasonable doubt that several aggravating circumstances existed in relation to his murder of two women. As a result, Petitioner's sentence satisfies the requirements of Furman and Gregg, creating the presumption that Petitioner's "sentence was not 'wantonly and freakishly' imposed – and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." Walton v. Arizona, 497 U.S. 639, 656 (1990), overruled on other grounds by Ring v. Arizona, 536 U.S. 584 (2002). Petitioner has failed to overcome that presumption. This Court further concludes that, because he has failed to allege facts that would entitle him to relief, Smith v. Singletary, 170 F.3d 1051, 1053 (11th Cir. 1999), Petitioner is not entitled to conduct discovery or have a hearing regarding this claim.

c. *Bush v. Gore*

Petitioner is also entitled to no relief with respect to that portion of Ground 4 in which he claims that prosecutors in Georgia are given unconstitutionally broad discretion in making the decision to impose the death penalty. In Bush v. Gore, 531 U.S. 98 (2000), the Supreme Court held that where fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of

similarly situated individuals. Noting that the right to life is obviously a fundamental right, Petitioner complains that the lack of standards to guide Georgia prosecutors "in determining which cases warrant seeking the death penalty inevitably leads to the disparate treatment of similarly situated people accused of potentially capital offenses." [Doc. 36 at 211].

Other courts have considered and rejected the argument applying the Bush v. Gore holding to the discretion afforded prosecutors in determining whether to pursue the death penalty in a particular case, e.g., Coleman v. Quarterman, 456 F.3d 537 (5th Cir. 2006); Crowe v. Terry, 426 F. Supp. 2d 1310 (N.D. Ga. 2005), and this Court agrees with the reasoning of those opinions.

This Court first notes that the context of Bush is clearly distinguishable from a prosecutor's decision to pursue a death sentence. In Bush, the Supreme Court rejected the Florida Supreme Court's attempt to determine voter intent because there were no uniform standards in place for making the determination. Bush, 531 U.S. at 105-06. Noting that the right to vote is a fundamental right, the Court objected to a system of counting votes that varied from county to county and even"within a single county from one recount team to another." Id. at 106. Absent consistent and objective criteria, each recount team could apply different standards in deciding whether to count a vote, resulting in arbitrary and disparate treatment of voters. Id. at 105.

While Georgia prosecutors necessarily have discretion in determining whether to pursue a death sentence, that decision alone – in contrast to the decision of whether to count a vote – does not directly implicate a fundamental right. Instead, it merely starts a process that includes numerous procedural protections that are consistent throughout the state. The mere existence of "discretionary stages" in a death penalty scheme does not result in the arbitrary imposition of the death penalty. Gregg v. Georgia, 428 U.S. 153, 199 (1976). So long as proper judicial procedures are in place, the judicial process is sufficient to prevent the type of arbitrary death sentences prohibited in Furman. Id.

Additionally, "[d]iscretion is essential to the criminal justice process." McCleskey v. Kemp, 481 U.S. 279, 297 (1987), and if this Court were to adopt Petitioner's argument "it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant." Gregg, 428 U.S. at 199 n.50. Such a system would be unwieldy, would limit the effectiveness of prosecutors, and could potentially and dramatically increase the number of death sentences imposed. While the discretion afforded prosecutors in whether to pursue the death penalty is not ideal, any alternative would certainly be worse. As such, this Court declines to apply the Bush v. Gore decision in the context urged by Petitioner.

d. Prosecutorial Animus

With respect to Petitioner's claim that the Hall County district attorney arbitrarily sought the death penalty because of personal animus or some other arbitrary consideration, this Court agrees with Respondent that Petitioner has failed to present evidence sufficient to support a conclusion that the district attorney abused her discretion. The only such evidence presented by Petitioner was the speculative testimony of trial counsel that (1) the district attorney had reacted in a heated manner when counsel referred to Petitioner's crimes as "just a domestic violence case," and (2) that the district attorney had narrowly won her latest election and felt political pressure to seek the death penalty more often in light of the increasingly conservative electorate. However, the district attorney enjoys a presumption that she properly exercised her discretion which can be overcome by only "exceptionally clear proof" to the contrary, McCleskey, 481 U.S. 297, and Petitioner's evidence fails to overcome that presumption. As mentioned above, the district attorney's decision to seek the death penalty merely began a process that has repeatedly been held to provide sufficient procedural safeguards. Moreover, "a legitimate and unchallenged explanation" for the district attorney's decision "is apparent from the record: [Petitioner] committed an act for which the United States and Georgia laws permit imposition of the death penalty." Id. at 296-97. Petitioner was convicted by a jury of murdering two women while in

the process of committing other crimes, and the jury further concluded the presence of several statutory aggravating factors. Accordingly, the prosecutor's decision to seek the death penalty was consistent with Georgia law and was not arbitrary. Crowe v. Terry, 426 F. Supp. 2d 1310, 1355 (N.D. Ga. 2005).

5. Ground 5 - Petitioner's Challenge to Georgia's Unified Appeal Procedure

In his Ground 5, Petitioner challenges Georgia's Unified Appeal Procedure ("UAP"), O.C.G.A. § 17-10-36, arguing that it violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

> The UAP sets forth rules promulgated by the Georgia Supreme Court that prescribe procedures to be utilized in death penalty cases by the trial court, defense counsel, and the prosecutor prior to, during, and after trial. The procedures were established to prevent or correct errors in the proceedings and to ensure that the defense raises, or expressly waives, all matters that can be raised prior to trial. One such procedure requires the trial court to hold conferences with defense counsel and the prosecutor where the court inquires whether the defense will raise various issues or whether they will be waived.

Ford v. Schofield, 488 F. Supp. 2d 1258, 1338 (N.D. Ga. 2007) (citations omitted).

Petitioner first argues that the conferences violate due process because it "upsets the balance of power between the state and the accused in the adversarial system by forcing the defense throughout the proceedings to disclose strategy and tactics." [Doc. 36 at 243]. Petitioner further argues that the UAP violates a defendant's right to

silence because it requires the defendant to respond to the court's inquiries regarding his satisfaction with defense counsel and the manner in which his defense is being conducted. Petitioner also contends that the procedure violates his right to counsel by: (1) asking counsel to identify which issues will or will not be raised, which allegedly discloses trial strategy; (2) asking the defendant during the course of trial whether he is satisfied with counsel, without providing independent counsel to assist him in making this judgment; and (3) thrusting the court directly into the attorney-client relationship. Finally, Petitioner argues that the UAP violates the Equal Protection Clause because it applies only in capital cases.

As Respondent points out, the state habeas corpus court, in an adequate and independent state ground for denying relief, concluded that this claim was procedurally defaulted because Petitioner failed to raise it in his appeal. [Doc. 20-5 at 4]. Petitioner argues that the state court failed to evaluate his assertion of cause and prejudice to excuse the default. However, Petitioner cannot establish prejudice because he cannot demonstrate that he is entitled to relief based on his claims.

The exact arguments that Petitioner raises about the UAP were raised by the petitioner in Ford v. Schofield case cited above. This Court adopts the holding from that court:

> Noting that the procedures were enacted for the benefit and not the detriment of a defendant, the Georgia Supreme Court has addressed these

> challenges on numerous occasions and found the UAP to be constitutional. See, e.g., Jackson v. State, 270 Ga. 494, 498-99, 512 S.E.2d 241 (1999); Ledford v. State, 264 Ga. 60, 65, 439 S.E.2d 917 (1994); Rogers v. State, 256 Ga. 139, 146, 344 S.E.2d 644 (1986); Sliger v. State, 248 Ga. 316, 318-19, 282 S.E.2d 291 (1981); see also Putman v. Turpin, 53 F. Supp. 2d 1285, 1304 (M.D. Ga. 1999). The Petitioner has not identified any Supreme Court precedent in support of his argument that the UAP is unconstitutional.

Ford, 488 F. Supp. 2d at 1339.

Put simply, the UAP has been in use in death penalty cases in Georgia for approximately forty years, and Plaintiff has not cited to a single case that has held the procedures set forth therein to violate any constitutional requirement. As such, this Court concludes that Petitioner's Ground 5 fails to state a claim for relief.

6. Ground 6 - The Trial Court's Refusal to Provide Additional Funds for a Second Demographics Expert

In Ground 6, Petitioner very briefly argues that the trial court violated his constitutional rights by failing to provide him with adequate funds to hire a demographics expert to properly pursue his claim that the Hall County jury pool unconstitutionally underrepresented Hispanics. As was discussed above in relation to Petitioner's Ground 3, the trial court provided funds for trial counsel to hire a demographics expert. That expert then produced a study in which she purported to demonstrate that Hispanics were significantly underrepresented in the Hall County jury

pool. The trial court was critical of the study because of the expert's flawed methodology and denied Petitioner's motion challenging the jury pool. Trial counsel then sought additional funding, presumably to perform another study that corrected the problems identified with the earlier study. The trial court denied that motion, finding that Petitioner had already spent a significant amount trying to prove the claim, and that his arguments were not convincing.

In rejecting this claim in Petitioner's appeal, the Georgia Supreme Court recounted the facts at length before concluding that Petitioner "failed to show why these additional funds were critical to his defense." Morrow v. State, 532 S.E.2d at 85. Petitioner does not attempt to explain why this Court should not defer to the Georgia Supreme Court decision under § 2254(d). Rather he merely asserts, without explanation, that the state habeas corpus court's determination that the claim was barred under the doctrine of res judicata was incorrect. Accordingly, Petitioner has failed to meet his burden under § 2254(d). Moreover, as discussed above in relation to Petitioner's Ground 3, Petitioner has failed to establish that he would be entitled to relief with respect to his claim regarding the underrepresentation of Hispanics in the Hall County jury pool because he made no showing under the third prong of the Duren test – that the underrepresentation was due to a systematic exclusion of Hispanics in the jury selection process. As a result, Petitioner cannot demonstrate that he was

prejudiced by the trial court failing to provide him with additional funds to hire an additional expert to do an additional study of the demographics of the Hall County jury pool.

7. Grounds 8 and 9 - Trial Court's Refusal to Change Venue and Improper Prosecutorial Statements[7]

In Ground 8, Petitioner contends that his rights were violated by media publicity before and during his trial. In his brief, however, he has failed to point to or discuss evidence of publicity, and he has made no showing to demonstrate how publicity adversely affected his trial.

In Ground 9, Petitioner asserts that, "throughout" his trial and sentencing, prosecutors "injected all manner of impermissible, improper, and inflammatory matters." [Doc. 36 at 291]. Petitioner then provides a recitation of impermissible actions that he accuses prosecutors of taking:

> introducing clearly irrelevant and inadmissible hearsay evidence; testifying to facts not in evidence; offering the State's own opinions of the evidence and of the credibility of defense witnesses; injecting false and improper victim impact considerations; improperly shifting the burden of proof to Petitioner; improperly invading the province of the court by charging the jury on the law; presenting improper and prejudicial testimony and evidence; impermissibly injecting evidence of unrelated,

[7] Petitioner withdrew his Ground 7

> clearly prejudicial, prior bad acts; discrediting Petitioner's case in mitigation because he chose to exercise his constitutional rights; vouching for the thoroughness of the State's investigation; disparaging the jury's consideration of mercy; asking the jury to punish Petitioner for who he was, rather than for what he had done; improperly attacking defense expert with instances of prior bad acts; improperly implying that jurors must impose death; improperly minimizing the importance of the jury's sentencing decision; interjecting his own opinion as to the appropriate punishment; interfering with the province of the jury to determine the appropriate penalty; vouching for the State's witnesses; urging consideration of matters not in evidence; misstating the evidence and the law; asserting that sympathy and mercy have no place in these penalty phase considerations; and injecting improper religious doctrine into the proceedings; and playing upon the juror's [sic] prejudices.

[Id. at 250-51].

As with his Ground 8, Petitioner fails to cite to the record or provide even the slightest description of, for example, an instance in which a member of the prosecution team introduced irrelevant or inadmissible hearsay evidence, testified to facts not in evidence, or offered an opinion on the evidence or the credibility of a witness.[8]

As stated above in relation to his unsupported ineffective assistance claims, Petitioner was required to fully raise all claims that he wants this Court to consider in his final brief. Further, it is not this Court's role to mine the record and interpretively

[8] Petitioner also obliquely references one prosecutor's actions, discussed above, where the prosecutor stood in front of the jury with his arms held out to his sides. This Court determined, however, that the gesture was unlikely to have had a significant impact on the jurors.

divine what Petitioner's claims may be. This Court thus concludes that Petitioner has failed to demonstrate that he is entitled to relief with respect to his Grounds 8 and 9.

8. Ground 10 - Petitioner's Challenge to the Trial Court Evidentiary Rulings

At Petitioner's trial, the trial court permitted the state to present testimony regarding statements that one of Petitioner's murder victims had made about Petitioner's behavior prior to the murders. The trial court also permitted LaToya Horne to testify that, before the murders, Ann Young was on the telephone with Petitioner even though she was not a part of the conversation. In his Ground 10, Petitioner contends that admission of the out-of-court statements violated his Sixth Amendment right to confront his accusers. The Georgia Supreme Court addressed the statements under the necessity exception to the hearsay rule and concluded that the statements were admissible. State v. Morrow, 532 S.E.2d at 87-88. Petitioner contends that the statements are inadmissible under Crawford v. Washington, 541 U.S. 36 (2004). The Supreme Court did rule in Crawford that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court. However, the Crawford opinion was issued in 2004, and Petitioner's direct appeal was

exhausted in 2001 when the Supreme Court denied certiorari, and, in Whorton v. Bockting, 549 U.S. 406, 421 (2007), the Supreme Court announced that Crawford is not retroactively applicable on collateral review. See also Lockyer, 538 U.S. at 71-72 (noting that state court decisions are measured under § 2254(d) against Supreme Court precedent at "the time the state court [rendered] its decision."). As a result, Petitioner is not entitled to relief with regard to this claim.

9. Ground 11 - The Trial Court's Penalty Phase Instructions

In Ground 11, Petitioner contends that the trial court erred in instructing the jury at the close of the penalty phase of the trial. Specifically, Petitioner complains that the trial court failed to instruct the jury about the meaning of a life sentence, failed to instruct the jury that aggravating circumstances must be found to have been committed contemporaneously with the underlying murders, and failed to instruct the jury that any findings about mitigating factors need not be unanimous. As with many of his claims, Petitioner has failed to provide much in the way of argument to support his claims, and his citations to case law are sparse and generally inapposite.[9] As a result, this Court

[9] Petitioner cites to Mills v. Maryland, 486 U.S. 367 (1988), for the proposition that mitigating circumstances need not be found unanimously, which relates to one of his claims, but he also makes the following cites: Enmund v. Florida, 458 U.S. 782, 796 (1982) (Constitution only permits imposition of the death penalty where jury finds the defendant evidenced a clear intent to kill); Zant v. Stephens, 462 U.S. 862 (1983)

had some difficulty in determining exactly how Petitioner contends that the challenged instructions violated his rights.

Petitioner argues that the instruction regarding the meaning of a life sentence allowed the jury to "unreliably and inaccurately speculate that Petitioner would be released on parole should they impose a life sentence," [Doc. 36 at 255], implying that jurors opted for the death penalty to prevent Petitioner's release on parole. The problem with this argument is that Petitioner's jury had three options in sentencing Petitioner: (1) a death sentence, (2) life without parole, and (3) life with the possibility of parole, and the trial court's instruction clearly explained these options. To the degree that the jury was concerned that Petitioner would be released on parole, they could have chosen the life without parole option.

The trial court gave the following instruction on aggravating circumstances:

> Under the law of the State of Georgia, the following allegations may constitute statutory aggravating circumstances, if proven by the State of Georgia by evidence beyond a reasonable doubt.
>
> Under Official Code of Georgia Annotated Section 17- 10-30(b)(2), statutory aggravating circumstances: One, the offense of murder of Tonya Rochelle Woods was committed while the defendant was engaged in the commission of another capital felony, that being the murder of Barbara

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(Constitution requires that statutory aggravating circumstances be found beyond a reasonable doubt); Lockett v.Ohio, 438 U.S. 586 (1978) (capital defendant must be permitted to introduce any evidence of her character and background in mitigation), none of which relate to his claims.

> Ann Young; two, the offense of murder of Barbara Ann Young was committed while the defendant was engaged in the commission of an aggravated battery against Latoya Precal Horne; three, the offense of murder of Tonya Rochelle Woods was committed while the defendant was engaged in the commission of an aggravated battery against Latoya Precal Horne; four, the offense of murder of Barbara Ann young was committed while the defendant was engaged in the commission of a burglary of the dwelling house of Barbara Ann Young, located at 1898 Moore Lane, Gainesville, Hall County, Georgia; five, the offense of murder of Tonya Rochelle Woods was committed while the defendant was engaged in the commission of burglary of the dwelling house of Barbara Ann Young, located at 1898 Moore Lane, Gainesville, Hall County, Georgia.

[Doc. 15-12 at 72].

Earlier, the trial court stressed that the jury must determine that the state demonstrate the existence of a statutory aggravating circumstance beyond a reasonable doubt before it could consider imposing a death sentence. [Id. at 70-71]. This Court finds that the trial court clearly instructed the jury that it must find the statutory aggravating circumstances beyond a reasonable doubt and that Petitioner engaged in the behavior "while" he committed – or contemporaneously with – the underlying murders. Petitioner fails to explain how jurors could have come to understand something different based on the instruction.

The trial court gave the following instruction on mitigating evidence:

> Mitigating evidence differs from the statutory aggravating circumstances because you are not required to be convinced by evidence beyond a reasonable doubt that a mitigating circumstance exists before you must take the mitigating circumstance into evidence as you deliberate this case.

> The law requires you to consider all mitigating circumstances if there is any evidence to support them. [Petitioner] has no burden of proof in this case.

[Id. at 72].

This Court first notes that the Supreme Court in Mills v. Maryland did not hold that courts must instruct jurors that they need not find mitigating circumstances unanimously. Rather, the Court held that an instruction requiring unanimity in order to find the existence of a mitigating circumstance violated the Constitution, and the instruction given by the trial court does not imply that the jurors had to be unanimous in order to find the existence of a mitigating circumstance. Indeed, the trial court's instruction that jurors must "consider all mitigating circumstances if there is any evidence to support them" clearly stressed to the jury that mitigating evidence was to be given special weight. Moreover, in Ward v. Hall, 592 F.3d 1144, 1187-1188 (11th Cir. 2010), the Eleventh Circuit approved a materially identical instruction after finding the instruction did not violate the requirements of Mills.

This Court thus concludes that Petitioner has failed to establish that the jury instructions given at the close of the penalty phase of his trial violated his rights.

10. Grounds 12 and 13 - The Delay in Executing Petitioner and Petitioner's Challenge to Georgia's Method of Execution

As recounted above, Petitioner was convicted and sentenced to death in 1999, and in Ground 12, Petitioner argues that the extended delay in executing him violates his Eighth Amendment rights. In his Ground 13, Petitioner challenges Georgia's method of lethal injection. In response to a § 2254 petitioner's challenge to Alabama's lethal injection protocol, the Eleventh Circuit stated:

> Issues sounding in habeas are mutually exclusive from those sounding in a § 1983 action. See Hutcherson v. Riley, 468 F.3d 750, 754 (11th Cir. 2006) ("An inmate convicted and sentenced under state law may seek federal relief under two primary avenues:" a petition for habeas corpus or a complaint under 42 U.S.C. § 1983). "The line of demarcation between a § 1983 civil rights action and a § 2254 habeas claim is based on the effect of the claim on the inmate's conviction and/or sentence." Id. A claim is properly raised under § 1983 when "an inmate challenges the circumstances of his confinement but not the validity of his conviction and/or sentence." Id. (internal quotation marks omitted). By contrast, "habeas corpus law exists to provide a prisoner an avenue to attack the fact or duration of physical imprisonment and to obtain immediate or speedier release." Valle v. Sec'y, Fla. Dep't of Corr., 654 F.3d 1266, 1267 (11th Cir. 2011)
>
> .
>
> Usually, an inmate who challenges a state's method of execution is attacking the means by which the State intends to execute him, which is a circumstance of his confinement. It is not an attack on the validity of his conviction and/or sentence. For that reason, "[a] § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures." Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1261 (11th Cir. 2009). Hence, we conclude that the district court did not err in dismissing McNabb's lethal injection challenge in his federal habeas petition. That avenue of relief is still available to him in a § 1983 action.

McNabb v. Comm'r Ala. Dep't of Corr., 727 F.3d 1334, 1344 (11th Cir. 2013).

This Court further notes that Georgia's lethal injection protocol has recently changed, and, given the documented difficulty that the state has had in securing lethal injection drugs, that method may change again before the state court issues Petitioner's execution warrant. Accordingly, judicial efficiency demands that consideration of this question be postponed until Petitioner's execution is imminent lest a decision that is made on the current protocol is rendered moot by a change in that protocol.

Similarly, this Court further concludes that Petitioner's claim that the delay in executing him violates his Eighth Amendment rights is not appropriately brought under § 2254. A petition brought under § 2254 challenges the fact of conviction or the validity of a sentence while a § 2241 petition "challenges . . . the execution of a sentence," Antonelli v. Warden, U.S.P. Atlanta, 542 F.3d 1348, 1352 (11th Cir.2008) (citation omitted), and Petitioner's claim of a delay is clearly a challenge to Georgia's execution of his sentence. The cause of judicial efficiency likewise demands that this Court decline to review this claim because, over time, the nature of Petitioner's claim will change as the claim of a delay potentially grows stronger as time passes, possibly requiring another review of the claim if this Court were to rule on it here.

Accordingly, this Court denies both claims without prejudice to Petitioner raising them in a 42 U.S.C. § 1983 or 28 U.S.C. § 2241 action.

11. Ground 14 - Trial Court Improperly Excused Jurors for Cause

In his Ground 14, Petitioner complains that the trial court excused ten members of the jury venire for cause because of their views on the death penalty even though those views were not extreme enough to warrant exclusion. This Court first points out that Petitioner named the ten jurors, briefly discussed legal standard under Witherspoon v. Illinois, 391 U.S. 510 (1968), and then expressed an entitlement to relief. Entirely missing from Petitioner's discussion is any mention of the facts surrounding the ten jurors and their voir dire testimony as well as argument pointing out how the trial court erred in each case. Once again, this Court points to its requirements for Petitioner's final brief, [See Doc. 23 at 3], and concludes that Petitioner's claim is insufficient to state a claim for relief.

Moreover, in affirming Petitioner's convictions and sentences, the Georgia Supreme Court held that the trial court did not err in excusing jurors for bias against the death penalty, Morrow v. State, 532 S.E.2d at 86, and, aside from his conclusory assertion otherwise, Petitioner has failed to demonstrate that the state court's conclusion was unreasonable.

12. Ground 15 - Jurors Who Should Have Been Removed

In Ground 15, Petitioner claims that four members of the venire panel – identified by Petitioner as O'Kelley, Hoynes, Callahan, and Taylor – should have been removed for cause by the trial court because of their views on the death penalty or because they were biased. Petitioner cannot succeed on this claim, however, because none of these four members of the panel served on the jury at Petitioner's trial, and he thus cannot have been prejudiced by the trial court's refusal to strike them for cause. This is true even though Petitioner was required to use his peremptory strikes to avoid having some or all of those panel members serve. "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," the Supreme Court has held that the criminal defendant "has not been deprived of any . . . constitutional right." United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" demonstrates "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." Id. at 316.

13. Ground 17[10] - Cumulative Error

In his final ground for relief, Petitioner very briefly asserts that the cumulative effect of the unconstitutional incidents at Petitioner's capital trial served to deprive him of his right to a fair trial. Cumulative error analysis addresses the possibility that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." United States v. Rosario Fuentez, 231 F.3d 700, 709 (10th Cir. 2000). However, in order for a court to perform a cumulative error analysis, there first must be multiple errors to analyze, and this Court has not identified such error. Accordingly, Petitioner is not entitled to relief with respect to his Ground 17.

III. Conclusion

For the reasons stated, it is hereby **ORDERED** that all of Petitioner's claims for relief under 28 U.S.C. § 2254 are **DENIED**, except that Petitioner's Grounds 12 and 13 are **DENIED** without prejudice to Petitioner raising those claims in a later proceeding as discussed above. This action is hereby **DISMISSED** and the Clerk is **DIRECTED** to close this action.

[10] Petitioner has withdrawn his Ground 16.

Pursuant to Rule 11 of the Rules Governing § 2254, a certificate of appealability is hereby **GRANTED** with respect to Petitioner's claim that his trial counsel was ineffective in investigating and presenting the case in mitigation but **DENIED** as to all other claims in the petition.

IT IS SO ORDERED, this twenty-eighth day of July, 2016.

WILLIS B. HUNT, JR.
Judge, U. S. District Court

In the Supreme Court of Georgia

Decided: October 17, 2011

S11A0937, S11X0938. HUMPHREY v. MORROW; and vice versa.

THOMPSON, Justice.

A jury convicted Scotty Garnell Morrow of the murders of Barbara Ann Young and Tonya Rochelle Woods, of the aggravated battery of LaToya Horne, and of related crimes. The crimes all occurred on December 29, 1994. Morrow was sentenced to death and to several terms of imprisonment, and this Court affirmed his convictions and sentences on June 12, 2000. Morrow v. State, 272 Ga. 691 (532 SE2d 78) (2000). Morrow filed a petition for a writ of habeas corpus on October 30, 2001, which he amended on February 3, 2005. An evidentiary hearing was held on April 25 and 26, 2005. In an order filed on February 4, 2011,[1] the habeas court vacated Morrow's death sentence based on the alleged ineffective assistance of Morrow's trial counsel in the sentencing phase of Morrow's trial, but the habeas court refused to disturb Morrow's

[1] We note with concern the fact that Morrow's habeas petition was pending in the habeas court for nearly nine and a half years, which is twice as long as it took to bring this matter to a verdict in the trial court. We urge the habeas courts to make every reasonable effort in death penalty cases to adhere to the time limitations imposed under Uniform Superior Court Rule 44.

convictions. In case number S11A0937, the Warden has appealed the vacating of Morrow's death sentence, and Morrow has cross-appealed in case number S11X0938. In the Warden's appeal, we reverse and reinstate Morrow's death sentence. In Morrow's cross-appeal, we affirm.

I. Factual Background

The evidence at Morrow's trial showed that Morrow dated and lived with Barbara Ann Young but that, beginning at least by early December of 1994, Ms. Young was beginning to lose interest in Morrow. On December 6, Morrow slapped Ms. Young and dragged her by her arm in her own home. On December 9, Morrow was giving a ride to Ms. Young, but he refused to drop her at the college that she was attending and, instead, beat her and raped her twice. After this incident, Ms. Young made Morrow move out of her home. On December 24, Ms. Young fled her home, where Morrow had been visiting, and ran to a neighboring home seeking refuge and saying that Morrow was going to kill her.

Finally, on December 29, 1994, Tonya Woods and LaToya Horne were visiting Ms. Young, and two of Ms. Young's children were also present in the home as witnesses to the events that transpired there. Morrow and Ms. Young

argued over the telephone. Later, Morrow entered Ms. Young's home, stood at the entrance to the kitchen, argued with Ms. Woods, and began shooting the nine-millimeter handgun he had brought. Morrow shot Ms. Woods in her abdomen, severing her spine and paralyzing her, and Ms. Woods fell backwards to the floor over a chair. Morrow then shot Ms. Horne in her arm, and he also possibly fired at Ms. Young as she fled from the kitchen. Morrow pursued Ms. Young down a hallway and kicked open her bedroom door. Morrow and Ms. Young struggled in the bedroom. A shot was fired inside the bedroom, likely injuring Ms. Young's back from the action of the gun and burning Ms. Young's hand. The bullet passed through the closed bedroom door and into the ceiling in the hallway outside. Ms. Young fled the bedroom, but Morrow pursued her into the hallway. Morrow likely smashed her head into the bedroom's doorframe, leaving behind skin, hair, and blood. Morrow then grabbed her by her hair as she lay on the floor, and he fired a fatal shot into her head above her right ear. This fatal shot was likely fired as she attempted to shield her head with her left hand, which was shot through the palm. Morrow then returned to the kitchen, where he either cleared a jam in the gun or reloaded it. He fired a fatal shot under Ms. Woods' chin and into her head at close range, and he shot

Ms. Horne in the face and arm. Morrow left the home, cut the telephone line outside, and then fled. Ms. Young and Ms. Woods died of their wounds. Ms. Horne was badly injured, but she managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear.

II. Alleged Ineffective Assistance of Counsel

The habeas court concluded that Morrow's trial counsel rendered ineffective assistance in their preparation for and performance in the sentencing phase of Morrow's trial but not in the guilt/innocence phase. In order to prevail on an ineffective assistance of counsel claim, a petitioner must show that his trial counsel rendered constitutionally-deficient performance and that actual prejudice of constitutional proportions resulted. Strickland v. Washington, 466 U. S. 668, 687 (III) (104 SC 2052, 80 LE2d 674) (1984); Smith v. Francis, 253 Ga. 782, 783-784 (1) (325 SE2d 362) (1985). See also Rompilla v. Beard, 545 U. S. 374 (125 SC 2456, 162 LE2d 360) (2005) (applying Strickland, 466 U. S. 668); Wiggins v. Smith, 539 U. S. 510 (123 SC 2527, 156 LE2d 471) (2003) (same). We adopt the habeas court's findings of fact unless they are clearly erroneous, but we apply the facts to the law de novo in determining whether trial

counsel performed deficiently and whether any deficiency was prejudicial. See Strickland, 466 U. S. at 698 (IV); Head v. Carr, 273 Ga. 613, 616 (4) (544 SE2d 409) (2001). Trial counsel are "strongly presumed" to have performed adequately; therefore, a petitioner bears the burden to prove otherwise. Strickland, 466 U. S. at 690 (III) (A). In assessing the degree to which counsel's deficiencies might have prejudiced a petitioner's defense, we consider the cumulative effect of all of trial counsel's deficiencies within the context of everything that occurred at trial. See Schofield v. Holsey, 281 Ga. 809, 812 n.1 (642 SE2d 56) (2007) (holding that the combined effect of trial counsel's various professional deficiencies should be considered). In the interest of judicial efficiency, this Court may simply assume certain alleged deficiencies to have existed and then weigh any prejudice that might have resulted in the final analysis of prejudice arising from counsel's deficiencies. Lajara v. State, 263 Ga. 438, 440-441 (3) (435 SE2d 600) (1993) (noting that an appellate court need not address whether counsel was deficient if the claim can be rejected based on a lack of prejudice).

To show sufficient prejudice to warrant relief, a petitioner must show that

> there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different [Cit.].

Smith, 253 Ga. at 783 (1). The Warden incorrectly argues that the prejudice standard applied by the habeas court in Morrow's case was erroneous. Under Georgia's death penalty laws, which provide for an automatic sentence less than death if the jury is unable to reach a unanimous sentencing verdict, a reasonable probability of a different outcome exists where "there is a reasonable probability that at least one juror would have struck a different balance" in his or her final vote regarding sentencing following extensive deliberation among the jurors. Wiggins, 539 U. S. at 537 (III). See OCGA § 17-10-30 (providing, both before and after being amended in 2009, that a sentence of death may only be imposed upon a jury's verdict recommending one).

For the reasons discussed below and upon our plenary review of the trial and habeas court records, we conclude that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not

in reasonable probability have resulted in a different outcome in either phase of Morrow's trial.

A. Actual Preparation and Performance

1. Preparation of Evidence

We begin our analysis of the assistance trial counsel rendered by summarizing their pre-trial preparations. Counsel focused much of their efforts on supporting a possible defense theory that was based on the allegedly-spontaneous nature of the murders, and they attempted to prepare evidence of Morrow's background and mental state that would support their theory that he had acted impulsively and out of character. Counsel testified that they believed that the "domestic circumstances of the case" could possibly support a verdict of voluntary manslaughter, and they pressed the State to consider a plea bargain to life without parole based on this characterization of the murders.

Trial counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively, despite the fact that counsel believed that a sound strategy would be to focus on Morrow's character as an adult. Counsel found Morrow's sister to be a more-reliable source of information than his mother.

Contrary to Morrow's argument, it is simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New Jersey, although we acknowledge that they relied heavily on Morrow, his mother, and his sister to provide information about that portion of Morrow's life. Counsel testified that they also contacted jail staff, Morrow's former co-workers, and numerous other potential witnesses. Counsel obtained funds for a private investigator, and counsel testified that they closely monitored the investigator's progress and that the investigator "concentrated about 65 percent of his efforts on mitigation witnesses." The investigator testified that he was relatively inexperienced in mitigation investigations; however, we note that trial counsel retained ultimate responsibility for the defense strategy.

Counsel had Morrow examined by a psychiatrist. The psychiatrist's report stated that Morrow's mother had been "battered" by Morrow's father and that Morrow had been "abandoned" by his father, had been "picked on" as a child because he was on welfare, and was currently depressed and remorseful. However, the psychiatrist's report also unflatteringly indicated that Morrow had been suspended from school numerous times for fighting, that Morrow had battered his ex-wife and his girlfriend, and that Morrow had a diagnosis of

alcoholism, polysubstance abuse, and a personality disorder that included "anti-social" features. The psychiatrist's report indicated a sexual history that was unremarkable, except perhaps for the fact of Morrow's promiscuity with women. After concluding that the psychiatrist's report was potentially harmful to the defense on the whole, counsel eventually arranged for Morrow to be examined repeatedly by a psychologist in an effort to get Morrow to open up more about his background, to prepare Morrow emotionally to testify well, and to prepare the psychologist's possible trial testimony, which is outlined below. Before having Morrow examined, counsel briefed the psychologist on what their investigation had revealed about Morrow, and the psychologist never expressed to counsel any concern that additional information was necessary to his conclusions.

Counsel and their investigator made reasonable attempts to contact a person who reportedly had served as a personal mentor to Morrow when he lived in the Northeast, to contact members of Morrow's extended family through Morrow's mother, and to obtain Morrow's school records and childhood psychological records. Counsel considered hiring a social worker but concluded

that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing.

2. Presentation of Evidence

At trial, counsel presented the following evidence: In the guilt/innocence phase, counsel presented testimony from an investigator to explain that Ms. Young had not referred to the incident where Morrow kidnapped her and had sex with her as a "rape" and that Morrow had beaten her with his fist rather than with a gun during that incident. Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders. Trial counsel then concluded the guilt/innocence phase with testimony from Morrow himself, in which he described his history with Ms. Young, gave explanations about his alleged past abuse of her that were more favorable to himself than the State's evidence about those incidents, and explained how he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him. At the conclusion of the guilt/innocence phase, counsel argued to the jury that Morrow had "snapped."

In the sentencing phase, trial counsel attempted to carry forward their theme about Morrow's good character through the following witnesses: several of Morrow's former co-workers; a detention officer who had formed a favorable opinion of Morrow; a volunteer minister who explained Morrow's good behavior in the jail and his potential to minister to other inmates; a pastor who described Morrow as "dependable" and "sincere" and as being remorseful for his crimes; a friend who had known Morrow for 10 years who spoke favorably of Morrow's lack of a bad temper, his involvement with his children, and his respect for his mother; Morrow's ex-wife who described Morrow as being quiet, rarely abusive, and involved with his children; Morrow's ex-wife's new husband who described Morrow as being "the perfect father"; Morrow's half-sister who described him as being "a kind, loving person" who did not lose his temper; and a former girlfriend who described Morrow as not being abusive and as being fearful of getting hurt emotionally. Morrow's sister testified about her father's abuse of Morrow's mother, including stomping on her and causing her to miscarry, and about how Morrow had attempted to protect her. Contrary to Morrow's current description of the portion of his life he spent in the Northeast after Morrow's mother's divorce, Morrow's sister described her memories of

that time period as "pretty good." However, she explained that Morrow was bullied in school and that his mother "tried to make him be a man." She also outlined Morrow's life in general terms, including things such as how he had helped his mother with her nursing care business, was close to his mother, and was involved in church as a child. She explained that Morrow had been under stress because he feared that he was losing his children and because his aunt had recently died.

Counsel presented the testimony of a psychologist who had evaluated Morrow repeatedly. The psychologist testified that Morrow showed elevated scores for "paranoia," "hysteria," poor impulse control, exaggerated masculinity, depression, and anxiety. He stated that Morrow had been in special education classes since the fourth grade for reasons other than his behavior. He explained that Morrow had suffered from a sense of helplessness because he had been unable to protect his mother from abuse first by his father and later by his mother's boyfriend. He described how Morrow had reacted to being belittled by Ms. Woods on the day of the murders and had gone into a dissociative state as a result of the incident.

Finally, trial counsel presented testimony from Morrow's mother. She explained that her ex-husband had abused her severely, even stomping on her and causing her to miscarry, and that Morrow had tried to protect her. She outlined her and Morrow's life histories, and she included some discussion of the period during which Morrow lived in the Northeast. She explained how she had once spanked Morrow in front of his friends at school, and she discussed Morrow's academic problems. Her testimony concluded with a plea as a mother for Morrow's life to be spared.

In light of the summary of trial counsel's efforts outlined above and in light of our plenary review of the trial and habeas records, we conclude that it is simply not correct that trial counsel failed to investigate Morrow's background, including the period he spent in the Northeast. Counsel did such an investigation, but they reasonably relied on Morrow and his immediate family members to reveal that information.

B. Evidence that Trial Counsel Allegedly Failed to Discover

We now turn to the evidence that trial counsel allegedly should have discovered that they did not. The habeas court concluded that trial counsel performed deficiently in preparing for the sentencing phase. Morrow argues

that trial counsel failed to discover evidence falling mainly into two categories,[2] information about the portion of Morrow's life that he spent in the Northeast and information available through an independent forensic expert. As we explained above in our general discussion of the applicable standards of review, our assessment of how a jury might have reacted to the additional evidence that Morrow has presented in the habeas court is an assessment of the legal question of prejudice, which we perform de novo.

1. Information about Morrow's Life in the Northeast

The habeas court found that trial counsel performed deficiently in their efforts to discover "testimony and records documenting Petitioner's childhood in the New York City area." The habeas court assumed that Morrow was psychologically harmed by being sometimes left by his mother unsupervised or in the care of unreliable or unsavory persons, including Morrow's blind grandfather together with another man who was known to drink. However, our review of the record reveals that a jury would have found this characterization

[2] We also note the evidence that Morrow was born prematurely; however, like the habeas court apparently did, we find nothing compelling about this evidence and the speculative possibility that it could have had lasting effects on his mental state.

of how Morrow himself[3] was ever harmed to be overstated, and we also note that the jury actually did hear testimony at trial about how Morrow and his sister would sometimes be left alone while their mother was away. The habeas court noted that testimony at trial indicated that Morrow's mother moved to the Northeast to escape her badly abusive husband, but it found that new evidence suggested that the move was also partly motivated by sexual abuse Morrow's sister had suffered. However, Morrow's sister testified that she did not tell Morrow about the abuse until after he was arrested, meaning it could not have affected his conduct during the murders. The habeas court notes testimony that, when Morrow was living in his aunt's home in Brooklyn, his aunt and her boyfriend were unkind to him and his sister and disciplined them harshly and that the other children in the home bullied him. We find this new testimony to be less than compelling as alleged proof of trial counsel's failings and resulting prejudice, particularly because testimony was actually presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving.

[3] Morrow's sister testified in the habeas court that the sighted man once molested her. However, there is no evidence that she ever disclosed this to trial counsel pre-trial during their numerous consultations with her, and there is no evidence that Morrow had any knowledge of the incident prior to his crimes.

Morrow presented evidence in the habeas court suggesting that he had been raped by his cousin as a child. However, we note that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history. We disagree with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child or because the alleged perpetrator had once allegedly attempted to molest another cousin on a dare. Finally, although we do not find that counsel performed deficiently in failing to discover Morrow's alleged rapes, particularly because Morrow himself never made such allegations pre-trial, we also note with regard to any resulting prejudice that Morrow's only direct evidence of the alleged rapes even in the habeas court was his own statement to a psychologist. We have said the following about such circumstances:

> Although an expert witness may rely on the statements of others in forming his or her expert opinions, those opinions should be given weight only to the extent that the statements upon which they rely are themselves found to have been proven reliable. An expert witness must not be permitted to serve merely as a conduit for hearsay. Therefore, in considering whether a jury in reasonable probability would have been swayed by additional testimony not

> presented by counsel, we do not assume the correctness of the facts alleged in the experts' affidavits but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.

Whatley v. Terry, 284 Ga. 555, 565 (V) (A) (668 SE2d 651) (2008) (footnotes omitted). Thus, we conclude that the testimony of Morrow's expert about Morrow's recent allegations about the rapes would not have been given great weight by the jury.

The habeas court highlighted Morrow's evidence suggesting that his mother had dated a man who was "cruel and controlling," would force Morrow to help him do his janitorial work, would punish Morrow with a belt,[4] and would abuse Morrow's mother. We note, however, that trial counsel did present testimony at trial from a psychologist showing that the boyfriend had been abusive to Morrow's mother and had once cruelly mocked Morrow when he attempted to defend his mother with a baseball bat.

The habeas court notes evidence presented in the habeas court suggesting one of Morrow's mother's later boyfriends might have sexually abused

[4] We note that the testimony in the habeas court was somewhat inconsistent regarding the degree of harshness involved. We also note that there was inconsistent testimony about whether this boyfriend might have made sexual comments to Morrow's sister, although we also note that there was no evidence showing that Morrow was aware of those alleged comments.

Morrow's sister. However, our review of the record does not reveal that Morrow was ever aware of this alleged abuse; therefore, it would not have affected the jury's assessment of his moral culpability in the murders if it had been presented at trial.

Although we do not enumerate all of the examples here, we note that much of the habeas court's order is simply a recitation of the same basic life history that was outlined for the jury at trial.

Finally, the habeas court discusses the new testimony presented by the psychologist who testified at Morrow's trial. The habeas court found that the psychologist's testimony would have been enhanced if the psychologist had been aware of the additional alleged emotional traumas that Morrow had faced as a child. As we have outlined above, the psychologist's trial testimony reveals that his pre-trial evaluation of Morrow through repeated interviews with him was thorough, and his trial testimony set forth a compelling picture for the jury. We find that the additional matters discussed above, including such things as Morrow's having been treated badly in his aunt's home and the additional evidence of his having been mistreated by his mother's boyfriend, would not have significantly enhanced the psychologist's trial testimony in the eyes of the

jury. As to Morrow's essentially-unsubstantiated claim of rape, our discussion above demonstrates that trial counsel did not perform deficiently regarding those allegations because Morrow never revealed them pre-trial and that those allegations, which are based essentially on only Morrow's own report, would have been regarded as suspect by the jury even if we were to assume that they should have been discovered pre-trial.

2. Information from an Independent Forensic Expert

Morrow presented testimony from an expert in forensics. We find that, even assuming the correctness of this expert's new testimony, there is no substantial prejudice as to either phase[5] of Morrow's trial arising out of trial counsel's failure to present similar testimony.

First, the expert claims that the evidence at the crime scene shows that Ms. Woods was standing rather than sitting when Morrow shot her, causing her to fall backwards over a chair. Although this testimony would have tended at trial to confirm Morrow's version of how the three victims were arranged in the room when he started shooting them, it would not have had a significant impact

[5] The issue of trial counsel's performance regarding potential testimony from a forensic expert during the sentencing phase is raised in the Warden's appeal, and it is raised regarding the guilt/innocence phase in Morrow's cross-appeal.

on the jury in light of the fact that the evidence was clear that Morrow began shooting simply because he was upset by what Ms. Woods had said to him rather than because of any threat he sensed. In fact, Ms. Horne herself testified at trial in a manner consistent with Morrow's new expert testimony, as she claimed that she "remember[ed] Tonya falling back in the chair." Thus, we conclude that trial counsel's failure to obtain expert testimony like this was not prejudicial.

Second, Morrow's new expert has testified, contrary to the extensive expert testimony at trial, that Ms. Young's hand was shot through during the struggle in her bedroom and that the shot then grazed her forehead. This contrasts with the State's evidence at trial showing that a shot was fired inside the bedroom but did not strike Ms. Young, that Ms. Young's forehead likely was injured when her head struck a doorframe during the struggle, and that Morrow then injured Ms. Young's hand when he shot through it and into the side of her head as she shielded herself. Morrow actually relied on the State's testimony showing that the injury to Ms. Young's forehead was not from a gunshot to argue to the jury that the injury could have been simply the result of a fall. Our review of Morrow's new expert testimony leads us to conclude that

Morrow cannot show prejudice for two reasons. First, we believe that the jury would, like us, favor the testimony of the State's experts upon reviewing the two contrasting accounts of precisely how the struggle with Ms. Young transpired prior to the final shot to her head. Second, even if the jury chose to believe the version of events set forth by Morrow's new expert, that version would not be significantly mitigating, because it still depicts Morrow as having struggled with Ms. Woods for the gun in the bedroom, chasing her as she fled into the hallway, grabbing her by her hair as she lay helpless on the floor, and shooting her in the head.

Finally, Morrow's new expert testified that the clicking sound heard by Ms. Horne and the unspent bullet on the floor next to Ms. Woods' feet could have been the result of Morrow's clearing a jam in his gun rather than his reloading. We find this testimony not to be mitigating for two reasons. First, the testimony would have been essentially cumulative of similar testimony from an expert for the State, which the State even highlighted in its closing argument. Second, regardless of whether Morrow was clearing a jam in his gun or reloading, it is clear that he was taking active steps to prepare his gun to continue his murderous rampage.

C. Form of the Sentencing Verdict

In his argument regarding the form of the sentencing verdict, which is discussed further below, Morrow argues that his trial counsel rendered ineffective assistance by failing to object. Specifically, Morrow argues that it is not possible to determine from the jury's verdict if the jury, having clearly found in its verdict multiple statutory aggravating circumstances for each of the individual murders, concluded that a death sentence was the appropriate sentence for the murder of Barbara Ann Young, for the murder of Tonya Woods, or for each of those murders. See OCGA § 17-10-31 (providing that, except in cases of treason or aircraft hijacking, a death sentence may only be imposed upon a finding of one or more statutory aggravating circumstances); OCGA § 17-10-30 (b) (setting forth the statutory aggravating circumstances). We conclude that there is no reasonable probability that the jury would have imposed anything less than two separate death sentences for the two murders if trial counsel had successfully objected to the form of the sentencing verdict.

D. Combined Effect of Individual Ineffective Assistance Claims

In light of the foregoing discussion regarding the various ways in which we have found or have assumed trial counsel's performance to have been

deficient, we conclude that there is not a reasonable probability that the absence of those deficiencies would have changed the outcome of either phase of Morrow's trial. See Holsey, 281 Ga. at 812 n.1 (considering the combined effect of trial counsel's deficiencies); Lajara, 263 Ga. at 440-441 (3) (rejecting a claim solely on the basis of a lack of prejudice). Accordingly, we refuse to disturb Morrow's convictions and order Morrow's death sentence reinstated.

III. Remaining Cross-Appeal Claims

A. Compositions of the Grand and Traverse Juries

Morrow claims that the compositions of his grand and traverse juries were unconstitutional and violated OCGA § 15-12-40 because Hispanic persons were under-represented on the lists from which those juries were drawn. The habeas court correctly concluded that it was not free to re-examine this claim on habeas corpus, because the claim was decided adversely to Morrow on direct appeal. See Hall v. Lance, 286 Ga. 365, 376 (III) (687 SE2d 809) (2010) (holding that matters decided on direct appeal may not be re-examined by the habeas courts); Morrow, 272 Ga. at 692-695 (1) (addressing Morrow's jury composition claim on direct appeal). Morrow argues that the habeas court should have re-opened this claim, arguing that the release of the 2000 Census has revealed new facts

which should now be considered. See Lance, 286 Ga. at 376 (III) (noting that habeas courts "should not reconsider issues previously addressed by this Court where there has been no change in the law or the facts since this Court's decision"); Bruce v. Smith 274 Ga. 432, 434 (2) (553 SE2d 808) (2001) (noting that, "[w]ithout a change in the facts or the law, a habeas court will not review an issue decided on direct appeal"). But see Head v. Hill, 277 Ga. 255, 257 (II) (A) (1) (587 SE2d 613) (2003) (noting that a claim based on new law may only serve as the basis for habeas corpus relief if the new law is of the type that is given retroactive effect). This Court allows claims to be revisited on habeas corpus where new facts have developed since the time of the direct appeal not because the Court intends to allow prisoners to have a second chance to prove their claims but, instead, because a claim that is based on facts that did not actually exist at the time of direct appeal is essentially a different claim. We reject Morrow's argument that his jury composition claim should be re-opened, because we find that he has pointed merely to a new means by which the relevant facts might be proven rather than to any new underlying facts. His present claim does not present a new claim. Furthermore, even if this claim were not barred by res judicata, it would lack merit in light of our holding that

jury commissioners properly rely on the most-recent Decennial Census that is available at the time jury lists are constructed. See Williams v. State, 287 Ga. 735 (699 SE2d 25) (2010).

B. Proportionality of Morrow's Death Sentence

This Court held on direct appeal that the death penalty was not disproportionate punishment in Morrow's case. See Morrow, 272 Ga. at 703 (17). However, Morrow argues that this Court should re-examine that question, particularly in light of the new evidence that he has presented in the habeas court. As this Court has done in the past, we pretermit whether a re-examination of the proportionality of a death sentence by this Court on habeas corpus might ever be appropriate. Instead, we simply conclude that no cause to consider doing so exists in this case, a case that involves two especially-brutal murders and clear evidence of escalating prior violence toward the main target of Morrow's discontent, Ms. Young. See Schofield v. Meders, 280 Ga. 865, 871 (8) (632 SE2d 369) (2006) (stating that the Court "perceive[d] no reason to re-examine the issue [of proportionality]"); Fleming v. Zant, 259 Ga. 687, 688-689 (2) (386 SE2d 339) (1989) (refusing to "reach the issue of whether there may be some circumstances under which a second proportionality review would

be appropriate").

C. Form of the Sentencing Verdict

As was noted above in the discussion of the alleged ineffective assistance of counsel, Morrow argues that the form of the jury's sentencing verdict in his trial was improper in that it did not clearly indicate that the jury had unanimously recommended a death sentence for either of the two individual murders but, instead, simply found multiple statutory aggravating circumstances regarding each of the individual murders and recommended one unified death sentence. The habeas court erred by finding this claim to be barred as previously litigated, because, although the underlying facts of the issue were briefly noted by this Court sua sponte in a footnote outlining the procedural history of the case, the issue was not raised as a distinct claim in Morrow's appeal. See Morrow, 272 Ga. at 692 n.1 (noting the form of the jury's sentencing verdict). However, the habeas court correctly found in the alternative that this claim was barred by procedural default. See Hall v. Brannan, 284 Ga. 716, 725-726 (III) (670 SE2d 87) (2008). The bar to procedurally-defaulted claims can be overcome by satisfying the cause and prejudice test, and the showing of "cause" under that test can be made by

demonstrating that counsel rendered ineffective assistance under constitutional standards. See id. However, Morrow's counsel cannot be regarded as having rendered deficient performance on appeal, because they could not have successfully raised a claim about the jury's sentencing verdict on direct appeal in light of the fact that the issue had not been preserved by objection at trial. Likewise, as is discussed above, Morrow cannot show the ineffective assistance of his counsel at trial, because he has failed to show that an objection at trial would have in reasonable probability led to anything other than the imposition of two death sentences, one for each of the murders. Thus, Morrow's attempt to rely upon ineffective assistance of counsel to satisfy the cause and prejudice test fails, and this claim remains barred by procedural default.

D. Claims that are Deemed Abandoned

In a footnote, Morrow has purported to incorporate all remaining issues that he raised in the habeas court. These unspecified, unsupported claims are deemed abandoned. See Supreme Court Rule 22; Hall v. Terrell, 285 Ga. 448, 457 (III) (679 SE2d 17) (2009).

Judgment reversed in S11A0937. Judgment affirmed in S11X0938. All the Justices concur.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

SCOTTY GARNELL MORROW,)
Petitioner,)
v.) Habeas Corpus
) Case No. 2007-V-769
HILTON HALL, Warden)
Georgia Diagnostic Prison,)
Respondent.)

ORDER

This case is before the court on Petitioner's Amended Petition for a Writ of Habeas Corpus challenging his convictions and sentence of death imposed in the Superior Court of Hall County, Georgia (Criminal Action No. 95-CR-0264A). Having considered the Petitioner's original and amended Petitions for Habeas Corpus, Respondent's Answers to the Petitions, the record at trial and on appeal, evidence submitted at the habeas corpus evidentiary hearing and the pleadings filed in the instant proceeding, including the post-hearing briefs submitted on behalf of both parties, the Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and hereby GRANTS the Petition for a Writ of Habeas Corpus as to the sentence of death and VACATES the sentence of death.

PROCEDURAL HISTORY

Petitioner was arrested on December 29, 1994 for the murders of Barbara Ann Young and Tonya Woods and the aggravated assault of LaToya Horne. All three women were shot the morning of December 29 during a confrontation between Petitioner and Ms. Young. Petitioner was arrested within hours of the crimes. Gainesville attorneys William Brownell, Jr. and Harold Walker, Jr. were appointed to represent him shortly thereafter.

On March 6, 1995, a grand jury indicted Petitioner on two counts each of malice murder and felony murder, six counts of aggravated assault, and one count each of aggravated battery, cruelty to a child, burglary and possession of a firearm during the commission of a felony. The State filed notice that it intended to seek the death penalty on May 1, 1995. After protracted motions litigation, a jury convicted Petitioner of malice murder and other crimes on June 26, 1999 and sentenced him to death three days later, finding as aggravating factors that the murder of Ms. Young was outrageously vile, horrible or inhuman in that it involved torture and depravity of mind, that the murder of Ms. Woods was outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind and an aggravated battery to Ms. Woods before her death, that the murder of Ms. Woods was committed while Petitioner was engaged in the commission of the aggravated battery of Ms. Horne; and that the murders of Ms. Young and Ms. Woods were committed while Petitioner was engaged in the commission of a burglary. The jury did not render a sentencing decision on each malice murder count separately but rather recommended a single death sentence without specifying the murder count for which that sentence should be imposed. The trial court constructively amended the verdict to consist of only a single malice murder conviction and then imposed a single death sentence upon that malice murder conviction.

The Supreme Court of Georgia affirmed Petitioner's convictions and sentence of death and the United States Supreme Court denied certiorari review of that decision. *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000); *Morrow v. Georgia*, 532 U.S. 944, 121 S.Ct. 1408 (2001). Petitioner thereafter initiated the instant challenge to his convictions and sentence of death. An evidentiary hearing was held on Petitioner's claims on April 25-26, 2005. Following the hearing and close of evidence, the parties submitted post-hearing briefs. This Order follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PETITIONER'S CLAIMS NOT PROPERLY BEFORE THE COURT.

The doctrine of *res judicata*, making judgments conclusive, applies to habeas corpus proceedings and to the rulings and findings of habeas courts. *Walker v. Penn*, 271 Ga. 609, 610, 523 S.E.2d 325 (1999); *Elrod v. Ault*, 231 Ga. 750, 204 S.E.2d 176 (1974). For this reason, issues actually litigated and decided by the Georgia Supreme Court on direct appeal will not be reviewed again by the Court absent a showing of a miscarriage of justice. *Turpin v. Todd*, 268 Ga. 820, 831, 493 S.E.2d 900 (1997). Any claim of error or violation of Petitioner's rights decided adversely to him on direct appeal is barred at this stage of the proceedings, and habeas corpus relief is hereby DENIED as to each such claim or alleged error. *See Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78.

Georgia law also requires that errors or deficiencies in Petitioner's trial be objected to and pursued on direct appeal if possible. Issues which Petitioner failed to properly raise and preserve at trial or failed to pursue on direct appeal are procedurally defaulted and may not be litigated in a habeas corpus proceeding absent a showing of cause and actual prejudice or a showing of a miscarriage of justice. *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). Habeas corpus relief is hereby DENIED as to any claim of error or violation of Petitioner's rights that Petitioner could have raised at trial or pursued on direct appeal.

1. Petitioner's Claim Regarding the Constitutionality of the Unified Appeal Procedure (Claim I of the Amended Petition).

Petitioner asserts that O.C.G.A. § 17-10-36 (the Unified Appeal Procedure) is facially unconstitutional and that its operation deprived him of various constitutional rights. The Court

takes note that constitutional challenges to the Unified Appeal Procedure have been considered and rejected by the Georgia Supreme Court on several occasions. *Rogers v. State*, 256 Ga. 139, 146, 344 S.E.2d 644 (1986); *Sliger v. State*, 248 Ga. 316-318, 282 S.E.2d 291 (1981). The Court finds that this issue is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

2. Petitioner's Claim That His Death Sentence Is Arbitrary And Disproportionate. (Claims II and III of the Amended Petition).

Petitioner also alleges that his death sentence was imposed in part upon the basis of arbitrary and improper factors and consequently, that his sentence is unconstitutionally disproportionate to the sentences imposed upon similarly-situated Georgia murderers. This Court finds that the evidence, while not sufficient in its own right to form a basis for relief, raises the specter that improper bias infected the District Attorney's decision to seek death, and consequently, this Court finds that careful examination of the proportionality of Petitioner's sentence is warranted in the instant case.

Having completed that careful examination, this Court finds the need to write separately regarding its independent conclusion that Petitioner's sentence is unconstitutionally severe given Petitioner's personal moral culpability and the rarity with which similar murder offenses are punished with a sentence of death. Nevertheless, this Court is obliged to stop short of vacating Petitioner's sentence upon that ground. *Res judicata* principles prohibit this Court from resolving the same claims previously raised and resolved in connection with Petitioner's case. *Head v. Carr*, 273 Ga. 613 (2001). Respondent correctly points out that the proportionality of Petitioner's sentence was previously addressed by the Georgia Supreme Court. (R. Br. at 95). While this Court believes that Petitioner's current claim includes important evidence and

considerations not addressed by the Georgia Supreme Court in adjudicating the proportionality of Petitioner's sentence on direct review, *Morrow v. State,* 272 Ga. 691, 703 (2000), it is not clear that this Court is authorized to perform a second proportionality review at this juncture. *Fleming v. Zant*, 259 Ga. 687, 688-689, 386 S.E.2d 339, 340 (1989) (holding open the question of whether "there may be some circumstances under which a second proportionality review would be appropriate"). Should Petitioner's death sentence, vacated in Sections II, *infra*, be reinstated at any point, this Court hopes that the Georgia Supreme Court will carefully reexamine the proportionality of Petitioner's sentence pursuant to the requirements of O.C.G.A. §17-10-35(c) and the U.S. and Georgia Constitutions.

Trial counsel's ineffective representation at trial and on appeal precluded the Georgia Supreme Court from considering important evidence and argument.[1] Specifically, the record adduced before this Court includes: (1) evidence of improper factors and motivations which may have influenced the Hall County District Attorney's decision to seek the death penalty and the District Attorney's decision to decline Petitioner's offer to plead guilty in exchange for a sentence less than death, (2) forensic evidence and expert testimony which suggest that

[1] Some of these facts and arguments are thus procedurally defaulted by virtue of Petitioner's failure to raise them. This Court finds that trial and appellate counsel's constitutionally ineffective representation, described below, constitutes cause to overcome the default of these facts. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Holladay v. Haley,* 209 F.3d 1243, 1254 ("constitutionally ineffective assistance of counsel can constitute cause"); *Orazio v. Dugger,* 876 F.2d 1508, 1513 (11th Cir. 1989) (failure to raise claim on direct appeal, resulting in later bar of the claim, constituted ineffective assistance of appellate counsel). Should any court find that Mr. Morrow's sentence is disproportionate, prejudice to overcome the default will have been satisfied as well. *Davis v. Secretary, Department of Corrections,* 341 F.3d 1310 (11th Cir. 2003) (when trial counsel performs deficiently in failing to preserve issues on appeal, prejudice test is whether there was a reasonably likelihood of success on the claim).

Petitioner's crime was less aggravated than portrayed at trial and that Petitioner's testimony in his own defense *could* be reconciled with the physical evidence, (3) additional evidence bearing upon Petitioner's mental state at the time of the murders, and (4) argument presented on Petitioner's behalf citing numerous cases more aggravated or equally aggravated than Petitioner's that resulted in a life sentence or term of years. (See P. Br. at 111-119). Collectively, these factors beg a second look at the constitutionality of Petitioner's sentence.

First, this Court notes the evidence that the Hall County District Attorney may have weighed improper factors in her decision to seek a death sentence. (See P. Br. at 121-124). Because Georgia's system for determining death penalty eligibility places tremendous discretion in the hands of the elected District Attorney for each judicial district, such evidence merits careful consideration. Unlike most states, Georgia has no crime of "capital murder" and Georgia does not have second and third degree murder, only a single crime of "malice murder." *See* O.C.G.A. 16-5-1 (defining murder as causing the death of another with "malice aforethought, either express or implied or caus[ing] the death of another human being."). Just one of ten statutory aggravating circumstances must be present in order to render a given murder a death-eligible offense. *See* OC.G.A. § 17-10-30(b)(1)-(b)(10). Because these aggravating factors are relatively expansive, a great number of murders entail at least one of these circumstances. *See e.g.* O.C.G.A. § 17-10-30(b) (listing as aggravating circumstances such factors as "the offense . . .was committed while the offender was engaged in the commission of [another murder, kidnapping or armed robbery] or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree," and "the offense . . .was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim.") In short, Georgia

prosecutors would be authorized to seek the death penalty for the majority of murder offenses yet in practice, they do not seek death in the overwhelming number of cases.

The result is that whether a person charged with murder will face the death penalty depends largely on the individual county in which the crime occurred, or even more disturbingly, the race of the victim and offender. *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (allowing Georgia to carry out executions even though a person is four times more likely to be sentenced to death if the victim was white than if the victim was African-American). *Compare Bush v. Gore*, 531 U.S. 98 (2000) (When fundamental rights are involved, the Equal Protection Clause of the Fourteenth Amendment requires that there be "uniform" and "specific" standards to prevent the arbitrary and disparate treatment of similarly situated people.).

Because so few standards existed to channel her discretion, the District Attorney who chose to seek the death penalty for Mr. Morrow could have weighed wholly irrelevant considerations in the death calculus. In fact, the evidence presented in the hearing before this Court raises the specter that the District Attorney's political motives and personal bias were at play. Lydia Sartain had been District Attorney for the Northeastern Judicial District for more than a year prior to Petitioner's arrest. (HT 111).[2] Trial counsel testified that her election was the first highly contested partisan election for District Attorney the Northeastern Judicial District

[2] For the purposes of this Order, references to the record below shall be abbreviated as follows:

HT = Habeas Corpus Evidentiary Hearing Transcript in *Morrow v. Schofield*, Case No. 2001-V-769.
P.Ex. = Petitioner's Exhibit in *Morrow v. Schofield*, Case No. 2001-V-769.
R.Ex. = Respondent's Exhibit in *Morrow v. Schofield*, Case No. 2001-V-769.
ROA = Record on Appeal to the Georgia Supreme Court in *State v. Morrow*, 272 Ga. 691; 532 S.E.2d 78 (2000).
TT = Trial Transcript in *State v. Morrow*, Case No. 95-CR-0264A.
PHT = Pre-trial Hearing Transcript in *State v. Morrow*, Case No. 95-CR-0264A.

had seen. (HT 283). Though a practiced attorney and well-connected politician, Ms. Sartain won by only a narrow margin against a largely unknown opponent with a minimally funded campaign. (HT 282-284). Ms. Sartain may have been aware that her decisions were being watched closely by an increasingly conservative constituency. As Mr. Walker testified:

> Suddenly it became who is reflecting the political values of the county. There had been some difficult decisions made in previous murder and death penalty cases that the attorneys in town were convinced, and I believe, were done for political considerations, as well. It was just that we were no longer a tiny town where you knew you were going to get elected, you knew you were going to succeed because everybody knew the quality of your work. It suddenly became a county that was doubling in size and which voters were going to have a say in how the county was legally run and how the decisions were made. And I think we have suffered in a way from that. And I fear that it may have affected how this case was handled.

(HT 283). Mr. Brownell shared his co-counsel's suspicions that the political ramifications motivated Ms. Sartain's decision to pursue the death penalty in Mr. Morrow's case:

> Q: When Ms. Sartain, the district attorney at the time, noticed this case for death, were you surprised?
>
> A: Because of the politics involved, no, I was not. Did I feel that it was a case that warranted the announcement factually, substantively? No, I did not think it did, but it was a very political atmosphere and she was a fairly new DA. For that reason I wasn't surprised.

(HT 113; *accord* Brownell Aff., P.Ex. 4 at HT 550 "For Lydia, there was a great deal at stake politically).

Along with these political incentives, the evidence suggests that the District Attorney may have had a considerable personal interest -- an interest largely unrelated to the

equities of Petitioner's case -- in achieving the most severe sentence possible. Mr. Walker testified that approximately a year after Petitioner's arrest, the trial judge inquired into the possibility of a negotiated resolution to the case. (HT 233; *see also* 12-14-95 PHT). When Mr. Walker responded that he believed it an appropriate case for a life sentence based upon a number of factors, including that the offense occurred in the context of a heated domestic dispute, Ms. Sartain became incensed:

> As I left the office, Ms. Sartain became very upset, literally jabbed me in the chest, and said don't you ever refer to it as just a domestic violence case again. I had known Lydia for quite a while. . . She seemed to be able to sift out very well the cases that needed special attention. And I had hoped she would do that with this case in making a final decision about whether it was a death penalty. On that day, though, it was obvious that there was something about this case and something about Scotty that really set her off. I don't think she was doing it just to try to intimidate me. I don't think she was doing it as a tactic. I think it really set something off in her mind because she became infuriated. I had never seen her look that way before.

(HT 234; *see also* Walker Aff., P.Ex.2 at HT 439; *and* HT 129, "she literally had her finger and was poking [Mr. Walker] in the chest and poked him all the way to the wall saying, 'Don't you ever describe this case that way,' got furious, turned around and walked off.").

It appears the District Attorney also had an acrimonious professional history with defense counsel which may have fueled her decisions. Lead counsel, Mr. Brownell, testified that he had worked under Ms. Sartain's supervision while an Assistant District Attorney and left that position just days prior to his appointment to Mr. Morrow's case. He and Ms. Sartain "did not see eye to eye on a whole lot of different things." (HT 111, HT 131). Mr. Brownell's wife also served under Ms. Sartain's supervision as the Victim Witness Assistance Program coordinator for the Judicial Circuit. Though Mr. Brownell's wife had been recognized repeatedly for her

accomplishments in this position, Ms. Sartain terminated her, a decision Mr. Brownell attributed to Ms. Sartain's intolerance for "women who were extremely capable." (HT 131). Not only did Mr. Brownell resign his position as ADA in response, but he actively supported Ms. Sartain's opponent's campaign in the subsequent election, a fact of which she was aware. (HT 132).

Thus, any number of improper considerations may have influenced the prosecutorial decision to seek the death penalty in this case.[3] However, Petitioner has not proven conclusively that the District Attorney acted with a discriminatory or arbitrary motive in seeking his execution[4] sufficient to require that his death sentence be vacated on that basis. *See McCleskey v. Kemp*, 481 U.S. 279, 293, 107 S.Ct. 1756, 1767, citing *Whitus v. Georgia,* 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967) (death sentence would be improper upon a demonstration that the decision-makers acted with discriminatory purpose). Again, however, this Court finds evidence sufficient to merit a careful and thorough re-examination of the appropriateness of a death sentence in this case.

The possibility that the District Attorney was biased in choosing to prosecute the case capitally rendered the Georgia Supreme Court's automatic proportionality review of Petitioner's sentence of central importance in guarding Petitioner's right to be sentenced in a manner

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[3] This Court is also persuaded that the District Attorney's personal and political motives were a potential source of her continuing refusal to entertain plea negotiations. The unrefuted evidence is that Mr. Morrow immediately took responsibility for his crime and expressed tremendous remorse. The trial judge encouraged the parties to discuss possible resolutions on multiple occasions. Trial counsel repeatedly approached the District Attorney and the Assistant District Attorneys responsible for Petitioner's case, indicating Mr. Morrow's willingness to accept a life without parole sentence. The District Attorney consistently refused discussions. (HT 128 – 131; 233 – 235).

[4] The Court notes that neither party attempted to elicit testimony from Ms. Sartain herself, making it impossible for the Court to determine her motives with any confidence.

consistent with the treatment of similarly situated offenders. *See* O.C.G.A. § 17-10-35 (charging the Georgia Supreme Court with the task of reviewing *every* death sentence imposed in the Superior Courts of the state, providing "an added safeguard from the imposition of an arbitrary sentence"); *Gregg v. Georgia,* 428 U.S. 153, 204 (upholding Georgia's amended capital sentencing scheme in part upon a finding that automatic proportionality review by the Georgia Supreme Court would protect against the influence of impermissible factors); *Thomason v. State*, 268 Ga. 298, 314, 486 S.E.2d 861, 875 (1997) (Bentham, C.J. concurring in part and dissenting in part). Georgia's death penalty sentencing scheme requires the Court not only to examine the lower court proceedings for error on direct review, but to assure that "the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor" and to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. §17-10-35(c)(1),(3). Specifically, that Court must focus on "how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed" and to set aside death sentences that are out of line with sentences imposed for similar crimes. *Terrell v. State*, 276 Ga. 34, 40, 572 S.E.2d 595, 601 (2002).

The Georgia Supreme Court however, was hampered in its ability to conduct an accurate and meaningful proportionality review by trial counsel's lack of effective representation. As detailed below, trial counsel failed to support Petitioner's trial testimony regarding the spontaneous and disorganized nature of his crime with the testimony of a qualified forensic examiner, and failed to present complete evidence regarding Petitioner's mental state at the time of the crime. Given this gap in the evidence and the evidence of prosecutorial bias, this Court invites the Georgia Supreme Court to undertake a second proportionality review. After

independently considering the facts and circumstances of Petitioner's crime, Petitioner's personal history, and reported murder cases resulting in sentences of life, life without parole, and death, this Court concludes that execution is a disproportionate sentence for Petitioner's crimes. Furthermore, this Court suggests that adequate review by the Georgia Supreme Court on direct review would have resulted in such a finding.

Courts have long recognized that a death sentence is qualitatively different than a sentence of life imprisonment:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also Gardner v. Florida*, 430 U.S. 349, 357 (1977). Because of this qualitative difference, crimes for which the offender is executed must fall within a narrow class of murders "more horrid than others." *Thomason*, 268 Ga. at 315 (Benham, C.J. concurring in part and dissenting in part); *see also Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1195. When the crime falls outside this core class of the most abhorrent murders, a death sentence is constitutionally and statutorily prohibited. O.C.G.A. 17-10-35(c)(3). *Enmund v. Florida,* 458 U.S. 782, 798 (1982).

Therefore, on direct review, the Georgia Supreme Court was tasked with determining whether "in cases similar to Petitioner's throughout the state the death penalty has been imposed generally, and not wantonly and freakishly." *Horton v. State*, 249 Ga. 871, 880, 295 S.E.2d 281, 289 (1982). Petitioner has presented statistics reflecting that in the years surrounding his arrest there were an average of more than 560 murders each year. (P. Br. at 108, citing *Georgia Bureau of Investigation, Statewide Profile of Reported Index Crimes, 1980 – 2004.*) The vast

majority of these offenders were not given a death sentence. *See* Bill Rankin, et al., *A Matter of Life or Death: Death Still Arbitrary, An AJC Special Report*, ATLANTA JOURNAL-CONSTITUTION, Sep. 24-27, 2007 (conducting statistical analysis of the 1315 death eligible murder cases in Georgia between the years 1995 to 2004 and finding that only 4.3% resulted in death sentences; even of the most aggravated ten percent of those 1315 cases, less than a quarter were sentenced to death).

Petitioner contends that a large number of these murders were the unplanned killing of an intimate during a domestic dispute, and that these crimes typically do not result in imposition of the death penalty. This Court agrees with that assessment. As related *infra*, Mr. Morrow's crime was spontaneous, occurred in response to at least some provocation from victim Tonya Woods, and was complete within the span of a couple moments. There is reliable evidence to suggest that Petitioner, while not legally insane, was laboring under emotional distress at the time of the crime. (*See e.g.* HT 2518-2520).

As Mr. Brownell, a ten year career prosecutor until immediately prior to his appointment to Petitioner's case, testified at the evidentiary hearing, none of the classic circumstances of a death penalty offense were present:

> Mr. Brownell: . . .And the more I got to know Scotty and develop these surrounding circumstances, the more I was convinced that if he was convicted of murder I was convinced that he definitely should not have received the death sentence.
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> Q [by counsel for Petitioner]: That is a big step to make from going from ten years as almost a career prosecutor to having a case like this and meeting a client like that. I mean, how did that feel to you?
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> A: Every case has its own circumstances. Anthony Mobley was a case that even-- I was raised Catholic so my inclination is sort of an anti-death penalty anyway. There is that slight inclination. But

> ten years as a prosecutor kind of counters that. With Anthony Mobley and the John Waldrip, Tommy Waldrip case up in Dawson County, those were cases that I had absolutely no difficulty seeing that the death penalty would have been appropriate. This case was absolutely nothing like that.
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> Q: What was absent from this case in your opinion?
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> A: Premeditation. With those cases there was an absolute lack of remorse, a likelihood that there would be reoccurrence in some of those other cases.
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> Q: When you say reoccurence, future dangerousness?
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> A: Reoccurrence of significant violence, including even murder. I didn't see that even as a remote possibility in Scotty's case. He had no serious criminal history. . .

(HT 120-121).

Cases involving hot-blooded crimes are not traditionally viewed as death penalty offenses by juries and prosecutorial decision-makers. This Court notes the relative rarity with which the death penalty is imposed in Georgia cases in which an offender kills a spouse or girlfriend under circumstances that suggest the crime was hot-blooded or committed in reaction to provocation. Petitioner's brief to this Court recites a number of published cases in which particularly aggravated killings of a former or current partner resulted in life sentences. (P. Br. at 111-114, citing *Hayes v. State*, 562 S.E.2d 498 (Ga. 2002); *Wilson v. State*, 562 S.E.2d 164 (Ga. 2002); *Somchith v. State*, 527 S.E.2d 546 (Ga. 2000); *Miller v. State*, 561 S.E.2d 810 (Ga. 2002); *See Smith v. State*, 475 S.E.2d 613 (Ga. 1996); *Massengale v. State*, 441 S.E.2d 238 (1994); *Wessner v. State*, 223 S.E.2d 141 (Ga. 1976), *overruled on other grounds, Jordan v. State*, 276 S.E.2d 224 (Ga. 1981); *Roller v. State*, 453 S.E.2d 740 (Ga. 1995); *Smith v. State*, 508 S.E.2d 173 (Ga. 1998); *Fletcher v. State*, 545 S.E.2d 921 (Ga. 2001); *Cash v. State*, 368 S.E.2d 756 (Ga. 1988).

Petitioner also correctly points out that examination of published cases does not capture those instances in which the defendant pled guilty and received a sentence less than death, or in which a sentence of less than death was imposed following trial and the defendant elected not to appeal.[5]

This Court does appreciate the most aggravated aspects of Petitioner's crime – that Petitioner murdered two victims and attempted to kill a third while in a home where children could have been injured by the shots. However, those factors alone do not appear to place Petitioner's crime into a category of Georgia murders which routinely result in a death sentence. Rankin, et al., *supra* (finding that of 172 multiple murder cases between 1995 and 2004, only 17 offenders received the death penalty).

Consequently, among the sizeable number of individuals convicted of similar and more aggravated crimes, Petitioner's sentence seems unusually severe. The prosecutor's election to seek the death penalty in the instant case, and the jury's subsequent death verdict, are, in the opinion of this Court, an aberration. Therefore the death sentence Petitioner received is "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . .[because Petitioner] is among a capriciously selected handful upon whom the sentence of death has in fact been imposed." *Furman*, 408 U.S. at 309-310 (Stewart, J., concurring).

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[5] The Georgia Supreme Court has ruled that in conducting proportionality review, the Court does "compare cases as to which the death penalty could have been sought by the prosecutor but was not." *Horton v. State*, 249 Ga. 871; 295 S.E.2d 281 (1982).

In conducting its initial proportionality review, the Georgia Supreme Court cited cases with crimes purportedly similar to Petitioner's offense in the Appendix to its opinion.[6] *Morrow v. State*, 272 Ga. 691, 703, 532 S.E.2d 78, 89-90 (2000). However, of the ten death penalty cases cited by the Georgia Supreme Court, nearly half involve convictions and/or sentences which were subsequently vacated by reviewing courts upon a finding that the sentence was the result of constitutional error. *See Terry v. Jenkins*, 280 Ga. 341, 347, 627 S.E.2d 7 (2006), *Schofield v. Gulley,* 279 Ga. 413, 416, 614 S.E.2d 740, 743 (2005); *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005); *Head v. Stripling*, 277 Ga. 403, 590 S.E.2d 122 (2003).

Moreover, many of the ten cases cited by the Georgia Supreme involved substantial planning, torture, or a killing committed for pecuniary gain, reflecting a degree of culpability simply not reflected in the evidence presented at Petitioner's trial and before this Court. (P. Br. at 116-117, citing *Gulley v. State,* 271 Ga. 337, 338-339, 519 S.E.2d 655, 658-659 (1999); *Cook v. State,* 270 Ga. 820, 821, 514 S.E.2d 657, 660 (1999); *Jenkins v. State,* 269 Ga. 282, 283-284, 498 S.E.2d 502, 507-508 (1998); *DeYoung v. State,* 268 Ga. 780, 781-782, 493 S.E.2d 157, 161-

[6] Despite the Court's prior ruling in *Horton, supra*, the Court did not examine or consider *any* similar cases which resulted in a sentence less than death. Both this Court, at least one former Supreme Court justice, and legal observers have questioned whether such proportionality analysis satisfies the requirements of O.C.G.A. § 17-10-35(e) and of the Eighth Amendment as outlined in *Gregg v. Georgia,* 428 U.S. 153 (1976). *See Walker v. Georgia*, 129 S.Ct. 453, 457 (mem.) (2008) (Stevens, J., statement regarding the denial of certiorari)("It now appears to be the [Georgia Supreme] [C]ourt's practice never to consider cases in which the jury sentenced the defendant to life imprisonment [when performing the requisite proportionality review on direct appeal]...the likely result of such a truncated review, particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors, is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment"); K. Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure*, 64 U. Miami L. Rev. 175 (2009). However, that question need not be resolved here.

162 (1997), *Stipling v. State*, 261 Ga. 1, 401 S.E.2d 500, 502 (1991). Only five of the ten total cases cited by the Georgia Supreme Court involved the murder of a current or former spouse or girlfriend. In only one of these cases, *McMichen v. State,* is there even a remote possibility that some minimal provocation existed. Mr. McMichen killed his estranged wife and her new boyfriend. The Court states that McMichen took his five-year old daughter, of whom he had custody, to his wife's trailer for a scheduled visit, where McMichen himself then reportedly provoked a fight with the wife's new boyfriend before shooting both victims. McMichen had previously been overheard saying that if the baby to whom his former wife had just given birth was revealed not to be his, that he would kill her, a fact reflecting premeditation unlike any present in Petitioner's case. 265 Ga. 598, 599-600, 458 S.E.2d 833, 838 (1995). The remaining four cases cited by the Court, though they involve the murder of a current or former partner, all involved considerable planning, callousness, torture, deliberate suffering imposed upon the victim and/or some pecuniary gain. *Palmer v. State,* 271 Ga. 234, 236, 517 S.E.2d 502, 505 (1999); *Tharpe v. State,* 262 Ga. 110, 416 S.E.2d 78, 79-80 (1992); *Lynd v. State,* 262 Ga 58, 59-60, 414 S.E.2d 5, 7 (1992); *Ford v. State,* 257 Ga. 461, 462, 360 S.E.2d 258, 259 (1987).

Finally, the Eighth Amendment to the federal Constitution requires that punishment serve a legitimate end. If a lesser punishment is able to satisfy society's legitimate interests, execution becomes nothing more than the "pointless and needless extinction of life" which is "patently excessive," violating both the Eighth Amendment and Georgia law. *Furman*, 408 U.S. at 312 (White, J. concurring). Given the consistency with which the State employs lesser sentences than death to punish conduct more vile than Petitioner's, and in light of the credible and unrebutted testimony that Petitioner poses no continuing threat while incarcerated, a sentence

less than death would suffice to serve society's legitimate penal interest. (*See* TT 4588-4591; HT 90-93; P.Ex 156 at HT 3048-3417).

Georgia criminal defendants more culpable than Petitioner are routinely given a sentence less than death. Its use in Mr. Morrow's case is thus wholly arbitrary and it is excessive in proportion to the crime for which he stands convicted. This Court holds the view that Petitioner's execution would serve no other purpose than the wanton and unnecessary infliction of pain prohibited by the Eighth Amendment.[7] *Enmund v. Florida,* 458 U.S. 782, 798, 102 S.Ct. 3368 (1982). Should Petitioner's death sentence, vacated *infra*, be subsequently reinstated, this Court suggests that a subsequent re-evaluation of its proportionality by the Georgia Supreme Court would serve the ends of justice.

3. Petitioner's Claim That His Grand Jury Pool Was Unconstitutionally Composed (Claim IV of the Amended Petition).

In paragraphs 2-5, Petitioner alleges that the grand jury pool from which his grand jury was drawn underrepresented Hispanic persons to an unconstitutional degree. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 292 Ga. at 692-695(1). In paragraph 5, Petitioner alleges that O.C.G.A. § 15-12-40 governing the compilation of grand jury lists is unconstitutional and deprived him of his right to a fair cross-section of the community in his grand jury. The Court finds that this issue is procedurally defaulted. *Black v. Hardin*, 255 Ga. at 240. In paragraph 6, Petitioner alleges that the grand jury indictment was invalid due to racial discrimination, the inclusion of personally biased grand jurors, the inclusion of grand jurors biased by pretrial publicity, the State's alleged

[7] The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *See e.g. Furman*, 408 U.S. at 239; *Robinson v. California*, 370 U.S. 660, 666-667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 67 S.Ct. 374 (1947).

failure to present exculpatory and impeaching evidence to the grand jury, and an unconstitutionally comprised jury commission. The Court finds these issues to be procedurally defaulted because they were not raised on direct appeal. *Black v. Hardin*, 255 Ga. at 240. In paragraph 7, Petitioner alleges that the jury commission was unlawfully and unconstitutionally comprised in violation of O.C.G.A. § 15-12-20. The Court finds that this issue is procedurally defaulted. *Id.* The Court DENIES Petitioner relief on this claim in its entirety.

4. Petitioner's Claim That His Traverse Jury Pool Was Unconstitutionally Composed (Claim V of the Amended Petition).

In paragraphs 2-3, Petitioner alleges that the traverse jury pool from which his petit jury was drawn underrepresented Hispanic persons to an unconstitutional degree. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 692-695(1). In paragraph 4, Petitioner alleges that O.C.G.A. § 15-12-40 is unconstitutional and its operation deprived Petitioner of his right to a fair cross-section of the community in his traverse jury. The Court finds that this claim is procedurally defaulted because it was not raised on direct appeal. *Black v. Hardin*, 255 Ga. at 240. In paragraph 5, Petitioner alleges that his traverse jury was unconstitutionally composed due to racial discrimination in the selection of a jury foreperson, the inclusion of personally biased jurors, and the inclusion of jurors prejudiced by pretrial publicity. The Court finds that these issues are procedurally defaulted. *Id.* Also in paragraph 5, Petitioner alleges that the commission which selected his traverse jury was unlawfully and unconstitutionally comprised in violation of O.C.G.A. § 15-12-20. The Court finds that this issue is procedurally defaulted. *Black*, at 240. The Court DENIES Petitioner relief on this claim.

5. Petitioner's Claim Regarding Funding For An Expert Demographer (Claim VI of the Amended Petition).

Petitioner alleges that the trial court violated his constitutional rights by failing to provide funding for an expert demographer to conduct a challenge to the composition of the traverse jury array. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 695-696(2). The Court DENIES Petitioner relief on this claim.

6. Petitioner's Claim That The State Failed To Disclose Material And Exculpatory Evidence (Claim VII of the Amended Petition).

Petitioner claims that the State's alleged failure to disclose material and exculpatory information deprived him of various constitutional rights. The Court finds that this issue is procedurally defaulted because petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

7. Petitioner's Claim That The State Presented False Testimony (Claim VIII of the Amended Petition).

Petitioner alleges that the State violated his constitutional rights by knowingly presenting unspecified false testimony. The Court finds that this issue is procedurally defaulted because petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

8. Petitioner's Claim Regarding The Trial Court's Threat To Order Disclosure Of The Contents Of Ex Parte Applications For Funds (Claim IX of the Amended Petition).

Petitioner alleges that the trial court's alleged threats to require defense counsel to disclose to the State the contents of *ex parte* applications for funds rendered his trial fundamentally unfair and deprived him of various constitutional rights. The Court finds that this

issue is procedurally defaulted because petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

9. Petitioner's Claim Regarding Alleged Improper Comments Of The Trial Court (Claim X of the Amended Petition).

Petitioner claims that allegedly improper and prejudicial comments of the trial court rendered his trial fundamentally unfair and deprived him of various constitutional rights. The Court finds that this issue is procedurally defaulted because petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

10. Petitioner's Claim Regarding Restrictions On Voir Dire (Claim XI of the Amended Petition).

Petitioner alleges that the trial court's restrictions on voir dire deprived him of various constitutional rights. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 698(6) ("[t]he trial court did not improperly restrict voir dire"). The Court DENIES Petitioner relief on this claim.

11. Petitioner's Claim Regarding Excusal Of Venire Members (Claim XII of the Amended Petition).

Petitioner alleges that the trial court violated various constitutional provisions by excusing venire members whose views on the death penalty were not extreme enough to warrant exclusion. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 698(6). The Court DENIES Petitioner relief on this claim.

12. Petitioner's Claim Regarding The Failure To Excuse Certain Venire Members (Claim XIII of the Amended Petition).

Petitioner alleges that the trial court deprived him of various constitutional rights by failing to excuse for cause certain venire members who were personally biased against him or in

favor of the death penalty. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 698(7). The Court DENIES Petitioner relief on this claim.

13. Petitioner's Claim Regarding The State's Peremptory Strikes (Claim XIV of the Amended Petition).

Petitioner alleges that the State exercised its peremptory strikes in a racially discriminatory manner in violation of various constitutional provisions and *Batson v. Kentucky* 476 U.S. 79 (1986). The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

14. Petitioner's Claim Regarding The State's Withdrawal Of Its Consent To A Change Of Venue (Claim XV of the Amended Petition).

Petitioner alleges that the trail court deprived him of various constitutional rights by allowing the State to withdraw its consent to his request for a change of venue and ordering that he be tried in Hall County. The Court finds that this claim is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 697-698(5). The Court DENIES Petitioner relief on this claim.

15. Petitioner's Claim Regarding Allegedly Prejudicial And Inflammatory Evidence (Claim XVI of the Amended Petition).

Petitioner claims that the introduction of allegedly prejudicial and inflammatory evidence deprived him of various constitutional rights. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

16. Petitioner's Claim Regarding Alleged Prosecutorial Misconduct (Claim XVIII of the Amended Petition).

Petitioner claims that alleged instances of prosecutorial misconduct rendered his convictions and death sentence fundamentally unfair and deprived him of various constitutional rights. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

17. Petitioner's Claim Regarding Alleged Improper Restrictions On His Questioning Of A Mental Health Expert (Claim XIX of the Amended Petition).

Petitioner claims that the trial court improperly restricted his questioning of a mental health expert thus depriving him of various constitutional rights. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

18. Petitioner's Challenge To The Jury Instructions Given At The Sentencing Phase Of His Trial (Claim XX of the Amended Petition).

Petitioner claims that the instructions given to the jury by the trial court at the sentencing phase of his trial deprived him of various constitutional rights and rendered his sentence unreliable. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

19. Petitioner's Claim That His Constitutional Right To Confront His Accusers Was Violated (Claim XXI of the Amended Petition).

Petitioner claims that his constitutional right to confront his accusers was violated when the trial court allowed the introduction of out-of-court declarations by deceased victims, and when witness Latoya Horne was improperly permitted to testify to the identity of a person on the

other end of a phone conversation to which she was not a party. The Court finds that this constitutional claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. To the extent that these issues were decided on direct appeal, they are barred from review as *res judicata*. *Morrow*, 272 Ga. at 700-702. The Court DENIES Petitioner relief on this claim.

20. Petitioner's Claim That The State Improperly Presented Evidence Designed Solely To Inflame The Jury (Claim XXII of the Amended Petition).

Petitioner claims that the State improperly presented victim impact testimony, evidence, and argument designed solely to inflame and unduly prejudice the jury in violation of various constitutional rights and Georgia law. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

21. Petitioner's Claim That Juror Misconduct Deprived Him Of His Constitutional Rights (Claim XXIII of the Amended Petition).

Petitioner claims that unspecified and unproven instances of juror misconduct violated various constitutional provisions and deprived him of a fair trial. The Court finds that this claim is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

22. Petitioner's Claim Regarding The Constitutionality Of The Form Of The Sentencing Verdict At Petitioner's Trial (Claim XXIV of the Amended Petition).

Petitioner claims that the form of the sentencing verdict at Petitioner's trial is unconstitutional because the sentencing court merged the two murder counts into one after discovering that the jury had failed to specify for which murder the death sentence was to be imposed. The Court finds that this claim is barred by the principle of *res judicata*. The Georgia

Supreme Court was aware of the form of the jury's verdict, yet did not make a finding of substantive or procedural error when citing to the consolidated verdict. *See Morrow*, 272 Ga. at 692 ("Because the jury did not specify on the jury form that it was recommending a death sentence for both murders, the trial court merged the malice murder conviction for the killing of Tonya Woods with the malice murder conviction for the killing of Barbara Ann Young and imposed a single death sentence").

To the extent that Petitioner failed to raise this claim on direct appeal, the Court finds that this claim is procedurally defaulted. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

23. Petitioner's Claim That His Death Sentence Is Unconstitutional Because The Jury Failed To Return A Unanimous Verdict (Claim XXV of the Amended Petition).

Petitioner claims that the jury's verdict does not reflect a consensus by the jury as to his death sentence because the sentencing verdict failed to specify for which murder the death sentence was being imposed. Petitioner further asserts that this error renders his death sentence unconstitutional. To the extent that the Georgia Supreme Court was aware of the form of the sentencing verdict and chose not to make a finding of substantive or procedural error, the Court finds that this issue is *res judicata*. *See Morrow*, 272 Ga. at 692. To the extent that this claim raises new issues not raised below, the Court finds that portion of the claim to be procedurally defaulted. *Black v. Hardin*, 255 Ga. at 240. The Court DENIES Petitioner relief on this claim.

24. Petitioner's Claim That The Cumulative Effect Of Errors At His Trial Deprived Him Of His Right To Due Process And Rendered His Trial Fundamentally Unfair (Claim XXVI).

Petitioner claims that the various procedural and substantive errors alleged in his petition, when considered as a whole, rendered his trial fundamentally unfair and deprived him of various

constitutional guarantees. The Court notes that "[a]lthough the combined effects of trial counsel's errors should be considered together as one issue, it remains the case that '[t]his State does not recognize the cumulative error rule.'" *Schofield v. Holsey*, 281 Ga. 809, 812, 642 S.E.2d 56 (2007), citing *Bridges v. State*, 268 Ga. 700, 708, 492 S.E.2d 877 (1997). Accordingly, the Court finds that this claim is non-cognizable and DENIES Petitioner relief on this claim.

25. Petitioner's Claim That Lethal Injection Constitutes Cruel And Unusual Punishment And Violates Various Constitutional Provisions (Claim XXVII of the Amended Petition).

Petitioner claims that the Georgia death penalty statute is unconstitutional because it mandates that executions be carried out by lethal injection. The allegation that lethal injection constitutes cruel and unusual punishment is non-cognizable in this habeas proceeding because it is not an assertion of a "substantial denial" of Petitioner's constitutional rights "in the proceedings which resulted in his conviction." *See* O.C.G.A. § 9-14-42(a). Accordingly, the Court DENIES Petitioner relief on this claim.

26. Petitioner's Claim That The Death Penalty Is Imposed Arbitrarily And Capriciously Amounting To Cruel And Unusual Punishment (Claim XXVIII of the Amended Petition).

In paragraph 2, Petitioner claims that Georgia's statutory death penalty procedures are unconstitutional because they do not result in the fair and nondiscriminatory application of the death sentence. The Court finds that this portion of the claim is procedurally defaulted because Petitioner did not raise the issue on direct appeal. *Black v. Hardin*, 255 Ga. at 240. In paragraph 3, Petitioner claims that the death penalty was sought and imposed arbitrarily, capriciously, and discriminatorily in his case depriving him of various constitutional rights. The Court finds that this portion of the claim is procedurally defaulted as well. *Id.* In paragraphs 4-6, Petitioner

challenges the proportionality of his sentence. The Court finds that this issue is *res judicata* because it was decided adversely to Petitioner on direct appeal. *See Morrow v. State*, 272 Ga. at 703(17). In paragraphs 7-11, Petitioner claims that the decision of the State to seek the death penalty and the imposition of the death penalty itself was the result of the alleged "inherent discrimination" in the application of Georgia's death penalty statute. The Court finds that this issue is procedurally defaulted because Petitioner failed to raise it on direct appeal. *Black v. Hardin*, 255 Ga. at 240. Accordingly, the Court DENIES Petitioner relief on this claim.

II. PETITIONER'S CLAIMS PROPERLY BEFORE THE COURT.

1. Petitioner's Claim That He Was Denied The Effective Assistance Of Counsel At Sentencing (Claim XVII of the Amended Petition).

Petitioner alleges that he was deprived of the effective assistance of counsel during the preparation for and the conduct of his trial. This claim is neither barred nor defaulted. Petitioner is not precluded from raising the issue of effective assistance of trial counsel, as his trial counsel also represented him on direct appeal. *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991); *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998) (Georgia law provides that an ineffective assistance of counsel claim need not be raised until such time as trial counsel no longer represents the defendant).

After thoroughly considering the evidence in this case and the arguments of counsel, the Court finds that Petitioner was deprived of his state and federal guarantees to the effective assistance of counsel at the *sentencing* phase of his capital trial. *Wiggins v. Smith*, 539 U.S. 510, *Strickland v. Washington*, 466 U.S. 688 (1984); *Johnson v. State*, 266 Ga. 380, 467 S.E.2d 542 (1996). Trial counsel failed to conduct an adequate background investigation and failed to prepare and present an adequate mitigation case. This failure constitutes deficient performance

that rendered the penalty phase of Petitioner's trial constitutionally unreliable. The Court therefore VACATES Mr. Morrow's sentence of death on the basis of this claim.

A. Preliminary Findings of Fact.

i. Trial Counsel's investigation.

As detailed *supra*, Petitioner shot his former girlfriend Barbara Ann Young, and two of her friends – Latoya Horne and Tonya Woods – when Ms. Young refused to attempt to reconcile their relationship. Later that same day, Petitioner gave a statement to law enforcement admitting responsibility for the shootings. Shortly after his arrest, attorneys William Brownell and Harold Walker [hereinafter collectively, "Trial Counsel"] were appointed to represent him. The record reflects that Mr. Brownell and Mr. Walker logged thousands of hours on Petitioner's case between the time of their appointment and the time of Petitioner's 1999 trial. (HT 4314-4358).

Trial Counsel began working on the case immediately. They met Petitioner and his mother within a week of their appointment. (HT 438; 725-729). They prepared a substantial number of pretrial motions. At Petitioner's arraignment in June 1995, Trial Counsel filed more than seventy motions, including motions to suppress the evidence. (ROA 70-307). The litigation of the suppression issues accounted for most of the time that counsel spent on the case in the first year following Petitioner's arrest. (HT 451; HT 568).

Counsel's first motions also included applications for county funds to obtain experts and an investigator to assist the defense. (ROA 73). In September 1995, the trial court granted the defense funds with which to hire a pathologist, a mental health expert, a social worker and an investigator. The Court indicated that further funds for each of these professionals would be available upon a proper proffer. (9-21-95 PHT). Trial Counsel did not seek funds for the retention of a defense crime scene expert or other forensic examiner aside from a pathologist.

In October 1995, Trial Counsel located a psychiatrist, Dr. Roy Carter, to perform a mental health screening. (HT 1095-1096). Mr. Brownell testified that he and Mr. Walker "wanted to make sure that [Petitioner] had an appropriate mental capacity, so [they] asked for funds for just a very basic psychiatric evaluation." (HT 125). When Dr. Carter was hospitalized prior to performing the evaluation, the defense instead retained Dr. Dave Davis. (HT 1094, 1098-1099, 1101). Mr. Brownell indicated in his letter retaining Dr. Davis in January 1996 that "[p]er your recommendation, [he] [was] in the process of gathering school records and medical records." *Id.* Though Petitioner's mother provided counsel with a list of schools and approximate dates of Petitioner's attendance (HT 734), there is no evidence of a written records request from Trial Counsel to any school, physician or hospital in the record before this Court. In later correspondence, Trial Counsel provided Dr. Davis with documents and photographs generated during the law enforcement investigation into the crime. (HT 1059-1061). Regarding Petitioner's history, Trial Counsel told Dr. Davis that Petitioner had two prior arrests and that both he and his mother had a history of unexplained headaches. *Id.* Mr. Brownell again indicated that they were "still in the process of gathering [school and medical] records." *Id.* There is no evidence that Trial Counsel provided Dr. Davis with any further information regarding Petitioner's background.

In March 1996, Dr. Davis performed a "psychiatric interview and mental status exam" lasting approximately two hours. (HT 1049-1054). He concluded that Petitioner was competent to stand trial and suffered from a personality disorder, "probably the result of his rather deprived early childhood." *Id.*

Following the Court's order granting funds, Mr. Walker also made attempts to retain the other professionals for which funds had been approved, including a pathologist, a social worker

and an investigator. (HT 754; 996). Mr. Walker testified that none of the persons he contacted were available to work on the case so the task of finding other appropriate experts was "back-burnered." (HT 440). No further effort was made to enlist the assistance of any expert or investigator aside from Dr. Davis until the spring of 1999.

Petitioner's motions to suppress evidence were denied in early 1996. (ROA 1363-1402). By that point, Trial Counsel had raised challenges to the Hall County jury arrays, alleging that Hispanic persons were a cognizable group and that Hall County jury commissioners unconstitutionally underrepresented the county's substantial Latino community. (HT 546). The jury composition litigation became an even more substantial drain on Trial Counsel's time than the motions to suppress previously had been. The litigation of Petitioner's challenge to the jury composition spanned four years and several hearings. Mr. Brownell, who took the lead on the jury composition matter, spent hundreds of hours litigating the issue. (HT 4313-4358; ROA 1404-1410; 1605-1606).[8]

Throughout the motions litigation, Trial Counsel maintained regular contact with Petitioner, Petitioner's mother Betty Bowles and Petitioner's sister Samantha Morrow. (*See e.g.* HT 734, 984). Though some of this contact was for the purpose of retrieving information about Petitioner, most of the contact consisted of non-substantive updates on the status of the case and the motions litigation.

In December 1998, Trial Counsel sent Petitioner a letter requesting a list of "individuals that [he] would like to testify at the sentencing phase of the trial." The letter informed Petitioner

[8] The trial court denied Petitioner's challenge to the grand jury array and held that Petitioner's indictment should stand in June 1998. (ROA 1473-1490). Litigation on the challenge to the traverse jury array continued into May 1999 despite a scheduled June trial date. (1-19-99 PTH; 3-2-99 PTH, 3-30-99 PHT, 4-26-99 PTH, 5-4-99 PTH).

that "these [sentencing phase witnesses] are simply individuals that [sic] have good things to say about [him]." (HT 1023). Petitioner sent Trial Counsel a list of names in response. (HT 1024-1026).

In March of 1999, Trial Counsel associated Dr. William Buchanan, a psychologist, for two purposes: 1) to articulate for the jury Petitioner's mental state at the time of the crime and 2) to "counsel" Petitioner in an effort to make him a more effective witness in his own defense. Trial Counsel observed that Petitioner tended to cope with stress by blunting his emotions, making him appear flat, callous, and stoic. Counsel were concerned that, owing to this tendency, Petitioner may make a poor witness in his own defense. (HT 78).

Dr. Buchanan first met with Trial Counsel on March 29, 1999. (HT 2897). He met with Petitioner for the first time later that day to conduct a "standard intake interview" lasting about an hour, after which his psychometrist conducted testing of Petitioner. (HT 2517). Dr. Buchanan's second session with Petitioner occurred on May 17. Dr. Buchanan's third and fourth sessions occurred on June 11 and June 14, 1999, after Petitioner's trial had begun. (HT 46; 2895, 2903-2910). During these final two sessions, Dr. Buchanan continued to elicit from Petitioner substantial information relevant to his opinions of Petitioner's psychological functioning. *Id.* Trial Counsel provided Dr. Buchanan with an overview of the crime and some basic biographical information on Petitioner; they did not provide Dr. Buchanan a detailed account of Petitioner's life history nor any significant records pertaining to Petitioner's life. (HT 2517). Dr. Buchanan did not interview any of Petitioner's family members nor did he suggest areas which Trial Counsel should explore further with the witnesses. (HT 50).

Trial Counsel Harold Walker first contacted Gary Mugridge, an investigator with the John Villines firm, on April 16, 1999. (HT 1370, 1483). Mr. Mugridge had forty years of

investigative experience but he had never before performed a capital case mitigation investigation. (HT 172; 181). After an initial meeting, Trial Counsel retained Mr. Mugridge to collaborate in the investigation of Petitioner's case. (HT 175; 1483). The first substantive meeting between counsel and Mr. Mugridge occurred on April 29, less than six weeks prior to trial. (HT 175-177).

Trial Counsel requested that Mr. Mugridge interview nearly every individual on the State's witness list. They also testified before this Court that Mr. Mugridge's primary responsibility was to locate effective mitigation witnesses. (HT 178-179, 189). Mr. Mugridge's mitigation efforts resulted in interviews of a number of Petitioner's former co-workers, friends, girlfriends and pastors. These witnesses spoke fondly of Petitioner and expressed shock and disbelief regarding the crime. (*See e.g.* HT 190; 1332-1573). Mr. Mugridge and Mr. Walker together conducted multiple interviews of Petitioner's mother and sister in May of 1999, and Mr. Mugridge interviewed Petitioner's father, who had not been involved in Petitioner's life during much of his childhood and who was in failing health at the time of the interview. (HT 206). Mr. Mugridge made an attempt to contact by telephone a man Petitioner's sister identified as a big brother figure to him in New Jersey but no evidence exists that Mr. Mugridge or Trial Counsel attempted to contact any other witness from Petitioner's childhood there aside from his mother and sister. (HT 213). In fact, Mr. Mugridge specifically denied contacting any other witness from Petitioner's childhood in New York/New Jersey. (HT 188). On May 26, 1999, Trial Counsel sought and received an additional $8000 to permit Mr. Mugridge to continue working on the case until and through the June 7 commencement of trial. (ROA 1575).

During these four years prior to trial, Trial Counsel's efforts also included repeated attempts to negotiate a life sentence plea. The testimony before this Court establishes that early

in the progress of the case, Petitioner expressed to Trial Counsel both his remorse and his willingness to enter a guilty plea in exchange for a lesser sentence even if that sentence were life without parole. (HT 128, 130, 235-236). The District Attorney would not agree to a lesser sentence and Petitioner's trial began on June 7, 1999.

ii. Petitioner's trial.

The Georgia Supreme Court summarized the State's evidence at Petitioner's trial as follows:

> Barbara Ann Young began dating Scotty Morrow in June 1994 and she broke up with him in December 1994 because of his abusive behavior. At 9:52 a.m. on December 29, 1994, Morrow telephoned Ms. Young at her home, but she told him that she wanted him to leave her alone. After hanging up, Morrow drove to Ms. Young's home and entered without permission. Ms. Young was in the kitchen with two of her friends, Tonya Woods and LaToya Horne. Two of Ms. Young's children, five-year old Christopher and eight-month-old Devonte, were also present. There was an argument in the kitchen and Ms. Woods told Morrow to leave because Ms. Young did not want to have anything to do with him anymore. Morrow yelled, "Shut your mouth, bitch!" and pulled a nine-millimeter pistol from his waistband. He shot Ms. Woods in the abdomen and Ms. Horne in the arm. The bullet that struck Ms. Woods severed her spinal cord, paralyzing her from the waist down.
>
> Ms. Young fled down the hallway and into her bedroom. Morrow caught her in the bedroom and beat her on the head and face. She managed to flee back to the hallway where Morrow grabbed her by the hair and shot her point-blank in the head, killing her. From his hiding place in a nearby bedroom, Christopher saw Morrow kill his mother. Morrow returned to the kitchen. Testimony as to clicking noises and the fact that a live cartridge was found on the kitchen floor indicate that he either reloaded his pistol or cleared a jam. He then placed the muzzle of the pistol an inch from Ms. Woods' chin and killed her with a shot to the head. The medical examiner opined that, although she was paralyzed, Ms. Woods had not lost much blood at that time and was probably still conscious when the fatal shot was fired. Morrow also shot Ms. Horne two more times, in the face and arm, and fled after cutting the phone line.

Morrow, 532 S.E.2d at 87. The State also presented evidence during the guilt-innocence phase of trial that Petitioner was violent toward Ms. Young on three occasions during the three weeks preceding the crime. (TT 3242-3250, 3893-4003).

The defense presented three witnesses in response: Petitioner, his sister, and Bartow County Sheriff's Department investigator Randy Wolf. Investigator Wolf testified in rebuttal to the State's evidence regarding one of the prior instances of violence by Petitioner against Ms. Young. (TT 4103-4109). Petitioner's sister Samantha testified regarding the history of Petitioner's relationship with Ms. Young and certain events leading up to and surrounding Petitioner's arrest. (TT 4116-4136).

Petitioner testified in his own defense. He told jurors that he went to Ms. Young's house to discuss the faltering relationship and to plead for her return. He testified that he drew his gun from his waistband when victim Tonya Woods taunted him about having been used by Ms. Young. According to Petitioner, Ms. Woods told him that Ms. Young was reconciling her relationship with a prior boyfriend who had been incarcerated on drug charges and was soon to be released; both Ms. Woods and Ms. Horne were laughing. (TT 4180-4182).

Although Trial Counsel believed that Petitioner's testimony was the only way to establish the provocation that occurred just prior to the shootings, Petitioner's testimony was problematic for the defense in multiple respects. Petitioner's demeanor during the testimony, particularly under cross-examination, made him appear cold and remorseless as Trial Counsel had feared. (HT 485).

Furthermore, Petitioner's factual version of the events during the shooting itself was undermined by the State's evidence on three key points. First, Petitioner testified that Tonya Woods was standing immediately in front of him interjecting the derisive comments when he

shot her. (TT 4181, 4220-4221, 4224). The Assistant District Attorney argued that Petitioner instead began shooting while all three women were seated passively at the table. The State's argument was supported by testimony from the surviving victim, Ms. Horne, that Ms. Woods was seated at the kitchen table when Petitioner first shot her from his position several feet away in an archway separating the kitchen from the living room. (TT 3544).

Second, Petitioner testified that after shooting Ms. Woods and Ms. Horne, he followed Ms. Young down the hall to her bedroom where they struggled over the gun. As Ms. Young grabbed for the gun, a round fired through her hand in the bedroom. (TT 4227-4228). Mr. Morrow admitted that he also fired a second fatal shot at Ms. Young after she retreated back into the hallway, but denied ever beating Ms. Young with the gun during the struggle and denied striking her head on the doorjamb. (TT 4230-4231). Petitioner was contradicted on this point by GBI Special Agent Terry Cooper who testified that according to his review of the evidence, Ms. Young did not suffer any gunshot wounds in the bedroom and the substantial blood found in the bedroom instead came from a head laceration Ms. Young suffered when Petitioner struck her with the gun and then struck her head against the doorjamb. (TT 3461-3462, 3473-3475).

Finally, Petitioner testified that at no point did he stop to reload his weapon. This testimony also was called into question by testimony from the surviving victim that while shooting in the kitchen, Petitioner stopped and made a clicking noise with the gun, as though he was "putting bullets in or something." (TT 4185, 3551).

The jury rejected Petitioner's argument that he was guilty of voluntary manslaughter and convicted him of two counts each of felony murder and malice murder. The only additional evidence submitted by the State in aggravation was victim impact evidence from Barbara Ann

Young's family via the testimony of her step-mother, Mary Young, and from the family of Tonya Woods via the testimony of her brother, Tim Woods.

In mitigation, Trial Counsel presented the testimony of thirteen lay witnesses and the testimony of Dr. Buchanan regarding his conclusions. The lay witnesses primarily were drawn from various areas of Petitioner's adult life – his co-workers, pastors and ex-wife – and their testimony focused overwhelmingly on Petitioner's positive personality traits.[9]

Petitioner's sister, Petitioner's mother and Dr. Buchanan were the only witnesses to reference Petitioner's childhood during their testimony. Petitioner's sister Samantha testified that their parents divorced when Petitioner was three and that their father physically and emotionally abused their mother when she and Petitioner were toddlers. Samantha also testified that after the divorce, she and her brother moved with their mother to Brooklyn, New York where their mother worked multiple jobs. She told the jury that when Petitioner was in the fifth grade he was picked on in school and that he eventually dropped out of high school to join the Job Corps. The remainder of Samantha's testimony focused on describing Petitioner's good traits and adult life. (TT 4671-4684).

Petitioner's mother Betty Bowles testified similarly. She told the jury that after her children were born, her husband began to physically abuse her in the children's presence. (TT

[9] Three of Petitioner's former coworkers testified that Petitioner was a kind friend, a hard-working employee, and a concerned father both to his own children and to Ms. Young's children. (TT. 4577-4578, 4583, 4604, 4623-4625, 4609). Two pastors testified to the sincerity of Petitioner's faith and his ability to inspire others. (TT 4513-4514, 4597-4598, 4596, 4600-4601). An officer responsible for the section of the jail where Petitioner had been housed prior to trial testified that Petitioner was well-behaved, often assisted the other officers, was considered a peace-keeper on the cell block and was well-respected by the other inmates. (TT 4589-4591). Petitioner's ex-wife and her current husband both testified that Petitioner was a caring father to his two sons and that his sons loved him; while Petitioner's half-sister Deborah Morrow testified that her brother was a kind person. (TT 4647, 4650, 4657, 4662-4664). Petitioner's former girlfriend testified that she and Petitioner had a good relationship and that he had not been violent toward her. (TT 4781-4783).

4786). She then moved with the children to New York where her sister lived, in an effort to get away from her former husband. Her testimony concerning Petitioner's childhood and adolescence in the New York City area consisted only of the following information:

- While Ms. Bowles worked, her sister and friend watched the children. The children helped with her job as a janitor. (TT 4788-4789).
- She took Petitioner to "several psychiatrists" and was told that "he was a little slow in some things." (TT 4790).
- When it was reported to her that Petitioner was inattentive in school, she went to the school and spanked him with a strap in front of his classmates. (TT 4792).
- Petitioner dropped out of school and joined the Job Corps. (TT 4792-4793).
- She provided foster care for disabled children and Petitioner assisted with the children's care. (TT 4794-4795).

The only witness to address Petitioner's mental state at the time of the crime was Dr. Buchanan. Dr. Buchanan testified that he administered a battery of standardized measures to test Petitioner's cognitive ability and personality configuration. These tests revealed that Petitioner was of low average intelligence and did not suffer from a delusional or thought disorder. Dr. Buchanan further testified that the testing suggested that Petitioner was depressed, anxious, prone to alcohol and drug abuse and had difficulty coping with the stresses of everyday life. (TT 4727-4731). When asked by Mr. Walker to "sum up" the test results measuring Petitioner's personality functioning, Dr. Buchanan testified that Petitioner was best described as

> a suspicious, mistrustful person who's likely to have problems in interpersonal relationships, who is impulsive, who has poor frustration tolerance, but yet who has low energy. He's a very macho sort of strong male identification. The rest of the MMPI would suggest he's not psychotic, he's not schizophrenic, he doesn't have a thought disorder.

(TT 4726).

Dr. Buchanan's testimony concerning Petitioner's thirteen years spent in the New York area as a child was that Petitioner "lived here in Georgia for awhile, he lived in New York, he lived in New Jersey and he kind of went back and forth a couple of times." (TT 4734).[10]

The remainder of Dr. Buchanan's testimony was spent primarily recounting Petitioner's relationship with the victim and his actions on the morning of the crime. (TT 4736-4741). With respect to Petitioner's mental state at the time of the crime, Dr. Buchanan opined that Petitioner appeared to be in a state of shock or dissociated on the videotape of his post-arrest statement, which Dr. Buchanan had viewed, and concluded by offering that Petitioner's personality defects contributed to his reaction to the victims on the morning of the crime. (TT 4646-4647).

Trial Counsel argued in closing that his background mitigated in favor of a life sentence for the two murders. (TT 4928-4959). Jurors were not persuaded and voted to impose a sentence of death after finding the five aggravating factors listed above.

[10]When counsel asked Dr. Buchanan if he had obtained a history from Petitioner, Dr. Buchanan testified that Petitioner had disclosed the following: a) He was present when his father physically abused their mother; they divorced when Petitioner was about four years old (TT 4732); b) Petitioner's mother later was involved in another physically abusive relationship. He tried to defend her but the boyfriend simply laughed at him (TT 4732-4733); c) He was in special education and dropped out of school after ninth grade (TT 4733-4734); d) He married when he was nineteen and had two children. His wife left him while pregnant with their second child, prompting a two to three month long depression and drinking binge (TT 4735); e) He broke off a previous relationship when he feared it was getting too close. (TT 4736).

iii. Evidence available to Trial Counsel but not presented to the jury.

The record now before this Court contains credible evidence of Petitioner's difficult childhood that was neither presented to the jury nor considered by Dr. Buchanan in reaching his conclusions about Petitioner's mental state. Records and testimony before this Court, readily available to Trial Counsel in 1999, reflect a number of circumstances in Petitioner's childhood that reasonable jurors may have weighed as substantially mitigating.

a. Petitioner's developmental years in New York and New Jersey.

The evidence of Petitioner's development amassed by habeas counsel differs in both quality and quantity from that offered at trial. As an initial matter, the evidence presented in these proceedings concerning Petitioner's premature birth and early childhood in Georgia can be characterized as more detailed and complete than that presented by Trial Counsel.[11] While Trial Counsel presented evidence that Petitioner witnessed his father abuse his mother while still a toddler, habeas counsel compiled readily available evidence of the impact of that abuse together

[11] *See Terry v. Jenkins*, 280 Ga. 341, 347, 627 S.E.2d 7 (2006) (habeas court "juxtapose[s] the evidence presented at trial with the evidence that trial counsel failed to discover"); *Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (counsel must present "more than a hollow shell of the testimony necessary" for the jury's "'particularized consideration of relevant aspects of the [defendant's] character and record.'") (citations omitted); *Hall v. McPherson*, 284 Ga. 219, 225-26 (2008) (although trial counsel presented some evidence of defendant's abandonment, neglect and abuse at sentencing, counsel were deficient in failing to present available, more detailed and graphic mitigating evidence about defendant's upbringing as well as mental health related evidence); *Williams v. Allen*, 542 F.3d 1326, 1329-30, 1339-40, 1342-43 (11th Cir. 2008) (where counsel presented mother's testimony about physical abuse of defendant by father and violence in home, counsel rendered prejudicially deficient performance in failing to uncover and present additional, more detailed evidence of chronic domestic violence and abuse of the defendant).

with a number of other detrimental conditions in Petitioner's early childhood.[12] For instance, evidence has been offered that after Petitioner's mother's initial separation from his father, she left him in the care of neglectful, abusive and alcohol-addicted relatives while she worked, and later left him alone in a housing project apartment while she went to school. (HT 1982-1984, 2290-2291, 2303-2304, 2344).

However the most striking difference between the evidence collected by Trial Counsel and that amassed by habeas counsel is the latter's inclusion of testimony and records documenting Petitioner's childhood in the New York City area. Petitioner left Georgia with his mother and his sister when he was seven years old and returned at age nineteen as a young adult with a wife and infant son. The omission of these critical years of Petitioner's life from Trial Counsel's sentencing phase presentation can fairly be described as pivotal. *Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (prejudicially deficient performance found "where an attorney's efforts to speak with available witnesses were insufficient 'to formulate an accurate life profile of [the] defendant.'") (quoting *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)).

Petitioner's mother, Betty Bowles, testified at trial that her initial move to the northeast was motivated by her desire to escape her abusive ex-husband. In actuality, the evidence suggests that her decision was also partially precipitated by a desire to escape a sexually abusive relative who had assaulted Petitioner's sister while he was supposed to be looking after the children. (HT 2305). The family first moved to Philadelphia where they lived with Ms. Bowles'

[12] *See Williams v. Allen*, 542 F.3d at 1340 ("A reasonable investigation ... should have included, at a minimum, interviewing other family members who could corroborate the evidence of abuse and speak to the resulting impact on [the defendant].")

brother for a summer before moving to her sister Emma's home in Brooklyn, New York. Emma already shared her home with her own two sons, her boyfriend "Snook," Snook's adult son and some rotating combination of Snook's four other adolescent children. (HT 2292; 2352; 2305; 2356). Affidavit testimony indicates that Emma agreed to let her sister reside in the crowded house because Ms. Bowles could help her care for her new baby, but did not welcome her sister's children. (HT 2347). The evidence establishes that Emma and Snook treated Petitioner and his sister poorly and punished them harshly. (HT 1989-1990; 2306; 2352; 2348; 2356).

Ms. Bowles and her sister Emma worked and were absent from the home for long periods of time. When Petitioner and his sister were not in school, they were unsupervised and in the company of Snook's teenage children. (HT 1992; 2306). Witnesses recall that Petitioner was targeted for teasing and bullying by these teenagers because of his small size and reluctance to fight back. (HT 1991; 2306; 2353; 2356-2357). They frequently beat Petitioner up. *Id.*

Petitioner was also the victim of a series of rapes during this time period. Credible evidence exists that Earl Green, one of Snook's sons, sexually assaulted Petitioner in the basement on multiple occasions.[13] (HT 1993; 2359-2360; 2399-2513). During the time frame of these assaults, Petitioner began to wet the bed and display behavioral and adjustment problems. (HT 1993-1994; 2348; 2357; 2362-2363).

School records reflect that Petitioner's teacher during this time period observed multiple problems and recorded that Petitioner "seem[ed] to have an emotional disturbance." (HT 2147). The school health records show that Petitioner exhibited "difficulty in school adjustment" and

[13] Evidence corroborating Earl Green's violent propensities was also available to Trial Counsel. Earl Green's cousin testified that when he passed out during a "game" as a kid, he regained consciousness to find that Earl had removed his pants and was attempting to penetrate him. (HT 2359-2360). Earl Green has a lengthy criminal history as an adult and served a prison term for killing one of his homosexual partners. (HT 2399-2513).

was "nervous and restless." (HT 2131). Petitioner failed third grade. (HT 2292; 2123). As Mrs. Bowles testified at trial, when the teacher alerted her to these problems, she went to the school and beat him with a strap in front of his classmates. Petitioner was suspended twice during his second attempt at third grade. (HT 2113, 2121).

Petitioner was teased and degraded by the other children at school as well. (HT 1995; 2292; 2307). Trial Counsel could have elicited testimony that Petitioner was chased home from school by bullies nearly every day during these elementary school years. (HT 1996-1997; 2307; 2292). When Petitioner's mother learned that he was not confronting the bullies, she became angry and beat him. (HT 1997).

Mrs. Bowles eventually saved enough money to move out of her sister's apartment, but the family moved frequently thereafter, eight times in seven years. (HT 1393). Mrs. Bowles became involved with a married man, George May, and he and his adult son Gregory spent increasing amounts of time with Petitioner's family over the eight-year course of the relationship. (HT 2306; 2367). Testimony indicates that in fact some of the family's moves were to permit George May to work as a janitor or building superintendent in exchange for free housing for Mrs. Bowles and the children. (HT 2362-2363; 2368; 2393). May also used these jobs to explain his extended absences from home to his wife, allowing him to stay with Mrs. Bowles during the work week. (HT 2307; 2368).

George May is recalled by several witnesses as cruel and controlling. (HT 2362; 2368; 2383-2384; 2354; 2371). He delegated his responsibility for the janitorial maintenance of the apartment buildings in which they lived to Petitioner when Petitioner was as young as ten. (HT 2363; 2307-2308; 2384; 2389). May would inspect Petitioner's work and beat him if it was unsatisfactory. (HT 2000). According to the testimony, May would require Petitioner to strip

naked and lie on a bed while he whipped him with his belt until he grew too tired to continue. (HT 2307-2308; *see also* HT 2368; 2384). The relationship between May and Petitioner's mother eventually deteriorated to the point of violence as well. When Petitioner attempted to intervene when May hit his mother, May threatened to kill him. (HT 2309).

As the relationship with George May ended, Petitioner's mother met another man, Morris Bowles. (HT 2509). They married within a year. Though Morris Bowles did not beat Petitioner, witnesses describe that he and Petitioner did not get along. (HT 2312). When the family moved to a more affluent neighborhood, Petitioner, by then a teenager, resided in a third floor attic room separate from the family's first floor apartment. (HT 2310). This arrangement left Bowles with privacy to sexually abuse Petitioner's sister. The evidence suggests that Petitioner's mother had little awareness of her children's problems; her attention was consumed with the care of severely disabled foster children who had been placed with her. (HT 2311-2312).

The testimony reflects that Petitioner eventually encountered mentors who took him under their wing but it does not appear from the evidence that either Petitioner's self-esteem or academic performance ever improved. (HT 2309). He dropped out of high school and joined the Job Corps program. (HT 2311) After getting into an altercation with another boy on an assignment in Kentucky, Petitioner left and never returned to the program. (HT 2170-2208; 2013).

When he returned to New York, Petitioner rekindled a relationship with his high school girlfriend and proposed marriage to her. (HT 2324). Before they could marry, they learned that she was pregnant. *Id.* Petitioner, his new wife, and their new baby stayed with relatives but found it difficult to maintain steady employment. It was then, at age nineteen, that Petitioner

suggested that he and his wife move back to Georgia, where he could find a better job and reconcile his relationship with his father. (HT 2325).

Trial Counsel interviewed and presented testimony from Petitioner's former wife, and it is only from this point forward that Trial Counsel's investigation more accurately and more fully revealed Petitioner's life history. It is clear that Trial Counsel's investigation did not include meaningful inquiry into any portion of Petitioner's formative years in New York and New Jersey prior to his marriage.

b. Testimony of Dr. Buchanan.

As with the lay witnesses and documentary evidence, the expert witness testimony presented by Petitioner in these habeas proceedings is both strikingly more complete and more compelling than that offered at trial. Dr. Buchanan's testimony at trial recounted a disjointed set of life events and test scores which seemed to reveal Petitioner to have underlying character flaws, including a short temper. The testimony provided by Dr. Buchanan during the evidentiary hearing before this Court was a primer on the effects of child physical and sexual abuse, paired with a cogent explanation of how the resulting maladjustment manifested in Petitioner. Dr. Buchanan explained the role of Petitioner's early trauma in both his life and his crime.[14] His testimony before this Court credibly summarized the test results in a different light, explaining that the testing documented the expected artifacts of Petitioner's repeated victimization as a child, not necessarily personality flaws:

[14] *See, e.g., Bright v. State*, 265 Ga. 265, 276, 455 S.E.2d 37 (1995) ("[A] psychiatrist could have evaluated, in terms beyond the ability of the average juror, Bright's ability to control and fully appreciate his actions in the context of the events that arose on the night of the murders, given his severe intoxication, his history of substance abuse, his troubled youth, and his emotional instability.")

> I noted that Mr. Morrow's testing, consistent with my clinical impressions, painted him as atypically mistrustful and suspicious. Persons with a history of repeated or prolonged trauma in their lives are typically anxious, paranoid and easily startled: what is referred to in the professional vernacular as "hypervigilant." In Mr. Morrow's case, the sexual assaults and beatings to which he was subjected over time likely reinforced the lesson that he should be on constant alert for threat. Over time this inherent distrust of the environment, of the people with whom he has relationships, of the world around him became as chronic as the trauma to which he was exposed. The literature teaches as well that a state of alert can be so reinforced that it becomes imbued in the victimized person's biology. Therefore, more telling still are the high-end scores I obtained concerning Mr. Morrow's level of anxiety; anxiety is often the hallmark of this physiological reconditioning. The problems I noted with Mr. Morrow's poor impulse control are similarly consistent; they too are likely a byproduct of his inability to modulate his own responses.

(HT 2518-2519).

Dr. Buchanan's testimony before this Court also explains Petitioner's detached demeanor during his trial testimony. Trial Counsel testified in these proceedings that Petitioner remained expressionless and appeared callous when relating his actions on the day of the crime. Reasonable jurors, without any alternative explanation, could have interpreted Petitioner's demeanor as a lack of remorse. Had he been armed with Petitioner's history, Dr. Buchanan would have countered this impression:

> True to the profile of the chronically traumatized individual, Mr. Morrow learned to separate his conscious existence from his emotional states. In the face of an experience such as a rape or beating, the victim often divorced himself from his emotions as a means of surviving the event. For this reason, Mr. Morrow's sister Samantha's recollection of Mr. Morrow's reaction to the beatings he received is the most revealing. Samantha describes how Mr. Morrow never cried or screamed during the extended beatings, but held a cold, expressionless affect. It's difficult to conceive of a more direct reinforcement for suppression of one's emotions. By the time he reached adulthood, Mr. Morrow was skilled at blocking out emotion.

(HT 2519).

Furthermore, Dr. Buchanan's testimony before this Court had the added benefit of lending credibility to aspects of Petitioner's trial testimony itself. The thrust of Petitioner's case was that Petitioner lost control, and at various points claimed partial amnesia for the events. Again, had he been fully apprised of Petitioner's history, Dr. Buchanan could have explained that Petitioner's loss of control and partial amnesia were consistent with Petitioner's abused childhood and his coping strategies. More importantly, he would have given jurors a basis to believe that Petitioner had previously experienced such dissociated events. With a proper evidentiary presentation by Trial Counsel, Dr. Buchanan's testimony on this point would have been corroborated by the testimony of lay witnesses who were actually present and observed dissociated states in Petitioner during his adolescence and early adulthood. (*See e.g.* HT 2377, 1309-1310, 2314) (Petitioner's former neighbor and sister recall an incident in Petitioner's adolescence during which he became inexplicably agitated and later had no apparent memory of the incident); (HT 2013; 2170-2208) (Petitioner recalls that he was disciplined in connection with the Job Corps program for an altercation with another boy for which he has no memory).

Thus, more comprehensive and helpful testimony could easily have been elicited from Dr. Buchanan which would have helped the jury "to understand the effect [the defendant]'s troubled youth, emotional instability and mental problems might have had on his culpability for the murder." *Turpin v. Lipham*, 270 Ga. 208, 219, 510 S.E.2d 32, 42 (1998). Within reasonable probability, at least one juror hearing more complete testimony from Dr. Buchanan would have voted for a sentence less than death.

c. Testimony of Robert Tressel.

Petitioner has also presented evidence in these proceedings from a qualified independent forensic expert, Robert Tressel. (HT 1896-1914). Mr. Tressel reviewed the available evidence surrounding the crime, including the crime scene photos, autopsy reports, and law enforcement reports. He also examined much of the physical evidence, including the 9 mm handgun and bullets fired during the shootings, and reported his conclusions. Like Dr. Buchanan's testimony, these conclusions lend support to Petitioner's trial testimony, which was largely refuted or unsupported at trial.

First, Mr. Tressel testified that the evidence conclusively establishes that Ms. Woods could only have been standing when shot, just as Petitioner maintained in his testimony. (HT 1903). The bullet which passed through Ms. Woods' abdomen had an upward trajectory, rather than downward as would be expected if Ms. Woods were seated when shot by a standing assailant. Mr. Tressel further points out that the bullet's point of entry was low on Ms. Woods' abdomen, at a point which would have been at or very near the fold of her lap when seated, and that there is no bullet hole in Ms. Woods shirt, meaning that her shirt did not extend far enough down to cover the point of entry. Had Ms. Woods been seated, it would have been nearly impossible for the bullet to strike her in the place in which it entered, and more impossible still that it would have done so without passing through her shirt. As importantly, according to Mr. Tressel's testimony, Ms. Woods had to have been standing just 12 to 24 inches away from Petitioner at the time she was first shot, not seated across the room as suggested by the surviving victim; the pattern of stippling apparent around the wound in the crime scene photographs is a pattern which may only be produced at a close distance. (HT 1903-1905).

Second, Mr. Tressel's testimony corroborates Petitioner's testimony concerning the struggle with Ms. Young in the back bedroom and hallway. During cross-examination at trial,

Petitioner denied ever having struck Ms. Young with the gun or having beat her head against the doorjam, as GBI Agent Cooper told the jury the evidence established. After examining the crime scene photos and pathologist's reports, Mr. Tressel holds this view of the evidence:

> With regard to victim Barbara Ann Young, the evidence supports the following sequence of events: After Mr. Morrow followed Ms. Young down the hall and into the bedroom, the two struggled at the foot of the bed and just to the left (south) of the closed door. At some point during the struggle, Ms. Young grabbed for the gun with her left hand in an attempt to shield herself from the weapon. The gun was fired and the bullet passed through her hand and created both the wound and the soot ring noted on the palm. After passing through the hand, the bullet then traveled upward – either because of the angle of the gun, because of the shielding motion, or because it was deflected by its impact with a metacarpal bone (as described in the autopsy) – and then grazed Ms. Young's left forehead, contacting just enough to create first, at the lower end, an abrasion and then becoming deep enough to be characterized as a slight laceration near the top. At the same time, Ms. Young's hand would have been propelled away from the barrel of the gun and come into contact with her frontal scalp, most probably transferring hair to the back of her injured hand. After piercing her hand and grazing her forehead, this bullet continued through the door just above Ms. Young's hand and into the ceiling in the hallway. The Hi-Point 9 mm at issue here ejects its shell casings up, to the right and slightly back, and thus when the round was fired through Ms. Young's hand, the resultant shell casing was kicked to the right and landed in the center of the bed where it was discovered and photographed by investigators.
>
> The struggle inside the bedroom continued with Ms. Young bleeding from her hand onto the bed, the laundry, the floor and her own legs. As she grabbed and attempted to open the door, she transferred blood from her hand to the door and the adjacent bedroom wall, creating the numerous transfer smears and dropped blood stains apparent in the photographs. Ms. Young succeeded in opening the door and made it as far as the hallway. When exiting the bedroom, blood and hair were transferred from her wounded left hand to the bedroom doorframe facing the hallway. The blood transfer apparent on the door frame in the hall next to the furnace area is consistent as being transferred from an injury site that was already bleeding when the stains were deposited there. In other words, the doorframe is not what caused the injury that resulted in the blood observed there.

(HT 1905-1906).

An independent crime scene expert also could have challenged Agent Cooper's view of the evidence by pointing out certain implausibilities in his testimony:

> If we accept the State's assumption that no gunshot wound occurred in the bedroom, the only bleeding injury Ms. Young would have had while inside the bedroom was the abrasion/laceration in her hairline. The State's theory thus attributes the significant amounts of low velocity blood spatter on the bedspread, laundry, floor and Ms. Young's legs, as well as numerous transfer smears on the bedroom wall, to a laceration only 10 mm long. The cut to her head would have begun to bleed, certainly, but it is simply not possible that a superficial cut of this length generated the appreciable amount of blood we see in the photographs of the bedroom, and particularly not given the short duration it took the events to transpire.
>
> In his trial testimony, Agent Cooper reasons that no gunshot wound could have been inflicted in the bedroom because no high velocity blood spatter (i.e. a "mist" of blood) consistent with a gunshot wound was discovered there. This reasoning fails to consider where the high velocity spatter would be expected. High velocity spatter is produced only as a bullet exits the body, not as it enters. If Ms. Young's hand was in front of her when it was wounded, as supported by the evidence I've described above, the high velocity spatter would be expected on her face or neck. However, any evidence of high velocity spatter on her head and neck was obscured by the time Ms. Young's body was photographed; the subsequent gunshot wound to the head bled profusely after the body came to rest on the hallway floor, and the head and neck were covered in blood when the body was discovered by police.
>
> Second, the State's contention that the gunshot wound to the back of Ms. Young's head was a re-entry wound produced by a bullet that first passed through her hand is contradicted by the autopsy report itself. The Medical Examiner's description of the purported reentry wound notes that "the outer table of the right parietal skull in the vicinity of this [gunshot] defect display [sic] scattered black particles suggestive of gunpowder." If, as the State contends, Ms. Young's hand was covering the barrel of the gun when this round was fired into her head, we would not expect to see any gunpowder on her skull. The gunpowder would have been deposited on her hand, and her skull would have been shielded from gunpowder deposits entirely. Moreover, for the dorsal side of Ms. Young's hand to have been pressed to the back of her head at the time the wound was inflicted not only requires her to be in a rather contorted position, but supposes that, without being able to see its location behind and above her, Ms. Young was able to reach her hand above her head, determine the gun's location, and press her hand to it before she was shot.

> Further, despite the Medical Examiner's reference to the gunshot wound to the head as a "gunshot wound of reentrance," neither the autopsy report's description of this wound nor the photographs reveal anything suggestive of the irregular shape characteristic of a re-entry wound. The report describes the wound as "approximately round, measuring 11 mm in diameter," with "slightly irregular marginal abrasion rang[ing] from 2 mm width to 4 mm width," and "inward beveling and displacement of fragmented skull on the anterior edge." Thus, according to both the medical examiner's observations and the photographs themselves, the wound has an elliptical marginal abrasion and has displaced the skull in one direction, meaning that the bullet entered the skull at an angle. However, the ragged entry wound edges suggestive of a bullet that has already been destabilized by prior contact with another object or person is not apparent in the Medical Examiner's description nor the photos of this wound. In summary, nothing about this wound suggests that it was a re-entry wound. The evidence surrounding Ms. Young's death is better explained by an earlier wound inflicted to the hand that also grazes her left upper forehead, followed shortly thereafter by a wound to the back of the head inflicted in the hallway.

(HT 1907-1909).

Finally, Mr. Tressel's testimony provides an explanation for the clicking sound reported by the surviving victim other than Petitioner reloading his weapon. Having examined the 9 mm firearm used by Petitioner during the crime, Mr. Tressel concluded that the weapon had a defect which made it prone to jamming. (HT 1909-1910). The testimony of an independent crime scene expert thus would have provided the defense a basis to argue at trial that Petitioner cleared a jam in the gun rather than reloaded it.

In sum, Petitioner has demonstrated in these proceedings that an independent forensic examiner could have provided the jury an opportunity to conclude that Petitioner's testimony could be reconciled with the physical evidence. As a result, at least one juror may have found that his crime was less aggravated than portrayed by the State's witnesses, and, within reasonable probability, voted for a sentence less than death.

B. Relevant Legal Standards.

A criminal defendant is entitled to the effective assistance of counsel under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The "Sixth Amendment right to counsel afford[s] criminal defendants a right to counsel 'reasonably likely to render and rendering reasonably effective assistance.'" *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citations omitted). Counsel's conduct is violative of the Sixth Amendment if it "so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* at 686.

In order to prevail on a claim of ineffective assistance of counsel so as to warrant a reversal of a conviction or death sentence, a habeas petitioner must make the following two-prong showing: Counsel must first show "that counsel's performance was deficient" and second, "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 686. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness," defined as "reasonableness under prevailing professional norms." *Id.* at 688; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). The second part of the *Strickland* test assesses whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* 466 U.S. at 694; *Schofield v. Gulley,* 279 Ga. 413, 416, 614 S.E.2d 740, 743 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* With regard to the penalty phase of a capital case in a state like Georgia, where non-unanimity on a death verdict results in a life sentence, the question this Court must answer as regards prejudice is whether

there is a reasonable probability that at least one juror would have reached a different result. *Wiggins,* 539 U.S. at 537; *Hall v. McPherson*, 284 Ga. 219, 234, 663 S.E.2d 659, 669 (2008).

"[E]ffective representation, consistent with the Sixth Amendment...involves 'the independent duty to investigate and prepare.'" *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (citations omitted). In a capital case, this duty includes the duty to investigate the client's background and character for mitigating evidence. *Williams v. Taylor*, 529 U.S. 362 (2002); *Thomason v. Head* 276 Ga. 434, 578 S.E.2d 426 (2003). The American Bar Association Standards for Criminal Justice (2nd ed. 1980) recognize the duty of defense counsel to investigate their case in unambiguous terms:

> The lawyer...has a substantial and important role to play in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information...will be relevant at trial and at sentencing.

ABA Standards for Criminal Justice (The Defense Function) 4-4.1.

The death penalty has long been deemed a qualitatively different punishment than a sentence of imprisonment, and for this reason our justice system demands a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Ford v. Wainwright*, 477 U.S. 399, 411 (1982); *Beck v. Alabama* 447 U.S. 625, 638 (1980). For this reason, "extraordinary measures" are required to ensure the reliability of a death determination. *Eddings v. Oklahoma,* 455 U.S. 104, 108 (1982) (O'Connor, J., concurring). In the death penalty context, therefore,

counsel has an affirmative obligation to conduct a thorough and diligent investigation into the client's background for potential mitigating evidence. *See Williams v. Taylor*, 529 U.S. 362 (2002); *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216, 227 (1998).

In a capital case, "[m]itigating evidence, 'anything that might persuade the jury to impose a sentence less than death,' is critical in the sentencing phase of a death penalty trial since 'the jury may withhold imposition of the death penalty for any reason, or without any reason.'" *Thomason*, 578 S.E.2d at 429. (Citations omitted) (emphasis in original). "'The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant.'" *Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002) (quoting *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991)). For this reason, investigation for mitigating evidence is different from investigation in non-capital cases:

> Counsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that the jury has found him guilty of a capital offense.

Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003) (quoting *Marshall v. Hendricks,* 307 F.3d 36, 103 (3d Cir. 2002)).

In *Carr v. Schofield*, the Eleventh Circuit explained that in a death penalty case, competent defense counsel must present the jury with the totality of reasonably available mitigation evidence:

> Ineffective assistance of counsel is established when counsel has failed to provide the jury with the "totality of the available mitigation evidence . . . [to] []weigh[] . . . against the evidence in aggravation," including a "graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' [which] might well . . .

> influence[ ] the jury's appraisal of his moral culpability." *Williams v. Taylor*, 529 U.S. at 397-98. . . . Counsel must present "more than a hollow shell of the testimony necessary" for the jury's "'particularized consideration of relevant aspects of the [defendant's] character and record.'" [*Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999)] (quoting *Woodson* [*v. North Carolina*, 428 U.S. 280, 303 (1976)]). Counsel's failure to demonstrate available evidence of the defendant's upbringing, disposition, history of providing needed assistance to his family and others, acts of compassion and heroism, and circumstances at the time of the crime, especially his health, employment history, and economic status, "brings into question the reliability of the jury's determination that death was the appropriate sentence." *Id.* at 1202.

364 F.3d 1246, 1265 (2004) (parallel citations omitted). The Eleventh Circuit has also noted that counsel renders prejudicially deficient performance in a capital case "where an attorney's efforts to speak with available witnesses [a]re insufficient 'to formulate an accurate life profile of [the] defendant.'" *Williams v. Allen*, 542 F.3d at 1339 (quoting *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995).

Where counsel invokes a strategic judgment to justify a failure to investigate or present certain evidence, the deference this Court owes such a judgment is "defined ...in terms of the adequacy of the investigations supporting those judgments." *Wiggins*, 539 U.S. at 521. The question is not whether counsel should have developed and presented the new evidence, but "whether the investigation supporting counsel's decision not to introduce...evidence...*was itself reasonable*." *Id.* (italics in original).

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-691. While "every effort [must] be made to eliminate the distorting effects of hindsight," 466 U.S. at 689, in performing this analysis, so also must courts avoid

substituting a "*post-hoc* rationalization of counsel's conduct [for] an accurate description of their deliberations prior to [trial]." *Wiggins*, 539 U.S. at 526-527.

Where trial counsel's "failure to investigate thoroughly result[s] from inattention, not reasoned strategic judgment," counsel's performance is unreasonable. *Wiggins*, 539 U.S. at 512; *see also McPherson*, 663 S.E.2d at 662 (counsel's failure to investigate unreasonable where it resulted from inattention, not strategy); *Hardwick*, 320 F.3d at 1185 ("counsel's failure to present or investigate mitigation evidence cannot result from 'neglect'") (citations omitted). Again, the question becomes whether, but for counsel's failure to investigate and present the newly uncovered evidence, there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537; *McPherson*, 663 S.E.2d at 669.

"In any case presenting an ineffective assistance claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in the American Bar Association standards and the like...are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688.[15] Since *Strickland*, the United States and Georgia Supreme Courts have assessed trial counsel's performance in light of the prevailing professional norms reflected in such sources as the American Bar Association (ABA) Standards for Criminal Defense and the ABA Guidelines for death penalty defense in particular. The ABA Guidelines state that: "[i]nvestigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor...among the topics counsel should

[15] This is because the Sixth Amendment guarantee "relies...on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversarial process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." ABA Guidelines 11.4.1(C) and 11.8.6(B), *1989 ed.*

In *Williams v. Taylor*, the Court cited the ABA standards in stressing counsel's "obligation to conduct a thorough investigation of the defendant's background" for mitigating evidence. 529 U.S. at 396. In *Wiggins v. Smith*, the Supreme Court reiterated that a defense attorney in a death penalty case has an affirmative duty to conduct a reasonable investigation of her client's background to determine whether there is evidence that may mitigate the crime. 539 U.S. at 534. The Court emphasized that this duty stems from the ABA Guidelines, which the *Wiggins* court embraced as the prevailing standards of performance for counsel. The Georgia Supreme Court has followed the United States Supreme Court in endorsing the ABA Guidelines as an appropriate source of prevailing norms by which to measure capital defense counsel's performance. *See Franks v. State,* 278 Ga. 246, 261, 599 S.E.2d 134 (2004) (endorsing ABA Guidelines as guide to prevailing norms); *Hall v. McPherson,* 284 Ga. at 221 (state habeas court properly measured counsel's performance against prevailing norms as set forth in ABA Death Penalty Guidelines and Southern Center for Human Rights death penalty defense manual). Effective capital counsel, the United States Supreme Court has held, must "conduct a *thorough* investigation of the defendant's background" for "*all reasonably available* mitigating evidence." *Wiggins*, 539 U.S. at 522, 524 (quoting *Williams*, 529 U.S. at 396, and ABA Guideline 11.4.1)(second emphasis in original). Having performed a reasonable investigation, competent counsel "present[s] and explain[s] the significance of all the available evidence [in mitigation]." *Williams*, 120 S.Ct. at 1516.

The *Wiggins* Court also reiterated that "an objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,'" includes a "context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 at 523. Performing this review, the Court held that an attorney who fails to conduct a reasonable investigation and therefore fails to present complete mitigation evidence at the penalty phase of a death penalty trial has provided constitutionally ineffective assistance of counsel. *Id.* at 534. The Court found that despite arranging for a psychological evaluation and obtaining a pre-sentence background report and state foster care system records on *Wiggins*, counsel had "acquired only a rudimentary knowledge of [the defendant's] background from a narrow set of sources." *Id.* at 524-525. Applying *Strickland*, the Court held that counsel's decision to terminate the mitigation inquiry was unreasonable because it was not informed by a thorough investigation into *Wiggins*' background. *Id.* Together the *Williams* and *Wiggins* decisions stand for the proposition that counsel's duty to conduct a thorough investigation is not necessarily discharged merely by obtaining and presenting *some* evidence.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court again found that the Petitioner's trial counsel provided constitutionally ineffective assistance because they failed to investigate or obtain readily available records surrounding his prior convictions, records which would have indicated he suffers from schizophrenia, organic brain damage and other disorders. 545 U.S. at 390-393. As in the instant case, Rompilla's counsel spoke to their client and his relatives in an attempt to gather mitigating information for the sentencing phase. *Id.* at 381. ("This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and

examinations of reports by three mental health experts who gave opinions at the guilt phase."). However because the additional undiscovered mitigation evidence was sufficiently compelling to "undermine confidence in the outcome actually reached at sentencing," the Supreme Court vacated Rompilla's death sentence. *Id.* at 393.

C. Ultimate Findings of Fact and Conclusions of Law

Applying these same standards to Trial Counsel's handling of Petitioner's case, this Court finds that Petitioner was deprived of his state and federal guarantees to the effective assistance of counsel at the sentencing phase of his capital trial. *Strickland*, 466 U.S. at 686; *Johnson v. State*, 266 Ga. 380, 381, 467 S.E.2d 542, 544 (1996). Trial Counsel failed to perform a complete background investigation, failed to uncover substantial mitigating evidence and expert testimony explanatory of the crime and supportive of their case theory, and thus failed to make a complete presentation of all reasonably available evidence to the jury. Had counsel performed as constitutionally required, there is a reasonable probability that the outcome of Petitioner's sentencing would have been different.

i. Trial Counsel performed deficiently in failing to investigate and prepare a complete mitigation case so as to formulate an accurate life profile of Petitioner.

There is little question that both Mr. Brownell and Mr. Walker dedicated themselves to working on Petitioner's behalf. Each logged thousands of hours on the case. Many aspects of Petitioner's case were litigated not only effectively but vigorously. Indeed, it may have been Trial Counsel's focus on other aspects of Petitioner's case, together with their combined lack of

experience in preparing capital case mitigation,[16] that accounts for their neglect of the mitigation case. Whatever the reasons, the record before this Court demonstrates that Trial Counsel unreasonably failed to perform a complete search for mitigating evidence.

Trial Counsel was appointed to represent Petitioner in January 1995, nearly four and a half years prior to trial, and they promptly had at their disposal the tools with which to begin a mitigation investigation. The defense was granted funds for an investigator, a psychiatrist, and a social worker as early as September of 1995. While Trial Counsel's notes reflect attempts to identify an available social worker and investigator after the funds became available, the evidence reflects that counsel's initial phone calls were not followed up and these professionals were not retained. (HT 746-748; 983, 995). Counsel also had some basic knowledge of their client with which to begin the investigation. About a week after being appointed, counsel spoke to Petitioner's mother and learned information that could have (and should have) been the seeds of their early investigation, including that Petitioner was born prematurely, was psychologically tested at a school in Brooklyn, and had a history of headaches and blackouts. (HT 725-729). Trial Counsel also knew from their first interviews with Petitioner and his mother that Petitioner lived in New York or New Jersey from elementary school until early adulthood. (*Id.*, HT 741-743). Despite the advantages of time and resources, the majority of Trial Counsel's efforts to prepare mitigation evidence occurred in April, May and June of 1999, the months immediately preceding Petitioner's trial.

[16] Both the record of Petitioner's trial and the record developed before this Court reveal Petitioner's counsel to be experienced and adept trial lawyers. However neither of them had previously taken a death penalty case to trial as defense counsel. Mr. Brownell had litigated numerous felonies and even death penalty cases, though only as a prosecutor. (HT 560). Harold Walker had been involved in one prior death penalty case but the State withdrew their death notice prior to trial. (HT 450-451).

The ABA Guidelines stress that investigation into issues relating to both phases of a capital trial "should begin immediately upon counsel's entry into the case and should be pursued expeditiously." Guideline 11.4.1(A). Yet the evidence reflects that Trial Counsel made almost no forward progress on the mitigation investigation between late 1995 and early 1999. Though Trial Counsel were themselves consumed by other aspects of the case for nearly its entire pre-trial pendency, no investigator or social worker was hired until mid-April 1999 when Gary Mugridge was brought on board by Mr. Walker. Mr. Mugridge's file reflects that he was first contacted on April 16, 1999, less than two months prior to the June 7 commencement of trial and more than three and a half years *after* the funds first became available from the Court. (HT 1370, 1483). The first substantive meeting with counsel did not occur until April 29, less than six weeks prior to trial.[17] (HT 1483; 177). Again, the ABA Guidelines warn that resources such as investigators and experts should be sought early in the case and counsel here had no disincentive to do so. ABA Guideline 8.1, commentary; Guideline 11.4.1, commentary.

Counsel retained Dr. Buchanan only two months prior to trial yet charged him with the vital task of explaining to the jury the psychological and emotional processes that led Petitioner to shoot three people. (HT 47; 2517; *see also* HT 776). Dr. Buchanan met with Petitioner (and had him tested) for the first time on March 29, 1999, just a few weeks prior to trial. (*Id.*). Some portion of Dr. Buchanan's evaluation of Petitioner occurred *after* the jury selection process had begun. (HT 46; 2903-2910). In sum, Dr. Buchanan's task was a rushed endeavor. The time frame placed specific constraints on his inquiry into Mr. Morrow's psychological and cognitive functioning and left questions regarding the cause and significance of Dr. Buchanan's test results

[17] During their first conversation, Mr. Mugridge and Mr. Walker discussed the nature of the investigation and the fee structure for retaining Mr. Mugridge's firm. (HT 175-176; 1483).

unanswered.[18] As experienced trial lawyers, defense counsel should have understood the necessity of developing a crystallized defense well before jury selection began.

Trial Counsel compounded the disadvantages of Dr. Buchanan's and Mr. Mugridge's late association by failing to provide them with the appropriate guidance. Both men were competent professionals in their own right, but each was handicapped by Trial Counsel's failure to provide vital information. In the case of Dr. Buchanan, his examination was handicapped by Trial Counsel's failure to provide him with complete information regarding Petitioner's history. Among the undiscovered mitigation are the missing puzzle pieces that were necessary for Dr. Buchanan to explain Petitioner's emotional and psychological deficits and in turn, explain his crime.

In the case of Mr. Mugridge, Trial Counsel unreasonably failed to make certain he understood the basic precepts of capital case sentencing phase investigation.[19] Rather than separately utilize the cache of funds granted for a forensic social worker *and* the cache of funds granted for an investigator, counsel instead retained only an investigator and assigned him with responsibility for the entirety of the case investigation. (HT 549; 441; 455). Though Mr. Mugridge was by every account highly skilled, his skills and experience were ill-suited to the task of preparing a mitigation case. At the time of his testimony in this case, Mr. Mugridge had nearly fifty years of investigative experience as a law enforcement officer. However, prior to Petitioner's case, he had never been involved in a mitigation investigation. By his own

[18] The personality testing performed by Dr. Buchanan revealed Petitioner had substantially elevated scores in a number of areas, including hysteria, for which Dr. Buchanan was unable to provide a complete explanation. (HT 75-76).

[19] The nature and breadth of relevant admissible mitigating evidence is not an obvious concept. The introduction to the ABA Guidelines warns that even experienced trial lawyers may "fail to appreciate the different form of advocacy required at a death penalty sentencing trial."

description, his understanding of what constituted mitigating evidence at the time was "rudimentary."[20] (HT 172-173, 181). Counsel thus delegated primary responsibility for the mitigation investigation without confirming that the responsible professional possessed a basic understanding of what constitutes relevant, admissible mitigating evidence. Rather than hiring a separate professional with the requisite expertise to work in tandem with the experienced (and if appropriately utilized, invaluable) investigator they had on board, Petitioner's counsel neglected to use all the resources at their disposal. The Supreme Court has held that where such resources are made available, as they were in Petitioner's case,[21] the failure to enlist a readily available

[20] The discrepancy between the expertise Mr. Mugridge possessed and the expertise a forensic social worker could have provided is further underscored by his testimony at the evidentiary hearing concerning his subsequent involvement in another death penalty case. Mr. Mugridge recounted that several years after Petitioner's trial, he was retained by defense attorneys in a Walton County capital case. There he worked as part of a defense team that included a psychologist and a forensic social worker. (HT 181). When the team's investigation was complete, the social worker gave comprehensive testimony about the defendant's life experiences and resultant adult functioning. Mr. Mugridge's reaction to the testimony is telling:

> A: I was surprised by the testimony. . . because to me it seemed like there was a lot of second hand testimony that was admissible and more or less hearsay of things that she had been told by other people. As a matter of fact, it was people that I had located that she had given me names of I had interviewed, and then she had gone out and done follow up interviews and then was testifying based on what those people had told her.
>
> Q: In her testimony, what did that entail?
>
> A: She more or less built a life history of the defendant in that case of her – this was a female and she more or less developed her from the time of her childhood up through her adolescence into her adult years, and things that she was exposed to in her life that more or less affected her personality and how she functioned within society.

[21] *See* 9-21-95 PHT. Early in counsel's representation of Petitioner, the trial court granted funds for a mitigation social worker, among other experts. However, counsel neglected to make use of these funds to retain such a specialist, as such efforts in general were terminally "back-burnered." (HT 754; 996).

forensic social worker falls below prevailing professional norms for the preparation of a capital case and is objectively unreasonable. *Wiggins*, 539 U.S. at 524-525. Nothing in the case now before this Court, including Mr. Mugridge's participation, makes counsel's failure to take advantage of available court funds to retain a mitigation social worker any more reasonable.

At the heart of this Court's analysis however is not the belated and ill-planned nature of counsel's mitigation investigation, but its inadequacy. Trial Counsel was aware from the outset that Petitioner moved north at age seven and did not return to Georgia until he was an adult. (HT 741-743; 184; 550; 441). There is likewise no question that at the time of trial, counsel was unaware of the rapes, beatings and other developmental insults that Petitioner suffered while living in New York and New Jersey. (HT 441, 551). The limited extent of counsel's efforts to unearth any evidence or contact any witnesses relating to Petitioner's life in New York and New Jersey is equally clear. Counsel attempted to contact *one* witness concerning Petitioner's childhood in New York and New Jersey, his informal "big brother" figure, and sought to obtain *one* set of New York school records. (HT 187, 212; 551; 1332-1573). Nothing became of their efforts in either instance. (HT 212). In short, Trial Counsel knew that Petitioner was raised in the New York area from the age of seven yet did little to investigate his life there. Such an omission constitutes deficient performance in satisfaction of the *Strickland* standard. *See e.g. Wiggins*, 529 U.S. at 534; *McPherson*, 663 S.E.2d at 662; ABA Guideline 11.8.3(F).

Counsel's failure to investigate this portion of Petitioner's life was not the result of a strategic judgment. It appears that in many respects, counsel simply failed to appreciate the importance of diligently documenting their client's life, and so neglected to do so. Mr. Brownell testified that he believed a general impression of Petitioner's circumstances was sufficient:

> THE HABEAS COURT:.[D]id it ever occur to you that you had a gap in his history that might have been important?
>
> A: No.
>
> THE COURT: Like his growing up years?
>
> A: No it did not occur to me that there was a significant piece of information or a significant segment of information. I know that he grew up in New York. He grew up in a less than perfect Father Knows Best atmosphere. And we attributed things, you know, the problems, the anxiety and some of those things toward just not growing up in a completely functional family.

(HT 146).

As discussed *supra,* Trial Counsel's investigator, Mr. Mugridge, had an incomplete understanding of mitigating evidence as well. (HT 181; 1383). Mr. Mugridge also labored under the misimpression that court-imposed budget constraints prohibited travel to New York or New Jersey to locate witnesses and that Mr. Brownell and Mr. Walker wanted his efforts to focus on Petitioner's life in Georgia. (HT 188, 213). Trial Counsel, on the other hand, left Mr. Mugridge to work largely autonomously, "presum[ing] that if Gary thought there was a witness [in New Jersey] who might be of some help, he would have let us know so that we could arrange for that witness to fly down or for Gary to go there." (HT 551; 441). Such miscommunication can be a lethal error in a death penalty case, and has been found to constitute ineffective assistance of counsel. *See Terry v. Jenkins*, 280 Ga. at 344, 347 ("lack of oversight" and supervision of case investigation, including miscommunication between counsel and co-counsel, resulted in prejudicially deficient preparation in capital case).

Thus, counsel's failures cannot be attributed to a strategic judgment to spend their time and resources elsewhere but rather to counsel's mere inexperience, miscommunication, and neglect of crucial aspects of the case. Where, as here, trial counsel's "failure to investigate

thoroughly result[s] from inattention, not reasoned strategic judgment," counsel's performance is unreasonable. *Wiggins*, 539 U.S. at 525; *McPherson*, 663 S.E.2d at 662; *Hardwick*, 320 F.3d at 1185.

Respondent argues that Trial Counsel did investigate, pointing to Trial Counsel's repeated interviews with Petitioner's mother and sister, both of whom lived with Petitioner during his childhood in the New York area. According to Respondent, the blame for the deficiencies in the mitigation evidence properly lies with Petitioner and his family, who failed to disclose their circumstances.

Respondent's argument fails for several reasons. First, while it is certainly true that the information provided by the client and his family informs the reasonableness of counsel's decisions made thereafter, it is neither Petitioner's nor his family's duty to identify mitigating information. It appears that Trial Counsel did not explain the full scope of potentially mitigating information nor ask thoroughly sifting questions designed to elicit such information. Respondent points to Mr. Brownell's letter to Petitioner roughly six months before trial asking that he provide names of potential mitigation witnesses and to Petitioner's letter of reply listing a number of witnesses. (HT 1023-1026). This list, not surprisingly, did not result in the names of persons from his childhood in New York; Trial Counsel's instructions indicated that mitigation witnesses were "simply individuals that have good things to say about [him]." (HT 1023).

Second, while Petitioner's mother and sister may have been an adequate *start* to the New York investigation, Trial Counsel was aware that neither witness was equipped to give complete information.[22] Petitioner's mother was, according to her own testimony, working multiple jobs

[22] *Compare McPherson*, 284 Ga. at 221-23 (counsel ineffective for relying on defendant's mother for accurate information about her son's life history, where counsel knew she was likely omitting

and absent from the home a great deal during the relevant time frame. In addition, both Mr. Brownell and Mr. Walker acknowledge that Petitioner's mother was a difficult witness to extract specific information from and was hampered by her own emotional distress over Petitioner's crime and impending capital trial. While Petitioner and his sister were close growing up, she was herself a child during the relevant time frame.

The Warden's argument that Petitioner and his family are at fault for Trial Counsel's failure to investigate fails for one final, crucial reason: they *did* provide Trial Counsel with information about their life in New York and that information provided every indication that Trial Counsel should look further. In evaluating counsel's failures to learn what happened to Petitioner in New York and New Jersey, this Court must eliminate the distorting effects of hindsight and undertake a "context-dependent consideration of the challenged conduct, as seen 'from counsel's perspective at the time.'" *Wiggins*, 510 U.S. at 523, quoting *Strickland*, 466 U.S. at 689, 690, 691. This Court has undertaken that context-conscious evaluation, and such an evaluation only highlights the unreasonableness of Trial Counsel's failures.

From their interviews with Petitioner and his mother and sister, Trial Counsel had before them numerous indicators that additional investigation would be fruitful. "A court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527. In

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additional significant details of childhood abuse); *Turpin v. Christenson*, 269 Ga. at 237-38 (counsel ineffective for relying on defendant's estranged father for mitigation, as he could not be relied upon to provide accurate information); *Rompilla v. Beard*, 125 S.Ct. at 2466-68 (where defendant and some family members unforthcoming about defendant's life history, competent counsel exploits leads to significant mitigating information by inquiring with collateral witnesses who could corroborate abusive childhood); *Williams v. Allen*, 542 F.3d at 1340-41 (ineffective assistance found where counsel relied primarily on mother for information about defendant's history of childhood abuse, and failed to inquire with collateral witnesses who could have offered more detailed history of abuse).

this case, that "quantum of information" includes specific indicia of problems during Petitioner's upbringing. (HT 196; 551; 441). Petitioner and his family told Trial Counsel that Petitioner was referred to a school psychologist and tested during his second grade year in Brooklyn. (HT 783, 1182; 1372-1379). Trial Counsel did not inquire into the specific behaviors that were observed in Petitioner that lead to the testing. Petitioner told counsel that he suffered blackouts as a child and again suffered blackouts while in training with the Job Corps around 1984 or 1985. (HT 739). Trial Counsel noted that a neurologist may be necessary to the defense but did nothing to inquire further about witnesses or records which might document the blackouts, their nature, frequency, duration and precipitating factors.

In January 1996, Mr. Morrow's mother provided counsel with the names and dates of attendance for Petitioner's Brooklyn and New Jersey schools.[23] (HT 734). Counsel did not obtain the school records which reflect Petitioner's adjustment problems and his teachers' observations, including one teacher's observation that he seemed to have an "emotional disturbance." (HT 2109-2169). And while Petitioner's mother revealed she worked three jobs while a single parent, counsel talked to not a single witness aside from Petitioner's sister to document what occurred in her absence. (HT 768-769).

Even the basic report prepared by Dr. Dave Davis in 1996 after he "screened" Petitioner for competence and intelligence contained information which should have invited further investigation. The report reflected that Petitioner "attended many different schools growing up because of moving. . .was a problem child, with many fights, did not do his schoolwork, was truant, and the class clown." Petitioner reported to Dr. Davis feeling "hopeless, helpless, lonely,

[23] Petitioner's mother also told counsel that her son would come home from school beat up and that she would tell him that he had to learn to stick up for himself.

regretful, ashamed, guilty, afraid, depressed," and that he grew up in a bad environment. (HT 1049-1054). Dr. Davis "pointed out to [Petitioner] that there was a pattern of abandonment and loss of relationships in his life" and Petitioner agreed, saying that this was a "major factor." (HT 1054). Trial counsel's failure to follow-up is deficient in nearly any context, and certainly given the circumstances of the crime in the case before them.

During Mr. Mugridge's first interview with Petitioner at the jail, Petitioner provided substantial detail about his former schools in New York and New Jersey. Petitioner provided the name of a former girlfriend, Toni Baker, as well. (HT 1372-1379). Counsel did not obtain the school records and did not contact Ms. Baker. Mr. Mugridge also testified that he was aware from speaking with Petitioner's sister that "when they had moved up to the New Jersey area, apparently [Petitioner's mother] had had a relationship with more than one man up there during that period of time. She also had remarried at one point. . . .and because of some of that, and they moved to different areas, according to Samantha, she never went into a lot of detail. She just told me Scotty had a real hard time growing up as a young boy. And she said he just had a hard life growing up." (HT 196). Neither Mr. Mugridge nor Trial Counsel pressed Mr. Morrow's sister further on these subjects, nor did they interview any collateral witnesses. Thus, Trial Counsel was not only well aware that Petitioner lived in Brooklyn and New Jersey with his mother, but their files contained glaring red flags that something negatively impacting his development may have occurred there. That counsel had these red flags and failed to act on them places counsel's conduct well outside the range of reasonable professional conduct. *Williams*, 529 U.S. at 395-396; *McPherson*, 284 Ga. at 221-23; *Williams v. Allen*, 542 F.3d at 1340-41.

Moreover, investigating further into Petitioner's early life would have been consistent with Trial Counsel's theory of the case. Given that counsel testified that their primary objective was to *explain* the crime to the jury (HT 549), research into their client's life and background would not have been simply consistent, but a top priority. This is not a case in which counsel's other objectives were incongruent with a sifting mitigation investigation. *Compare Wiggins*, 539 U.S. at 536. In this case, Trial Counsel identified that Petitioner's degree of moral culpability was the central issue. (ROA 783-812; HT 46; 2517; 439; 550). Counsel's theory focused on the forces that could drive Petitioner to commit such a crime. As Mr. Walker explained:

> Our theory at trial was that Scotty was actually a good guy, and that the moment of panic and torment that he felt when he heard that [Barbara] Ann [Young] and her children were leaving him for her drug-dealing boyfriend was actually the culmination of something that had been festering since long before Ann came along.

(HT 484; 469-470). His testimony further reveals that Mr. Walker had some suspicion of what caused Petitioner to snap:

> My theory, again, was this is somebody who the rest of his life did not indicate he was someone to suspect would end up shooting somebody in cold blood, that because of emotional aspects of the case that he snapped. . .The more we got into the case, the more we realized that there were aspects of his past life, from moving around, from his mother not having a long-term stable relationship. There had been lot of rejection in Scotty's life. There had been a lot of emotional difficulty that he faced in being rejected by women. That happened with his previous wife. The one time before when he had gotten into criminal trouble was an incident with a transvestite that called into question his masculinity. I looked at this as being something similar when Ms. Young's friends were making fun of him and telling him to get out and take his things and leave forever, a real man is coming into the house. This is a guy who is more of a man than you are. And I felt like, while I am certainly no psychologist, I felt like that whatever had happened in his life up to that point, all came together to the point that it just burst in his mind and made somebody who previously appeared incapable of such an act capable during minutes to commit the shootings.

(HT 251-252).

Thus according to Trial Counsel's own testimony, their central goal was attempting to discover an explanation for the defendant's behavior, an explanation that likely involved feelings of powerlessness and threats to his masculinity. It was illogical and unreasonable to remain substantially ignorant of more than half of Petitioner's life prior to the crime, including many of his formative years. As Mr. Walker's testimony demonstrates, Trial Counsel were aware that the answer to the "why" question was to be found somewhere in Petitioner's history of rejection, abandonment, and childhood sexual abuse. There is no reason to assume that the answer would be discovered without reference to Petitioner's experiences between the ages of seven and twenty. *See e.g.* ABA Guideline 11.8.3(F), (counsel should consider sentencing phase witnesses and evidence "familiar with . . .and relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecution.").

Confronted with this type of evidence, "any reasonably competent attorney would have realized that pursuing these leads was necessary" to making an informed choice about what evidence to present. *Wiggins*, 539 U.S. at 525. Compelling evidence was available. Had they performed the investigation required by the Constitution, Petitioner's jurors would have heard the evidence. (HT 442; 551). Trial counsel faced no disincentive nor obstacle to such investigation. They were assigned a judge more than willing to delve into the county coffers to finance a constitutionally adequate defense (HT 440; *see also* 9-21-95 PHT), had ample time for travel and investigation, and their client's family members were largely cooperative (HT 240; 548). In short, counsel had every incentive to fulfill their duty to fully investigate Petitioner's background for mitigating evidence, yet not a single disincentive.

Trial Counsel themselves acknowledge that they had no strategic or other reason for failing to investigate an enormous portion of Petitioner's childhood. (HT 442-443; 551).[24] Similarly, Trial Counsel had no strategic or other reason to forego a defense crime scene expert, yet had every reason to retain such an expert. In a capital case, Trial Counsel failed to determine if Petitioner's version of the events, a version that involved a frantic and passion-fueled response to provocation, was supported by the physical evidence. Trial Counsel sought to prove in both phases of the trial that Petitioner did not have time to deliberate upon any aspect of his crime as it unfolded. There was thus every reason to present evidence to refute the State's evidence to the contrary. *Rompilla*, 125 S.Ct. at 2465 (counsel has obligation to attempt to rebut aggravating circumstances which the State may foreseeably raise); *Wiggins*, 123 S.Ct. at 2538 (once counsel has chosen a strategy, counsel has "every reason to develop the most powerful ... case possible" along those lines). Trial Counsel was well aware of Petitioner's statements regarding the specifics of the crime yet did nothing to independently corroborate those statements. This, too, was unreasonable.

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[24] In fact, Mr. Walker testified that his practice and approach to obtaining information about a client's life has changed since Petitioner's trial:

> How it has affected my practice is I do a lot more mental health evaluations, both in my adult felony cases and in my juvenile cases. I have gotten funding for social workers in order to help me handle both juvenile cases being treated as adult cases and cases that are still remaining in juvenile court. . .Just being alerted to what I miss, what you think you are getting that you just can't get without having somebody knowing, possessing the tools to go beyond the initial answer you might get of, oh, there is nothing there. What I have learned from this case is also I don't trust what the parents tell me about a youth's childhood. It is just not going to be accurate.

(HT 278-279).

Where, as in the instant case, counsel's failure to investigate and present mitigation evidence results from neglect, inattention, inexperience, and miscommunication among the defense team, the failure cannot be deemed reasonable. *Gulley*, 614 S.E.2d at 742; *McPherson*, 663 S.E.2d at 662, *citing Terry v. Jenkins*, 280 Ga. 341, 347, 627 S.E.2d 7 (2006); *Hardwick*, 320 F.3d at 1185. In failing to investigate more than half of Petitioner's life prior to the crime to explain why this crime may have occured and in failing to corroborate their own client's testimony with the testimony of a scientific expert, counsel's conduct fell far short of compliance with the constitutional obligation to seek and present to the jury "all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 522. Counsel's performance was deficient.

ii. There is a reasonable probability that had Trial Counsel performed a constitutionally adequate investigation, Petitioner's trial would have resulted in a life sentence.

As fully elucidated above, to prevail on his ineffective assistance of counsel claim, Petitioner must not simply make the foregoing demonstration that counsel's representation was deficient, but also must demonstrate that his counsel's performance prejudiced the outcome of his trial. *Strickland*, 466 U.S. at 694. Petitioner's "burden is to show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not.'" *Martin v. Barrett*, 279 Ga. 593, 619 S.E.2d 656 (2005), *citing Gulley*, 614 S.E.2d at 740. Petitioner has satisfied this requirement. The undiscovered mitigation, when taken together with the mitigating evidence that *was* aptly presented by Trial Counsel, is compelling. Furthermore, reasonable jurors could have found Petitioner's crime to be unplanned and emotionally fueled – the kind of scenario courts have deemed to be less aggravating in

comparison to the kind of mitigating evidence Petitioner has presented here.[25] When his crime is viewed in light of all the available evidence in mitigation, there is – at a bare minimum – a reasonable probability that at least one of the jurors would have struck a different balance as to sentence. *See Rompilla*, 545 U.S. at 393 ("If the undiscovered mitigating evidence, taken as whole, might well have influenced the jury's appraisal of [Petitioner's] culpability," then the deficient performance of the Petitioner's attorneys mandates reversal of the death sentence.).

According to Trial Counsel's own testimony (and well corroborated by the record below), the defense theory in support of a life sentence had two aspects: 1) that Petitioner had many positive and caring qualities and 2) that owing in some measure to childhood circumstances beyond his control, Petitioner "snapped" in a moment of extreme pain and committed the crime. With respect to the first prong of their theory, Trial Counsel made a considerable evidentiary presentation. They presented testimony from Petitioner's co-workers, pastors, family, friends, former girlfriend and ex-wife to effectively demonstrate that Petitioner had, among other redeeming traits, the capacity to be a good father and a loyal friend. (TT 4577-4587, 4593-4658, 4799-4785). They presented testimony from corrections officers to demonstrate that these were qualities that Petitioner maintained even after his incarceration, and that he would not be a continuing threat in prison. (TT 4588-4592).

As to the second aspect of their defense theory – that Petitioner "snapped" – Trial Counsel failed to deliver on their promise to the jury to explain Petitioner's crime. *See e.g.*

[25] *See, e.g., Grayson v. Thompson*, 257 F.3d 1194, 1229 n.19 (11th Cir. 2001) (evidence that crime involved unplanned, impulsive violence stemming from "irrational rage" or "sudden temper" may weaken aggravating power of the facts of the crime) (quoting *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995)); *Williams v. Taylor*, 120 S.Ct. at 1516 (evidence tending to show that the defendant's "violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation" can overcome aggravation introduced by state).

Wiggins, 539 U.S. at 515-516 (counsel ineffective where they told the jury during opening statements that they would hear that Petitioner "has had a difficult life" but did not present readily available evidence of those difficulties), *Ouber v. Guarino*, 293 F.3d 19 (1st Cir. 2002) (finding ineffectiveness in Trial Counsel's failure to deliver on key promise to the jury). From the outset, Trial Counsel failed even to confirm that their client's testimony that his crime was frantic and in response to provocation could be reconciled with the physical evidence. Rather than elicit a crime scene expert to review the evidence and explain it to the jury, Trial Counsel left the jury to believe that Petitioner lied to them and that he refused to admit that his crime was as calculated and deliberate as the State alleged.

Further, the defense provided little explanation for how Petitioner, a purportedly caring person, could commit two murders and attempt a third. Trial Counsel's investigation failed to reveal the most crucial portions of Petitioner's background, those portions that would bridge the gap for the jurors. As a result of their failure to support this second aspect of their argument, that Petitioner "snapped," Trial Counsel undermined the credibility of the evidence they *did* present in support of their first argument, the evidence that Petitioner was typically a caring person.

The jury was told only that Petitioner spent his first three years surrounded by the domestic abuse Petitioner's father perpetrated against his mother; that his mother fled the abuse when Petitioner was still a preschooler; and that he was then raised in New Jersey by a strong-willed and caring even if largely absent mother. (*See e.g.* defense penalty phase closing argument at TT 4934-4935). The information the jury was given about his childhood after the move to New Jersey was cursory at best. It did not include the devastating neglect, sexual abuse, bullying, and beatings to which Petitioner was subjected during the formative years of his life in Brooklyn and New Jersey. *See McPherson*, 284 Ga. at 221-23, 234-35 (cursory presentation of

some evidence of abuse and neglect was unreasonable and prejudicial in light of available additional evidence demonstrating severity and scope of chronic childhood abuse); *Williams v. Allen*, 542 F.3d at 1340-41 (same). In short, because counsel neglected to conduct a competent investigation, counsel presented an incomplete and inaccurate picture of Petitioner's life, in violation of his "constitutionally protected right" to have his attorney "present[] and explain[] the significance of all the available evidence [in mitigation]." *Williams*, 120 S. Ct. at 1513, 1516.

Trial Counsel did not leave room for jurors who might have suspected there was more to Petitioner's background to fill in the gaps on their own. Counsel instead told the jurors they were going to hear everything there was, start to finish, that might explain "what was going on in his mind...on December 29th [on] Moore Lane." (TT 4934). In the defense penalty phase opening statement, counsel promised:

> The evidence in this part of the case is going to be focused on Scotty Morrow, and we are going to be presenting evidence that takes you back basically to the very beginning...we're going to be presenting you with **everything** and then you decide how significant it is.

(TT 4561) (emphasis supplied).

Had Trial Counsel performed the required investigation, they could have delivered on this promise. The unpresented evidence is obvious support for Trial Counsel's chosen theory that Petitioner was a nice guy who snapped. Trial Counsel's testimony indicates that they would have recognized the value of the evidence and utilized it. Counsel would have had the viable explanation they sought for how Petitioner could be so overcome by emotion that he would shoot three people.

Perhaps the best indicia of the potential impact of the unpresented mitigation evidence come from the testimony of Dr. Buchanan. Dr. Buchanan's testimony regarding Petitioner's

emotional and psychological makeup was at best unflattering, at worst aggravating. The jury was told that Petitioner had a poor tolerance for stress, was impulsive and hyper-masculine. With the addition of the undiscovered evidence, his testimony, though largely consistent with his trial testimony, takes on an altogether different tenor. Dr. Buchanan could have explained the impact of a traumatic and abusive childhood on Petitioner's emotional make-up, on his adult relationships and ultimately on his behavior on the day of the crime.[26] Dr. Buchanan could have removed the aggravating sting of Petitioner's flat emotional affect during his testimony in his own defense and lent credibility to Petitioner's claim of partial amnesia for the events. Petitioner's blunted emotional state was, according to Dr. Buchanan's unrebutted testimony before this Court, a learned response to overwhelming experiences.

With the benefit of Petitioner's complete history and Dr. Buchanan's explanation of its import, the jury would have been able to apply "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynbaugh*, 492 U.S. 302, 319 (1989); *see also Hall v. McPherson*, 663 S.E.2d at 666, *citing Bright v. State*, 265 Ga. 275(2)(e), 455 S.E.2d 37 (1995) ("in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation"). In short, the evidence Trial Counsel failed to present is perhaps the most

[26] *See, e.g., Bright v. State*, 265 Ga. 265, 276, 455 S.E.2d 37 (1995) ("[A] psychiatrist could have evaluated, in terms beyond the ability of the average juror, Bright's ability to control and fully appreciate his actions in the context of the events that arose on the night of the murders, given his severe intoxication, his history of substance abuse, his troubled youth, and his emotional instability.")

persuasive brand of mitigating evidence: evidence of a direct link between Petitioner's early deprivation and abuse and his crimes.

While Petitioner's crime was horrible and intolerable, the facts are not such as to foreclose a reasonable probability that at least one juror would have opted for a sentence less than death. "Many death penalty cases involve murders that are carefully planned, or accompanied by torture, rape or kidnapping." *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998) (quoting *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995)); *see also Collier v. Turpin*, 177 F.3d 1184, 1203 (11th Cir. 1999). This case, by contrast, appears to involve unplanned, impulsive violence stemming from "irrational rage" or "sudden temper." *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995). The evidence demonstrates that Petitioner's crime was sparked by Petitioner's emotional suffering and the murders unfolded in the moments immediately after he was mocked by his estranged girlfriend's friends and ordered to leave her home. While it is intolerable to respond to emotional suffering with violence of any kind, the evidence, including the mitigating evidence pertaining to Petitioner's horrific upbringing and its impact on his psyche, tends to show that Petitioner truly did "snap" and impulsively shot the victims in this case. In light of the mitigating evidence now adduced, it is reasonably probable that at least one juror would have placed Petitioner's acts of violence in the context of his horrific upbringing and its devastating impact on his mental health and emotional well-being.

Notably, the aggravating aspects of Petitioner's crime appear no more severe, and in certain respects appear less severe, than those in recent United States and Georgia Supreme Court cases in which the court examined counsel's failure to present mitigating evidence and found that the failures prejudiced the outcome of the petitioner's trial. *Williams*, 529 U.S. at 362; *Wiggins*, 539 U.S. at 510; *Rompilla*, 545 U.S. at 374; *Gulley*, 614 S.E.2d at 740; *McPherson*, 663

S.E.2d at 659; *Jenkins*, 627 S.E.2d at 7. In those cases, the Court examined the value of the unpresented mitigating evidence in light of egregious aggravating factors. *Williams*, 529 U.S. at 367-368 (Williams beat an elderly victim to death with a mattock for refusing to lend him three dollars); *Wiggins*, 539 U.S. at 553-554 (Wiggins drowned a 77-year old woman in her bathtub, sprayed her with Ant and Roach Spray, ransacked her apartment and took her car and credit cards); *Rompilla*, 545 U.S. 397-400 (Rompilla stabbed a bar owner numerous times about the head and neck, beat him with a blunt object, gashed his face with portions of a broken liquor bottle and set his body on fire); *Gulley*, 614 S.E.2d at 740 (Gulley beat an elderly woman and her daughter with a wooden stick after they interrupted him burglarizing, then cut a towel into strips, used it to restrain the elderly woman, and stabbed her in the chest. While she bled to death, Gulley raped her daughter, who could hear her mother praying in the next room, then strangled the daughter with an electrical cord until she passed out. He stole both of the women's purses and the daughter's car as he left); *McPherson*, 663 S.E.2d at 659 (McPherson checked out of rehab, picked up his girlfriend at work, manually choked her and beat her in the head and face with a ball peen hammer, then stole her credit cards and car). Yet in each case, the Court concluded that the unpresented mitigation could have swayed the jury's estimation of culpability. *Id.* If there exists a reasonable probability that compelling mitigation could have swayed at least one juror in these more aggravated cases, the available mitigating evidence in the instant case easily carries the day.

Petitioner's personal history similarly lacks much of the aggravation at issue in the prejudice analysis in the applicable ineffective assistance of counsel cases. Petitioner does not

have a substantial criminal history.[27] Petitioner did not resist arrest and he did not commit other crimes contemporaneous with the murders. (TT 3748-3758). He immediately accepted responsibility for his crimes. (ROA 783-812; HT 119). His remorse and personal torment over his actions were noted by many of the witnesses to appear before this Court. (HT 46; 119; 139; 227; 438; 550). The evidence indicates that Petitioner was a non-violent inmate in the county detention center. (TT 4589-4591). Yet the United States Supreme Court has found prejudice flowing from trial counsel's failure to present mitigating evidence even when the petitioner has a lengthy and aggravated history of misconduct. *Williams*, 529 U.S. at 368 (Williams had prior convictions for armed robbery, grand larceny and burglary and had recently committed two auto thefts and two other assaults on elderly victims, one of whom was left in a vegetative state); *Rompilla*, 535 U.S. at 387 (Rompilla "had a significant history of felony convictions indicating the use or threat of violence," including rape and assault.)

Further, given the impulsive nature of Petitioner's crime placed in the mitigating context of his deprived and abuse-laden life history, there is ample reason to believe that Petitioner was prejudiced by counsel's failure to locate and include evidence of his childhood experiences in the New York area and the resultant effects on his functioning. The Court concludes that if the jury had heard the evidence that an adequate investigation by Trial Counsel would have developed, together with the factors already presented at trial and those discussed above, "there is a reasonable probability that...the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is not possible for this Court to have confidence in the outcome of

[27] To the extent that Petitioner did have prior encounters with law enforcement, these arrests go hand and glove with the unpresented mitigation evidence. The defense could have tied Petitioner's prior arrests for assaulting a transgendered prostitute and his prior assaults upon the victim, Ms. Young, to his early childhood history of physical and sexual abuse and abandonment.

Petitioner's sentencing trial. The sentence of death imposed by the Superior Court of Hall County is hereby VACATED.

SO ORDERED this 3rd day of February, 2011.

Hon. Wendy L. Shoob, Judge
Superior Court of Butts County
(sitting by designation)

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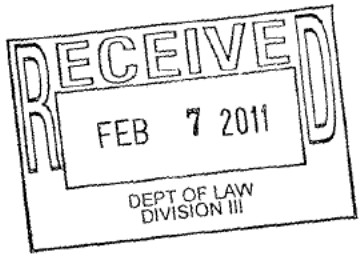
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