IN THE

SUPREME COURT OF THE UNITED STATES

_____

No. _____

_____

SCOTTY GARNELL MORROW,

Petitioner,

v.

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison.

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

---

*S. Jill Benton (Ga. Bar No. 053659)
Nathan Potek (Ga. Bar No. 747921)
FEDERAL DEFENDER PROGRAM, INC.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
T. 404-688-7530
jill_benton@fd.org
Nathan_potek@fd.org

Marc Holzapfel (NY Bar No. 2724565)
CJA COUNSEL, admitted *pro hac vice*
10 Appleton Place
Glen Ridge, New Jersey 07028
T. 201-247-7518
Mfholzapfel@gmail.com

COUNSEL FOR MR. MORROW

SUPREME COURT OF GEORGIA
Case No. S19W1169

May 2, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

SCOTTY GARNELL MORROW v. BENJAMIN FORD, WARDEN.

After careful review of Morrow's application for a certificate of probable cause to appeal the dismissal of his second state habeas petition, the Warden's response, Morrow's reply, and the record in this case, the application is denied as lacking arguable merit because Morrow's claim is procedurally barred under Georgia law. See Supreme Court Rule 36.

Morrow's associated motion for a stay of execution is also denied.

All the Justices concur, except Warren, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

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

Sue C. Fulton, Chief Deputy Clerk

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

SCOTTY GARNELL MORROW,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2019-HC-9**
	*	
v.	*	**HABEAS CORPUS**
	*	
BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent.	*	

ORDER

This is Petitioner's second state habeas petition alleging that "[b]cause the trial court, *not the jury*, made the necessary finding for death when it imposed a sentence that conformed to neither the indictment, the evidence, the instructions given to the jury, nor the jury's verdict, the death sentence in Mr. Morrow's case violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §1, ¶¶1, 2, 11 &17 of the Constitution of the State of Georgia." (Pet. at 2). This claim was previously raised in Petitioner's first state habeas proceeding (Claim XXIV), and the Georgia Supreme Court determined on appeal from that proceeding that the claim was barred as procedurally defaulted. *Humphrey v. Morrow*, 289 Ga. 864, 876-77 (2011).

As this claim was already ruled upon, this Court is procedurally barred under the doctrine of res judicata from reviewing the Georgia Supreme

Court's determination that the claim was procedurally defaulted. Issues previously raised may not be relitigated in habeas corpus if there has been no change in the facts or the law or a miscarriage of justice. *Bruce v. Smith*, 274 Ga. 432, 434 (2001); *Gaither v. Gibby*, 267 Ga. 96, 97 (1996); *Gunter v. Hickman*, 256 Ga. 315 (1986); *Elrod v. Ault*, 231 Ga. 750 (1974). Morrow has pled neither new facts nor new law or a miscarriage of justice to overcome the bar to his claim. Consequently, this claim is barred from this Court's review. *See* O.C.G.A. § 9-14-51. This Court DISMISSES this instant petition.

As this Court is able to determine from the face of the pleadings that the claim in this petition is barred from this Court's review, the petition is dismissed without the necessity of a hearing. *See Collier v. State*, 290 Ga. 456 (2012). Additionally, Petitioner's request for a stay of execution is denied.

SO ORDERED, this 1 day of May, 2019.

THOMAS H. WILSON
Chief Judge of the Superior Courts
Towaliga Judicial Circuit

Prepared by:
Sabrina D. Graham
Senior Assistant Attorney General
sgraham@law.ga.gov

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Pleading and Proposed Order, prior to filing the same, by emailing, properly addressed upon:

S. Jill Benton
Federal Defender Program, Inc.
101 Marietta Street, N.W.
Suite 1500
Atlanta, Georgia 30303
jill_benton@fd.org

Marc F. Holzapfel
10 Appleton Place
Glen Ridge, NJ 07028
Mfholzapfel@gmail.com

This 30th day of April, 2019.

s/Sabrina D. Graham
SABRINA D. GRAHAM
Senior Assistant Attorney General

IN THE SUPERIOR COURT FOR THE COUNTY OF HALL

STATE OF GEORGIA

STATE OF GEORGIA,		
PROSECUTOR,	§	**CRIMINAL INDICTMENT**
VS.	§	**NUMBER: 95CR-264A**
SCOTTY GARNELL MORROW,	§	**OFFENSE: MURDER, ET AL.**
DEFENDANT.	§	

VERDICT AS TO SENTENCING

I. AGGRAVATING CIRCUMSTANCE(S)

We, the jury, find based upon evidence presented by the State of Georgia beyond a reasonable doubt that statutory aggravating circumstance(s) [DO] [~~DO NOT~~] *(STRIKE THROUGH WORD(S) THAT DO(ES) NOT APPLY)* exist in this case.

DNR

If you find that statutory aggravating circumstance(s) do not exist, in Section II, fix the sentence at life imprisonment.

If you find that statutory aggravating circumstance(s) do exist, mark on the attached list which statutory aggravating circumstance(s) have been proven by the State of Georgia beyond a reasonable doubt. In Section II, fix whichever of the three sentences you find appropriate.

THE FOREPERSON MUST SIGN AND DATE EACH PAGE OF THE VERDICT.

II. SENTENCE *(CHECK ONLY THE SENTENCE YOU FIX)*

WE, THE JURY, FIX THE SENTENCE AT:

_____ LIFE IMPRISONMENT

_____ LIFE IMPRISONMENT WITHOUT PAROLE

yes DEATH

Ronald M Lucado
SIGNATURE OF JURY FOREPERSON

6-29-99
DATE

FILED IN OFFICE
This 29th day of June 1999
Dwight S. Wood
DWIGHT S. WOOD Clerk
10:55 P.M.

Res. Ex. No. 7
Case No. 2:12-CV-51

STATE OF GEORGIA VS. SCOTTY GARNELL MORROW
CASE NUMBER: 95CR-264A
PAGE 3

II. O.C.G.A. Section 17-10-30(b)(7) Statutory Aggravating Circumstances

yes (1) The offense of murder of Barbara Ann Young was outrageously and wantonly vile, horrible or inhuman in that it involved depravity of mind;

yes (2) The offense of murder of Barbara Ann Young was outrageously and wantonly vile, horrible or inhuman in that it involved torture to Barbara Ann Young prior to the death of Barbara Ann Young;

_____ (3) The offense of murder of Barbara Ann Young was outrageously and wantonly vile, horrible or inhuman in that it involved aggravated battery to Barbara Ann Young prior to the death of Barbara Ann Young;

yes (4) The offense of murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved depravity of mind;

yes (5) The offense of murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved torture to Tonya Rochelle Woods prior to the death of Tonya Rochelle Woods;

yes (6) The offense of murder of Tonya Rochelle Woods was outrageously and wantonly vile, horrible or inhuman in that it involved aggravated battery to Tonya Rochelle Woods prior to the death of Tonya Rochelle Woods.

Donald M Ruark
SIGNATURE OF JURY FOREPERSON

6-29-99
DATE

STATE OF GEORGIA , SCOTTY GARNELL MORRC
CASE NUMBER: 95CR-264A
PAGE 2

LIST OF STATUTORY AGGRAVATING CIRCUMSTANCES

Mark in space provided which stautory aggravating circumstance(s) have been proven by evidence presented by the State of Georgia beyond a reasonable doubt.

I. O.C.G.A. Section 17-10-30(b)(2) Statutory Aggravating Circumstances

yes (1) 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 Ann Young;

YES (2) 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;

YES (3) 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;

YES (4) 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;

YES (5) The offense of murder of Tonya Rochelle Woods 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.

Donald M. Runnels
SIGNATURE OF JURY FOREPERSON

6-29-99
DATE

III. O.C.G.A. Section 17-10-30(b)(10) Statutory Aggravating Circumstances

_____ (1) The offense of murder of Barbara Ann Young was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest of the Defendant;

_____ (2) The offense of murder of Tonya Rochelle Woods was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest of the Defendant.

Donald M Record
SIGNATURE OF JURY FOREPERSON

6-29-99
DATE

ORIGINAL

IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
Prosecutor,	)	
	)	
vs.	)	CASE NO. 95-CR-0264A
	)	
	)	
SCOTTY GARNELL MORROW,	)	
	)	
Defendant.	)	

Proceedings held in the above-entitled case, before the Honorable C. Andrew Fuller, Judge Presiding; reported by Valerie N. Almand, Certified Court Reporter, said proceedings commencing on the 15th day of July 1999.

APPEARANCES OF COUNSEL:

On Behalf of the State:

LISA JONES, Assistant District Attorney

JOHN WARR, Assistant District Attorney

On Behalf of the Defendant:

WILLIAM M. BROWNELL, JR., Attorney at Law

HAROLD M. WALKER, JR., Attorney at Law

- - -

VOLUME I OF I

- - -

PROCEEDINGS

THE COURT: Good morning. I had scheduled a hearing this morning in the State of Georgia as the prosecutor versus Scotty Garnell Morrow as the defendant in Criminal Indictment Number 95-CR-264A, and I scheduled the hearing as a result of the need to present Mr. Morrow with an order pronouncing and amending sentence, and I'm going to ask Mr. Hopkins, if you'll approach, I'm going to provide Mr. Morrow a certified copy of that order at this time.

As we are continuing to proceed under the Unified Appeals, I noticed that Mr. Morrow is present, Mr. Brownell is present in representation of Mr. Morrow and Ms. Jones is here in representation of the State.

Mr. Morrow was provided a trial by jury beginning June the 7th in the case that I've styled for the record, and on June the 29th of 1999 the jury returned a verdict fixing sentence at death, and there was then a sentencing or the conversion by the Court of the verdict of the jury into a judgment, which was not fully compliant with the statute, and as a result thereof I have entered the order pronouncing and amending sentence, and it states as follows:

On the 7th day of June, 1999 the above-captioned and numbered capital case was called by the Court for a trial by jury. After conclusion of the guilt-innocence phase of the case on the 26th day of June, 1999, the jury found the defendant

guilty of each count of the above-captioned and numbered indictment. Upon conclusion of the sentencing phase of the above-captioned and numbered case on the 29th day of June, 1999, the jury returned a verdict fixing a sentence of death upon the defendant. On the 29th day of June, 1999 the Court orally pronounced sentence upon the defendant, making the sentencing verdict of the jury the sentencing judgment of the Court.

For record purposes and pursuant to the directive set forth in Official Code of Georgia Annotated Sections 17-10-33 and 17-10-34, the Court hereby enters this written order pronouncing and amending sentence, as to Count One of the above captioned and numbered indictment, the defendant Scotty Garnell Morrow is hereby sentenced to death. Defendant Scotty Garnell Morrow shall be put to death in a manner as provided by the law of the State of Georgia. The execution of defendant Scotty Garnell Morrow will occur in Jackson, Butts County, Georgia at the Georgia Diagnostic and Classification Prison on a date which is seven days in duration commencing at noon on a specified date and ending at noon on a specified date; the time period of execution shall commence not less than twenty days nor more than sixty days from the date of sentencing.

The execution date set for defendant Scotty Garnell Morrow will begin at 12:00 o'clock p.m. noon of the 21st day of August, 1999 and will end at 12:00 o'clock p.m. noon of the 27th day of August, 1999.

On the 29th day of June, 1999 the Court orally pronounced sentence upon defendant Scotty Garnell Morrow imposing a sentence of death as to Count One, murder, and imposing a second sentence of death as to Count Two, murder.

Although the jury found defendant Scotty Garnell Morrow guilty of the murder of Barbara Ann Young in Counts One of the indictment and guilty of the murder of Tonya Roshelle Wood in Count Two of the indictment, the Court determines that the sentence of death fixed by the jury and pronounced as the sentencing judgment of the Court is as to Count One. Thus, the defendant Scotty Garnell Morrow is hereby sentenced to death pursuant to the terms set forth in this order as to Count One, murder. Count Two, murder, Count Three, felony murder and Count Four, felony murder of the indictment merge for the purposes of sentencing.

And Mr. Morrow, I asked that you be brought up for that specific purpose, to be given a copy of that order and thus allowing the Court also to orally pronounce sentence as I have just done.

Mr. Brownell, any position that you want to make known for the record? And I'm not suggesting you need to.

MR. BROWNELL: Yes, sir. Judge, I recognize that the Court recognized that there was only one verdict of death as set out by the jury. At this point because we just recently received this order, I think I received it yesterday or the day

before, I haven't had extensive time to research the issue.

Because the verdict did not specify as between Counts One, Two, Three or Four, I think there's at least a possibility that may not even be a proper verdict, and I'm going to have to research that further.

What I'd like to do at this point is very simply object to the imposition of the death sentence as to Count One, just to preserve the issue and reserve the right to follow up with either an additional issue on motion for new trial or after talking it over with co-counsel, Mr. Walker, possibly just preserve that as appeal issue.

But I think in order to preserve it properly I would need to make the motion and I am, therefore, making a motion stating that it's our position that it would not be a proper verdict, and the Court may want to go ahead and rule on that just so that it's in the record, but we would object to the imposition of the death sentence because it's our position that the verdict did not specify what count that was on.

THE COURT: Then your objection will be noted and I will overrule the same.

Ms. Jones, any position you want to voice for the record? And I'm not suggesting you do that.

MS. JONES: No, Your Honor. Obviously the State would feel that it was a proper verdict and we would ask that the Court rule as it has.

THE COURT: Also, the Unified Appeal and the Georgia Supreme Court require a report of a trial judge to be filed. I do not think that I have yet provided a copy to either counsel because it is incomplete, and Mr. Brownell in particular, I would like to ask for Mr. Morrow's assistance in completeing this.

It is information that is just background related, and for instance, I'm going to begin by looking at the report of the trial judge of the Superior Court of Hall County, the State versus Scotty Garnell Morrow, a case in which the death penalty was imposed. It's sectioned as A, data concerning the defendant: One, name, Morrow, Scotty Garnell; two, date of birth, March 2, 1967; question three, sex, I've marked male; question four, race colon, I've marked black; question five, marital status, I've marked divorced; question six, number of children, I've listed two, as I recall from the evidence.

It then goes on to ask ages, and I would prefer not to have to look back through the record to gain that information. Mr. Morrow --

MR. BROWNELL: Judge, if I could just have one second. That's fine, Judge. And it would be easiest if you just asked those questions directly to Mr. Morrow.

THE COURT: All right, Mr. Morrow. You were placed under oath earlier in this trial, you'll remain under oath, I wouldn't administer an additional oath to you but would ask you

to respond to these questions for me, please.

Question number six says number of children, I've put two. You have two natural children; is that correct?

THE DEFENDANT: That's correct.

THE COURT: And the ages of your children?

THE DEFENDANT: My son Adrian is ten, and my son Scotty Jr. is thirteen.

THE COURT: Thank you. Question seven, father living, I put yes, as I recall from the evidence.

THE DEFENDANT: That's correct.

THE COURT: Mother living, yes, as I recall from the evidence.

THE DEFENDANT: That's correct.

THE COURT: Question eight, number of brothers and sisters.

THE DEFENDANT: Three.

THE COURT: All right, that's all I need. Question nine, education completed, high school, GED? Or ninth grade, or can you tell me what level of education did you last complete?

THE DEFENDANT: Tenth grade.

THE COURT: Question ten, Mr. Brownell, I'm seeking your assistance also. I could not answer this question. Intelligence level colon, the first option I have is IQ below seventy, low; the second option, IQ seventy to a hundred, medium; third, IQ above a hundred, high. I know Dr. Buchanan

provided some assistance to you. Do you have that information?

MR. BROWNELL: Judge, I think there was actually testimony in court. My recollection was that it was in about the 90 range, so that would be between the seventy and a hundred.

THE COURT: All right. And I'm going to tentatively mark that. I'm going to ask Ms. Bebko to look back through the record to confirm that for me also.

MR. BROWNELL: If it's not in the record, I can state in my place that Dr. Buchanan did provide, I can't remember if it's -- it's right around the 89, 90, 91, so I'm confident that it is definitely between seventy and a hundred.

THE COURT: All right. Eleven, psychiatric evaluation performed, I marked yes. I know there was some type of psychiatric evaluation performed by the testimony of Dr. Buchanan. If performed, is defendant: A, able to distinguish right from wrong, mark yes or no; B, able to adhere to the right, yes or no; C, able to cooperate intelligently in his own defense, yes or no.

And the question is more toward -- of course, I have an independent basis for marking those questions, but that's not what it's asking for, it's asking for the results of a psychiatric evaluation. And did Dr. Buchanan also testify to those areas?

MR. BROWNELL: No, sir. But we did have a

psychiatrist very early in the case do an evaluation of those issues. It was somebody other than Dr. Buchanan. And he determined that there was no insanity defense, that's why we did not approach that.

THE COURT: Then as a result of your knowledge of the psychiatric evaluation which was performed, I marked it correctly as yes. It then goes on to say if performed, is defendant: A, able to distinguish right from wrong. Did your psychiatric evaluation respond to that question?

MR. BROWNELL: And it would be yes. Yes, sir.

THE COURT: B, able to adhere to the right.

MR. BROWNELL: Yes, sir, and the answer there would be yes.

THE COURT: And C, able to cooperate intelligently in his own defense?

MR. BROWNELL: Yes, sir, and again, yes.

THE COURT: Question twelve, if examined were character or behavior disorders found, yes or no.

MR. BROWNELL: And Judge, that would be by Dr. Buchanan, and I think he did testify that there, although there was not a mental illness, there were some character flaws or some personality flaws.

THE COURT: Then I'll mark that as yes. Question thirteen, what other pertinent psychiatric and psychological information was revealed. I'm going to -- and what I'd like to

do, Mr. Brownell, is have you provide me with any psychiatric or psychological reports, evaluations that were done and presented in writing. You've mentioned two different medical psychological folks that have evaluated Mr. Morrow. Were there written reports on both of those?

MR. BROWNELL: No, sir, just on the first. That would be only on the insanity issue. It was a very brief one.

THE COURT: And if I were to direct you to ask Dr. Buchanan to provide one -- I simply would like to file those written reports under seal along with this report for whatever use the Georgia Supreme Court finds in their use of this report. Any objection to that? And you can think about that, because I'm going to give question thirteen to you.

What other pertinent psychiatric and psychological information was revealed. Other than Dr. Buchanan's testimony, which I'm going to attach also, I don't know. I haven't seen the reports. And Dr. Buchanan didn't do a report. So I'm going to put you in a position also of answering that question, and I guess you can decline to answer it and the record then will reflect that, and I don't encourage or discourage you to do either.

MR. BROWNELL: Yes, sir.

THE COURT: But I'll just give you some time to think about your position in reference to a response to that question, knowing what I'd like to do, which is attach -- which is have

written reports prepared, paid for, and then submit it under seal, just as I will submit Dr. Buchanan's testimony not under seal as part of this report, to try to answer that question. I know that the supreme court evidently wants a much shorter answer, given that they give three lines to present that response.

MR. BROWNELL: I can, for whatever it's worth, Judge, I can state -- I don't know what the supreme court's definition of pertinent is, and I think that may be the Court's difficulty also.

We -- it's our position that we submitted, we tendered everything that was pertinent through Dr. Buchanan's testimony; that anything else was really minor and personal, and I can't really think of anything else that he didn't testify to, so I think if the Court were to attach his testimony I believe that that would cover everything that could possibly be pertinent.

THE COURT: All right. Then that's what I will do.

Mr. Morrow, the next question is prior work record of defendant. I know that you, as I recall at one time worked at Lowe's and then also drove a concrete truck, if I recall correctly. But your most recent job last held was what type of job?

THE DEFENDANT: Truck driver.

THE COURT: For Lowe's?

THE DEFENDANT: No, that was --
THE COURT: Then truck driver for who?
THE DEFENDANT: Terry Dicks trucking.
THE COURT: Will you spell that last name?
THE DEFENDANT: D-I-C-K-S.
THE COURT: The question asks for type of job, I put truck driver for Terry Dicks trucking. It asks salary. Can you tell me what your annual gross salary was or monthly gross salary or weekly gross salary?
THE DEFENDANT: Annual would be fifty-five thousand a year.
THE COURT: Dates held, can you give me a rough feel for the dates that you held employment with that company?
THE DEFENDANT: May '94 to October '94.
THE COURT: October of '94?
THE DEFENDANT: Yes.
THE COURT: And reason for termination.
THE DEFENDANT: I quit, I was just tired of being on the road.
THE COURT: It asks for the work -- record work history and it gives five or six columns for each job that you may have held. How about the job that you held prior to being a truck driver for Terry Dicks trucking?
THE DEFENDANT: That would be Lowe's.
THE COURT: And were you --

THE DEFENDANT: A driver, truck driver.

THE COURT: Salary, roughly? Hourly? You can give it to me in any fashion you can recall.

THE DEFENDANT: Hourly rate was twelve fifty an hour.

THE COURT: Dates held, again roughly?

THE DEFENDANT: That would have been back a year from the prior job.

THE COURT: All right. So I can basically put 5 of '93? One year?

THE DEFENDANT: I'd say a year and maybe two or three months.

THE COURT: I'm going to put about February of '93 to 5 of '94 when you picked up with Terry Dicks trucking. And reason for termination?

THE DEFENDANT: I just quit, left.

THE COURT: Job before Lowe's?

THE DEFENDANT: Truck driver for Freight Direct.

THE COURT: Freight Direct. Roughly a salary?

THE DEFENDANT: That was twenty-two dollars an hour.

THE COURT: Dates held, roughly? We're back to February of '93 so we're going back in time from February '93.

THE DEFENDANT: An eight-month period.

THE COURT: All right. Then I'm going to basically put June of '92 to February of '93. Any other jobs that you've held that you want to mention for the purposes of this report?

It appears that the job description you've given indicates you've been a truck driver. Anything else you want to list as a prior job?

THE DEFENDANT: No.

THE COURT: All right. That ends the section that I would ask questions of Mr. Morrow. Section B is data concerning the trial. And section C, offense-related data; section D, representation of defendant. I'm going to complete the report as best as it can be completed.

There is a section G, chronology of case that is yet to be questions that can be answered, date motion for new trial ruled on, things of that nature, but I will provide a copy of the completed report as best as it can be completed to each counsel.

I'll ask each counsel to respond in writing to that report in the event that they care to, pursuant to the direction of the Unified Appeals, and Ms. Jones, I did not mean to leave you out of this process, but I was simply interested in gaining information from Mr. Morrow that would assist me in completeing the report. Any position you want to voice for the record? You'll have that opportunity, obviously, when I provide you with the report.

MS. JONES: Not at this time, Your Honor.

THE COURT: Mr. Morrow, and I know Mr. Brownell has a copy of the Unified Appeals. I assume you still have a copy; is

that correct?

THE DEFENDANT: That's correct.

THE COURT: And I know from the progress in this case that you can read; is that correct?

THE DEFENDANT: That is correct.

THE COURT: I want to point your attention to Page 15 of the Unified Appeals, the copy that I have, more particularly it's the outline of the proceedings, Roman Numerical Figure IV, review proceedings, I have already read that. I'm going to not read it at this time but just bring your attention back to it.

And there's a related part at Page 36, part Roman Numerical Figure IV beginning with motion for new trial. I know again we've read through that already and Mr. Brownell will go through those with you again.

You have certain appellate rights that are explained to you in the Unified Appeals. The Court's already explained them to you, I'm sure Mr. Brownell and Mr. Walker have explained them to you. Please read through those again. I'm going to consider for the purposes of any appellate action the date of July the 7th as your critical date for any thirty-day period of time that would run for the filing of any appellate action, rather than June the 29th, given that I've now entered an order pronouncing and amending sentence that is dated as of July the 7th, and it was filed as of July the 7th also, even though today is, well, July the 15th. Either way, Mr. Brownell, I am going

to order that if you're going to take appellate action that you do so, since you are in representation of Mr. Morrow, for the purposes of appeal, that you do so prior to the date that has been set for execution in the order that I've just read.

MR. BROWNELL: Yes, sir, I think that would be wise.

THE COURT: Please make sure that you do that. I know that you would have anyway, but for record purposes please make sure that you do that.

MR. BROWNELL: And Judge, for the Court's information, and it's really probably just to satisfy any curiosity that the Court may have, at this point it does not appear that we'll be going forward with a motion for new trial. I think we're probably going to go with a direct appeal. I do need to again go over that with Mr. Walker and get his opinion, especially concerning this latest sentencing issue. But that would be our intent at this time would be to file a direct appeal, notice of appeal and direct appeal to the supreme court.

THE COURT: I appreciate you letting me know that too.

Any other matters that we need to address, Ms. Jones, from the State's position?

MS. JONES: No, Your Honor.

THE COURT: Any other matters that we need to address, Mr. Brownell, from Mr. Morrow's position?

MR. BROWNELL: Yes, sir, briefly. We are filing a

request to remain in local custody pending motion for new trial an appeal. This is based on OCGA 42-5-50.

As I read the statute, there really is no discretion. As soon as defense counsel states that the defendant is needed in local custody to assist with the prosecution of that appeal, then it's automatically granted. I have prepared and I'll be filing a request. It's got a copy of the order with it. We can go ahead and address that, and I only have the one original.

THE COURT: Any objection -- Ms. Jones, Mr. Brownell, will you take that to Ms. Jones first to see if she has any objection to my signing that at this time?

MS. JONES: Your Honor, I think Mr. Brownell is correct, according to the code section. Captain Ash has informed me that Mr. Morrow was to be transferred to Jackson State Prison tomorrow, and that's already been established. I'd just like to make the Court aware of that, understanding we'd leave it to the Court's discretion in line with the statute. But I think it's necessary that you be aware of that.

THE COURT: Thank you for that information, Ms. Jones. And I'm going to sign the order allowing Mr. Morrow to stay in the custody of the Hall County sheriff. And Mr. Brownell, you'll need to tend to that immediately based on what Ms. Jones has just mentioned.

MR. BROWNELL: Yes, sir, and I'll get Captain Ash a copy of this order as quickly as we can. I'm assuming, just

because you know it's now signed.

CAPTAIN ASH: If the Court please, I'll accept your verbal from here and make sure it's canceled tomorrow.

THE COURT: Thank you, Captain Ash. Thank you, Mr. Brownell, I've signed that order.

MR. BROWNELL: Thank you, Judge. That would be all from the defendant.

THE COURT: Mr. Morrow, then I'll continue with the path that I've followed under the unified appeal. Even at this phase of the case, I want to make sure that you are satisfied with the representation provided to you by counsel, Mr. Brownell and Mr. Walker. Are you?

THE DEFENDANT: Yes, sir.

THE COURT: And do you continue to have access to Mr. Brownell and Mr. Walker by telephone and by the use of the United States mail and things of that nature?

THE DEFENDANT: Yes.

THE COURT: And have you been satisfied with the number of times that Mr. Brownell and Mr. Walker have visited you or responded to you by telephone or responded to you by the United States mail?

THE DEFENDANT: Yes.

THE COURT: And are you comfortable that Mr. Brownell and Mr. Walker are continuing to represent you at this phase of the case, that is the appellate phase of the case?

THE DEFENDANT: Yes.

THE COURT: And have you asked Mr. Brownell and Mr. Walker to do anything for you in that regard concerning the appeal of your case that Mr. Walker or Mr. Brownell have flatly refused to do?

THE DEFENDANT: No.

THE COURT: Or that Mr. Brownell or Mr. Walker simply haven't done?

THE DEFENDANT: No.

THE COURT: As you know, you have the opportunity to voice any objections that you have to the representation of Mr. Brownell and Mr. Walker of you, in particular at this phase of the case.

THE DEFENDANT: Yes.

THE COURT: But also including any aspect of your case, off -- well, out of the presence of counsel and everyone but the court reporter and the judge. Do you need to tell me anything with just the court reporter and the judge present?

THE DEFENDANT: No, sir.

THE COURT: All right. Then we'll stand in recess in Mr. Morrow's case. Thank you.

THE DEFENDANT: Thank you.

(Proceedings concluded).

- - -

C E R T I F I C A T E

G E O R G I A:

HALL COUNTY:

I hereby certify that the foregoing proceedings were taken down, as stated in the caption, and were reduced to typewriting; that the foregoing pages numbered 1 through 18 are a true and accurate transcription of the stenographic notes taken by me of said proceedings.

I further certify that any attached exhibits are true and correct copies of exhibits identified in said proceeding.

I further certify that I am not of kin or counsel to the parties in the case, am not in the regular employ of counsel for any of the said parties; nor am I in any way interested in the result of said case.

This, the 15th day of September 1999.

VALERIE N. ALMAND, CCR, B-531

GEORGIA, HALL COUNTY

I hereby certify that the foregoing pages hereto attached comprise the original of the Court Reporter's Transcript as filed in this office on SEPTEMBER 15, 19 99, in the case of

SCOTTY GARNELL MORROW

Appellant

Vs.

STATE OF GEORGIA

Appellee

Witness my signature and the seal of Court affixed

this the 15TH day of SEPTEMBER, 19 99

Dwight S. Wood

Clerk Superior Court, HALL County, Ga.

Case No. 500P0112

January Term, ~~19~~ 2000

SUPREME COURT OF GEORGIA

Scotty Darnell Marrow

VERSUS

The State

COURT REPORTER'S TRANSCRIPT

Filed in office October 4, 1999

Dara Anderson

~~C~~S.C. Ga.

IN THE SUPERIOR COURT FOR THE COUNTY OF HALL

STATE OF GEORGIA

STATE OF GEORGIA,

§ CRIMINAL INDICTMENT NUMBER: 95CR-264A

PROSECUTOR,

§

§

VS.

§ OFFENSES:
COUNT 1: MURDER;
COUNT 2: MURDER;
COUNT 3: FELONY MURDER;
COUNT 4: FELONY MURDER;
COUNTS 5, 6, 7, 8, 9 and 10: AGGRAVATED ASSAULT;
COUNT 11: AGGRAVATED BATTERY;
COUNT 12: CRUELTY TO CHILD;
COUNT 13: BURGLARY;
COUNT 14: POSSESSION OF A FIREARM DURING THE COMMISSION OF FELONIES

SCOTTY GARNELL MORROW,

§

DEFENDANT.

§

ORDER PRONOUNCING AND AMENDING SENTENCE

On the 7th day of June, 1999, the above-captioned and numbered capital case was called by the Court for a trial by jury. After conclusion of the guilt/innocence phase of the case, on the 26th day of June, 1999, the jury found the Defendant guilty of each count of the above-captioned and numbered indictment. Upon conclusion of the sentencing phase of the above-captioned and numbered case, on the 29th day of

June, 1999, the jury returned a verdict fixing a sentence of death upon the Defendant. On the 29th day of June, 1999, the Court orally pronounced sentence upon the Defendant, making the sentencing verdict of the jury the sentencing judgment of the Court.

For record purposes and pursuant to the directive set forth in Official Code of Georgia Annotated §§17-10-33 and 17-10-34, the Court hereby enters this written Order Pronouncing And Amending Sentence. As to Count One of the above-captioned and numbered indictment, the Defendant, Scotty Garnell Morrow, is hereby sentenced to death. Defendant Scotty Garnell Morrow shall be put to death in a manner as provided by the law of the State of Georgia. The execution of Defendant Scotty Garnell Morrow will occur in Jackson, Butts County, Georgia, at the Georgia Diagnostic and Classification Prison on a date which is seven days in duration commencing at noon on a specified date and ending at noon on a specified date. The time period of execution shall commence not less than twenty (20) days nor more than sixty (60) days from the date of sentencing. The execution date set for Defendant Scotty Garnell Morrow will begin at 12:00 o'clock p.m., noon, of the 21st day of August, 1999 and will end at 12:00 o'clock p.m., noon, of the 27th day of August, 1999.

On the 29th day of June, 1999, the Court orally pronounced sentence upon Defendant Scotty Garnell Morrow imposing a sentence of death as to Count One, Murder, and imposing a consecutive sentence of death as to Count Two, Murder.

Although the jury found Defendant Scotty Garnell Morrow guilty of the murder of Barbara Ann Young in Count One of the indictment and guilty of the murder of Tonya Rochelle Woods in Count Two of the indictment, the Court determines that the sentence of death fixed by the jury and pronounced as the sentencing judgment of the Court is as to Count One. Thus, the Defendant, Scotty Garnell Morrow is hereby sentenced to death pursuant to the terms and conditions set forth in this order as to Count One, Murder. Count Two, Murder, Count Three, Felony Murder and Count Four, Felony Murder, of the indictment merge for the purposes of sentencing.

SO ORDERED, this the 7th day of July, 1999, nunc pro tunc the 29th day of June, 1999.

C. Andrew Fuller

C. ANDREW FULLER, JUDGE
SUPERIOR COURT FOR THE
NORTHEASTERN JUDICIAL CIRCUIT

cc: Lee Darragh, Assistant District Attorney
W.M. Brownell, Jr., Attorney for Defendant
Harold M. Walker, Jr., Attorney for Defendant

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

SCOTTY GARNELL MORROW,
Petitioner,
v.

HILTON HALL, Warden
Georgia Diagnostic Prison,
Respondent.

Habeas Corpus
Case No. 2007-V-769

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

---

[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.
>
> 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?
>
> 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.
>
> Q: What was absent from this case in your opinion?
>
> 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.
>
> Q: When you say reoccurence, future dangerousness?
>
> 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).

[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

---

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.

---

[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)

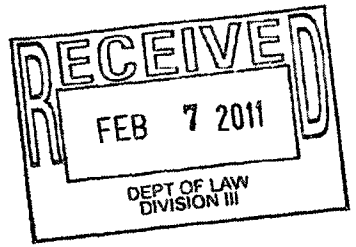
Copies to: Marc Holzapfel
Attorney for Defendant
10 Appleton Place
Glen Ridge, NJ 07974

Brian S. Kammer
Executive Director
Georgia Resource Center
303 Elizabeth Street
Atlanta, GA 30307

Beth A. Burton
Asst. Attorney General
132 State Judicial Bldg.
40 Capitol Square SW
Atlanta, Georgia 30334

Natasha Nankali, Habeas Clerk
Council of Superior Court Judges
18 Capitol Square, SW
Suite 108
Atlanta, GA 30334

Beth Weaver
Habeas Corpus Clerk
Clerk of Superior Court of Butts County
P.O. Box 320
Jackson, GA 30233-0320


RECEIVED
FEB 7 2011
DEPT OF LAW
DIVISION III