APPENDIX

TABLE OF APPENDICES

Appendix A

SUPREME COURT OF GEORGIA

No. S20W0783

DONNIE CLEVELAND LANCE,

v.

BENJAMIN FORD, Warden.

January 29, 2020

ORDER

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

DONNIE CLEVELAND LANCE
v. BENJAMIN FORD, WARDEN.

Upon consideration of Lance's application for a certificate of probable cause to appeal the dismissal of his second state habeas petition, the Warden's response, and the record, the application is denied as lacking arguable merit. See Supreme Court Rule 36; *Redmon v. Johnson*, 302 Ga. 763 (809 SE2d 468) (2018).

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

All the Justices concur, except Warren, J., disqualified.

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.

s/_____, Clerk

Appendix B

IN THE SUPERIOR COURT
OF BUTTS COUNTY
STATE OF GEORGIA

No. 2003-V-490

HABEAS CORPUS

DONNIE CLEVELAND LANCE,

Petitioner,

v.

HILTON HALL, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

April 22, 2009

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

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

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

* * *

[Table of Contents omitted]

FINAL ORDER

I. PROCEDURAL HISTORY

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

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on February 25, 2002. *Lance v. State*, 275 Ga. 11 (2002). Thereafter, Petitioner filed a petition for writ of certiorari in the

United States Supreme Court, which was denied on December 2, 2002. *Lance v. Georgia*, 537 U.S. 1050 (2002).

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

II. STATEMENT OF FACTS

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

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

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

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

The State also presented evidence that appellant had a long history of abuse against Joy, including kidnapping, beatings with his fist, a belt, and a handgun, strangulation,

> electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse. Several witnesses testified that appellant had repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch's wife and several other persons related to Joy. A relative of Joy testified that Lance once inquired how much it would cost to "do away with" Joy and Butch. Towana Wood, who was Butch's former wife, and Joe Moore testified about an invasion of Butch's home committed by Joe Moore and appellant in 1993. The invasion was prompted in part by appellant's belief that Butch was romantically involved with Joy. In the 1993 incident, appellant kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun.
>
> *Lance v. State*, 275 Ga. 11, at 13 (2002).

III. SUMMARY OF PETITIONER'S CLAIMS

The Petition for Writ of Habeas Corpus (as amended) enumerates twenty-nine (29) claims for relief. As is stated in further detail below, the Court finds: (1) that some of the claims are procedurally barred due to the fact that they were litigated on direct appeal; (2) that some of the claims are procedurally defaulted because Petitioner failed to timely raise the alleged errors and failed to satisfy

the cause and prejudice test or the miscarriage of justice exception; (3) that some of the claims are non-cognizable; and (4) that some of the claims are neither procedurally barred nor defaulted and are, therefore, properly before the Court for habeas review.

ABANDONED CLAIMS

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

IV. CLAIMS BARRED BY *RES JUDICATA*

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

> **The portion of Claim II** wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of competent and independent experts on the issues of time of death (pathologist) and latent footprint analysis (crime scene expert), (see *Lance v. State*, 275 Ga. at 13-14(2));
>
> **The portion of Claim V** wherein Petitioner alleges that the State engaged in

prosecutorial misconduct by failing to disclose material exculpatory information regarding a deal given to Frankie Shields and presenting false testimony[1] from Frankie Shields about possible deals, benefits, proceeds or other inducements they had received, expected to receive or did receive in exchange for such testimony. (see *Lance v. State*, 275 Ga. at 25-26(35)).

Claim VI, wherein Petitioner alleges that he did not kill, attempt to kill, or intend to kill Joy Lance or Dwight Wood, Jr., (*Enmund v. Florida*, 458 U.S. 782 (1982), (see *Lance v. State*, 275 Ga. at l2-13(1));

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

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

The portion of Claim XII wherein Petitioner alleges that the prosecution impermissibly struck a disproportionate

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

number of jurors based on racial bias, (see *Lance v. State*, 275 Ga. at 17(12));

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

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

Claim XX, wherein Petitioner alleges that the trial court erred in refusing to excuse for cause numerous potential jurors (prospective jurors Casey, Dial, Braswell and juror Witcher), who were biased against Petitioner and/or whose views regarding the death penalty would have substantially impaired their ability to fairly consider a sentence less than death and to fairly consider and give weight and meaning to all proffered mitigating evidence, (see *Lance v. State*, 275 Ga. at 15-17(8)(9)(11));

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

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

V. CLAIMS WHICH ARE PROCEDURALLY DEFAULTED

In his petition, Petitioner raises several claims which are procedurally defaulted due to Petitioner's failure to raise the claims on trial and on direct appeal. This Court finds that Petitioner has failed to establish cause[2] and actual prejudice or a miscarriage of justice sufficient to excuse his procedural default of the following claims. See *Black v. Hardin*, 255 Ga. 239 (1985); O.C.G.A. § 9-14-48(d); *Hance v. Kemp*, 258 Ga. 649(4)(1988).

> **The portion of Claim II** wherein Petitioner alleges that the trial court failed to provide Petitioner with the necessary assistance of a mental health expert, a polygraph expert, and a fingerprint expert;
>
> **Claim III**, wherein Petitioner alleges that his execution would be unconstitutional because he suffers from mental retardation, illnesses, and disabilities;[3]

---

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

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

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

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

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

Claim VII, wherein Petitioner alleges that the prosecution suppressed material exculpatory evidence, including but not limited to, evidence of communications and meeting with certain key witnesses who testified against the Petitioner;[4]

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

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

---

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

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

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

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

The portion of Petitioner's Post-Hearing Brief (as it relates to **Claim XX**) wherein Petitioner alleges that the trial court improperly qualified juror Queen to serve on Petitioner's case;

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

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

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

The portion of Petitioner's Post-Hearing Brief wherein Petitioner alleges

that the trial court erred when it denied Petitioner's request for additional counsel.

With regard to the allegation in **Petitioner's Post-Hearing Brief** that the trial court erred when it denied Petitioner's request for additional counsel, the Court notes that Petitioner had *retained* the counsel of his choice for his trial. J. Richardson Brannon, Petitioner's trial counsel, was an attorney who had extensive criminal litigation experience, including capital litigation experience. (Res. Ex. 2, HT 8304-8305, 8308-8309; HT 35-36). Petitioner relies on the American Bar Association's guidelines, which recommend that two qualified attorneys be assigned to represent capital defendants, as well as Georgia's Unified Appeal Procedure, in support of this claim. The Court notes that the ABA guidelines are not "requirements" which were binding on the trial court at the time of trial, and the Unified Appeal Procedure did not become effective until after Petitioner's trial. Although the better practice would have been for the trial court to appoint second counsel to assist in the Petitioner's defense, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

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

1) Jurors searched the Bible during deliberations;

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

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

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

5) Jurors improperly considered matters extraneous to the trial;

6) Certain jurors refused to deliberate;

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

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

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

10) Jurors improperly prejudged Petitioner's case;

Petitioner argues that the jurors prayed together, consulted the Bible to justify imposing the death penalty and that there were Gideon Bibles in their hotel rooms. Petitioner failed to raise these claims at trial or on direct appeal although the alleged basis for these claims was available to trial and appellate counsel, just as it was available to habeas counsel. Petitioner's allegation rests solely on the testimony of juror Tona Harrell. Significantly,

the affidavit of Tona Harrell was obtained by Petitioner on October 23, 1999, which was four months after Petitioner"s trial. (HT 3494). Petitioner's appeal was docketed in the Georgia Supreme Court on December 16, 1999. Subsequently, the case was remanded for an evidentiary hearing on the issue of whether Frankie Shields was given a "deal" by the State prior to trial. After the hearing was concluded, the appeal was docketed again on August 30, 2001. See *Lance*, 275 Ga. at 12. Accordingly, as Petitioner was aware of the basis of this claim at the time of the April 2000 hearing in the trial court, Petitioner could have reasonably raised this claim in a motion for new trial or on direct appeal.

Georgia law is clear that claims Petitioner failed to raise on direct appeal are not reviewable by this Court as Petitioner has failed to establish the requisite cause and prejudice or a miscarriage of justice to overcome his procedural default of these claims. See, e.g., *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985); O.C.G.A. § 9-14-48(d). Accordingly, Petitioner has procedurally defaulted this claim and it is barred from this Court's review. *Black v. Hardin*, supra.

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

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

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

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

To establish the requisite prejudice, Petitioner had to show that the jurors relied on the Bible for their sentencing decision, not merely that the jury read the Bible or prayed for personal inspiration or

spiritual guidance as the facts establish in the instant case. As held by the Georgia Supreme Court in *Cromartie v. State*, 270 Ga. 780, 789-790 (1999), "a juror's personal use of the Bible or other religious book outside the jury room is not automatically prohibited."

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

Accordingly, Petitioner has failed to establish the requisite miscarriage of justice or cause and prejudice to overcome his default of this claim and it remains barred from this Court's review.

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

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

miscarriage of justice to overcome his default of this claim.

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

The Court finds that the prosecution's statements that Petitioner loved to inflict pain on the victim and that Petitioner's culpability for the murders can be implied from his own statement, "if I can't have you no one else can," were not improper. (T. 1928, 1935). Both the State and the defendant are given wide leeway during closing argument to argue all reasonable inferences that may be drawn from the

evidence. *Smith v. State*, 279 Ga. 48, 50 (2005). An attorney may make almost any form of argument he or she desires if it is based upon the facts in the record and the deductions that may be drawn therefrom. Whether such argument is illogical, unreasonable, or even absurd, is a matter left for the reply of the adverse party, not for rebuke by the court. *Morgan v. State*, 267 Ga. 203, 203-204 (1996). As these arguments were reasonable inferences from the considerable evidence that came out at trial of violence, domestic abuse, and death threats that Petitioner repeatedly imposed on the victims, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

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

Petitioner also alleges that the State's comments about mercy and deterrence were in error. (T. 1936-37, 1940). The Court finds that both of these arguments are proper. The Georgia Supreme Court has held that it is acceptable for the prosecution to argue that the defendant showed the victim no mercy. See *Crowe v. State*, 265 Ga. 582, 592-593; *Moon v. State*, 258 Ga. 748, 760 (1988). The Georgia Supreme Court has also held that a prosecutor may vigorously argue that a death sentence is the

appropriate punishment and may remind the jury of the retributive and general deterrent function of its verdict. *Fleming v. State*, 265 Ga. 541, 458 (1995); Ford v. State, 255 Ga. 81, 93 (1985). As such, the prosecutor's references in the instant case to Petitioner's lack of mercy and his use of the phrase, "There's only one verdict that will stop the Donnie Lances of this world," were not improper. Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

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

Petitioner also claims that the prosecutor improperly offered his personal opinion during closing arguments. (T-1762-1765, 1769-72, 1773, 1776-77, 1778, 1785-86, 1790-91, 1805-06, 1807, 1808, 1810, 1813, 1814, 1823-27, and 1829). The Georgia Supreme Court has held that a prosecutor's statements, even if "couched in the framework of personal opinion," are not improper if the statements are inferences drawn from the evidence. See *Carr v. State*, 267 Ga. 547, 556 (1997). See also *Shirley v. State*, 245 Ga. 616, 617 (1980) (holding that it is not improper for a prosecutor to urge the jury to draw conclusions as to a witness' veracity from the evidence); *Jackson v. State*, 281 Ga. 705, 708 (2007) (finding that a "prosecutor's use of phrases such as 'I

think' and 'I know' does not amount to an impermissible statement of personal opinion"). The Court finds that some of the statements alleged by Petitioner to be opinions are actually not opinions, and the remaining statements are permissible inferences from the evidence that are merely set in the framework of a personal opinion. See *Carr*, 267 Ga. at 556. Thus, the Court concludes that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Petitioner claims that the State improperly referred to religion and/or God in the closing argument. The laws of Georgia do not forbid all references to religion in a closing argument. The Georgia Supreme Court has held, "It is not and has never been the law of Georgia that religion may play no part in the sentencing phase of a death penalty trial." *Greene v. State*, 266 Ga. 439, 449 (1996). "While it is improper for the prosecutor to urge the imposition of the death penalty based on Appellant's beliefs or to urge that the teachings of a particular religion mandate the imposition of that sentence, the prosecutor nevertheless may allude to such principles of divine law relating to transactions of men as may be appropriate to the case." *Hill v. State*, 263 Ga. 37, 46 (1993). While the Georgia Supreme Court has found error in references to religion which invite jurors to base their verdict on extraneous matters not in evidence, (*id.* at 45-46), the Court has distinguished these direct references from passing religious references. See *Carruthers v. State*, 272 Ga. 306, 309-310 (2000).

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

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

In a portion of **Petitioner's Post-Hearing Brief** (as it relates to **Claim V**) Petitioner alleges that the State violated his constitutional rights by not disclosing an alleged deal with Morgan

Thompson (a/k/a Frank Morton). Petitioner failed to raise this allegation on direct appeal. The Court finds that the claim was available to appellate counsel just as it was available to habeas counsel, particularly in light of the fact that habeas counsel rests this claim on the testimony of Frankie Shields, with whom appellate counsel spoke.

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

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

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

In **Claim IX** Petitioner alleges that gruesome photographs and a video of the crime scene and the victims were improperly admitted into evidence. However, the admission of evidence is a matter

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

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

Unless there are some very exceptional circumstances, photographs of the deceased are generally admissible to show "the nature and extent of the wounds, the location of the body, the crime scene, the identity of victim and other material issues. *Moses v. State*, 244 Ga. 180, 187 (1980). "Although photographs of the victim are prejudicial to the accused, so is most of the state's pertinent

testimony. The pictures may be gory, but murder is usually a gory undertaking." *Id.*

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

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

In *Vance*, the Georgia Supreme Court did note that a better charge would not include the phrase "moral and reasonable certainty." However, the Court recognized that the language "moral and reasonable certainty" is all that can be expected in a legal investigation," and held that the charge granted no reversible error when "considered in the context of the charge *as* a whole." *Id.* at 238 (citing *Francis v.*

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

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

In the instant case, the trial court's reference to a "moral and reasonable certainty" appeared in the context of a charge which as a whole repeatedly and accurately conveyed to the jury the concept of reasonable doubt. Thus, the reference to "moral and reasonable certainty" did not lessen the burden of

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

VI. NON-COGNIZABLE CLAIMS

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

> **Claim XIV**: Petitioner's claim that O.C.G.A. § 17-10-38, was declared unconstitutional in *Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137 (2001), and his death sentence is therefore null and void and may not be carried out is non-cognizable in these habeas proceedings. Alternatively, even if this claim was cognizable, this Court would find it is without merit. See *Dawson supra*; *United States v. Chandler*, 996 F2d 1073, 1095 (11th Cir. 1993); *Malloy v. South Carolina*, 237 U.S. 180 (1915); *Simms v. Florida*, 754 So.2d 657 (2000);
>
> **Claim XV**: Petitioner's claim that death by lethal injection would subject Petitioner to punishment under a law which is *ex post facto,* fails to allege a substantial violation of constitutional rights in the proceedings which resulted in Petitioner's convictions and sentences and is non-cognizable. Alternatively, even if this claim was

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

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

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

Claim VI: Actual Innocence:

Petitioner's stand alone claim of actual innocence is non-cognizable in this habeas corpus proceeding, as the Georgia Supreme Court has held that "it is not

the function of the writ of habeas corpus to determine the guilt or innocence of one accused of a crime." *Devton v. Wanzer*, 240 Ga. 509, 510 (1978). Petitioner's proper avenue to assert his bare allegation of actual innocence is in the trial court by properly filing an extraordinary motion for new trial. *Cf. Felker v. Turpin*, 83 F.3d 1303 (11th Cir. 1996) (noting that Georgia law, unlike a number of other states, permits motions for new trial on newly discovered evidence grounds and provides that the time for filing such motions can be extended). See also *Mize v. Head*, Civil Action No. 99-V-847 (death penalty habeas corpus case in Butts County in which the habeas corpus court found Petitioner's claim of actual innocence non-cognizable and Petitioner filed an extraordinary motion for new trial regarding that claim); *Waldrip v. Head*, Civil Action No. 98-V-139 (death penalty habeas corpus case in Butts County in which the habeas court found Petitioner's claim of actual innocence non-cognizable; application to appeal this issue was denied by Georgia Supreme Court). Thus, this claim is not reviewable by this Court as it is not a cognizable constitutional claim.

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

Petitioner's Post-hearing brief II(B): Petitioner also raises the issue of the State's response to the open records requests *made by habeas counsel.* However, this issue is not cognizable before this Court because it does not allege a substantial violation of Petitioner's rights "in the proceedings which resulted in [the petitioner's] conviction," O.C.G.A. § 9-14-42(a), and therefore cannot form a basis for habeas corpus relief:

VII. CLAIMS PROPERLY BEFORE THE COURT FOR HABEAS REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

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

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

---

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

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

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

In *Strickland*, the Court established a deferential standard of review for judging ineffective assistance claims by directing that "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining

counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

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

Further, not only did the *Strickland* court establish a strong presumption in favor of effective assistance of counsel, but the Court in Strickland also instructed reviewing courts that the proper focus of a court reviewing a claim of ineffective assistance of counsel is to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 688. See also *Adams v. State*, 274 Ga. 854, 856 (2002) ("strong presumption" exists in favor of finding defendant was provided with effective representation).

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

See also *Strickland*, supra at 694." *Head v. Carr*, 273 Ga 613, 616 (2001).

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

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

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

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

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

1) Denial of Request for Additional Counsel

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

The Court further finds that Georgia case law does not support Petitioner's contention that additional counsel was required to be appointed as

numerous death sentences have been upheld even where a defendant was represented by only one attorney. See e.g., *Hammond v. State*, 264 Ga. 879, 888 (1995); *Gary v. State*, 260 Ga. 38 (1990); *Osborne v. Terry*, 466 F.3d 1298, 1308 (11th Cir. 2006); *Housel v. Head*, 238 F.3d 1289, 1294 (11th Cir. 2001). The Court concludes that Petitioner cannot establish ineffective assistance of counsel based merely on the fact that he was represented by one attorney. The Court finds that the *Strickland* standard applies to all of Petitioner's ineffective assistance of counsel claims and Petitioner bore the burden of establishing that trial counsel was deficient and Petitioner was prejudiced by trial counsel's representation with regard to all of his ineffective assistance of counsel claims.

2) Investigation of Prior Bad Acts

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

The record establishes that trial counsel filed a Motion for Notice of Intent to Use Evidence of Other Crimes on March 31, 1998. (R. 142-144). On June 24, 1998, one year prior to trial, the State filed its notice of intent to introduce evidence of prior difficulties. (R. 211-215). On June 29, 1998, the State also filed its

Notice of Intent to Introduce Evidence of Similar Transactions, which also set forth the specific factual instances the State was seeking to introduce and the witnesses that would testify with regard to these similar transactions. (R. 220-223). Following the filing of the State's notice, the trial court held an extensive hearing on the similar transactions evidence. (8/25/98 Similar Transaction Hearing; 9/28/98 Similar Transaction Hearing Continued). During that hearing, the State presented the testimony of 17 witnesses all of whom were cross examined by trial counsel. *Id.*

The trial court also conducted extensive hearings on the evidence of prior difficulties. (See 9/28/98 Pretrial Hearing; 9/29/98 Pretrial Hearing; I 0/2/98 Pretrial Hearing and 11/9/98 Pretrial Hearing). During the hearings, the State presented the testimony of 30 witnesses. *Id.* The hearing transcripts reveal that trial counsel conducted a cross examination of 28 of the 30 witnesses. *Id.*

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

Trial counsel testified that, after learning that the State was going to present this evidence at trial, he spoke with Petitioner's family with whom he had excellent and continuous rapport regarding the

circumstances surrounding the prior incidents. (HT 75, 96, 8333). Trial counsel also spoke with Jim Whitmer, who had previously represented Petitioner regarding Petitioner's prior criminal cases which the State was noticing its intent to introduce, and obtained Mr. Whitmer's files regarding his representation of Petitioner with regard to those cases. (HT 95-96, 8328-8329, 8540-9000, 10783). Trial counsel also obtained medical records that document the injuries sustained by Joy Lance with regard to one of the prior similar transactions in which Joy Lance was "pistol whipped" by Petitioner, (HT 9450-9480), and counsel maintained a file on the prior difficulties that the State noticed they were seeking to introduce that included research and an index of the prior difficulties. (HT 9481-9505, 9506-9539).

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

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

> While the court is cognizant of the complexity of any death penalty trial, the court notes that counsel for the defendant has opted into the reciprocal discovery provisions of the Georgia criminal procedure code and the state began compliance with those provisions on or about April 2, 1998, and continues to serve defense counsel as required with discovery materials as they are made known to the state. In addition, the state has an 'open file policy' in this case which affords the defense access to the entire contents of the state's file. The defendant has had the services of his counsel since before indictment; counsel has had an opportunity for more than one year to discover the facts of this case. Counsel for the defendant has tried death penalty cases in the past and is familiar with the current state of the law on the subject, as evidenced by the motions filed in this case and his able and eloquent arguments thereon. The relative complexity of the similar transactions and prior occurrences have all been simplified by the court's conducting hearings thereon giving counsel an opportunity not only to discover the facts of those alleged occurrences but also to place

> the witnesses on cross-examination prior to trial and to 'lock in' their remembrance of these events. The conduct months before trial of motions to suppress and to determine the voluntariness of defendant's statements under *Jackson v. Denno* gives defense counsel ample time prior to trial to prepare to meet this evidence.

(R. 413-414).

In denying Petitioner's motion for reconsideration, the trial court held that "there's been no specific showing of need." (6/3/99 Pretrial Hearing, p. 16). This Court finds that the bulk of investigation and preparation for trial had already been conducted prior to the filing of the motion for the appointment of additional counsel.

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

of Brannon's representation was impacted by the denial of his motion for additional counsel.

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

3) Representation at Guilt Phase and Strategy

Strickland instructs that with regard to trial counsel's obligation concerning making investigatory efforts, that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. 668. The "correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994). The Court finds that a review of the totality of the circumstances in the record before this Court shows that trial counsel's investigation of the guilt phase of Petitioner's case was reasonable and did not constitute deficient performance.

Brannon testified that he worked "nonstop day and night on the guilt/innocence phase" of Petitioner's case. (HT 45). In investigating the guilt phase, trial counsel engaged in numerous conversations with Petitioner regarding the specific facts of the case and Petitioner's alibi. (HT 8326-8327, 10772-10790). Trial counsel also spoke with Petitioner's family members and other witnesses. (HT 10772-10790). In addition to interviewing

witnesses, counsel visited the crime scene wherein he took photographs and measurements, and he examined the various places that were struck by the fired projectiles. (HT 67-68, 108, 8344-8345, 10785). Counsel also traveled to Petitioner's shop on three separate occasions and took photographs, (HT 10782-10783), reviewed the Georgia Bureau of Investigation file and was permitted access to the State's file. (HT 108, 110, 10774, 10787).

Trial counsel also employed the services of Investigator Pennington to assist in the investigation of Petitioner's case. Investigator Pennington's billing records reflect that he spent a considerable amount of time locating and interviewing witnesses and trial counsel's testimony confirms that Investigator Pennington was responsible for interviewing witnesses. (R. 554-555; HT 52-53). Trial counsel further testified that Investigator Pennington continued to investigate and follow up on leads during the trial. (HT 77, 115-116).

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

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

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

Mr. Whitlock stated that, the following day (November 9, 1997), he saw Petitioner and Joe Moore at his residence around 1:00 p.m., and that they only

stayed for about ten or fifteen minutes. (T. 1589-1590). Regarding Petitioner's demeanor, Mr. Whitlock testified that he acted normal. (T. 1590).

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

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

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

Trial counsel presented the testimony of Matthew and Will Skinner, two children who lived

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

Trial counsel also presented the testimony of Petitioner's father Jimmy Lance to attempt to rebut the prior difficulties between Petitioner and Joy Lance. Regarding the incident wherein Petitioner attempted to electrocute Joy, Petitioner's father testified that they were fighting because Joy was having an affair. (T. 1547). When he arrived at Petitioner's shop, Petitioner and Joy had stopped fighting. (T. 1547-1548). Petitioner's father testified that Petitioner did not bit Joy during that fight; however, he did observe blood on Joy's nose. (T. 1548). He further denied that Petitioner had attempted to electrocute Joy during that incident. (T. 1546, 1548). Regarding another incident of violence between Petitioner and Joy, Petitioner's father testified that Petitioner never attempted to set Joy's hair on fire by spraying WD-40 on her. (T. 1548-1549).

Regarding the crime, Petitioner's father testified that he did not recall going to Petitioner's shop on the day of the crime; however, he saw Petitioner "come up and down the road and go in *bis* driveway." (T. 1553). On the day after the crime, he saw Petitioner around lunchtime. (T. 1553-1554). In an attempt to rebut the State's evidence that Petitioner's father assisted Petitioner in obtaining

alibi statements the day after the crime, trial counsel had Petitioner's father deny the allegations that he assisted Petitioner in obtaining alibi statements from various individuals in that he did not know about the murders until it was reported on the news. (T. 1554).

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

Gary Watson, who had known Petitioner for about thirty years, testified that Petitioner normally wore black, low-cut work shoes. (T. 1577). He also observed Petitioner wearing suede-like brown shoes. *Id.* Mr. Watson also testified that he had possession of Petitioner's sawed-off shotgun, until it was recovered from the police. (T. 1577-1579). Mr. Watson also testified that the .22 rifle recovered by the police at Petitioner's shop was likely his rifle as he had taken it up to Petitioner's shop to shoot squirrels that were tearing the insulation out of the ceiling. (T. 1579-1581).

The final witness presented during the guilt phase was the defense investigator Andy Pennington. Mr. Pennington testified at trial as an expert crime scene technician. (T. 1637-1638). Trial counsel elicited testimony from Investigator Pennington as to

the alleged flaws in the investigation performed by the State. Regarding the handling of the crime scene area, he testified that the investigators failed to maintain a log of who entered and exited the crime scene. (T. 1650). He also testified that the State investigators should have obtained measurements from the projectile hole through the blind in the window as it would have provided them with the caliber of the weapon, and they could have then verified "to see if it was one of the shotgun pellets or it was from another weapon." (T. 1650-1652). Based upon the number of projectile holes, Investigator Pennington opined that there could have been more than one weapon used in the crime. (T. 1651).

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

As to the semi-moist dirt area surrounding the trailer, Investigator Pennington testified that it would be very difficult for a person to walk into the house without leaving a footprint. (T. 1654-1655). He stated that a person would likely "leave tracks all the way up to the steps and on to the deck itself." (T. 1656-1657). Regarding Petitioner's Diehard shoe, Investigator Pennington testified that it had a "very distinctive" sole that would have left a clear mark in

the semi-moist dirt area. (T. 1657). Investigator Pennington further testified that the shoe print found on the door should have been visible with the naked eye in that there should have been "some kind of marking on the door or some kind of scuff or kick mark or dent or something on the door." (T. 1657-1658).

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

Investigator Pennington then provided testimony regarding the time of death of the victims. Specifically, be testified that heat would "accelerate" rigor mortis whereas cold would "retard it." (T. 1662). As there are a number of variables involved in establishing time of death, Investigator Pennington stated that "no expert has ever been able to pin down the time of death." (T. 1662-1663).

During bis guilt phase closing arguments to the jury, trial counsel stressed to the jury that Petitioner enjoyed the presumption of innocence until he was proven beyond a reasonable doubt by the State that Petitioner committed the crime. (T. 1724-1726).

Counsel asked the jury to approach Petitioner's case as if it was a friend that was on trial in that they should look at "every single piece of evidence" to determine whether or not it proved what it should have proven. (T. 1726).

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

Regarding the Diehard shoe print on the door, trial counsel stated that he was unable to determine whether or not there was actually a shoe print on the door. (T. 1730-1731). Counsel further stated that the investigators were unable to "see and couldn't take a gel impression" of the shoe print. (T. 1732). In addition, trial counsel stated that he was able to elicit during cross-examination evidence that the various crime scene investigators were in disagreement about certain issues. (T. 1731). In addition, counsel noted that the State did not have any fiber, hair or blood evidence. (T. 1732-1733).

In further attacking the State's case based upon the lack of evidence, trial counsel argued that the State did not have the murder weapon. (T. 1734-1735). Counsel also attacked the State investigators

for not locating the shotgun shells in the oil pit, and he argued that Joe Moore, not Petitioner, was the one who threw the shotgun shells away in a blue rag. (T. 1735-1736, 1739).

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

Additionally, trial counsel reminded the jury of the testimony of Will and Matt Skinner. Specifically, trial counsel stated that both Will and Matt provided testimony that they heard shots fired around noon, and they then observed a car leaving the scene at a high rate of speed. (T. 1740). Will Skinner also testified that he saw someone get into the car with what appeared to be a pistol. *Id.* In questioning why the State did not pursue Will and Matt Skinner, trial counsel asserted that it did not "fit their time of death." (T. 1741). In an attempt to persuade the jury into believing the testimony of Will and Matt, counsel argued that "c]hildren never tell a lie. If a child says it happened this way, surely it did." *Id.*

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

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

In concluding his argument to the jury, trial counsel summarized the evidence that was presented by the defense as to Petitioner's whereabouts around the time of the crime. (T. 1752-1754). He also reminded the jury that the time of death was important, and that there were a number of factors that would have affected a determination as to the time of death. (T. 1754-1756).

Petitioner bore the heavy burden of establishing deficiency and prejudice. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant

by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Based on counsel's investigation of Petitioner's guilt and the presentation of evidence at trial, the Court finds that Petitioner bas failed to establish deficient performance as required by *Strickland* as to his contentions of ineffective assistance as to guilt phase investigation and presentation of evidence in the guilt phase.

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

circumstances and the record before the Court, Petitioner has failed .to establish the prejudice prong of *Strickland* and this claim of ineffective assistance of counsel is DENIED.

4) Requesting Non-Mental Health Experts

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

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

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

request for the appointment of experts. (HT 5426). In denying Petitioner's trial counsel's request for various forensic experts, the trial court found the following:

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

(HT 5426-5428).

On direct appeal, the Georgia Supreme Court found no abuse of discretion as to the trial court's

denial of trial counsel's requests for funds for experts based on the trial court's finding that, "the requested funds were not necessary to a fair trial." *Lance v. State*, 275 Ga. 11, 14 (2002).

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

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

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

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

5) Not Utilizing a Crime Scene Expert

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

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

Additionally, as Brannon testified before this Court, there was very little physical evidence obtained. from the crime scene, as there were no fingerprints of Petitioner found at the crime scene (HT 61); there was no DNA of Petitioner's found at the scene (HT 60); there was no hair or blood of Petitioner found at the scene (HT 60); and there were no shotgun shells of Petitioner's that were linked to the scene. (HT 60). Brannon stated that there was only one shoeprint found at the scene, and that was an "invisible" footprint on the door, (HT 61), and that

there were no footprints coming up the steps. (HT 59).

Additionally, trial counsel argued in his closing:

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

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

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

(T. 1738-1739).

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

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

Also, Brannon cross-examined the State's experts on various issues relating to crime scene

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

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

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

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

6) Not Utilizing a Forensic Pathologist

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

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

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

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

The record shows that trial counsel cross-examined the medical examiner about the important testimony given concerning time of death and used

his own expert witness to testify about the difficulty in pinpointing the time of death.

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

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

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

The Court finds that Petitioner has failed to establish deficient performance under *Strickland* due to Petitioner's trial counsel's inability to obtain the services of a forensic pathologist or blood spatter

expert. Further, the Court finds that if trial counsel had presented the testimony of an expert, such as that given by Dr. Arden in the habeas proceedings, including the blood spatter and weapon evidence, there is no reasonable probability that the results of Petitioner's trial would have been different. Accordingly, these claims are DENIED.

7) Not Utilizing a Polygraph Expert

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

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

Further, in denying Petitioner's claim that the trial court erred in denying a mistrial with regard to the mention of the polygraph, the Georgia Supreme Court held on direct appeal, "The trial court's strong

curative instruction and its questioning of the jury regarding their ability to follow that instruction were sufficient to remedy any damage to the fairness of the proceedings." *Lance*, 275 Ga. at 22-23.

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

Further, the Court finds Petitioner's habeas expert's testimony that Mr. Moore's polygraph chart showed an immeasurable response unpersuasive. Petitioner's habeas witness, Cyrus Harden, conceded that he had testified less than ten times critiquing a polygraph test that someone else administered, that it is easier to testify about a polygraph test when you are the person who administered the test, and that he had administered polygraph tests to people who were under the influence, and "no response" does not mean that the person is lying. (HT 187-188). In contrast, Respondent presented the testimony of Paul Loggins, a polygraph expert who was assigned to the GBI's polygraph unit for fourteen years, has administered 7,030 polygraphs in the last eighteen years and administered the polygraph to Joe Moore on November 13, 1997. Mr. Loggins testified that he did not observe any indicator or physical

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

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

8) Not Utilizing a Fingerprint Expert

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

linked to the crime through fingerprint evidence and trial counsel did not need to further explore this issue. Petitioner has failed to establish deficiency or prejudice and this claim is DENIED.

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

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

According to the ABA guidelines in effect at the time of Petitioner's trial, counsel in a death penalty case should meet with his client immediately and, among other things, explore the existence of potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating or mitigating factors. ABA Guideline 11.4.1(D)(2)(a). With an eye towards the sentencing phase, counsel also should explore sources of information about the defendant's history, including his "medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and development delays)." *Id.* 11.4.1(D)(2)(c). Counsel also should *promptly* meet with witnesses "familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show

why the client should not be sentenced to death." *Id.* 11.4.1(D)(3)(b). The ABA Guidelines articulate reasonable professional standards for capital defense work and have long been referred to as guides to determining what is reasonable under the Sixth Amendment. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Hall v. McPherson*, 284 Ga. 219, 221 (2008).

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

Upon consideration and review of all of the evidence presented in this case, the Court finds that there is nothing in the record to establish that Petitioner was legally insane at the time of the commission of the crimes. Additionally, there has been no showing that Petitioner was incompetent to stand trial. Finally, Petitioner is not mentally

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

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

"The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant." *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991). The U.S. Supreme Court has explained that:

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

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

The harm stemming from the failure to present psychiatric mitigating evidence in capital cases is clear. It has long been recognized in Georgia that "evidence of a diminished capacity to fully appreciate the 'cruelty and gravity of his acts' is critical at the penalty phase of a capital case 'because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation.'" *Bright v. State*, 265 Ga. 265, 275, *455* S.E.2d 37, 50 (1995) (citations omitted).

Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. 'Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors.'" *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) (citations omitted). See also, *Turpin v. Christenson*, 269 Ga. 226, 241 (1998) (endorsing and quoting Middleton on this point); *Stephens v. Kemp*, 846 F.2d 642, 653 (11th Cir. 1993) ("prejudice is clear" where attorney failed to investigate adequately client's mental health and present evidence of client's mental problems in sentencing phase).

Experts are critical in helping to tie the various aspects of a defendant's life history, which may include instances affecting mental health, into a coherent picture of the defendant's state of mind throughout his life path leading up to the crime. The Georgia Supreme Court has repeatedly held that the average capital juror is hindered in bis sentencing deliberations when available psychiatric opinion testimony or other psychiatric mitigating evidence is not presented in court. In *Bright v. State*, the Court found that a psychiatrist would have been of invaluable assistance to the jury in deciding the defendant's fate: "a psychiatrist could have evaluated, in terms beyond the ability of the average juror, Bright's ability to control and fully appreciate his actions in the context of the events that arose on the night of the murders, given his severe intoxication, his history of substance abuse, his troubled youth, and his emotional instability." 265

Ga. 265, at 276 (1995). Similarly, in *Turpin v. Lipham*, the Court found counsel ineffective for failing to present the testimony of a mental health expert to help the jury understand the mitigating significance of the defendant's troubled upbringing and mental disorders: *"[T]he average juror is not able, without expert assistance, to understand the effect [the defendant]'s troubled youth, emotional instability and mental problems might have had on his culpability for the murder."* 270 Ga. 208, 219 (1998) (emphasis supplied). In this case, the jury was inexcusably deprived of expert testimony regarding Petitioner's psychiatric disorders, history of alcohol abuse, and head trauma which was critical to informed deliberation as to sentence.

Although trial counsel is afforded tremendous deference over matters of trial strategy, the decision to select a trial strategy must be reasonably supported and within the wide range of professionally competent assistance. *Devier v. Zant*, 3 F.3d 1445, 1453 (11th Cir. 1993); *Strickland* supra at 690. Before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing. *Jefferson v. Zant*, 263 Ga 316, 319-20 (1993); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995); *Bush v. Singletary*, 988 F.2d 1082, 1091 (11th Cir. 1993) ("After an adequate investigation, counsel may reasonably decide not to present mitigating character evidence at sentencing"). An attorney is not ineffective because he fails to follow every evidentiary lead, but an attorney's strategic decision is not reasonable " 'when the attorney has failed to investigate his options and

make a reasonable choice between them.' " *Baxter*, supra, quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). The failure to conduct a reasonable investigation may render counsel's assistance ineffective. *Baxter*, supra at 1514; *Curry v. Zant,* 258 Ga. 527, 530, (1988) (counsel ineffective for failing to further investigate client's mental health despite indications that client was mentally ill).

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

Brannon testified that, during his investigation and preparation for trial, he met and spoke with Petitioner frequently. (HT 1397). Brannon testified further that he and his paralegal assistant, Pat Dozier, had established an excellent rapport with Petitioner's family members and talked to them numerous times. (HT 1401-1405, 1410). After speaking with Petitioner and Petitioner's family members, Brannon felt that neither gave him any indication that Petitioner had any type of mental health problems. However, the record indicates that evidence regarding Petitioner's traumatic brain injuries and alcohol abuse was readily available to trial counsel. It was well known among Petitioner's family and friends that Petitioner was often involved in wrecks while racing cars, and that he rarely, if

ever, sought medical care following these wrecks. (Pet. Ex. 10 ¶ 6; Pet. Ex. 26 ¶ 4). It was also common knowledge that Petitioner had a longstanding drinking problem. (Pet. Ex. 28 ¶ 16; Pet. Ex. 40 ¶ 5; Pet. Ex. 36 ¶ 4; Pet. Ex. 41 ¶ 10). Additionally, in 1993 Petitioner was shot in the head by unknown assailants while sleeping on his couch and, in direct conflict with his physician's orders, Petitioner refused to stay in the hospital. (Pet. Ex. 21 ¶ 11). After he was shot, Petitioner began having terrible headaches. (Pet. Ex. 31 ¶ 26; Pet. Ex. 5 ¶ 9; Pet. Ex 43 ¶ 11). Petitioner also experienced dizziness and had difficulty working on cars in bis shop. He became even more quiet than he had before. (Pet. Ex. 21 ¶ 9). Finally, Petitioner was hospitalized at Georgia Regional Hospital for mental health treatment (Pet. Ex. 21 ¶ 13).

Even though Brannon has noted the importance of mental health evidence in capital cases, he testified that he did not investigate Petitioner's mental health in this case. He did not review medical records regarding Petitioner's numerous head traumas; did not review medical records regarding Petitioner's hospitalization for mental health treatment; did not inquire with Petitioner's family, friends, or any other members of the small-town community as to whether Petitioner had any history of mental health issues or whether he could have suffered some debilitating head traumas. Although Brannon testified at the evidentiary hearing that having Petitioner evaluated by a mental health expert was on his list of things to investigate in the case, he testified further that it was not a top priority. (HT 68-69). Consequently, Brannon did not

request the assistance of mental health experts that could have revealed the significant mental impairments from which Petitioner suffers. Based on the wealth of information that was readily available to trial counsel, and the lack of other evidence to offer in mitigation, the Court finds that trial counsel's failure to investigate Petitioner's mental health was unreasonable.

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

In light of the readily available evidence regarding Petitioner's diminished mental capacity

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

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

a) Petitioner's Mental Health Experts

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

Similarly, Ricardo Weinstein, Ph.D., an expert in Neuropsychology, found that Petitioner has frontal lobe damage. Dr. Weinstein also concluded that Petitioner has significant brain dysfunction and cognitive impairments. (HT 1037). He further noted that Petitioner was an alcoholic, (HT I 040), had been treated for depression and anxiety, (HT 1041), and that Petitioner appears to meet DSM-IV-TR criteria for a diagnosis of Dementia Due to Multiple Etiologies (head injuries plus chronic alcohol abuse). (HT 312). Dr. Weinstein further found Petitioner to have an IQ of 78, which places him in the borderline range of intellectual abilities. Dr. Weinstein, however, did not conclude that Petitioner could not have planned and/or committed the crimes. Dr Weinstein testified that, in considering Petitioner's culpability for the crimes charged, it would be important for the fact finder to have information about Petitioner's impaired mental abilities. (HT 260).

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

b) Respondent's Mental Health Experts

Daniel A. Martell, Ph.D., an expert in Neuropsychology, evaluated Petitioner and concluded that Petitioner suffered from brain dysfunction, but that it did not appear to affect Petitioner's ability to plan or control impulses. (HT 592-593). Dr. Martell agreed with Petitioner's expert (Dr. Weinstein) in finding that Petitioner appears to meet DSMN-TR criteria for a diagnosis of Dementia due to head injuries and chronic alcohol abuse. (HT 597). However, Dr. Martell concluded that Petitioner's history of head injuries did not affect Petitioner's cognitive functioning. (HT 585-586). Dr. Martel testified further that Petitioner's IQ score of 79 placed Petitioner in the borderline range, higher than mild mental retardation and just one point away from being in the low average range. (HT 585). Although Dr. Martel testified that there was nothing to show that the Petitioner was incapable of committing the murders in this case, (HT 602), Dr. Martell also concluded that if Petitioner actually did

commit the crime for which he was charged, his culpability for that offense would be affected by his brain dysfunction. Dr. Martell acknowledged that evidence regarding a defendant's mental illness, just like the information available, but never presented in Petitioner's trial, is routinely provided in capital cases. (HT 623-624.)

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

Introducing this mental health evidence would have been crucial in the sentencing phase of Petitioner's trial, *as* it directly related to the key issue before the jury: their individualized assessments of Petitioner's character, culpability, and worth. Trial counsel had no strategic reason for failing to inform the jury about Petitioner's mental deficiencies during sentencing. In fact, Brannon testified that evidence concerning Petitioner's organic brain damage and mental deficits was "precisely the type of evidence" he wanted to present at trial. (Pet Ex 3 ¶ 23.) Under these circumstances, the failure to provide the jury with evidence relating to Petitioner's

mental impairments was objectively unreasonable. *Crosby*, 320 F.3d at 1164 (Eleventh Circuit has held that "[w]hen mental health mitigating evidence was available, and *absolutely none* was presented [by counsel] to the sentencing body, and . . . no strategic reason [w]as . . . put forward for this failure,'" the omission was objectively unreasonable); *Brownlee*, 306 F.3d at 1070 (holding that "counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence").

Respondent contends that the evidence of alcohol abuse and head injuries (car wrecks, fights, gunshot wound) presented by Petitioner in the habeas corpus proceedings is as potentially aggravating as it is mitigating. This contention fails to take into account that Petitioner's primary focus of bis claim is trial counsel's failure to investigate and present evidence regarding Petitioner's mental health; particularly, his significant mental impairments. The fact that Petitioner's brain damage and diminished mental capacity may be attributed to one or more causes, including alcohol abuse and various forms of head trauma, is not the primary focus of Petitioner's claim.

Upon consideration and review of all of the evidence presented in this case, the Court finds that trial counsel was ineffective for failing to investigate Petitioner's mental health as a possible source of mitigating evidence in this case. The Court finds that trial counsel's decision to forego the investigation of

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

Accordingly, the Court finds that Petitioner is entitled to habeas relief on the portion of his ineffective assistance of counsel claim that is based on trial counsel's failure to investigate Petitioner's mental health, retain mental health experts, and present evidence of Petitioner's mental health in mitigation during the sentencing phase of the trial. The petition for writ of habeas corpus is GRANTED as to the death sentences imposed.

10) Investigation And Presentation of Other Mitigation Evidence

a) Residual Doubt theory

During the trial of this case Petitioner's counsel utilized the defense theory that Petitioner did not commit the crimes and was not present at the scene

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

It has been noted that "residual doubt is perhaps the most effective strategy to employ at sentencing." See *Tarver v. Hopper*, 169 F.3d 710, 715-716 (11th Cir. 1999) (citing law review study concluding that "the best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about bis guilt"). The Georgia Supreme Court has expressly held that it is a reasonable and professional decision for a lawyer to choose a mitigation theory of residual doubt and to present testimony consistent with that theory. *Head v. Ferrell*, 274 Ga. 399, 405 (2001). See also *Alderman v. Terry*, 468 F.3d 775, 789-790 (11th Cir. 2006) (upholding the habeas court's finding that defense counsel's residual doubt strategy was a reasonable, professional decision given the information that was available to counsel at the time of trial and the fact that the defendant maintained his innocence); *Parker v. Sec'y for the Dep't of Corr.*, 331 F.3d 764, 787-788 (11th Cir. 2003). Such was the strategy employed by Petitioner's trial counsel in this case.

Trial counsel's reliance on particular lines of defense to the exclusion of others is a matter of strategy and is not ineffective unless Petitioner can prove the chosen course, in itself, was unreasonable.

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

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

b) Decision Not To Use Family Members

Tue Petitioner asserts that other types of evidence should have been presented in mitigation

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

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

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

> And I did talk with them about that. And I thought about putting them up. But I told them here's what you're going to be faced with. And really nobody — I mean, they love Donnie and wanted to help Donnie, but nobody was dying to sit on the witness stand and be beat to death for another two or three hours with testimony that we'd already heard in the courtroom.

(HT 105).

The record establishes that trial counsel made a strategic decision to not present any of Petitioner's family members during the sentencing phase. The record indicates that trial counsel had numerous conversations with Petitioner's family members and

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

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

(T. 1917-1918).

Trial counsel was concerned that the State would again question character type witnesses and again review evidence of Petitioner's prior violence against Joy Lance and Butch Wood including: approximately six months prior to the murders Petitioner offered Mary Lance one thousand dollars to kill Joy Lance and Butch Wood Jr. (9/28/98 Pretrial Hearing, pp. 48-50); Petitioner telling various people he would kill Joy Lance and Butch Wood (9/28/98 Pretrial Hearing, pp. 50-51, 81, 109, 147, 157; 9/29/98 Pretrial Hearing, pp. 207, 259); Petitioner attempting to electrocute Joy in a tub of water (9/28/98 Pretrial Hearing,

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

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

c) Evidence Concerning Petitioner's Relationship with his Children

In the proceedings before this Court, Petitioner submitted affidavits from family and friends,

including Petitioner's daughter, Stephanie Lance, to support his assertion that trial counsel was ineffective in not presenting evidence that Petitioner had a loving relationship with his children as mitigating evidence.

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

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

The Court notes that trial counsel stated to the jury during his closing arguments that Petitioner had children who loved him. (T. 1943). He argued that if they sentenced Petitioner to death, then Petitioner's two children would not have a mother or father. (T. 1946-1947). Trial counsel asked the jury to "think about this long and hard before you decide to eliminate somebody. Think about Jessie and Stephanie." (T. 1948). Counsel argued that it was a

"powerful thing, to take somebody's life. It will affect you forever." (T. 1944).

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

d) Evidence of Petitioner's Nature to Help Others

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

Further, trial counsel was not unreasonable in not calling these lay witnesses to testify on Petitioner's behalf as counsel clearly stated his concern about putting up witnesses that would be cross-examined by the State regarding prior difficulties between Petitioner and Joy Lance. (HT 103-104). Informed strategy decisions by

experienced counsel, such as this decision by Brannon, are the type of actions which *Strickland* prohibits being "second guessed" by reviewing courts. See also *Jones v. Smith*, 772 F.2d 668 (11th Cir. 1985); *Gates v. Zant*, 863 F.2d 1492 (11th Cir.) cert. denied, 110 S.Ct. 353 (1989).

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

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

B. OTHER CLAIMS

1) Mental Retardation (Claim III)

Petitioner alleges that the imposition of the death penalty is unconstitutional in this case because his mental impairments render him the "functional, moral, legal, and constitutional equivalent" of an offender who is mentally retarded. The Court has previously found this claim to be procedurally defaulted. Regardless of whether the Court considers the claim for a miscarriage of justice excusing the

default or on the merits, the claim fails. Petitioner has not established that his mental impairments rendered him mentally retarded, and Petitioner's mental impairments do not automatically exempt him from capital punishment.

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

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

Significantly, the Georgia Supreme Court has expressly held that Atkins does not apply to persons who are not mentally retarded. In *Lewis v. State*, the Georgia Supreme Court heard the issue of whether the "ban [in *Atkins*] on executing the mentally retarded should be extended to apply to the mentally ill because [of] ... diminished culpability." 279 Ga. at 764. The Georgia Supreme Court rejected this claim, specifically "declin[ing] to extend the holdings of cases like *Atkins*" to a petitioner who claims to be mentally ill. *Id.*

The record before this Court shows that Petitioner's experts did not find that Petitioner was mentally retarded, but instead found that he functioned in the range of borderline intellectual functioning. (HT 790-816, 968-978, I 031-1063). Because Petitioner is not mentally retarded, there is no legal impediment to the imposition of his death sentence for the purposes of retribution or deterrence. Petitioner's alleged mental impairments are legally insufficient to excuse his culpability or preclude him from being executed, and therefore, this claim is DENIED.

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

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

A review of the sentencing phase jury instructions, in their entirety, establishes that Petitioner failed to show that the trial court erred in defining mitigating circumstances or erred in not instructing the jury that unanimity was not required to impose a life sentence. The jury instructions in this case regarding mitigating circumstances and unanimity have all been held to be constitutional by the Georgia Supreme Court. See, e.g., *King v. State*, 273 Ga. 258, 276 (2000); *Nance v. State*, 280 Ga. 125, 126 (2005); *Walker v. State*, 281 Ga. 157, 165 (2006). See also *McClain v. State*, 267 Ga. 378, 386 (1996) (holding that a jury need not be instructed as to specific standards for considering mitigating

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

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

VIII. CONCLUSION

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

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

State from again seeking the death penalty in such proceedings.

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

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

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

Appendix C

IN THE SUPERIOR COURT
OF BUTTS COUNTY
STATE OF GEORGIA

Civil Action No. 2019-HC-23
HABEAS CORPUS

DONNIE CLEVELAND LANCE,
Petitioner,
v.
BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Center,
Respondent.

January 24, 2020
12:51 PM

ORDER

This is Petitioner Donnie Cleveland Lance's second habeas petition before this Court. In the current petition, Petitioner argues that the grand jury that indicted his case was not randomly selected, making his death sentence invalid and unconstitutional. The Court finds this claim was previously raised by Petitioner in his first state habeas petition and this Court found it to be barred under state law as procedurally defaulted. Petitioner has submitted no new law or new facts with regard to

this claim that were not previously available. The Court is now barred by res judicata from again reviewing this claim. The instant petition is DISMISSED.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner's claim in this second state habeas petition, that the grand jury was unconstitutionally composed and selected, was previously raised in his first habeas petition to this Court. (Respondent's Attachment 1, pp. 26-27). In his amended petition from that first proceeding, filed in 2005, Petitioner alleged:

> The grand jury and traverse jury in Petitioner's case were unconstitutionally composed, were the result of unconstitutional practices and procedures, and subsequently denied Petitioner his constitutional rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, § 1, and ¶¶ 1, 2, 11 and 12 of the Georgia Constitution.

Id.

Applying state law, this Court found the claim to be procedurally defaulted as Petitioner did not raise this claim at trial or on appeal to the Georgia Supreme Court and Petitioner had failed to establish cause and prejudice or a miscarriage of justice to overcome that default. (Respondent's Attachment 2, p. 6 (citing *Black v. Hardin*, 255 Ga. 239 (1985); *Hance v. Kemp*, 258 Ga. 649 (1988); and O.C.G.A. § 9-14-48(d))).

Petitioner now raises this issue a second time. However, 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).

Petitioner alleges that he has new evidence in the form of: (1) interviews of unnamed witnesses; (2) the conviction and sentence of the prosecutor in his case; and (3) documents received in response to an Open Records Act request from the Jackson County Clerk's Office. Petitioner alleges this evidence allows him to overcome the state law bar. However the evidence he submits is not new. First, just as he recently did in preparing for clemency, Petitioner's counsel could have spoken to witnesses prior to or during trial or during the three years of discovery in the first habeas proceedings before this Court. Second, although the prosecutor's conviction and sentence do not provide cause to overcome the default as they did not prevent Petitioner from raising this claim, Petitioner was aware, at least by the time of his briefing in this Court, that the prosecutor was under indictment. Third, documents concerning the composition of the grand juries in Jackson County were available to Petitioner prior to trial (O.C.G.A. 50-18-72(6)), and if not then, certainly in his first habeas proceeding before this Court when he first raised this claim. Once his direct appeal ended in 2003, he was able to request the same records through the Open Records Act just as his did in 2019. *See* O.C.G.A. § 50-18-70.

This claim is barred from review by the state bar of res judicata as Petitioner previously raised this claim in his first state habeas petition and this Court found it to be procedurally barred.

II. CONCLUSION

As this Court is able to determine from the face of the pleadings that the claims in this petition are barred from this Court's review, the petition is dismissed without the necessity of a hearing. *See Collier v. State*, 290 Ga. 456 (2012).

SO ORDERED, this *24* day of *Jan* 2020.

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

Prepared by:
Beth Burton
Deputy Attorney General
bburton@law.ga.gov

Appendix D

IN THE SUPREME COURT OF GEORGIA

Application No. S19

DONNIE CLEVELAND LANCE,
Petitioner,
v.
BENJAMIN FORD, Warden
Georgia Diagnostic and Classification Prison,
Respondent.

January 27, 2020

EXECUTION SCHEDULED WEDNESDAY
January 29, 2020, 7:00 PM
Superior Court of Butts County
Case No. 2019-HC-23

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

* * *

Petitioner, Donnie Cleveland Lance, respectfully submits this Application for Probable Cause to Appeal the judgment of the Superior Court of Butts County entered January 24, 2020, denying his Writ of Habeas Corpus. *See* Attachment A. Mr. Lance makes this application pursuant to O.C.G.A. § 9-14-

52(b) and Georgia Supreme Court Rule 36. Mr. Lance filed a timely Notice of Appeal in the Superior Court on January 25, 2020. Mr. Lance is an indigent person currently under sentence of death in the custody of Respondent, the Warden of the Georgia Diagnostic and Classification Prison.

I. SUMMARY OF THE ISSUES TO BE APPEALED

Following an indictment by a non-randomly selected grand jury, Mr. Lance received a sentence of death. Accordingly, due to the grand jury not being randomly selected, his death sentence is invalid and unconstitutional and his execution would violate both the state and federal constitutions. Mr. Lance files this Petition to protect his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution (Article I, § 1, ¶¶ 1, 2, 11, and 17).

Without examining the significant newly discovered evidence or the fact that this evidence could not have been previously discovered through the exercise of normal due diligence, the habeas court rejected the claim on procedural grounds. To the extent that Mr. Lance's claim is procedurally defaulted, cause and prejudice exist to overcome the procedural default. Mr. Lance's significant cause and prejudice argument is detailed below at pages 13 to 21. In addition, the Superior Court was wrong in holding that res judicata bars Mr. Lance's claim here. Mr. Lance's instant claim differs from that claim previously resolved and, in fact, could not have been brought in prior litigation.

II. STATEMENT OF JURISDICTION

Pursuant to Article VI, Section VI, Paragraph III of the Georgia Constitution, this Court has jurisdiction over applications for Certificates of Probable Cause to appeal the final judgment in a capital habeas corpus proceeding.

III. PROCEDURAL HISTORY

Mr. Lance's former wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr. were found dead in Mr. Wood's home on November 9, 1997. After a fairly short investigation, Mr. Lance was arrested for these murders on December 2, 1997.

On March 3, 1998, Mr. Lance was indicted on two counts of malice murder, two counts of felony murder, one count of burglary, one count of possession of a firearm during the commission of a crime, and two counts of possession of a firearm by a convicted felon by a grand jury in Jackson County, Georgia, initiated by state prosecutor Tim Madison. (As discussed below, Mr. Madison was later sentenced to six years in prison for his role in theft schemes while he was prosecutor.) Mr. Lance's grand jury was composed of twenty-three grand jurors.

On June 23, 1999, the Superior Court of Jackson County, in Jefferson, Georgia, entered judgment against Mr. Lance on two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm, for the murders of Ms. Lance and Mr. Wood. Mr. Lance was sentenced to death by electrocution for the murders, twenty years for burglary and five years for possession of a firearm during the commission of a crime.

This Court affirmed Mr. Lance's convictions and sentences of death on February 25, 2002. *Lance v. State*, 560 S.E.2d 663 (Ga. 2002). A timely petition for writ of certiorari was denied by the United States Supreme Court on December 2, 2002. *Lance v. Georgia*, 537 U.S. 1050 (2002). The Supreme Court denied a petition for rehearing on January 27, 2003. *Lance v. Georgia*, 537 U.S. 1179 (2003).

On May 15, 2003, the Superior Court of Jackson County signed an order setting Mr. Lance's execution date for the week beginning at noon on June 2, 2003 and ending at noon on June 9, 2003. Mr. Lance filed a petition for writ of habeas corpus and a Motion for Stay of Execution in Butts County on May 29, 2003, and an order staying the execution was entered on that date. Then, Mr. Lance filed an Amended Petition on August 25, 2005. After a four-day evidentiary hearing, the Superior Court of Butts County concluded that counsel's failure to investigate and present readily accessible mental health evidence at the sentencing phase of trial constituted constitutionally deficient performance. *Lance v. Hall*, No. 2003-V-490, slip op. at 58 (Super. Ct. Butts Cty. Apr. 28, 2009). The State appealed the order to this Court, and Mr. Lance filed a cross appeal. This Court did not purport to dispute any of the habeas court's factual findings but conducted *de novo* review of the prejudice prong and reversed the grant of relief from the habeas court. *Hall v. Lance*, 687 S.E.2d 809, 812 (Ga. 2010). The United States Supreme Court denied certiorari on June 28, 2010 and denied a petition for rehearing on September 3, 2010. *Lance v. Hall*, 561 U.S. 1026 (2010).

Mr. Lance filed a federal petition for a writ of habeas corpus on July 29, 2010, which the United States District Court for the Northern District of Georgia denied in an unpublished opinion on December 22, 2015. *Lance v. Upton*, No. 2:10-CV000143-WBH (N.D. Ga. 2015). The Eleventh Circuit Court of Appeals affirmed the district court's ruling on August 31, 2017. *Lance v. Warden*, 706 F. App'x 565 (11th Cir. 2017). On January 7, 2019, the United States Supreme Court declined to hear Mr. Lance's case over the dissent of three justices. *Lance v. Sellers*, 139 S. Ct. 511 (2019) (Sotomayor, Ginsburg & Kagan, JJ., dissenting).

On April 26, 2019, Mr. Lance filed an extraordinary motion for new trial and for post-conviction testing in the Superior Court of Jackson County. An evidentiary hearing was held on July 31, 2019. The Superior Court denied the Motion on September 30, 2019, and an Application to Appeal the Denial of the motion was filed with this Court on October 30, 2019. This Court denied this Application on December 2, 2019 and denied a timely filed Motion for Reconsideration, on January 13, 2020. Mr. Lance filed a petition for writ of certiorari on January 23, 2020, which is presently pending in the United States Supreme Court.

Mr. Lance filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 18, 2019, raising a challenge to the composition of the grand jury that indicted him in his capital cases in Jackson County, Georgia in 1998 raising substantial newly discovered evidence supported by factual affidavit testimony and the

expert affidavit of Jeffrey Martin. Without considering the merits of the petition, the habeas court denied Mr. Lance's petition on procedural grounds on January 24, 2020. Mr. Lance filed a Notice of Appeal on January 25, 2020. This application follows.

While the case in Butts County was pending, the Superior Court of Jackson County issued a warrant for Mr. Lance's execution during a time period beginning on January 29, 2020, and ending on February 4, 2020. Mr. Lance's execution is currently scheduled for 7:00 p.m. on January 29, 2020.

IV. THE HABEAS COURT ERRED IN DENYING RELIEF ON MR. LANCE'S GRAND JURY CLAIM.

In the habeas court below, Mr. Lance asserted the claim that the grand jury in his case had not been randomly selected, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution (Article I, § 1, ¶¶ 1, 2, 11, and 17). The court found that the claim was procedurally defaulted under state law because Mr. Lance did not raise the claim at trial or on appeal to the Georgia Supreme Court. Order, p. 1. As discussed below cause and prejudice exist to overcome any such procedural default. The Superior Court also held that Mr. Lance's "claim is barred from review by the state bar of res judicata as Petitioner previously raised his claim in his first state habeas petition and this Court found it to be procedurally barred." Order, p. 3. As described below, this claim was not raised, nor could

it have been raised, in any previous proceeding. The claim is properly before this Court for review.

A. Recently Discovered Evidence Establishes That Mr. Lance's Grand Jury Was Not Randomly Selected.

In conducting an investigation for purposes of clemency proceedings, counsel uncovered evidence that the grand jury that indicted Mr. Lance was not selected at random. This non-random selection vitiates the array of the grand jury, resulting in reversible error. Mr. Lance's death sentence violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 1, paras. 1, 2, 11, and 17 of the Georgia Constitution and established precedent. *See Machetti v. Linahan*, 679 F.2d 236, 239 (11th Cir. 1982) (a criminal defendant's guaranteed right to a fair and speedy trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Georgia Constitution "embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community"); *Georgia v. Towns*, 834 S.E.2d 839, 844 (Ga. 2019) ("Even an occasional, limited, and well-intentioned violation of the randomness requirement in the statute governing the summoning of additional grand jurors undercuts a key feature of the modern scheme for selecting juries."). This was not by happenstance. Recently acquired evidence shows that Mr. Madison, the state prosecutor in Mr. Lance's case, took improper and illegal actions in selecting grand jurors in Jackson County and that this conduct by Mr. Madison (who

was incarcerated himself) violated substantial rights of Mr. Lance.

In 2018, Katrina Conrad, an investigator for the Federal Defender Program, conducted witness interviews for purposes of Mr. Lance's clemency proceedings. Conrad Aff. ¶ 2, attached hereto as Appendix 1. These interviews revealed Mr. Madison's improper actions, which in turn, affected the grand jury composition in Mr. Lance's case. *Id.* ¶¶ 3–5. As discussed below, Ms. Conrad followed up on the information she received in these interviews with an Open Records Act Request ("ORA Request") in November 2018 to seek available data on grand jury composition in Jackson County. *Id.* ¶ 7. This grand jury information was not of the type that counsel litigating a habeas corpus proceeding would normally seek.

Several witnesses have now expressed concerns that "Mr. Madison used his influence to 'pack' the grand jury or to get people he knew to serve repeatedly on the grand jury and that he was picking jurors from the same church." *Id.* ¶ 3. Further, witnesses suggested that the same jurors sat repeatedly. *Id.* The evidence is fairly summarized as follows:

> Madison hand-picked his friends and business owners he knew to sit on the grand jury, people he knew would be on his side; the same clique of people sat for years and years; he picked jurors from one church in Jefferson and the preacher there would preach about the grand jury indicting people; he would not put anyone who did not go to

> church on a grand jury and he put people on there that he knew would do what he wanted; he always had the same people on his grand juries; and, Madison manipulated grand jury pools.

Id.

Mr. Madison's corruption and blatant disregard for the office he held is evidenced by his later prosecution and guilty plea concerning his role in theft schemes in Banks County. *See* Indictment, *State of Georgia v. Madison*, No. 07-cr-184 (Super. Ct. Banks Cty. Aug. 28, 2007). On March 4, 2008, Mr. Madison pled guilty to two felony theft charges, one felony count of violation of oath of office, four felony counts of false statements and writings, and one felony count of conspiracy to defraud a political subdivision. Felony Plea Sheet, *State of Georgia v. Madison*, No. 07-cr-184 (Super. Ct. Banks Cty. Mar. 4, 2008). Mr. Madison was sentenced to six years in prison followed by six years on probation and $40,000 in restitution for his role in these theft schemes. *Id.*

Mr. Madison's wrongdoing was not isolated, as the investigation performed by habeas counsel has shown. By mapping the home addresses of grand jurors who served in the March 1998 term, Ms. Conrad determined that the "jurors were concentrated in ways that were disproportionate to the population in the given area based on census data." Conrad Aff. ¶¶ 2-4. Then, Ms. Conrad reviewed indictments from different grand jury terms which revealed that "several grand jurors had in fact sat on more than one grand jury." *Id.* ¶ 5. In November of 2018, Ms. Conrad and Mr. Lance's

counsel consulted with Jeffrey Martin[1], who advised them to make an ORA Request of the Jackson County Clerk's Office (the "ORA Request"). *Id.* ¶ 6. Ms. Conrad made the ORA Request on November 13, 2018 and gained access to some of the requested files in January and February of 2019. *Id.* ¶¶ 7–8. The County Clerk's Office has not been able to locate and provide many of the requested records. *Id.* ¶ 8. Mr. Martin used the records that were located to assess whether there were anomalies in the composition of Mr. Lance's grand jury. *Id.* ¶ 9.

After examining the records obtained from the ORA Request, Mr. Martin determined that the March 1998 term grand jury that indicted Mr. Lance was not randomly selected or derived from a jury list reflective of the Jackson County jury-eligible population. Martin Aff. ¶¶ 4–6, attached hereto as Appendix 2. The Jury Commissioners in Jackson County used a systematic process which resulted in a jury list comprised of a small group of manually selected jurors who have served repeatedly on multiple grand juries for many years. *Id.* ¶ 7.

Due to the large eligible population of jurors in Jackson County, there was no need for grand jurors to serve repeatedly. *Id.* ¶ 14. Despite this fact and the requirement under O.C.G.A. § 15-12-40 for the grand jury list to be revised every two years, the majority of the grand jurors that indicted Mr. Lance had served on previous grand juries. Martin Aff. ¶ 20. One of Mr.

---

[1] Mr. Martin holds a bachelor's degree in Mathematics and Economics from Vanderbilt University, and a Master's degree in Economics from the University of Chicago. He works as a consultant on, among other things, jury pool analysis.

Lance's grand jurors previously served on four grand juries, six served on three previous grand juries, three served on two previous grand juries, and six served on one previous grand jury. *Id.* ¶¶ 21–24. Several of those grand jurors had served together in previous grand jury terms. *Id.* ¶¶ 31–41. Additionally, nineteen of Mr. Lance's grand jurors appeared on the 1994 grand jury list and twelve appeared on the 1987 grand jury list. *Id.* ¶¶ 29–30. In the fourteen year period spanning from March 1984 through March 1998, the number of serving grand jurors was limited to 410 different persons—despite the population of 30,518 persons who were jury eligible as of 2000. *Id.* ¶ 14.

B. The Habeas Court Erred in Finding That Mr. Lance Has Not Shown Cause and Prejudice to Overcome a Procedural Bar

To the extent a procedural default of the present grand jury claim exists, Mr. Lance can overcome this bar because he can show adequate cause for failing to raise the issues at trial or on direct appeal and actual prejudice resulting from the alleged error. O.C.G.A. § 9-14-48(d); *see Humphrey v. Lewis*, 728 S.E.2d 603, 607 (Ga. 2012). In successive state habeas petitions, a petitioner must raise grounds that are constitutionally non-waivable or that could not have reasonably been raised in an earlier petition. *See Smith v. Zant*, 301 S.E.2d 32, 34 (Ga. 1983). Generally, a challenge to the array of grand jurors is waived unless made prior to the return of the indictment; however, courts may still hear the claim so long as the defendant can demonstrate that "'he had no knowledge, either actual or constructive, of

such alleged illegal composition of the grand jury prior to the time the indictment was returned.'" *Clark v. State*, 338 S.E.2d 269, 272 (Ga. 1986) (citation omitted); *Allen v. State*, 614 S.E.2d 857, 861 (Ga. 2005) ("'[A] challenge to the array is not waived as long as it is raised at the earliest opportunity to do so . . . .'") (citation omitted) (alterations added). Further, courts apply procedural default in capital cases less stringently than in non-capital cases. *See Patterson v. Alabama*, 294 U.S. 600, 607 (1935) (recognizing that capital cases are appropriate situations for liberally excusing procedural defaults).

1. There is Adequate Cause for the Default Arising from Newly Discovered Evidence and Governmental Interference.

Courts determine whether adequate cause exists for a procedural default by looking at objective factors external to the defense that impeded counsel's efforts to raise the claim on direct appeal. *Schofield v. Meders*, 632 S.E.2d 369, 372 (Ga. 2006). Objective factors which may constitute cause include a showing that a factual or legal claim was not available to counsel at the time or there was interference by governmental officials which prevented the defendant from raising the claim at trial and on direct appeal. *Turpin v. Christenson*, 497 S.E.2d 216, 229 (Ga. 1998). In this case, both newly discovered evidence and governmental interference impeded counsel's efforts to bring this claim earlier. First, there is newly discovered evidence that the grand jury was improperly selected, infringing on Mr. Lance's Sixth, Eighth, and Fourteenth Amendment rights. Second, this recently acquired evidence shows

that the prosecutor Tim Madison took improper and illegal action to select the grand jurors.

a. Newly Discovered Evidence

Mr. Lance could not have previously raised this claim to protect his rights under the Sixth, Eighth, and Fourteenth Amendments, as his trial counsel had no prior indication that the jury was non-randomly selected and that this claim existed. As described above, Ms. Conrad and Mr. Lance's counsel were only able to uncover this evidence after witness interviews revealed Mr. Madison's efforts to "pack" the grand jury. Conrad Aff. ¶ 3. (And it was only after Mr. Madison's indictment and plea that counsel had reasons to inquire specifically from witnesses about these types of facts surrounding Mr. Madison's conduct as a prosecutor.) After discovering this evidence, Ms. Conrad and Mr. Lance's counsel diligently investigated the claims, consulted expert consultant Jeffrey Martin, and made an ORA Request to obtain evidence relevant to the composition of Mr. Lance's grand jury. *Id.* ¶¶ 4–9. Even to this day, some of the evidence requested has not been provided by the Clerk's office. *Id.*

While, in theory, Mr. Lance could have spoken to the grand jurors years ago, he had no reason at that time to ask the witnesses about Mr. Madison and his grand jury "packing" process. *See Gibson v. Head,* 646 S.E. 2d 257 (Ga. 2007). At that point, nothing indicated that Mr. Madison used his influence to improperly affect the grand jury selection process, and Mr. Lance was entitled to assume that the District Attorney had not engaged in such improper conduct.

In *Gibson*, this Court held that the petitioner could not have raised his claim that his counsel faced a conflict of interest, even though he could have directly asked his counsel at any time previously, because the petitioner was entitled to presume that his counsel was not conflicted based on various conflict of interest reporting requirements, and therefore the claim was not reasonably available. *Gibson*, 646 S.E.2d at 260 ("Because [petitioner's] trial attorney had multiple duties of disclosure, [petitioner] was entitled to presume that the potential conflict at issue here did not exist."); s*ee also Todd v. Turpin*, 493 S.E.2d 900, 906 (Ga. 1997) (concealment by the State of the factual basis of a claim is a "significant factor to be considered" in determining whether cause exists to overcome a procedural bar). The existence of a corrupt prosecutor who manipulates grand juror service to "pack" the grand jury without any disclosure of same to a criminal defendant is tantamount to concealment.

Likewise, obligations that courts have recognized to exist under the United States Constitution and the Georgia Constitution were in place and should have been adequate to ensure that Mr. Lance received an impartial grand jury. *See Machetti*, 679 F.2d at 239 (finding an impartial grand jury "[f]undamental to our system of justice" under the Sixth Amendment); *see also* Ga. Const. art. I, § 1, ¶ XI ("The right to trial by jury shall remain inviolate . . . . [T]he defendant shall have a public and speedy trial by an impartial jury . . . ."). Recently, this Court recognized that violations of the randomness requirement undercuts the jury selection process and acknowledged that

> [i]n *every* case in which we have confronted a violation of a jury selection statute that impacted *who* was chosen for the array—that is, in every case in which there was good reason to doubt that a particular juror would have been selected for the array without the violation—we consistently have deemed it a violation of an "essential and substantial" provision of the statute and held that relief was warranted.

Towns, 834 S.E.2d at 842-43.

Additionally, Standard 3-4.5 of the ABA Standards of Criminal Justice Relating to the Prosecution Function provided the standard for Mr. Madison: "[T]he prosecutor should respect the independence of the grand jury and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury." Mr. Madison also was obligated to uphold the Oath of Georgia Prosecuting Attorneys by swearing to "faithfully and impartially and without fear, favor, or affection discharge [his] duties." O.C.G.A. § 15-18-2.

Accordingly, just as in *Gibson*, Mr. Lance was entitled to presume that the grand jury in his case had been selected in a random manner consistent with the United States Constitution and the Georgia Constitution, and that Mr. Madison had abided by the ethical code of prosecutors and his oath of office.

Similarly, while the records from the ORA Request have been theoretically available, Mr. Lance had no reason to request these historical records for the same reason that Mr. Lance did not question the witnesses regarding Mr. Madison's attempts to

"pack" the grand jury—no reason to look for the pattern existed. As noted by expert Jeffrey Martin, the type of historical data obtained to demonstrate the pattern of the non-random selection of these grand juries over several years is "unlike a typical [grand jury] challenge." Martin Aff. ¶ 6. Reasonable due diligence would not have included such an ORA Request.

At the time of trial in this case, trial counsel timely challenged the grand jury array, claiming that the sixth-month residency requirement was unconstitutional and that certain populations were systematically and purposefully excluded from the grand jury pool. In response to the challenge, the State turned over the grand jury certificates which provide information regarding the race and sex of members of the grand jury. This information only went to the grand jury that indicted Mr. Lance, however, and not to overlap with prior grand juries or issues of repeat grand jury service. At that time, there were improprieties beyond those that could be uncovered by review of the grand jury certificates. Without seeking years upon years of Jackson County indictments to determine who comprised the grand jury outside of the time of Mr. Lance's trial, counsel would not have knowledge of, nor any reason to inquire about, multiple appearances by persons on the grand jury lists. Due diligence does not require an attorney to review grand jury lists or indictments outside of the timeline of the client's case.[2] As the

[2] "To the extent the court finds that trial counsel was at fault for failing to discover this information earlier, Petitioner asserts that his trial counsel rendered constitutionally inadequate

evidence was not previously available, the petition Mr. Lance filed in Butts Superior Court was the earliest opportunity for this claim to be raised and therefore cause exists to overcome any procedural default.

b. Prosecutorial Misconduct

In addition to the newly discovered evidence that the grand jury was improperly selected, this new evidence also showed that this improper selection was likely due to interference by Mr. Madison—the state prosecutor. Mr. Madison was convicted and sentenced after Mr. Lance's state habeas case had been presented to the Superior Court. All witness interviews by Mr. Lance's defense team had been completed prior to counsel becoming aware that Mr. Madison was corrupt. It was not until Mr. Lance's investigator, Ms. Conrad, was conducting interviews in preparation for clemency proceedings that the information regarding Mr. Madison's conduct with the grand jurors was revealed. Conrad Aff. ¶ 2. Due diligence does not require counsel to assume that a prosecutor is corrupt.

Mr. Madison's conviction is relevant because, when Ms. Conrad later interviewed witnesses for the separate clemency process, Ms. Conrad asked a question "regarding their knowledge of Mr. Madison as the district attorney of Jackson County." *Id.* ¶ 2. Mr. Lance is not contending that Mr. Madison's conviction itself was cause for a habeas petition

---

representation. See *Turpin v. Todd*, 493 S.E.2d 900, 905–06 (Ga. 1997) ("[C]onstitutional ineffective assistance of counsel can constitute cause under OCGA § 9-14-48(d)").

based on new evidence on its own. It is important to note that Mr. Lance was unaware of Mr. Madison's improper role in the grand jury selection process at the time of his previous habeas proceedings. Ms. Conrad and Mr. Lance only became aware of Mr. Madison's improper connection to the grand jury selection process after Ms. Conrad noticed an "unusual number of people [mentioning] similar issues about the grand jury." *Id.* ¶ 4. But for Mr. Madison's conviction, which on its own did not seem suspicious enough to trigger an investigation into grand jury selections during his time as a prosecutor, Ms. Conrad would not have questioned the witnesses regarding patterns in the grand jury selection process.

2. There is Actual Prejudice as Mr. Lance was Not Afforded Full Constitutional Protection.

The prejudice needed to overcome a procedurally defaulted habeas corpus claim is actual prejudice that worked to the petitioner's actual and substantial disadvantage. *See Schofield*, 632 S.E.2d at 372-73. Georgia courts have also required that such prejudice infect the trial with a constitutional error. *See id.* Because the prejudice that must be shown to overcome procedural default is a prejudice of constitutional proportions and because a habeas petitioner is entitled to relief only for constitutional violations, the prejudice prong of the cause and prejudice test is coextensive with the merits of a claim of a constitutional violation. *Christenson*, 497 S.E.2d at 229-30. The improper selection of the grand jury prejudices Mr. Lance by depriving him of his

constitutionally mandated right to trial by a fair and impartial jury. *See* U.S. Const. amends. VI, VIII, XIV. As Mr. Lance can prevail on the merits of the claim, prejudice has been established.

The habeas court failed to even address Ms. Conrad's Affidavit—which clearly explains the discovery of new evidence of Mr. Madison's improper and illegal actions concerning the grand jury selection process. Both Ms. Conrad's and Mr. Martin's Affidavits presented the Court with significant new evidence that the habeas court did not engage with in its decision. When the habeas court matter of factly stated that "Petitioner has submitted no new law or new facts with regard to this claim that were not previously available," Order at 1, it entirely failed to engage with the information that the guilty plea of Tim Madison produced or the information it caused witnesses in Jackson County to reveal in Ms. Conrad's follow-up investigation.

C. The Habeas Court Erred in Finding that This Is the Same Claim Raised in Mr. Lance's Previous Habeas Petition.

The habeas court did not engage in the correct legal analysis in determining that the claim that Mr. Lance now raises was barred by res judicata. Res judicata does not bar a claim based on facts that were not reasonably available at the time of the first habeas proceeding, even if the claim was raised in the first habeas proceeding. *See Gibson v. Head*, 646 S.E.2d 257, 260 (Ga. 2007) ("The claim would not be barred by res judicata, however, if it were based on facts that were not reasonably available at the time of the first habeas proceeding.").

Mr. Lance's Amended Petition for Writ of Habeas Corpus, filed on August 25, 2005, raised the argument that the pools from which his grand and traverse jury were drawn were unconstitutionally composed and discriminatorily selected. However, as the State noted in their Response filed in the habeas court, the argument lacked support at the time. State's Response p. 8 ("He then challenged the composition and selection of the grand jury during his first state habeas proceeding, but failed to present any evidence or argument to support the claim."). The lack of prior sufficient factual information flows directly from the fact that Mr. Lance's argument in the present Application is not simply that the grand jury was unconstitutionally composed and discriminatorily selected based on generalized demographic data. The argument Mr. Lance now raises, based on newly discovered evidence, is that the grand jury was unconstitutionally composed because Mr. Madison packed the grand jury with individuals hand-picked and who served repeatedly. At the time of filing of the 2005 Amended Petition, Mr. Lance lacked the information to raise this claim. Moreover, there was no reason for Mr. Lance to suspect that this conduct had occurred or to seek the specific evidence necessary to show the impact of this "packing" on the grand jury's composition. Consequently, because the basis for the grand jury claim Mr. Lance is presently asserting is different from what he attempted to litigate on his first habeas petition, the doctrine of res judicata is inapplicable. *Gibson*, 646 S.E. 2d at 260.

D. Mr. Lance is Entitled to Relief on His Claim.

1. Right to a Fair and Impartial Grand Jury

Article I, Section I, Paragraphs I, II, and XI of the Georgia Constitution guarantee the right to a fair trial by an impartial jury to every criminal defendant, which right is extended to grand juries for cases in which state law requires a grand jury indictment. To this end, the Eleventh Circuit has found that "[f]undamental to our system of justice is the principle that the sixth amendment grants criminal defendants the right to an impartial jury. This guarantee also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community." *Machetti*, 679 F.2d at 239 (finding that state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners deprived habeas petitioner of her right to an impartial jury trial) (citing *Taylor v. Louisiana*, 419 .S. 522, 527–30 (1975); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1384 (11th Cir. 1982)).

Georgia courts have entertained challenges to composition of grand juries on the basis of whether the grand jury was representative of a proper cross-section of the community. In *Ramirez v. State*, 575 S.E.2d 462 (Ga. 2003), this Court stated:

> This Court has entertained fair cross-section challenges to *grand* jury source lists under the Sixth Amendment as made applicable to the states, at least to some extent, through the Fourteenth Amendment's due process clause. *See, e.g., Morrow*, 272 Ga. at 692-

> 695(1), 532 S.E.2d 78 [(Ga. 2000)]; *but see also* 4 LaFave, Israel & King, Criminal Procedure § 15.4(d), pp. 330-331 (2nd ed. 1999). Furthermore, this Court has held, based on OCGA § 15-12-40, that a defendant is entitled, under standards comparable if not identical to federal constitutional standards, to a grand jury drawn from a source list that represents a fair cross-section of the population. *West v. State,* 252 Ga. 156(1), 313 S.E.2d 67 (Ga. 1984).

Id. at 466 (alterations added). The importance of impartiality is highlighted by the fact that a defendant can provide the court evidence of a grand jury's impartiality prior to the grand jury's taking any action. *See Brown v. State*, 759 S.E.2d 489, 491 (Ga. 2014) (citing *Bitting v. State,* 139 S.E. 877 (Ga. 1927)).

Georgia recently revisited its grand jury selection process in an effort to make the process fairer and to ensure that the jury's composition is more representative of the community. Under former O.C.G.A. § 15-12-40, the county board of jury commissioners compiled, maintained, and revised a grand jury list comprised of a "fairly representative cross section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40. This process "utilized so-called 'forced balancing' in an attempt to make its jury lists include men and women and certain identifiable racial groups in proportion to the county's population as determined by the most recent decennial census. In some counties with fast-changing demographics, the process left those

proportions in the jury pool significantly out of line by the end of the decade." *Ricks v. State*, 800 S.E.2d 307, 310 (Ga. 2017) (internal citations omitted).

The Jury Composition Reform Act of 2011 replaced the previous jury process used in Georgia. The new jury composition laws were designed to provide a "consistent methodology that produces lists of eligible jurors that are updated annually for each county and more accurately reflect each county's jury-eligible population." *Id.* However, Mr. Lance's grand jury was selected under the previous—since corrected—system.

2. Grand Jury Indictments

Courts have recognized the importance of grand juries as an element of protection of defendants' rights under The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. As the United States Supreme Court has stated:

> Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed."

Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Thomas and Scalia, J.J., concurring) (quoting U.S. Const. amends. V, VI). In *Vasquez v. Hillery*, the United States Supreme Court explained the important role of the grand jury:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts.

474 U.S. 254, 263 (1986).

The importance of the grand jury indictment is further shown through the remedy for a constitutionally flawed indictment—mandatory reversal. In *Vasquez*, a racial discrimination case, the Court rejected the notion that "discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." *Id.* This effect cannot be adequately addressed by a later finding of guilt at trial. *Id.* ("Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come."). Rather, once a constitutional flaw is found in the grand jury process, the only appropriate remedy is a mandatory reversal. *Id.* at 264 ("The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.").

A non-randomly selected grand jury with intentionally chosen persons, similar to a racially discriminatory grand jury,[3] affects the fairness of criminal trials. Thus, the only appropriate remedy is mandatory reversal. While the constitutional right to an indictment by a grand jury has not been incorporated to the states, *see Hurtado v. California*, 110 U.S. 516 (1884), a state can choose to implement the requirement on its own accord. Once a state requires an indictment, as Georgia does, the indictment must be provided. *United States v. Choate*, 276 F.2d 724 (5th Cir. 1960) ("When an indictment is required for the institution of criminal proceedings, lack of an indictment goes to the court's jurisdiction."). Furthermore, the grand jury process must comply with constitutional requirements. *See*

---

[3] The United States Supreme Court has long held that discrimination in the selection of grand jurors violates a defendant's constitutional rights. *See Vasquez*, 474 U.S. 254; *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Bush v. Kentucky*, 107 U.S. 110, 119 (1883); *Neal v. Delaware*, 103 U.S. 370, 394 (1881); *see also Castaneda v. Partida*, 430 U.S. 482, 492–95 & n.12 (1977). Because discrimination in the grand jury selection process "strikes at the fundamental values of our judicial system and our society as a whole," it is well-established that a criminal defendant has suffered an equal protection violation when he is indicted by a grand jury that is the product of such a discriminatory process. *Rose*, 443 U.S. at 556 (citing *Neal*, 103 U.S. at 394; *Reece*, 350 U.S. at 87). "Since the beginning," the United States Supreme Court has "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage." *Id.* at 556–57 (citing *Neal*, 103 U.S. at 394; *Bush*, 107 U.S. at 119; *Virginia v. Rives*, 100 U.S. 313, 322 (1880)).

generally Colson v. Smith, 315 F. Supp. 179, 182 (N.D. Ga. 1970) ("If the indictment is returned by a grand jury which was selected in a racially discriminatory manner the indictment itself is void, and if the indictment is void there is no charge to which the accused can legally be held to answer."), *aff'd*, 438 F.2d 1075 (5th Cir. 1971). Here, the grand jury was chosen from a small and limited pool—therefore discriminating against the majority of eligible jurors and voiding the indictment.

3. A Constitutionally Invalid Indictment is Void in Georgia

In Georgia, "the return of an indictment by the grand jury [is] a necessary prerequisite to the jurisdiction of the courts of this State to try a person charged with a felony. … A conviction is void where there is no jurisdiction and we cannot breathe new life into a void conviction by remanding the case for a new indictment." *Cochran v. State*, 344 S.E.2d 402, 406 (Ga. 1986) (Smith, J., concurring) (internal citations omitted). Thus, in all cases in which Georgia state law requires a grand jury indictment to initiate criminal proceedings, the grand jury process must comply with federal constitutional requirements.

As explained in *Colson v. Smith*, "The constitutional right involved in the case of a state defendant is not a constitutional right to be indicted by a grand jury—for there is no such right, *Hurtado v. California*, 110 U.S. 516 (1884)—but, rather, the right to be indicted only by a fair and impartial grand jury when the state has provided for indictment by a grand jury at all." 315 F. Supp. at 182 n.3. A

constitutionally invalid indictment is void and removes jurisdiction from the trial court. In *Colson v. Smith*, the indictment was constitutionally defective because the grand jury was selected in a racially discriminatory manner. Thus, the Northern District of Georgia decided that the petitioner was "entitled to release, subject to the State's right to reindict him." *Id.* at 183.

The right to a reversal for a constitutional flaw extends beyond racially discriminatory grand jury processes. For example, a defendant may seek to void an indictment by alleging that the indictment contains a defect on its face that affects the substance and merits of the offense charged—such as failure to charge a necessary element of a crime in a motion in arrest of judgment. *See generally* O.C.G.A. § 17-9-61; *Motes v. State*, 586 S.E.2d 682, 683 (Ga. Ct. App. 2003).

Furthermore, as mentioned above, a grand jury indictment is required for Georgia courts to have jurisdiction to try a person charged with a felony. *See Cochran*, 344 S.E.2d at 406. Absent jurisdiction, a conviction is void and cannot be reinvigorated by remanding for a new indictment. *See id.* Elaborating on this concept in a dissenting opinion, Justice Hunstein stated:

> An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States,* 350 U.S. 359, 363 (1956); *see Lawn v. United States,* 355 U.S. 339(I) (1958); *see also Beck v. Washington,* 369 U.S. 541(I), 82

S.Ct. 955 (1962) (Douglas, J., dissenting) ("It is well settled that when either the Federal Government or a State uses a grand jury, the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial."). "A number of courts have interpreted this line of Supreme Court cases as recognizing a constitutional requirement that an indictment be returned by an unbiased grand jury." *United States v. Finley,* 705 F.Supp. 1297, 1307(IV) (N.D. Ill. 1988); *see, e.g., United States v. Burke,* 700 F.2d 70, 82 (2d Cir. 1983) ("When a person is brought before the grand jury and charged with a criminal offense, that individual is constitutionally entitled to have his case considered by an impartial and unbiased grand jury."); *United States v. Serubo,* 604 F.2d 807, 816 (3d Cir. 1979); *United States v. Waldbaum, Inc.,* 593 F.Supp. 967, 970(II) (E.D.N.Y. 1984); *United States v. Gold,* 470 F.Supp. 1336, 1345 (N.D. Ill. 1979); *State v. Murphy,* 538 A.2d 1235(II) (N.J. 1988); *see also* State *v. Barnhart,* 563 S.E.2d 820(II) (W.V. 2002); *State v. Emery,* 642 P.2d 838, 851 (Az. 1982). Accordingly, "it is settled that the Fifth Amendment requires that an indictment be returned by a legally constituted and unbiased grand jury." *Waldbaum, Inc.,* 593 F.Supp. at 970 (collecting cases).

Brown, 759 S.E.2d at 494 (Hunstein, J., dissenting).[4]

4. Mr. Lance's Conviction Should Be Reversed Because the Jackson County Grand Jury Process was Unconstitutional.

Mr. Lance was entitled to a fair and impartial grand jury. Although Mr. Madison obtained a grand jury indictment before initiating criminal

---

[4] Under current Georgia law, the Council of Superior Court Clerks of Georgia (the "Council") compiles a state-wide master jury list. O.C.G.A. § 15-12-40.1(a). The Council obtains the following data from the Department of Driver Services, the Secretary of State, the Department of Corrections, and the State Board of Pardons and Paroles:

> (i) a list of persons at least 18 years of age who have been issued a driver's license or personal identification card, excluding persons whose driver's license has been suspended or revoked due to a felony conviction, whose driver's license has been expired for more than 730 days, or who have been identified as non-citizens; (ii) a list of registered voters and individuals declared as mentally incompetent; (iii) a list of persons convicted of a felony in the state of Georgia; and (iv) a list of persons whose civil rights have been restored.

Id. §§ 15-12-40.1(a)-(c), (f)-(g). These lists contain information regarding the person's age, gender, and race. *See id.*

Once per calendar year, the Council provides a county master list to each county clerk. *Id.* § 15-12-40.1(d). The county clerk is then required to "choose a random list of persons from the county master jury list to comprise the venire." *Id.* § 15-12-40.1(h). Persons who have served as a trial or grand juror at any session of the superior or state courts are ineligible for duty as a juror until the county clerk receives the next succeeding county master jury list from the Council. *Id.* § 15-12-4(a). These new procedures were not followed, however, in the case of Mr. Lance.

proceedings against Mr. Lance, the grand jury indictment was constitutionally invalid because of the way the grand jury list was compiled.

As discussed above, Jackson County's grand jury list was compiled from a small group of manually selected jurors who repeatedly served on multiple grand juries dating as far back as fourteen years. Martin Aff. ¶¶ 6–7. The majority of Mr. Lance's grand jurors had been on the grand jury list for 11 years. *Id.* ¶ 10. Two-thirds of Mr. Lance's grand jurors had previously served with one of the other jurors. *Id.* ¶ 8. Two of the grand jurors had previously served on two grand juries together. *Id.* In 2000, two years after Mr. Lance was indicted, the population of Jackson County was 30,518. *Id.* ¶ 11. Yet, in the 29 Jackson County grand jury terms in the fourteen year span between March 1984 and March 1998, only 410 different people served as jurors. *Id.* ¶ 15. These statistical anomalies show that the Jury Commissioner for Jackson County was not following O.C.G.A. § 15-12-40, as established in 1998, which required the Commissioner to revise the grand jury list at least once every two years.[5]

---

[5] O.C.G.A. § 15-12-40 has since been revised in an effort to make the grand jury selection process representative of the community. The current statute requires that the clerk select "a random list of persons from the county master jury list" every year. O.C.G.A. § 15-12-40.1(h). O.C.G.A. § 15-12-4(a) attempts to limit repeat grand jurors by providing that a grand juror who has served "at any session of the superior or state courts shall be ineligible for duty as a juror until the next succeeding county master jury list has been received by the clerk." O.C.G.A. § 15-12-4(a). The effect of these changes is clear from the fact that the grand jury list used to indict Mr. Lance included 341

Mr. Lance's right to a fair and representative grand jury does not stem from the Georgia Code alone. Rather, the changes to the Code reflect necessary changes to provide the Sixth Amendment right to a fair and impartial grand jury. The updated Code reinforces the requirement that juries are selected at "random." As noted in *Machetti*, "the principle that the sixth amendment grants criminal defendants the right to an impartial jury . . . also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community." 679 F.2d at 239. The randomness requirement from O.C.G.A. § 15-12-40.1(h) is a method used by the state to ensure a fair and impartial jury. Here, Mr. Lance was denied his Sixth Amendment right to a fair and impartial jury as well as his right under O.C.G.A. § 15-12-40.1(h), as previously enacted, to a fair cross-section of his community.

Significantly, with regard to both the constitutional and statutory cross-section claims, "there is no constitutional guarantee that grand or petit juries, impaneled in a particular case, will constitute a representative cross-section of the entire community." *Sharp v. State*, 602 S.E.2d 591, 593 (Ga. 2004) (citing *Taylor*, 419 U.S. at 538; *Torres v. State*, 529 S.E.2d 883, 885 (Ga. 2000)). Rather, "[t]he proper inquiry concerns the procedures for compiling the jury lists and not the actual composition of the grand or traverse jury in a particular case." *Lawler v. State*, 576 S.E.2d 841, 845 (Ga. 2003) (citing *Torres*, 529

---

persons, while the current grand jury list for Jackson County includes 52,437 people. Martin Aff. ¶ 15.

S.E.2d at 885). Thus, if the procedure for compiling the grand jury list is flawed, so is the entire grand jury process. Here, the statistics support a finding that there were fundamental flaws in the compiling and the resulting composition of Mr. Lance's grand jury. As Mr. Lance's expert concluded, "[t]he theoretical chance of repeat grand jurors on a grand jury list randomly chosen every two years during the 14 year time period ending March 1998 is less than 0.001%." Martin Aff. ¶ 13. But yet there are numerous such instances of repeat grand juror service in the data Mr. Martin reviewed.

In *Towns*, this Court recognized that any violation of the randomness requirement "undercuts a key feature of the modern scheme for selecting juries." 834 S.E.2d at 844. The Court noted that while there was no issue concerning the randomness of the selection of the 150 individuals already summoned as trial jurors in *Towns*, the jury selection statute was violated when the clerk selected two jurors from the list to serve on the grand jury based on her personal knowledge of the prospective petit jurors, her own assessment of the extent to which she had the information necessary to contact them, and her estimate of the likelihood that they would be available to report immediately. *Id.* at 842. The Court found that every grand juror must be randomly selected, noting that

> [i]n *every* case in which we have confronted a violation of a jury selection statute that impacted *who* was chosen for the array—that is, in every case in which there was good reason to doubt that a particular juror

> would have been selected for the array without the violation—we consistently have deemed it a violation of an "essential and substantial" provision of the statute and held that relief was warranted.

Id. at 842-43. Here, there is evidence of impropriety that indicates that potentially all of Mr. Lance's grand jurors were not randomly selected.

In *Vasquez*, the United States Supreme Court noted that fundamental flaws in the composition of a grand jury are "not amenable to harmless-error review." 474 U.S. at 623–24. In so holding, the Court pointed to *Tumey v. Ohio* for the notion that the appearance of bias, whether or not bias actually existed, requires the presumption that the judicial process was impaired. *Id.* at 623. The Court continued, "when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Id.* In *Tumey v. Ohio*, the United States Supreme Court found that the appearance of bias, without evidence of actual bias, was sufficient for a reversal. 273 U.S. 510, 535 (1927). In likening fundamental flaws in the composition of juries in *Tumey,* the Court suggested that the appearance of impropriety in the jury selection process is of such magnitude, it requires reversal without actual proof of impropriety. The statistical analysis provided by Mr. Lance's jury expert and the illegal actions of District Attorney Madison provide, at a minimum, the appearance of impropriety in the composition of Mr. Lance's grand jury. Furthermore, while the

appearance of impropriety is sufficient to require reversal, the evidence of impropriety stemming from the Jackson County District Attorney's Office and, more specifically, from Mr. Madison, the District Attorney who prosecuted Mr. Lance (and later pled guilty to theft) is relevant to the inquiry of whether there was actual impropriety. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) ("[W]e accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. . . . This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case."). This is particularly the case in light of evidence that surfaced in Ms. Conrad's investigation of Mr. Madison's having personally exercised influence over the selection of grand jurors.

Mr. Lance was deprived of a fair and impartial grand jury. The statistical evidence shows impropriety on the part of the Jackson County District Attorney's Office in the repeated appointment of grand jurors to the jury array in Jackson County. Furthermore, historical evidence of misconduct—at this specific office and with this specific District Attorney—informs the inquiry into whether the grand jury selection was improper. The evidence of impropriety is further evidence that the procedure for compiling Mr. Lance's grand jury list was constitutionally flawed. According to the Supreme Courts of the United States and Georgia, a constitutionally flawed indictment is void. Once a grand jury indictment is found to be constitutionally impermissible, the impossibility of knowing the outcome of a properly constituted grand jury

mandates reversal. *Vasquez*, 474 U.S. at 624.[6] Thus, this Court should grant Mr. Lance's application for a Certificate of Probable Cause to appeal.

V. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court:

i. Grant a certificate of probable cause to appeal, permitting Mr. Lance an opportunity to present argument and full briefing,

ii. Issue a writ of habeas corpus to have Petitioner brought before it to relieve him of his unconstitutional sentence of death, and

iii. Grant such other relief as may be appropriate.

Respectfully submitted this, the 27th day of January, 2020. * * *

---

[6] To countenance this error, in even in a single capital case, undermines the reliability of the death penalty as a reflection of contemporary moral values and, therefore, violates the Eighth Amendment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 184 (1976) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of *the community's belief* that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.") (emphasis added); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (the Eighth Amendment prohibits excessive or disproportionate punishment). Moreover, the United States Supreme Court has held that the Eighth Amendment requires states to apply special procedural safeguards in order to carry out the death penalty. *Id.* Otherwise, the constitutional prohibition against "cruel and unusual punishments" would forbid its use. *Furman v. Georgia*, 408 U.S. 238 (1972).

Appendix E

SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

Habeas Corpus Case No. _____

CAPITAL CASE

DONNIE CLEVELAND LANCE,

Petitioner,

v.

BENJAMIN FORD, Warden
Georgia Diagnostic and Classification Prison,

Respondent.

December 18, 2019

PETITION FOR WRIT OF HABEAS CORPUS

1. Comes now Petitioner Donnie Cleveland Lance, by and through his undersigned counsel, and petitions this Court for a writ of habeas corpus pursuant to O.C.G.A. §§ 9-14-41 *et seq*. Petitioner is an indigent person currently under sentence of death in the custody of Respondent, the Warden of the Georgia Diagnostic and Classification Prison.

2. Petitioner files this Petition to protect his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution (Article I, § 1, paras. 1, 2, 11, and 17). Following an

indictment by a nonrandomly selected grand jury, Petitioner received a sentence of death. Accordingly, due to the grand jury not being randomly selected, his death sentence is invalid and unconstitutional and his execution would violate both state and federal constitutional protections.

I. INTRODUCTION

3. As counsel discovered in the past year in conducting investigation for purposes of clemency proceedings, the grand jury which indicted Mr. Lance was not selected at random. As such this non-random selection vitiates the array of the grand jury, resulting in reversible error. Mr. Lance's death sentence violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 1, paras. 1, 2, 11, and 17 of the Georgia Constitution and established precedent. *See Machetti v. Linahan*, 679 F.2d 236, 239 (11th Cir. 1982) (a criminal defendant's guaranteed right to a fair and speedy trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Georgia Constitution "embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community"); *Georgia v. Towns*, No. S19A0557, 2019 WL 5302078, at *5 (Ga. Oct. 21, 2019) ("even an occasional, limited, and well-intentioned violation of the randomness requirement in the statute governing the summoning of additional grand jurors undercuts a key feature of the modern scheme for selecting juries.").

II. BACKGROUND AND PROCEDURAL HISTORY

4. Mr. Lance's former wife, Sabrina "Joy" Lance, and her boyfriend, Dwight "Butch" Wood, Jr. were found dead in Mr. Wood's home on November 9, 1997. There was no direct evidence linking Mr. Lance or anyone to these crimes. Nevertheless, the local law enforcement officials immediately focused the investigation on Mr. Lance to the exclusion of other suspects. After a fairly short investigation, Mr. Lance was arrested for these murders on December 2, 1997. There were no witnesses to the crime. No murder weapon was ever found. And, despite the horrific nature of the murders and the fact that Mr. Lance was taken into custody for questioning within hours of the murders, no blood or other physical evidence was found either at the scene or on Mr. Lance that tied him to the scene of the murder.

5. On March 3, 1998, Mr. Lance was indicted on two counts of malice murder, two counts of felony murder, one count of burglary, one count of possession of a firearm during the commission of a crime, and two counts of possession of a firearm by a convicted felon by a grand jury in Jackson County, Georgia initiated by state prosecutor Tim Madison. (As discussed below, Mr. Madison was later sentenced to six years in prison for his role in theft schemes while he was prosecutor.) Mr. Lance's grand jury was composed of twenty-three grand jurors.

6. On June 23, 1999, the Superior Court of Jackson County, in Jefferson, Georgia entered judgment against Mr. Lance on two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm, for

the murders of Ms. Lance and Mr. Wood. Mr. Lance was sentenced to death by electrocution for the murders, twenty years for burglary and five years for possession of a firearm during the commission of a crime. The sentences are to be consecutively served.

7. Mr. Lance appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Mr. Lance's convictions and sentences of death on February 25, 2002. *Lance v. State*, 560 S.E.2d 663 (Ga. 2002). Mr. Lance filed a timely petition for writ of certiorari in the United States Supreme Court which was denied on December 2, 2002. *Lance v. Georgia*, 537 U.S. 1050 (2002). The United States Supreme Court denied a petition for rehearing on January 27, 2003. *Lance v. Georgia*, 537 U.S. 1179 (2003).

8. On May 15, 2003, the Superior Court of Jackson County signed an order setting Mr. Lance's execution date for the week beginning at noon on June 2, 2003 and ending at noon on June 9, 2003. Mr. Lance filed a skeletal petition for writ of habeas corpus and a Motion for Stay of Execution in Butts County on May 29, 2003, and an order staying the execution was entered on that date. Then, Mr. Lance filed an Amended Petition on August 25, 2005. After a four-day evidentiary hearing, the Superior Court of Butts County concluded that counsel's failure to investigate and present readily accessible mental health evidence at the sentencing phase of trial constituted constitutionally deficient performance. *Lance v. Hall*, No. 2003-V-490, slip op. at 58 (Super. Ct. Butts Cty. Apr. 28, 2009). The State appealed the order to the Georgia Supreme Court, and Mr. Lance

filed a cross appeal. The Georgia Supreme Court did not purport to dispute any of the habeas court's factual findings but conducted *de novo* review of the prejudice prong and reversed the grant of relief from the habeas court. *Hall v. Lance*, 687 S.E.2d 809, 812 (Ga. 2010). The United States Supreme Court denied certiorari of the Georgia Supreme Court's decision on June 28, 2010, and denied a petition for rehearing on September 3, 2010. *Lance v. Hall*, 561 U.S. 1026 (2010).

9. Mr. Lance filed a federal petition for a writ of habeas corpus on July 29, 2010, which was denied by the United States District Court for the Northern District of Georgia in an unpublished opinion on December 22, 2015. *Lance v. Upton*, Case. No. 2:10-CV000143-WBH (N.D. Ga. 2015). The Eleventh Circuit Court of Appeals affirmed the district court's ruling on August 31, 2017. *Lance v. Warden*, 706 F. App'x 565 (11th Cir. 2017). On January 7, 2019, the United States Supreme Court declined to hear Mr. Lance's case over the dissent of three justices. *Lance v. Sellers*, 139 S. Ct. 511 (2019) (Sotomayor, Ginsburg & Kagan, JJ., dissenting).

10. On April 26, 2019, Mr. Lance filed an extraordinary motion for new trial and for post-conviction testing in the Superior Court of Jackson County. An evidentiary hearing was held on July 31, 2019. The Superior Court denied the Motion on September 30, 2019, and an Application to Appeal the Denial of the motion was filed with the Georgia Supreme Court on October 30, 2019. The Court denied this Application on December 2, 2019. A timely filed Motion for Reconsideration was filed

December 12, 2019 and is presently pending in the Georgia Supreme Court.

III. FACTS SUPPORTING THE CLAIM

11. In addition to the DNA evidence deficiencies noted above, recently acquired evidence shows that (i) Tim Madison, the state prosecutor in Mr. Lance's case, took improper and illegal actions in selecting grand jurors in Jackson County; and (ii) Mr. Lance's grand jury was not randomly selected. In 2018, Katrina Conrad, an investigator for the Federal Defender Program, conducted witness interviews for Mr. Lance's clemency proceedings. Conrad Aff. ¶ 2, attached hereto as Appendix 1. These interviews revealed Mr. Madison's improper actions, which in turn, affected the grand jury composition in Mr. Lance's case. *Id.* ¶¶ 3-5. As discussed below, Ms. Conrad followed up the information she received in these interviews with and Open Records Act request in November 2018 to seek available data on grand jury composition. *Id.* ¶ 7.

12. In the witness interviews Ms. Conrad conducted, several witnesses expressed concerns that "Mr. Madison used his influence to 'pack' the grand jury or to get people he knew to serve repeatedly on the grand jury and that he was picking jurors from the same church." *Id.* ¶ 3. Further, witnesses suggested that the same jurors sat repeatedly. *Id.* Ms. Conrad summarized:

> Madison hand-picked his friends and business owners he knew to sit on the grand jury, people he knew would be on his side; the same clique of people sat for years and years; he picked jurors from one church in

> Jefferson and the preacher there would preach about the grand jury indicting people; he would not put anyone who did not go to church on a grand jury and he put people on there that he knew would do what he wanted; he always had the same people on his grand juries; and, Madison manipulated grand jury pools.

Id.

13. Mr. Madison's corruption and blatant disregard for the office he held is evidenced by his later prosecution and guilty plea concerning his role in theft schemes in Banks County. *See* Indictment, State of Georgia v. Madison, No. 07-cr-184 (Banks Cty. Super. Ct. Aug. 28, 2007). On March 4, 2008, Mr. Madison pled guilty to two felony theft charges, one felony count of violation of oath of office, four felony counts of false statements and writings, and one felony count of conspiracy to defraud a political subdivision. Felony Plea Sheet, State of Georgia v. Madison, No. 07-cr-184 (Banks Cty. Super. Ct. Mar. 4, 2008). Mr. Madison was sentenced to six years in prison followed by six years on probation and $40,000 in restitution for his role in these theft schemes. *Id.*

14. Based on Ms. Conrad's knowledge of Mr. Madison's conviction and the "unusual number of people" who mentioned similar issues concerning the grand jury, Ms. Conrad decided to investigate the validity of these claims. Conrad Aff. ¶¶ 2-4. By mapping the home addresses of grand jurors who served in the March 1998 term, Ms. Conrad determined that the "jurors were concentrated in ways that were disproportionate to the population in

the given area based on census data." *Id.* ¶ 4. Then, Ms. Conrad reviewed indictments from different grand jury terms which revealed that "several grand jurors had in fact sat on more than one grand jury." *Id.* ¶ 5. In November of 2018, Ms. Conrad and Mr. Lance's counsel consulted with Jeffrey Martin, a grand jury expert, who advised them to make an Open Records Act Request of the Jackson County Clerk's Office (the "ORA Request"). *Id.* ¶ 6. Ms. Conrad made the ORA Request on November 13, 2018 and gained access to some of the requested files in January and February of 2019. *Id.* ¶¶ 7-8. The County Clerk's Office has not been able to locate and provide many of the requested records. *Id.* ¶ 8. Mr. Martin used the minimal records that were located to assess whether there were anomalies in the composition of Mr. Lance's grand jury. *Id.* ¶ 9.

15. After examining the records obtained from the ORA Request, Mr. Martin determined that the March 1998 term grand jury that indicted Mr. Lance was not randomly selected or derived from a jury list reflective of the entire community of Jackson County. Martin Affidavit ¶¶ 4-6, attached hereto as Appendix 2. The Jury Commissioners in Jackson County used a systematic process which resulted in a jury list comprised of a small group of manually selected jurors who have served repeatedly on multiple grand juries for many years. *Id.* ¶ 7.

16. Due to the large eligible population of jurors in Jackson County, there was no need for grand jurors to serve repeatedly. *Id.* ¶ 14. Despite this fact and the requirement under O.C.G.A. §15-12-40 for the grand jury list to be revised every two years, the

majority of the grand jurors that indicted Mr. Lance had served on previous grand juries. *Id.* ¶ 20. One of Mr. Lance's grand jurors previously served on four grand juries, six served on three previous grand juries, three served on two previous grand juries, and six served on one previous grand jury. *Id.* ¶¶ 21–24. Several of those grand jurors had served together in previous grand jury terms. *Id.* ¶¶ 31–41. Additionally, nineteen of Mr. Lance's grand jurors appeared on the 1994 grand jury list and twelve appeared on the 1987 grand jury list. *Id.* ¶¶ 29–30. From March 1984 through March 1998, the number of serving grand jurors was limited to 410 different persons—despite the population of 30,518 persons who were jury eligible as of 2000. *Id.* ¶ 14.

IV. LEGAL ARGUMENT

CLAIM I

MR. LANCE'S EXECUTION WILL VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §1, ¶ ¶ 1, 2, 11 & 17 OF THE GEORGIA CONSTITUTION BECAUSE THE GRAND JURY WAS NOT RANDOMLY SELECTED

A. Right to a Fair and Impartial Grand Jury

17. Article I, Section I, Paragraphs I, II, and XI of the Georgia Constitution guarantee the right to a fair trial by an impartial jury to every criminal defendant, which right is extended to grand juries for cases in which state law requires a grand jury indictment. To this end, the Eleventh Circuit has found that "[f]undamental to our system of justice is the principle that the sixth amendment grants

criminal defendants the right to an impartial jury. This guarantee also embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community." *Machetti*, 679 F.2d at 239 (finding that state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending written notice to the jury commissioners deprived habeas petitioner of her right to an impartial jury trial) (citing *Taylor v. Louisiana*, 419 U.S. 522, 527-30 (1975); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1384 (11th Cir. 1982)).

18. Georgia courts have entertained challenges to composition of grand juries on the basis of whether the grand jury was representative of a proper cross-section. In *Ramirez v. State*, 575 S.E.2d 462 (Ga. 2003), the Georgia Supreme Court stated:

> This Court has entertained fair cross-section challenges to *grand* jury source lists under the Sixth Amendment as made applicable to the states, at least to some extent, through the Fourteenth Amendment's due process clause. *See, e.g., Morrow*, 532 S.E.2d 78 (Ga. 2000); *but see also* 4 LaFave, Israel & King, Criminal Procedure § 15.4(d), pp. 330-331 (2nd ed. 1999). Furthermore, this Court has held, based on OCGA § 15-12-40, that a defendant is entitled, under standards comparable if not identical to federal constitutional standards, to a grand jury drawn from a source list that represents a fair cross-section of the population. *West v. State,* 313 S.E.2d 67 (Ga. 1984).

Id. at 466. The importance of impartiality is highlighted by the fact that a defendant can provide the court evidence of a grand jury's impartiality prior to the grand jury taking any action. *See Brown v. State*, 759 S.E.2d 489, 491 (Ga. 2014) (citing *Bitting v. State,* 1139 S.E. 877 (Ga. 1927)).

19. Georgia recently revisited its grand jury selection process in an effort to make the process fairer and to ensure that the jury's composition is more representative of the community. Under former section 15-12-40 of the Official Code of Georgia Annotated, the county board of jury commissioners compiled, maintained, and revised a grand jury list comprised of a "fairly representative cross section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40. This process "utilized so-called 'forced balancing' in an attempt to make its jury lists include men and women and certain identifiable racial groups in proportion to the county's population as determined by the most recent decennial census. In some counties with fast-changing demographics, the process left those proportions in the jury pool significantly out of line by the end of the decade." *Ricks v. State*, 800 S.E.2d 307, 310 (Ga. 2017) (citations omitted).

20. The Jury Composition Reform Act of 2011 replaced the previous jury process used in Georgia. The new jury composition laws were designed to provide a "consistent methodology that produces lists of eligible jurors that are updated annually for each county and more accurately reflect each county's jury-eligible population." *Id.* However, Mr. Lance's

grand jury was selected under the previous—since corrected—system.

B. Grand Jury Indictments

The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution emphasize the importance of grand juries. The Supreme Court has stated:

> Under the Federal Constitution, "the accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed."

Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (quoting U.S. Const. amends. V, VI). In *Vasquez v. Hillery*, the United States Supreme Court explained the important role of the grand jury as the following:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts.

474 U.S. 254, 263 (1986).

22. The importance of the grand jury indictment is further shown through the remedy for a constitutionally flawed indictment—mandatory reversal. In *Vasquez*, a racial discrimination case, the Court rejected the notion that "discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." *Id.* This effect cannot be adequately addressed by a later finding of guilt at trial. *Id.* ("Thus, even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come."). Rather, once a constitutional flaw is found in the grand jury process, the only appropriate remedy is a mandatory reversal. *Id.* at 624 ("The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.").

23. A non-randomly selected grand jury with intentionally chosen persons, similar to a racially discriminatory grand jury,[1] affects the fairness of

---

[1] The United States Supreme Court has long held that discrimination in the selection of grand jurors violates a defendant's constitutional rights. *See Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Bush v. Kentucky*, 107 U.S. 110, 119 (1883); *Neal v. Delaware*, 103 U.S. 370, 394 (1881); *see also Castaneda v. Partida*, 430 U.S. 482, 492-95 & n.12 (1977). Because discrimination in the grand jury

criminal trials. Thus, the only appropriate remedy is mandatory reversal. While the constitutional right to an indictment by a grand jury has not been incorporated to the states, *see Hurtado v. California*, 110 U.S. 516 (1884), a state can choose to implement the requirement on its own accord. Once a state requires an indictment, as Georgia does, the indictment must be provided. *United States v. Choate*, 276 F.2d 724 (5th Cir. 1960) ("When an indictment is required for the institution of criminal proceedings, lack of an indictment goes to the court's jurisdiction."). Furthermore, the grand jury process must comply with constitutional requirements. *See generally Colson v. Smith*, 315 F. Supp. 179, 182 (N.D. Ga. 1970) ("If the indictment is returned by a grand jury which was selected in a racially discriminatory manner the indictment itself is void, and if the indictment is void there is no charge to which the accused can legally be held to answer."), *aff'd*, 438 F.2d 1075 (5th Cir. 1971). Here, the grand jury was chosen from a small and limited pool—therefore discriminating against the majority of eligible jurors and voiding the indictment.

---

selection process "strikes at the fundamental values of our judicial system and our society as a whole," it is well-established that a criminal defendant has suffered an equal protection violation when he is indicted by a grand jury that is the product of such a discriminatory process. *Rose,* 443 U.S. at 556 (citing *Neal*, 103 U.S. at 394; *Reece*, 350 U.S. at 87). "Since the beginning," the United States Supreme Court has "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage." *Id.* at 556-57 (citing *Neal*, 103 U.S. at 394; *Bush,* 107 U.S. at 119; *Virginia v. Rives*, 100 U.S. 313, 322 (1880)).

C. A Constitutionally Invalid Indictment is Void in Georgia

24. In Georgia, "the return of an indictment by the grand jury [is] a necessary prerequisite to the jurisdiction of the courts of this State to try a person charged with a felony. … A conviction is void where there is no jurisdiction and we cannot breathe new life into a void conviction by remanding the case for a new indictment." *Cochran v. State*, 344 S.E.2d 402, 406 (Ga. 1986) (Smith, J., concurring) (internal citations omitted). Thus, in all cases in which Georgia state law requires a grand jury indictment to initiate criminal proceedings, the grand jury process must comply with federal constitutional requirements.

25. As explained in *Colson v. Smith*, "The constitutional right involved in the case of a state defendant is not a constitutional right to be indicted by a grand jury—for there is no such right, *Hurtado v. California*, 110 U.S. 516 (1884)—but, rather, the right to be indicted only by a fair and impartial grand jury when the state has provided for indictment by a grand jury at all." 315 F. Supp. at 182 n.3. A constitutionally invalid indictment is void and removes jurisdiction from the trial court. In *Colson v. Smith*, the indictment was constitutionally defective because the grand jury was selected in a racially discriminatory manner. Thus, the Northern District of Georgia decided that the petitioner was "entitled to release, subject to the State's right to reindict him." *Colson*, 315 F. Supp. at 183.

26. The right to a reversal for a constitutional flaw extends beyond racially discriminatory grand

jury processes. For example, a defendant may seek to void an indictment by alleging that the indictment contains a defect on its face that affects the substance and merits of the offense charged—such as failure to charge a necessary element of a crime in a motion in arrest of judgment. *See generally* O.C.G.A. § 17-9-61; *Motes v. State*, 586 S.E.2d 682, 683 (Ga. Ct. App. 2003).

27. Furthermore, as mentioned above, a grand jury indictment is required for Georgia courts to have jurisdiction to try a person charged with a felony. *See Cochran*, 344 S.E.2d at 406. Absent jurisdiction, a conviction is void and cannot be reinvigorated by remanding for a new indictment. *See id.* Elaborating on this concept in a dissenting opinion, Justice Hunstein stated:

> An indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States,* 350 U.S. 359, 363 (1956); *see Lawn v. United States,* 355 U.S. 339(I) (1958); *see also Beck v. Washington,* 369 U.S. 541(I), 82 S.Ct. 955 (1962) (Douglas, J., dissenting) ("It is well settled that when either the Federal Government or a State uses a grand jury, the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial."). "A number of courts have interpreted this line of Supreme Court cases as recognizing a constitutional requirement that an indictment be returned by an unbiased

> grand jury." *United States v. Finley,* 705 F.Supp. 1297, 1307(IV) (N.D. Ill. 1988); *see, e.g., United States v. Burke,* 700 F.2d 70, 82 (2d Cir. 1983) ("When a person is brought before the grand jury and charged with a criminal offense, that individual is constitutionally entitled to have his case considered by an impartial and unbiased grand jury."); *United States v. Serubo,* 604 F.2d 807, 816 (3d Cir. 1979); *United States v. Waldbaum, Inc.,* 593 F.Supp. 967, 970(II) (E.D.N.Y. 1984); *United States v. Gold,* 470 F.Supp. 1336, 1345 (N.D. Ill. 1979); *State v. Murphy,* 538 A.2d 1235(II) (N.J. 1988); *see also* State *v. Barnhart,* 563 S.E.2d 820(II) (W.V. 2002); *State v. Emery,* 642 P.2d 838, 851 (Az. 1982). Accordingly, "it is settled that the Fifth Amendment requires that an indictment be returned by a legally constituted and unbiased grand jury." *Waldbaum, Inc.,* 593 F.Supp. at 970 (collecting cases).

Brown v. State, 759 S.E.2d 489, 494 (Ga. 2014) (Hunstein, J., dissenting).[2]

---

[2] Under current Georgia law, the Council of Superior Court Clerks of Georgia (the "Council") compiles a state-wide master jury list. O.C.G.A. § 15-12-40.1(a). The Council obtains the following data from the Department of Driver Services, the Secretary of State, the Department of Corrections, and the State Board of Pardons and Paroles:

> (i) a list of persons at least 18 years of age who have been issued a driver's license or personal identification card, excluding persons whose driver's license has been suspended or revoked due to a felony

D. Mr. Lance's Conviction Should Be Reversed Because the Jackson County Grand Jury Process was Unconstitutional

28. Mr. Lance was entitled to a fair and impartial grand jury. As required by Georgia law, the state prosecutor, Tim Madison, obtained a grand jury indictment before initiating criminal proceedings against Mr. Lance. However, the grand jury indictment was constitutionally invalid because of the way the grand jury list was compiled.

29. As discussed above, Jackson County's grand jury list was compiled from a small group of manually selected jurors who repeatedly served on multiple grand juries dating as far back as fourteen years. Martin Affidavit ¶¶ 6-7. The majority of Mr. Lance's grand jurors had been on the grand jury list for 11 years. *Id.* ¶ 10. Two-thirds of Mr. Lance's

---

> conviction, whose driver's license has been expired for more than 730 days, or who have been identified as non-citizens; (ii) a list of registered voters and individuals declared as mentally incompetent; (iii) a list of persons convicted of a felony in the state of Georgia; and (iv) a list of persons whose civil rights have been restored.

Id. §§ 15-12-40.1(a)-(c), (f)-(g). These lists contain information regarding the person's age, gender, and race. *See id.*

Once per calendar year, the Council provides a county master list to each county clerk. *Id.* § 15-12-40.1(d). The county clerk is then required to "choose a random list of persons from the county master jury list to comprise the venire." *Id.* § 15-12-40.1(h). Persons who have served as a trial or grand juror at any session of the superior or state courts are ineligible for duty as a juror until the county clerk receives the next succeeding county master jury list from the Council. *Id.* § 15-12-4(a). These new procedures were not followed, however, in the case of Mr. Lance.

grand jurors had previously served with one of the other jurors. *Id.* ¶ 8. Two of the grand jurors had previously served on two grand juries together. *Id.* In 2000, two years after Mr. Lance was indicted, the population of Jackson County was 30,518. *Id.* ¶ 11. Yet, in the 29 Jackson County grand jury terms between March 1984 and March 1998, only 410 different people served as jurors. *Id.* ¶ 15. These statistical anomalies show that the Jury Commissioner for Jackson County was not following O.C.G.A. § 15-12-40, as established in 1998, which required the Commissioner to revise the grand jury list at least once every two years.[3]

30. Mr. Lance's right to a fair and representative grand jury does not stem from the Georgia Code alone. Rather, the changes to the Code reflect necessary changes to provide the Sixth Amendment right to a fair and impartial grand jury. The updated Code reinforces the requirement that juries are selected at "random." As noted in *Machetti*, "the principle that the sixth amendment grants criminal defendants the right to an impartial jury … also

---

[3] O.C.G.A. § 15-12-40 has since been revised in an effort to make the grand jury selection process representative of the community. The current statute requires that the clerk select "a random list of persons from the county master jury list" every year. O.C.G.A. § 15-12-40.1 (h). O.C.G.A. § 15-12-4(a) attempts to limit repeat grand jurors by providing that a grand juror who has served "at any session of the superior or state courts shall be ineligible for duty as a juror until the next succeeding county master jury list has been received by the clerk." O.C.G.A. § 15-12-4(a). The effect of these changes is clear from the fact that the grand jury list used to indict Mr. Lance included 341 persons, while the current grand jury list for Jackson County includes 52,437 people. Martin Affidavit ¶ 15.

embraces a right that grand and petit juries be selected at random so as to represent a fair cross-section of the community." 679 F.2d at 239. The randomness requirement from O.C.G.A. §15-12-40.1(h) is a method used by the state to ensure a fair and impartial jury. Here, Mr. Lance was denied his Sixth Amendment right to a fair and impartial jury as well as his right under O.C.G.A. §15-12-40.1(h), as previously enacted, to a fair cross-section of his community.

31. Significantly, with regard to both the constitutional and statutory cross-section claims, "there is no constitutional guarantee that grand or petit juries, impaneled in a particular case, will constitute a representative cross-section of the entire community." *Sharp v. State*, 602 S.E.2d 591, 593 (Ga. 2004) (citing *Taylor*, 419 U.S. at 538; *Torres v. State*, 529 S.E.2d 883, 885 (Ga. 2000)). Rather, "[t]he proper inquiry concerns the procedures for compiling the jury lists and not the actual composition of the grand or traverse jury in a particular case." *Lawler v. State*, 576 S.E.2d 841, 845 (Ga. 2003) (citing *Torres*, 529 S.E.2d at 885). Thus, if the procedure for compiling the grand jury list is flawed, so is the entire grand jury process. Here, the statistics support a finding that there were fundamental flaws in the compiling and the resulting composition of Mr. Lance's grand jury. As Petitioner's expert concluded, "[t]he theoretical chance of repeat grand jurors on a grand jury list randomly chosen every two years during the 14 year time period ending March 1998 is less than 0.001%." Martin Aff., ¶ 13. But yet there are numerous such instances of repeat grand juror service in the data Mr. Martin reviewed.

32. In *Towns*, the Supreme Court of Georgia recognized that any violation of the randomness requirement "undercuts a key feature of the modern scheme for selecting juries." 2019 WL 5302078, at *5. The Court noted that while there was no issue concerning the randomness of the selection of the 150 individuals already summoned as trial jurors in *Towns*, the jury selection statute was violated when the clerk selected two jurors from the list to serve on the grand jury based on her personal knowledge of the prospective petit jurors, her own assessment of the extent to which she had the information necessary to contact them, and her estimate of the likelihood that they would be available to report immediately. *Id.* at *3. The Court found that every grand juror must be randomly selected, noting that "[i]n every case in which we have confronted a violation of a jury selection statute that impacted who was chosen for the array—that is, in every case in which there was good reason to doubt that a particular juror would have been selected for the array without the violation—we consistently have deemed it a violation of an 'essential and substantial' provision of the statute and held that relief was warranted." *Id.* at *4. Here, there is evidence of impropriety that indicates that potentially all of Mr. Lance's grand jurors were not randomly selected.

33. In *Vasquez*, the United States Supreme Court noted that fundamental flaws in the composition of a grand jury are "not amenable to harmless-error review." 474 U.S. at 623-24. In so holding, the Court pointed to *Tumey v. Ohio* for the notion that the appearance of bias, whether or not bias actually existed, requires the presumption that

the judicial process was impaired. *Id.* at 623. The Court continued, "when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Id.* In *Tumey v. Ohio*, the United States Supreme Court found that the appearance of bias, without evidence of actual bias, was sufficient for a reversal. 273 U.S. 510, 535 (1927). In likening fundamental flaws in the composition of juries in *Tumey,* the Court suggested that the appearance of impropriety in the jury selection process is of such magnitude, it requires reversal without actual proof of impropriety. The statistical analysis provided by Mr. Lance's jury expert and the illegal actions of District Attorney Madison provide, at a minimum, the appearance of impropriety in the composition of Mr. Lance's grand jury. Furthermore, while the appearance of impropriety is sufficient to require reversal, the evidence of impropriety stemming from the Jackson County District Attorney's Office and, more specifically, from Mr. Madison, the District Attorney who prosecuted Mr. Lance (and later pled guilty to theft) is relevant to the inquiry of whether there was actual impropriety. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) ("[W]e accord some weight to petitioner's historical evidence of racial discrimination by the District Attorney's Office. … This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case."). This is particularly the case in light of evidence that surfaced in Ms. Conrad's investigation of Mr.

Madison's having personally exercised influence over the selection of grand jurors.

34. Mr. Lance was deprived of a fair and impartial grand jury. The statistical evidence shows impropriety on the part of the Jackson County District Attorney's Office in the repeated appointment of grand jurors to the jury array in Jackson County. Furthermore, historical evidence of misconduct—at this specific office and with this specific District Attorney—informs the inquiry into whether the grand jury selection was improper. The evidence of impropriety is further evidence that the procedure for compiling Mr. Lance's grand jury list was constitutionally flawed. According to the Supreme Courts of the United States and Georgia, a constitutionally flawed indictment is void. Once a grand jury indictment is found to be constitutionally impermissible, the impossibility of knowing the outcome of a properly constituted grand jury mandates reversal. *Vasquez v. Hillery*, 474 U.S. at 624.[4] Thus, this Court should grant Mr. Lance's Petition for Writ of Habeas Corpus.

---

[4] To countenance this error in even in a single capital case undermines the reliability of the death penalty as a reflection of contemporary moral values and, therefore, violates the Eighth Amendment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 184 (1976) ("[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of *the community's belief* that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.") (emphasis added); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (the Eighth Amendment prohibits excessive or disproportionate punishment). Moreover, the United States Supreme Court has held that the Eighth Amendment requires states to apply

E. Mr. Lance's Claims Have Not Been Procedurally Defaulted As Adequate Cause For The Default And Grand Jury Indictments And Actual Prejudice Exists

35. To the extent the State would argue, or the Court were to find, that any of Mr. Lance's claims are procedurally defaulted, Mr. Lance can overcome this bar because adequate cause for failing to raise the issues at trial or on direct appeal exists and actual prejudice resulted from the alleged error. O.C.G.A. 9-14-48(d); *see Humphrey v. Lewis*, 728 S.E.2d 603 (Ga. 2012). In successive state habeas petitions, a petitioner must raise grounds that are constitutionally nonwaivable or that could not have reasonably been raised in an earlier petition. *See Smith v. Zant*, 301 S.E.2d 32, 34 (Ga. 1983); O.C.G.A. § 9-1-51. Generally, a challenge to the array of grand jurors is waived unless made prior to the return of the indictment; however, courts may still hear the claim so long as the defendant can demonstrate that "he had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned." *Clark v. State*, 338 S.E.2d 269, 272 (Ga. 1986); *Allen v. State*, 614 S.E.2d 857, 861 (Ga. 2005) ("[A] challenge to the array is not waived as long as it is raised at the earliest opportunity to do so."). Further, courts excuse procedural default in capital cases less stringently than in non-capital cases. *See Patterson v.*

---

special procedural safeguards in order to carry out the death penalty. Id. Otherwise, the constitutional prohibition against "cruel and unusual punishments" would forbid its use. *Furman v. Georgia*, 408 U.S. 238 (1972).

Alabama, 294 U.S. 600, 607 (1935) (recognizing that capital cases are appropriate situations for liberally excusing procedural defaults).

1. There is Adequate Cause for the Default Arising from Newly Discovered Evidence, and Governmental Interference, and, in the Alternative.

36. Courts determine whether adequate cause exists for a procedural default by looking at objective factors external to the defense that impeded counsel's efforts to raise the claim on direct appeal. *Schofield v. Meders*, 632 S.E.2d 369, 372 (Ga. 2006). Objective factors which may constitute cause include a showing that a factual or legal claim was not available to counsel at the time or there was interference by governmental officials which prevented the defendant from raising the claim at trial and on direct appeal. *Turpin v. Christenson*, 497 S.E.2d 216, 229 (Ga. 1998). In this case, both newly discovered evidence and governmental interference impeded counsel's efforts to bring this claim earlier. First, there is newly discovered evidence that the grand jury was improperly selected infringing on Mr. Lance's Sixth, Eighth, and Fourteenth Amendment rights. Second, this recently acquired evidence shows that Tim Madison, the state prosecutor, took improper and illegal action to select the grand jurors.

a. Newly Discovered Evidence

37. Mr. Lance could not have previously raised this claim to protect his rights under the Sixth, Eighth, and Fourteenth Amendments, as his trial counsel had no prior indication that the jury was non-randomly selected and that this claim existed. As

described above, Ms. Conrad and Mr. Lance's counsel were only able to uncover this evidence after witness interviews revealed Mr. Madison's efforts to "pack" the grand jury. Conrad Aff. ¶ 3. After discovering this evidence, Ms. Conrad and Mr. Lance's counsel diligently investigated the claims, consulted a grand jury expert, and made an ORA Request to obtain evidence relevant to the composition of Mr. Lance's grand jury—some of which still has not been provided by the County Clerk's Office. *Id.* ¶¶ 4-9.

38. Trial counsel timely challenged the grand jury array claiming that the sixth month residency requirement was unconstitutional and that certain populations were systematically and purposefully excluded from the grand jury pool. In response to the challenge, the state turned over the grand jury certificates which provide information regarding the race and sex of members of the grand jury. At that time, there were improprieties beyond those that could be uncovered by review of the grand jury certificates. Without seeking years upon years of Jackson County indictments to determine who comprised the grand jury outside of the time of Mr. Lance's trial, counsel would not have knowledge of, nor any reason to inquire about, multiple appearances by persons on the grand jury lists. Due diligence does not require an attorney to review grand jury lists or indictments outside of the timeline of the client's case.[5] As the evidence was not

[5] "To the extent the court finds that trial counsel was at fault for failing to discover this information earlier, Petitioner asserts that his trial counsel rendered constitutionally inadequate representation. See *Turpin v. Todd*, 493 S.E.2d 900, 905-906

previously available, this petition is the earliest opportunity for this claim to be raised and therefore is not defaulted.

b. Prosecutorial Misconduct

39. In addition to the newly discovered evidence that the grand jury was improperly selected, this new evidence also showed that this improper selection was likely due to interference by Mr. Madison—the state prosecutor. Mr. Madison was convicted and sentenced after Mr. Lance's state habeas case had been presented to the Superior Court. All witness interviews by Mr. Lance's defense team had been completed prior to the team learning that Mr. Madison was corrupt. It was not until Mr. Lance's investigator, Ms. Conrad, was conducting interviews in preparation for clemency proceedings that the information regarding Mr. Madison's conduct with the grand jurors was revealed. *Id.* ¶ 2. Due diligence does not require counsel to assume that a prosecutor is corrupt.

2. There is Actual Prejudice as Mr. Lance was Not Afforded Full Constitutional Protection.

40. To show the element of prejudice to overcome a procedurally defaulted habeas corpus claim, the petitioner must demonstrate an actual prejudice that worked to the petitioner's actual and substantial disadvantage, infecting the petitioner's entire trial with error of constitutional dimensions. *See Schofield v. Meders*, 632 S.E.2d 369 (Ga. 2006). Because the

---

(Ga. 1997) ("constitutional ineffective assistance of counsel can constitute cause under OCGA § 9-14-48(d)").

prejudice that must be shown to overcome procedural default is a prejudice of constitutional proportions and because a habeas petitioner is entitled to relief only for constitutional violations, the prejudice prong of the cause and prejudice test is coextensive with the merits of a claim of a constitutional violation. *Turpin v. Christenson*, 497 S.E.2d 216 (Ga. 1998). The improper selection of the grand jury prejudices Mr. Lance by depriving him of his constitutionally mandated right to trial by a fair and impartial jury. *See* U.S. Const. amends. VI, VIII, XIV. As Mr. Lance can prevail on the merits of the claim, prejudice has been established.

V. PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court:

(1) Permit Mr. Lance an opportunity to present argument and full briefing,

(2) Issue a writ of habeas corpus to have Petitioner brought before it to relieve him of his unconstitutional sentence of death, and

(3) Grant such other relief as may be appropriate.

This 18th day of December, 2019. * * *

Appendix F

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT OF KATRINA CONRAD, LCSW

Comes now, Katrina Conrad, who after being duly sworn or affirmed, states as follows:

1. My name is Katrina Conrad. I am over the age of eighteen and competent to testify as to the matters set forth in this affidavit. I am employed as an investigator with the Federal Defender Program in Atlanta, Georgia, and am the investigator on the litigation team representing Donnie Lance in his capital collateral litigation.

2. In early 2018, I began interviewing witnesses in Mr. Lance's case in preparation for his clemency proceedings. I had not been involved in Mr. Lance's case during state or federal habeas litigation. In my preliminary review of the case, I learned that the district attorney who prosecuted Mr. Lance, Tim Madison, had been arrested and convicted in 2008 of several charges related to theft from his office. I reviewed the arrest and conviction records regarding Mr. Madison before conducting my interviews (*see* Attachment 1). As the arrest of the district attorney is a rare occurrence in my experience, I made it a point to question witnesses regarding their knowledge of Mr. Madison as the district attorney of Jackson County.

3. Several of the witnesses mentioned their concern about how Mr. Madison used his influence to

"pack" the grand jury or to get people he knew to serve repeatedly on the grand jury and that he was picking jurors from the same church. For example, I was told from various witnesses that: Madison hand-picked his friends and business owners he knew to sit on the grand jury, people he knew would be on his side; the same clique of people sat for years and years; he picked jurors from one church in Jefferson and the preacher there would preach about the grand jury indicting people; he would not put anyone who did not go to church on a grand jury and he put people on there that he knew would do what he wanted; he always had the same people on his grand juries; and, Madison manipulated grand jury pools.

4. I have conducted criminal investigations for 10 years, and in my experience this was an unusual number of people to mention similar issues about the grand jury, so I decided to see if I could determine if there was any validity to these concerns. I located the home address of each grand juror selected to serve in March 1998, and found where they lived at the time of Mr. Lance's indictment. I mapped these addresses in an effort to determine if they appeared to all come from the same area or if they in fact did attend the same church (*see* Attachment 2). My results from this mapping appeared to show that jurors were concentrated in ways that were disproportionate to the population in the given area based on census data.

5. I then wanted to explore the allegation that jurors were sitting on more than one grand jury. In our files, we had indictments in Mr. Lance's prior cases and had a few other indictments from witnesses involved in the case. The indictments list the names of the grand jurors who issued the indictment so I reviewed those to see if there was any overlap of grand jurors from term to term. This initial review showed that some grand jurors had in fact sat on more than one grand jury. I knew I needed to obtain more indictments to see if this was in fact an issue.

6. After speaking with the attorney on the case, we determined that we needed to consult with an expert in grand jury issues so we contacted Jeffrey Martin in November of 2018. Mr. Martin did an initial review of the materials that we had obtained. Based on the anomalies that we had discovered, Mr. Martin advised that we make an Open Records Act request of the Jackson County Clerk's Office of materials relevant to our inquiry.

7. On November 13, 2018, I made an Open Records Act Request to the Jackson County Clerk's office for material relevant to the grand jury (*see* Attachment 3). The initial response from the clerk of the court was that they could not access the files at the time because they were understaffed and the requested files had been misplaced during a move into their new facilities. Mr. Lance's counsel and the clerk went back and forth for several weeks in an effort to resolve the issue of access to the files.

8. Because of the issue of staffing shortages that the clerk of the court raised, we offered to provide someone from our office with a copier to copy the files if they were made available. We were able to begin copying the files at the end of January 2019 and finished copying the files that were made available in February of 2019. Many of the records requested in our November 13, 2018, ORA request were not provided as the clerk's office informed us that they could not be located.

9. After we received the records, we provided them to our expert, Jeffrey Martin, to assess if there were any anomalies in the grand jury composition. Mr. Martin's findings are outlined in his affidavit.

FURTHER AFFIANT SAYETH NAUGHT

s/*Katrina Conrad*

Sworn to or subscribed before me this the *17th* day of December, 2019.

s/

Notary Public, State of Georgia
GRETCHEN M. STORK
NOTARY PUBLIC
FULTON COUNTY
State of Georgia
My Comm. Expires February 18, 2023

Appendix G

IN THE SUPERIOR COURT
OF BUTTS COUNTY
STATE OF GEORGIA

Habeas Corpus Case No. _____

CAPITAL CASE

DONNIE CLEVELAND LANCE,

Petitioner,

v.

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Center,

Respondent.

STATE OF GEORGIA
COUNTY OF FULTON

Before the undersigned officer duly authorized to administer oaths comes Jeffrey Martin who swears and affirms the following under oath:

QUALIFICATIONS AND INTRODUCTION

1.

My name is Jeffrey Martin. I graduated from public school in Dekalb County Georgia, hold a Bachelor's degree in Mathematics and Economics from Vanderbilt University, and a Master's degree in Economics from the University of Chicago. I am employed as a consultant on jury pool analysis, a consultant on actuarial issues, and as a consultant to political campaigns on issues related to voting data

and projections. My academic research and current work involves the use of computers and statistical procedures to analyze data including Census data and voter registration data. I have been qualified as an expert witness on the procedures used to produce jury pools in Superior Courts in Georgia and South Carolina and in Federal Courts in Georgia, Alabama, Washington, and Michigan.

2.

I have been involved with jury challenges across the State of Georgia since 1997. I have worked on jury issues in 78 of the 159 Superior Courts in Georgia including Jackson County. I have worked on jury issues during years of "forced balancing" as well as since the 2012 change to inclusive jury lists. I answered questions for the Georgia Supreme Court group considering the change from "forced balancing" to inclusive jury lists and I am a member of the group which revised the Georgia Supreme Court's Jury Composition Rule effective July 1st, 2018. I have been involved in several Georgia Supreme Court cases concerning jury lists including Ricks v. The State (S17A0465 Decided May 15, 2017) and Williams v. The State (S10A0598 Decided June 28th, 2010).

3.

I have been asked by the attorneys for Donnie Cleveland Lance to review the jury list used by Jackson County to summon Grand Jurors in this case.

4.

I received data from the Federal Defender Program which included the Jackson County Grand Jury Certificate in effect in 1988 and indictments from Jackson County which detailed all the serving Grand Jurors from the March 1984 Grand Jury Term through the March 1998 Grand Jury Term. The data also included the grand jury lists for 1998, 1994 and 1987. The data is attached as Attachment A.

SUMMARY

5.

In my experience, a typical challenge to the grand jury array during the years of "forced balancing", such as Jackson County in 1998, would involve analysis of the applicable Grand Jury Certificate and grand jury list but not historical data. In this case, unlike a typical challenge, I have been presented with historical data which allows for the further analysis of the representativeness, inclusiveness, and randomness of the grand jury list.

6.

The jury list used by Jackson County to summon grand jurors who served on the March 1998 Term Grand Jury that indicted Donnie Cleveland Lance does not reflect the entire community of Jackson County.

7.

Instead the jury list represents a small group of manually selected jurors who have served repeatedly on multiple grand juries for many years.

8.

The process used by the Jury Commissioners in Jackson County that leads to a small group of manually selected jurors who have served repeatedly on multiple grand juries for many years is systematic. This process is the result of a choice to not fully revise the jury list every 2 years.

9.

The Grand Jury that indicted Donnie Cleveland Lance was composed primarily of grand jurors who had served previously and repeatedly on grand juries as far back as 14 years.

10.

2/3rds of the grand jurors who indicted Donnie Cleveland Lance had served with other grand jurors who indicted Donnie Cleveland Lance in previous Grand Juries. 1 pair of grand jurors served together on 2 previous Grand Juries.

11.

Nearly all of the Grand Jury that indicted Donnie Cleveland Lance consisted of persons who had been on the grand jury list for 4 years.

12.

A majority of the Grand Jury that indicted Donnie Cleveland Lance consisted of persons who had been on the grand jury list for 11 years.

13.

The theoretical chance of repeat grand jurors on a grand jury list randomly chosen every 2 years during the 14 year time period ending March 1998 is less than 0.001%.

14.

The jury eligible population of Jackson County in 2000, 30,518 persons, is 74 times larger than the group of 410 grand jurors who served from March 1984 through March 1998. Because of the large number of available persons, the need to have repeating grand jurors is not present.

15.

The grand jury list used to indict Donnie Cleveland Lance included 341 persons. By comparison, the grand jury list effective July 1st, 2018 in Jackson County includes 52,437 persons.

16.

Because the grand jury list only changes minimally and is so small, the grand jury list in Jackson County in 1998 did not reflect the approximately half of the population of Jackson County that had moved in the last 5 years and approximately 30% that had moved from somewhere other than Jackson County in the last 5 years.

DATA AND ANALYSIS

17.

Donnie Cleveland Lance was indicted by the March 1998 Term Grand Jury in Jackson County.

18.

Data was compiled for the 29 Grand Jury Terms in Jackson County from the March 1984 Term through the March 1998 Term from the data described in paragraph 4 and attached as Attachment A.

19.

In the data, there were 651 instances of grand jury service. These instances were filled by 410 different persons.

20.

The Grand Jury which indicted Donnie Cleveland Lance was composed of 23 Grand Jurors. 16 of the 23 (69.575) had previously served as a Grand Juror.

21.

1. Grand Juror that indicted Donnie Cleveland Lance had served on 4 previous Grand Juries. Grand Juror 310 served on the March 1985 Term, the March 1988 Term, the June 1990 Term and the September 1990 Term.

22.

6 or 26.09% of the Grand Jurors who indicted Donnie Cleveland Lance had served on 3 previous Grand Juries. Grand Juror #2 served on the September 1985 Term, the March 1988 Term, and the September 1995 Term. Grand Juror #4 served on the September 1986 Term, the March 1989 Term, and the September 1995 Term. Grand Juror #9 served on the September 1990 Term, the March 1992 Term, and the March 1997 Term. Grand Juror #17 served on the March 1985 Term, the March 1993 Term, and the September 1994 Term. Grand Juror #22 served on the March 1988 Term, the June 1990 Term, and the September 1994 Term. Grand Juror #23 served on the March 1986 Term, the September 1991 Term, and the March 1994 Term.

23.

3 of the Grand Jurors who indicted Donnie Cleveland Lance had served on 2 previous Grand Juries. Grand Juror #6 served on the September 1985 Term and the March 1996 Term. Grand Juror #11 served on the September 1989 Term and the March 1995 Term. Grand Juror #18 served on the September 1987 Term and the September 1994 Term.

24.

6 of the Grand Jurors who indicted Donnie Cleveland Lance had served on 1 previous Grand Jury. Grand Juror #3 served on the March 1996 Term. Grand Juror #5 served on the March 1994 Term. Grand Jurors #13 and #16 served on the March 1992 Terms. Grand Juror #15 served on the September 1994 Term. Grand Juror #21 served on the March 1995 Term.

25.

The Jackson County grand jury lists for 1998, 1994 and 1987 were supplied in the data as described in paragraph 4 and attached as Attachment A.

26.

The 1998 grand jury list comprised of 341 persons.

27.

OCGA Section 15-12-40, as in effect in 1998, required Jury Commissioners to revise the grand jury list at least once every 2 years.

28.

All of the 23 Grand Jurors who indicted Donnie Cleveland Lance appear in the 1998 grand jury list.

29.

19 of the 23 or 82.61% Grand Jurors who indicted Donnie Cleveland Lance appear on the 1994 grand jury of 4 years earlier. Jurors #2, #3, #4, #5, #6, #7, #9, #10, #11, #12, #13, #15, #16, #17, #18, #19, #21, #22, and #23 appear on the 1994 grand jury list.

30.

12 of the 23 or 52.71% Grand Jurors who indicted Donnie Cleveland Lance appear on the 1987 grand jury list of 11 years earlier. Jurors #2, #4, #6, #7, #9, #10, #11, #17, #18, #19, #21, and #23 appear on the 1987 grand jury list.

31.

Grand Jurors #10 and #17 served together on the March 1985 Term.

32.

Grand Jurors #2 and #6 served together on the September 1985 Term.

33.

Grand Jurors #2, #10, and #22 served together on the March 1988 Term.

34.

Grand Jurors #10 and #22 served together on the June 1990 Term.

35.

Grand Jurors #9, #13, and #16 served together on the March 1992 Term.

36.

Grand Jurors #5 and #23 served together on the March 1994 Term.

37.

Grand Jurors #15, #17, #18 and #22 served together on the September 1994 Term.

38.

Grand Jurors #11 and #21 served together on the March 1995 Term.

39.

Grand Jurors #2 and #4 served together on the September 1995 Term.

40.

Grand Jurors #3 and #6 served together on the March 1996 Term.

41.

Grand Jurors #10 and #22 served together on both the March 1988 Term and the June 1990 Term.

42.

Using data from all of the grand juries during District Attorney Madison's tenure, one Grand Juror served on seven grand juries.

43.

In the 2000 Decennial Census, the population age 18 and over (generally defined as the "jury eligible population") in Jackson County was 30,518 persons. These numbers are shown on the U.S. Census Bureau table QT-PL for 2000 and are attached as Attachment B.

44.

Of the total population age 5 and over, 48.4% lived in a different house 5 years earlier and 30.3% lived in a different county 5 years earlier. These percentages

are shown on the U.S. Census Bureau table DP-2 for the year 2000 and are attached as Attachment C.

Further Affiant Sayeth Not.

This *18th* day of December 2019.

s/*Jeffrey Martin*
Jeffrey Martin

Sworn to and subscribed before me this the *18* day of *Dec* 2019.

Notary Public s/
My Commission Expires *10/4/2023*
J MUHAMMAD
DEKALB COUNTY, GEORGIA
NOTARY PUBLIC
My Commission Expires October 4, 2023

Appendix H

Relevant Statute

O.C.G.A. § 5-5-41

Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)

(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6) (A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of

paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice

to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and bond forfeiture fund as provided in Article 3 of Chapter 21 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.