OCTOBER TERM 2019

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD LEON FIELDS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

EDWARD LEON FIELDS,	)	
	)	
Petitioner/Defendant,	)	
	)	
vs.	)	Case No. 10-CIV-115-RAW
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent/Plaintiff.	)	

OPINION AND ORDER

This is a proceeding initiated, on April 6, 2010, by the above-named petitioner's filing of a Motion to Vacate, Set Aside, or Correct Sentence.[1] The motion to vacate conviction and sentence is brought pursuant to 28 U.S.C. § 2255. The government has filed a response by and through the United States Department of Justice and the United States Attorney for the Eastern District of Oklahoma. On November 15, 2010, Petitioner filed his reply.

PROCEDURAL HISTORY

On August 1, 2003, Petitioner was named in a six-count indictment. The indictment charged Petitioner with Counts 1 and 3: First Degree Murder, in violation of 18 U.S.C. §§ 1111(a) and (b), 7(3) and 13; Counts 2 and 4, Use of a Firearm in a Federal Crime of

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[1]The motion itself does not contain any of the grounds for relief. Rather, Petitioner states:

> Mr. Fields raised ten grounds for relief. They are set forth in the pages attached to the back of this form. To aid the Court, Mr. Fields includes an Index to Grounds which is at the beginning of the attachment.
> With respect to each of the ten grounds raised, none were raised on direct appeal or in any other post-conviction proceeding." Dkt. # 1, at p. 5.

Only nine grounds, however, are raised in the pages attached to the original motion to vacate. Dkt. #s 1-2 and 1-3.

Violence Causing the Death of a Person, in violation of 18 U.S.C. §§ 924(c)(1)(A), (d), (j), 7(3) and 13; Count 5, Assimilative Crime Robbery with a Firearm, in violation of 18 U.S.C. § 7(3) and 13; and Count 6, Assimilative Crime Burglary of an Automobile, also in violation of 18 U.S.C. § 7(3) and 13. On March 15, 2004, the government gave notice of its intention to seek the death penalty in the event of a conviction on Counts 1 and/or 3.

On June 30, 2005, Petitioner appeared before this court and waived jury trial as to stage one only and entered pleas of guilty to all of the six counts contained in the indictment. Thereafter, on July 5, 2005, this court began death penalty qualification of potential jurors. On July 13, 2005, the second stage jury trial was commenced. On July 22, 2005, the jury unanimously returned a verdict of death. Cr. Dkt. # 228.

On November 8, 2005, the court sentenced Petitioner to death on Counts 1 and 3; 405 months on Counts 2 and 4, to be served consecutively to one another and consecutively to any other term of imprisonment imposed; 405 months on Count 5; and 84 months on Count 6. Additionally, in the event of subsequent release, Petitioner was ordered to serve 36 months of supervised release. Petitioner was further ordered to pay restitution in the sum of $15,323.84 and a $100 special assessment on each count, for a total special assessment of $600. The judgment and commitment was filed of record on November 15, 2005.

Following his conviction, Petitioner filed a direct appeal. The following issues were raised on appeal:

> 1. The federal government lacked subject-matter jurisdiction to prosecute Fields for crimes committed in the Quachita National Forest.
>
> 2. The district court erred in sustaining the government's challenge to a potential juror for cause.
>
> 3. Double-counting of the aggravator for substantial planning and premeditation unconstitutionally skewed the weighing process because the victims were killed in a single episode.

4. The single verdict of death on two counts of murder deprived Fields of a unanimous verdict on each count.

5. The evidence was insufficient to prove substantial planning and premeditation.

6. The non-statutory aggravating factor for future dangerousness is unconstitutionally vague and overbroad, should have been limited to future danger in the prison setting, and was not supported by the evidence.

7. Since the jury was not required to unanimously agree on the which factual predicates applied to the future dangerousness aggravator, petitioner's right to a unanimous verdict was violated.

8. The non-statutory aggravator relating to the infliction of anguish or other special suffering on the part of a victim is unconstitutionally vague and overbroad and statutorily preempted.

9. The trial court improperly admitted evidence regarding the impact of the murders on people unrelated to the victims.

10. The unanimous rejection of the severe disturbance mitigator was prejudicial error.

11. The jury should have been required to find that the aggravating factor(s) sufficiently outweigh the mitigating factors beyond a reasonable doubt.

12. The trial court's decision to allow the "guilley suit" in the jury room during deliberations was improper.

13. Cumulative error requires reversal.

After considering each of these issues, the Tenth Circuit Court of Appeals affirmed Petitioner's conviction. *United States v. Fields*, 516 F.3d 923 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 1905, 173 L.Ed.2d 1060 (2009).[2]

On April 6, 2010, Petitioner filed his Motion to Vacate pursuant to 28 U.S.C. § 2255 (Dkt. # 1). As previously indicated, Petitioner raised nine (9) grounds for relief. Seven of those grounds contain Sixth Amendment claims that he received ineffective assistance of counsel. In addition, he claims the Eighth Amendment was violated because the jury did not

[2]Certiorari was denied on April 6, 2009.

find as mitigating factors any of the uncontested mental health-related mitigating factors presented; the Eighth Amendment and international law bar his execution because he is not competent to be executed and the death penalty is precluded due to his deteriorating mental health; prosecutorial misconduct deprived him of due process and a fair trial; his Due Process rights were violated because the government withheld exculpatory evidence; cumulative errors deprived him of Due Process and a reliable sentencing hearing; and the manner of Petitioner's death, if carried out, would violate the Eighth Amendment.

Following extensive discovery of the issues herein, the record was expanded on October 13, 2015, with the filing by Petitioner of a document styled: "Grounds in Support of Amended Motion pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a person in federal custody" (Dkt. # 106)[3] and an Amended Appendix in support thereof consisting of thirty-six (36) exhibits (Dkt. #s 106-1 & 106-2). Thereafter, the record was further expanded on October 15, 2015, when the government filed a motion for summary judgment (Dkt. # 110) containing thirty-nine (39) new exhibits. On January 6, 2016, Petitioner filed his response adding thirteen (13) additional exhibits. Finally, on February 2, 2016, the government filed a reply (Dkt. # 122) containing eight (8) more exhibits. This Court has reviewed the relevant trial court records associated with Case No. CR-03-73-RAW, including pleadings, pretrial and trial transcripts as well as all of the pleadings and exhibits filed herein.

[3]This amended pleading contains the same nine grounds contained in the attachment to the original motion.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or the "Act") delineates the circumstances under which a federal court may grant collateral relief. Title 28, section 2255 provides, in pertinent part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). A prisoner seeking post-conviction relief under this statute must allege as a basis for relief: (1) lack of jurisdiction by the court entering judgment; (2) an error of constitutional magnitude; (3) a sentence imposed outside the statutory limits; or (4) an error of law or fact where the claimed error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185, 99 S.Ct. 2235, 2240, 60 L.Ed.2d 805 (1979).

Section 2255 is not a substitute for an appeal and is not available to test the legality of matters which should have been challenged on appeal. *United States v. Khan*, 835 F.2d 749, 753 (10th Cir. 1987), *cert. denied*, 487 U.S. 1222 (1988). Failure to raise an issue on direct appeal bars the movant/defendant from raising such an issue in a § 2255 Motion to Vacate Sentence unless he can show "both good cause for failing to raise the issue earlier, and that the court's failure to consider the claim would result in actual prejudice to his defense, . . ." *Id.* "An error of law [or fact] does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Blackwell*, 127 F.3d 947, 954 (10th Cir. 1997) (citations omitted).

In *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995), the Tenth Circuit held claims of constitutionally ineffective counsel should be brought on collateral review. Consequently, no procedural bar will apply to ineffective assistance of counsel claims which could have been brought on direct appeal but are raised in post-conviction proceedings. A petitioner may also raise substantive claims which were not presented on direct appeal if he can establish cause for his procedural default by showing he received ineffective assistance of counsel on appeal.

A court considering a claim of ineffective assistance of appellate counsel for failure to raise an issue is required to look to the merits of the omitted issue. Where the omitted issues are meritless, counsel's failure to raise it on appeal does not constitute constitutionally ineffective assistance of counsel. *Hooks v. Ward*, 184 F.2d 1206, 1221 (10th Cir. 1999). *See also*, *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000). Additionally, where claims have been raised and rejected on direct appeal, they can not be relitigated in a § 2255 motion. *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994).

STATEMENT OF THE FACTS

On appeal the Tenth Circuit accurately set forth the facts as relayed to the jury in this case. *Fields*, 516 F.3d, at pp. 927-928. Therefore, this court will not recite them here. The court will, however, discuss various facts as they become relevant to a particular issue. The court would also note that during the sentencing stage of the proceedings, the government presented twenty (20) witnesses and the defendant called nine (9) witnesses. Thereafter, the government put on three (3) rebuttal witnesses. *See*, Tr. of Jury Trial, Vol. VIII-XIII.

PETITIONER'S CLAIMS FOR RELIEF

I. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in Grounds One, Three, Four, Five, Six and Seven. *See*, Dkt. #s 14 and 106. Claims of ineffective assistance of counsel are governed by the now familiar two-part test announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The performance prong requires a defendant to show "that counsel's representation fell below an objective standard of reasonableness." *Id*., 466 U.S., at 688. While the prejudice prong requires a defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*., at 694. Failure to establish either prong of the *Strickland* standard will result in a denial of Petitioner's Sixth Amendment claims. *Id*., at 696.

"There is a strong presumption that counsel provided effective assistance, and a section 2255 defendant has the burden of proof to overcome that presumption." *United States v. Kennedy*, 225 F.3d 1187, 1196 (10th Cir. 2000) (quoting *United States v. Williams*, 948 F.Supp. 956, 960 (D.Kan. 1996), *cert. denied*, 522 U.S. 1033, 118 S.Ct. 636, 139 L.Ed.2d 615 (1997)). *See also*, *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009). "Effective assistance does not mean victorious or flawless counsel. To be ineffective, the representation must have been such as to make the trial a mockery, sham or farce, or resulted in the deprivation of constitutional rights." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1537 (10th Cir. 1994) (citations omitted). "The sixth amendment right to reasonably effective counsel does not mean 'errorless counsel' or counsel judged ineffective by hindsight." *Clark v. Blackburn*, 619 F.2d 431, 433 (5th Cir. 1980).

While ensuring that criminal defendants receive a fair trial, considerable judicial restraint must be exercised. As the Supreme Court cautioned in *Strickland*,

> 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 to 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.

Id., at 689. In order to establish prejudice at the penalty stage of a capital trial, the defendant must show "there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* In other words, deficient performance is prejudicial only where it is clear that "but for trial counsel's errors, there is a reasonable probability that the ultimate result would have been different," *Washington v. Johnson*, 90 F.3d 945, 953 (5th Cir. 1996), *cert. denied,* 520 U.S. 1122, 117 S.Ct. 1259, 137 L.Ed.2d 338 (1997); so that, the "confidence in the reliability of the verdict is undermined." *Id.* Establishing prejudice imposes a heavier burden on a petitioner than the harmless error test applied on direct appeal. *United States v. Haddock*, 12 F.3d 950, 958 (10th Cir. 1993). Moreover, "admissions of inadequate performance by trial lawyers are not decisive in ineffective claims." *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998). Ineffectiveness is a question the court must decide. *Id*.

A. Failure to investigate, present and effectively argue mitigating mental health evidence

In his first ground for relief, Petitioner claims counsel were ineffective "with regard to nearly every aspect of [his] mental health mitigation defense," Dkt. 14, at p. 5, enumerating six specific claims dealing with counsel's alleged failures regarding investigation, presentation and summation of mental health evidence. In essence, Petitioner asserts his counsel ineffectively argued his mental health history and failed to request jury instructions to the effect that his asserted mental conditions satisfied multiple mitigating factors. Although conceding that counsel presented "significant mental health-related mitigating evidence, including his pre-offense history of chronic depression and auditory hallucinations and a post-offense diagnosis of bi-polar disorder" (Dkt. # 14, at p. 21); substantial evidence of mental illness[4] and argued his various conditions established specific mitigating factors, petitioner complains because his lawyers did not argue that his mental health issues satisfied multiple mitigating factors. Petitioner also argues counsel were ineffective for failing to assert that his uncontested mental health history was mitigating and the Eighth Amendment was violated because the jury did not find any of this uncontested evidence was a mitigating factor in his case.

Petitioner further contends, despite the fact that in 2011 an MRI of his brain showed it was "normal",[5] counsel were ineffective for failing to investigate and present evidence of his organic brain damage. Petitioner also complains because counsel failed to call local

[4]Declaration of trial counsel states, in pertinent part, "[w]e offered and argued to the jury the existence of twenty-two mitigating factors. In the realm of mental health statutory mitigating factors: that he suffered a severe mental or emotional disturbance and that his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law, was significantly impaired. . . . .one of the Government's doctors (Mitchell) agreed that his history of depression and voices was true, and the Government conceded that in argument." Dkt. # 2-2 at pp. 11-12.

[5]*See*, Dkt. # 110-23, at p. 78.

medical professionals to support his manic flip defense and to testify that his mental illness was genuine. Additionally, petitioner states counsel were ineffective for eliciting damaging testimony during the cross-examination of Dr. Price and for failing to investigate and present evidence of compulsive aggression in effexor patients. Finally, petitioner complains trial counsel ineffectively failed to thoroughly and properly prepare two mental health experts who testified.

To support his claims, petitioner relies primarily upon an affidavit by Julia O'Connell, Federal Public Defender for the Northern and Eastern Districts of Oklahoma and lead defense counsel in the criminal proceedings from which this § 2255 action arose. Ms. O'Connell indicates she was an Assistant Federal Defender at the time of appointment but had never tried a federal death penalty case. Ms. O'Connell had, however, tried two state capital cases while employed by the state public defender's office. Dkt. # 2-2, at ¶ 2. While counsel bemoans the fact she was overworked and didn't have a clue what she was doing, the record reveals there were actually four (4) attorneys who made appearances in this matter, three of whom were from the local federal defender's office and each of those attorneys had substantial federal and/or state criminal trial experience.[6] *See also*, Dkt. # 110-1 (email in which Paul Brunton, Federal Public Defender advises Judy Clark, National Capital Resource Counsel that his office has "very able lawyers both with lots of trial, motions and appeal experience in state [death penalty] cases." Brunton forwarded his email and the response

[6]The docket sheet in this matter reflects Michael A. Able, Assistant Federal Public Defender appeared at Fields initial appearance on July 21, 2003. Mr. Abel was admitted to practice in the United States District Court for the Eastern District of Oklahoma on November 8, 1995 and he was not terminated as counsel in this case until November 15, 2005, following Fields' formal sentencing. Additionally, on July 25, 2003, both Julia O'Connell and Barry L. Derryberry entered their appearances on behalf of Fields. *See*, Dkt. #s 9 and 10, respectively. Finally, on August 12, 2003, Mr. Isaiah S. Gant filed a Motion to appear *pro hac vice* on behalf of Fields. Dkt. # 19. On September 9, 2003, the motion was granted. Dkt. # 29.

thereto to Michael Abel, Barry Derryberry and Rob Ridenour, three assistant federal public defenders in his office. This would imply more counsel were available to assist on this case than those who actually made a formal appearance in the case.) Additionally, Ms. O'Connell's emails establish that she consulted numerous times with attorneys from the National Capital Resource Counsel regarding the facts of this particular case and ideas on how best to defend it. *See*, Dkt. #s 110-1-110-10.

Ms. O'Connell claims, despite the fact her client "remained insistent, and ultimately pled guilty," if Isaiah "Skip" Gant, counsel deemed "Learned Counsel by the Federal National Resource Counsel Project" had joined her in counseling against the plea, together they might have convinced Fields not to plead guilty. *Id*., at ¶¶ 6 and 7. To the extent she admits Fields was insistent on pleading guilty, it is nothing more than wishful thinking to speculate that one more attorney would have been able to convince Fields to follow counsel's advice. Ms. O'Connell continues her affidavit by claiming she had no tactical or strategic reasons for everything which is challenged in the case. *Id*., at p.8 (¶¶s 11 and 12); p. 9 (¶¶s 13 and 14); p. 11 (¶ 17); p. 12 (¶ 18); p 13 (¶¶s 19 and 20); and p. 15 (¶¶s 22 and 23).

Statements by trial counsel in affidavits filed years after trial, where counsel in effect "fall on their swords," do not create credibility issues when trial counsel's documented contemporaneous statements show the contrary. *Jackson v. United States*, 638 F.Supp. 2d 514, 528 (W.D.N.C. 2009). *See also*, *Allen v. Mullin*, 368 F.3d 1220, 1240 (10th Cir. 2004) (court relied on contemporaneous court record to discount trial counsel's testimony in competency trial). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686, 104 S.Ct., at 2064.

In this court's opinion, the arguments made by petitioner are the kind of arguments which the Supreme Court in *Strickland* cautioned against, those made with the advantage of 20/20 hindsight. *Id*., 466 U.S., at 689, 104 S.Ct., at 2065. A review of the record reflects, despite the circumstances surrounding the murders of two individuals who were stalked like animals before being killed in cold blood, defense counsel presented a strong case in mitigation premised on several theories of mental illness, including the testimony of two mental health experts, Brad Grinage and George Woods. Grinage, a forensic psychiatrist testified Fields suffered from bipolar disorder and he described symptoms which led him to his diagnosis as depression, rushing thoughts which were episodic in nature and distractibility. *See*, Tr. of Jury Trial, Vol. XI at pp. 2778, 2790-2791, and 2794-2795. Additionally, Grinage indicated Fields had the classic symptoms of mania with regard to pleasure seeking behaviors and hypersexuality. *Id*., at pp. 2791-2792 and 2795. Moreover, Grinage explained the most compelling evidence in his diagnosis was the fact Field's primary care doctor had documented that Fields suffered from auditory hallucinations prior to the murders. Grinage also explained to the jury that treating bipolar patients with antidepressants, especially Effexor, carried an increased risk of causing mania or symptoms of hypomania and/or enhancing any existing psychosis. *Id*., at p. 2780. Finally, Grinage indicated, in his professional opinion, Fields was suffering from a "severe emotional mental disturbance, mainly bipolar disorder with psychotic features" with the psychotic features being auditory hallucinations. *Id*., at p. 2815.

The other defense expert, Dr. Woods, a neuropsychiatrist who specialized in examining the relationship between a person's brains and their behavior, testified that Fields had suffered from a mood disorder for many years beginning in childhood. *See*, Tr. of Jury Trial, Vol. XII at p. 2946. Woods also discussed Fields history of depression beginning at

age sixteen and the many different medications which had been tried. Woods further indicated Fields had a history of mania which he described as being at "the other end of the bipolar." *Id*., at p. 2973. Woods continued by explaining the symptoms experienced by Fields such as irritability, impaired judgment, hypersexuality, "anger and rage that's come out of nowhere," impaired functioning, problems sleeping, problems with his appetite and hearing voices both before and after the offenses. *Id*. Based upon his examination, Woods diagnosed Fields with either a schizoaffective disorder or a bipolar disorder with psychotic features which led Fields to display poor judgment and have erratic thinking. *Id*., at p. 2976-2977. Woods explained to the jury that the Effexor, which Fields was taking at the time of the murders, could "flip" people with bipolar disorder from depression to mania, further impairing his judgment.

Moreover, during closing argument, counsel addressed all aspects of Fields mental health discussing his depression and how it affected everything in his life, his inability to control what was going through his mind continually because of "rushing thoughts," and counsel implored the jury to show empathy for Fields since he had already accepted responsibility for his actions. Tr. of Jury Trial, Vol. XIV, at pp. 3434-3436. Counsel indicated his mental disease impaired his abilities. *Id*., at p. 3436. Counsel also emphasized the bipolar flip theory, pointing out to the jury that the Effexor built up like it was supposed to and then it hit a tipping point so bad that a girl friend of Fields called the prescribing doctor worried about either suicidal or homicidal behavior. Thus, counsel argued when Fields committed these offenses he was "under severe mental or emotional disturbances." *Id*., at p. 3440. Counsel also reminded the jury that all of the physicians who had treated Fields endorsed the idea that the voices were credible. *Id*., at 3439.

While the right to effective assistance of counsel extends to closing arguments, counsel still has wide latitude in deciding how best to represent their client, and deference to counsel's tactical decisions in their closing arguments is extremely important because of the broad range of legitimate defense strategy at this stage of the case. *Yarborough v. Gentry*, 540 U.S. 1, 4, 124 S.Ct. 1, 5, 157 L.Ed.2d 1 (2003). The purpose of closing arguments is to "sharpen and clarify the issues for resolution by the trier of fact . . . . " *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

> Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed it might sometimes make sense to forgo closing argument altogether.

Yarborough, *supra*. Therefore, as in all challenges to effectiveness of defense counsel's actions, this court's review of a defense attorney's summation is highly deferential.

Furthermore, in spite of petitioner's claim counsel should have argued these alleged mental issues satisfied multiple mitigators, the jury outright rejected this evidence, finding petitioner did not commit the offenses under severe mental or emotional disturbance. Cr. Dkt. # 229, at p. 6. To the extent the jury did not believe the mental health testimony was mitigating, it is pure speculation to suggest the jury would have viewed the evidence differently if counsel had argued it fit under several different mitigating factors. Ms. O'Connell's correspondence reveals she was aware she faced a difficult task to convince the jury to rely on her mental health evidence. Dkt. # 110-7. Counsel's criminal trial experience clearly gave her the ability to make a strategic decision as to the best way to argue the mental health evidence to the jury.

Fields argues failure to find the uncontested mental health evidence[7] was mitigating violates the Eighth Amendment. The government makes a compelling argument that this claim has been procedurally defaulted. Whether or not the claim has been defaulted, this court finds no authority to suggest that a jury is automatically required to find uncontested mental health evidence automatically qualifies as a "mitigating factor." Rather, the Supreme Court has suggested complete jury discretion is constitutionally permissible so long as the jury is not precluded from considering any relevant mitigating evidence offered by the defendant to support a sentence less than death. *See, Graham v. Collins*, 506 U.S. 461, 508, 113 S.Ct. 892, 919, 122 L.Ed.2d 260 (1993) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). The Eighth Amendment simply requires jurors be allowed to consider and determine for themselves the existence and weight to be accorded alleged mitigating factors. *See, Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).

Additionally, regardless of the reasons counsel did not followup with an MRI,[8] in light of the results of a 2011 MRI, this court finds petitioner has failed to establish prejudice based upon counsel's failure to investigate and/or present evidence of his alleged organic brain damage. While Petitioner urges this court to disregard the post-trial information of Dr. James Seward regarding a peer-reviewed psychological and neuropsychological evaluation of

[7]Fields argues "counsel's single-minded focus on the manic flip prevented the jury from finding and giving effect to the uncontested evidence of depression and the largely uncontested evidence of hallucinations." Dkt. # 106, at ¶ 16. There is nothing within the record to indicate the jury was prevented from considering **any** of the evidence which they heard at trial.

[8]In February, 2005, counsel advised the United States Attorney's office that the cost of a PET scan was $35,000 and suggested the prosecution team should absorb this cost. Thus, the cost of a brain imaging scan clearly played a role in counsel's decision to rely on their expert testimony and forego conducting a brain scan. *See*, Dkt. # 106-8.

Fields, Dkt. # 110-23, because it did not exist at the time of trial,[9] it is petitioner's burden to establish prejudice. The government's burden is to rebut the arguments presented by petitioner.

To support his argument that counsel was ineffective for failing to investigate and present evidence of his organic brain damage, petitioner submitted a neuropsychological examination report dated April 1, 2010, by Daniel A. Martell, Ph.D, Dkt. # 106-10. Dr. Martell claims the report of Dr. Price unequivocally demonstrates organic impairment in the frontal lobes. In that report, Dr. Martell indicates "any reasonable neuropsychologist looking at Dr. Price's neuropsychological data would have identified the presence of significant impairments (sic) Mr. Fields' brain functioning, primarily involving frontal lobe functioning", *id*., at p. 13, and "Mr. Fields has experienced a catastrophic loss of brain function over the past five years." *Id*., at p. 17. Dr. Martell goes on to state that "[t]his apparent degenerative brain disease process also raises important questions about his behavior at the time of the instant offense, as there is evidence in the test data from the time of trial that there was something abnormal and deteriorating about his neurocognitve (sic) functioning." *Id*. In addition, petitioner submits an affidavit from Dr. Grinage, which state "[i]t is highly likely that [Fields] has frontal lobe impairment that would affect his bipolar behavior and treatment." Dkt. # 106-4. To rebut Field's argument that he has significant brain impairments which trial counsel failed to follow up on, the government had the right to rely on current psychological testing, including an MRI of his brain. To hold otherwise, would allow post-conviction counsel to make arguments which could never have been proven at trial even if trial counsel had taken the very steps which post-conviction counsel argue they should have taken. While petitioner cites to, *United States v. Gonzalez*, 98

[9]*See*, Dkt. # 119, at pp. 31-32.

Fed.Appx. 825, 832 (10th Cir. 2004), an unpublished Tenth Circuit opinion, for the proposition that this court cannot resolve differences among the parties mental health experts without an evidentiary hearing, petitioner submits nothing to contradict or rebut the evidence submitted by the government which shows an MRI conducted in 2011 was normal.

Fields further argues the trial counsel failed to object when the Government "brought out harmful, but limited, testimony from Dr. Price regarding brain damage." Dkt. # 106, at p. 47. A review of the testimony, however, reveals interposing an objection to the limited testimony elicited by the government which briefly indicated Fields "cognitive processes . . . . . were intact"[10] and Price's statement he "thought there was probably going to be some brain dysfunction"[11] would have drawn the jury's attention to the testimony. Giving counsel's desire to limit the jury's exposure to such testimony, this court finds counsel's decision to not object was a reasonable trial strategy. Again, to the extent Fields does not have organic brain damage, counsel's limited cross-examination of Dr. Price was not ineffective. Nor did this brief testimony likely impact the outcome of the trial. Therefore, this court finds petitioner has failed to establish prejudice.

Petitioner also is dissatisfied with counsel's decision to not call his local medical professionals, *i.e.*, two psychiatrists who treated him while he was in custody - Joyce Bumgardner and Larry Trombka - and a physician and physician's assistant who treated petitioner prior to the murders - Dean Anderson and R.L. Winters, respectively. This testimony, however, was cumulative to the evidence, discussed above, which was presented

[10]Tr. of Jury Trial, Vol. XII, at p. 3106.

[11]Tr. of Jury Trial, Vol. XII, at p. 3154.

at trial through defense experts, Dr. Grinage[12] and Dr. Woods.[13] Moreover, trial counsel used this evidence in closing arguments to remind the jury that Fields had reported auditory hallucinations prior to the murders.[14] Counsel's failure to call witnesses whose testimony is cumulative of evidence already presented at trial is not considered constitutionally deficient performance. *Snow v. Sirmons*, 474 F.3d 693, 729 (10th Cir. 2007). Since evidence which is essentially cumulative would not have led the jury to reach a different result in the sentencing phase of a capital case, failure to present such evidence could not have prejudiced the defendant. *Humphreys v. Gibson*, 261 F.3d 1016, 1021 (10th Cir. 2001). Petitioner has failed to establish his attorneys actions regarding this omitted testimony rendered their assistance ineffective or that he was prejudiced thereby.

Petitioner further attacks counsel's failure to investigate and present evidence regarding how the use of Effexor correlates with compulsive aggression. Petitioner then cites to an FDA public health advisory asking manufacturers of ten anti-depressant drugs, including Effexor, to alter their labeling to include a "warning statement recommending 'close observation' of patients being treated with these drugs for increased depression or suicidality and noting that '[a]nxiety, agitation, panic attacks, insomnia, irritability, **hostility**, impulsivity, akathisia, hypomania, and mania . . . .'" Dkt. # 106, at p. 57 (bold in original). Yet, the two experts presented by counsel attributed Fields behavior to the effects of Effexor. First, Dr. Grinage opined Fields

> . . . . . had gone for some time with a depression that alternated with bipolar-like symptoms and could probably have been diagnosed with bipolar had it been recognized. And when given multiple fail trials of antidepressants which

[12]Tr. of Jury Trial, Vol. XI, at pp. 2795-2810, 2821, 2893-2894.

[13]Tr. of Jury Trial, Vol. XII, at pp. 2978 - 2995 and Vol. XIII, at pp. 3209-3210.

[14]Tr. of Jury Trial, Vol. XIV, at p. 3442.

> you might expect with a bipolar patient given an antidepressant with some norepinephrine activity that he developed an irritable manic mania. He went from depression or mixed depression manic state into a more irritable state. He continued to have depressive symptoms, so, he was - - in essence, he may have been completely in a mix, both depression and mania, but, he tended to have more of a diagnosable irritable mania as he described classically an increase in his rushing thoughts, hearing the voices more frequently and having anxiety associated with the voice.

Tr. of Jury Trial, Vol. XI, at pp. 2814-2815. Thereafter, Dr. Woods discussed "mania" and indicated that newer studies showed "often mania does not show up as just pure grandiosity but that it really shows up in irritability, in spontaneous anger, in kind of this inability to control your anger." *Id*., Vol. XII, at p. 2953. Dr. Woods further discussed the pharmacological literature surrounding Effexor, testifying:

> [w]hen you look at the literature - - not the PDR, not the Physicians Desk Reference, because the Physicians Desk Reference is not a learned treatise by any stretch of the imagination. But when you look at the actual literature, pharmacological literature, you see that Effexor has a significant incidence of flipping people into mania, of making that switch. When a person switches into mania, they often become - - their judgment becomes increasingly impaired.

Id., at p. 2990. Fields' argument that counsel would have learned that patients treated with Effexor "experience increased rates of compulsive aggression" is just another way of saying what defense experts actually said, *i.e.* Effexor increases the incidence of causing spontaneous anger, irritability or inability to control your anger. Therefore, this court finds counsel were not ineffective for failing to hire more experts who would have said the same things about the potential side effects of Effexor.

Finally, Petitioner states trial counsel failed to thoroughly and properly prepare their mental health experts. While trial counsel failed to provide Dr. Grinage with the transcript of Fields' change of plea hearing or to inform Woods of a pertinent statutory mitigator, this court finds petitioner has not established any prejudice occurred as a result of these oversights. Rather, as noted by the government, both experts testified consistent with the

written opinions they rendered before Fields entered his guilty pleas and defended their conclusions on cross-examination. Fields has failed to establish counsel was ineffective in investigating, presenting and/or arguing his mitigating mental health evidence.

B. Failure to investigate, present and argue evidence rebutting aggravating factors

In his third ground for relief, Petitioner claims trial counsel's failure to challenge the statutory aggravating factor of substantial planning and premeditation and the non-statutory mental anguish aggravator violated his right to effective assistance of counsel. Moreover, Petitioner contends the government presented false and misleading testimony and argument in support of the substantial planning and premeditation factor thereby violating his right to due process guaranteed by the Fifth Amendment.

1. Substantial planning and premeditation

In regard to this aggravating factor, the jury was instructed as follows:

> The government seeks to prove that the defendant committed the offense of murder after substantial planning and premeditation to cause the death of Charles Glenn Chick, Jr. and/or Shirley Elliot Chick. "Planning" means mentally formulating a method for doing something or achieving some end. "Premeditation" means thinking or deliberating about something and deciding whether to do it beforehand. "Substantial planning" means planning that is ample or considerable for the commission of the crime at issue.

Cr. Dkt. # 227, at p. 22.

Petitioner argues counsel was ineffective for failing to conduct a reasonable investigation by asking his friend and government witness, Daniel Presley, about his knowledge of ghillie suits and rifles with scopes. First, he claims Presley would have testified that "ghillie suits and ghillied weapons were common among hunters in the area."[15] He also claims Presley "would have explained, if asked, that it was not unusual for hunters who ate what they shot (such as Mr. Fields) to attach large scopes to their .22 rifles;"[16] and "Fields attached the scope to his rifle at least a year before the homicides."[17] Additionally, Fields

[15]Dkt. # 14, at p. 50; Dkt. # 106, at p. 61; and Dkt. # 106-21, at p. 4.

[16]Dkt. # 14, at p. 50; Dkt. # 106, at p. 68; and Dkt. # 106-21, at p. 5.

[17]Dkt. # 14, at p. 50; Dkt. # 106, at pp. 68-69; and Dkt. # 106-21, at p. 6.

asserts Presley could have rebutted the government's claim that he had tried to set up an alibi for the night of the homicides by testifying that Fields had asked him to go snake hunting on the night of the murders. Finally, Fields argues a reasonable investigation, including consulting with an independent crime scene investigator, would have found evidence to refute the government's allegations that Fields returned to the crime scene many hours after the shooting to "stage" a robbery. Dkt. # 14, at p. 66; Dkt. # 106, at pp. 71-79; and Dkt. # 106-24. According to Fields this additional testimony would have rebutted the substantial planning and premeditation aggravating factor.

If this testimony had been elicited, however, it would not have changed the defendant's own statements regarding the what he had done on the evening of July 10, 2003, which were introduced through Special FBI Agent Graff. In particular, Agent Graff begin by telling the jury that the defendant originally denied having any firearms and stated that he did not hunt. Tr. of Jury Trial, Vol. IX, at pp. 2249-2250. Additionally, Fields originally denied having been to the Winding Stair campground and told the FBI agent he had made a ghillie suit approximately four years before, but he had thrown it away about two or three years ago. *Id*., at pp. 2255-2256. Finally, Fields initially denied shooting the Chicks. *Id.*, at pp. 2256-2257.

Once confronted with the facts known by Agent Graff,[18] Fields changed his story and admitted that he had killed the Chicks. *Id*. In his confession to the FBI, Fields stated he went to the Winding Stair Campground on the evening of the 10th to use the bathroom. When he arrived at the campground, "he observed the Chicks over at the vista, which was an overlook

[18]These facts included: 1) defendant's truck had been seen at Winding Stair on the evening of the 9th; 2) agents were in the process of searching his truck; 3) a .22 rifle had been found behind the seat in his truck and it appeared to be consistent with the firearm that was used in the killings of the Chicks; 4) a ghillie suit had been found in the back of his truck which contained fibers that appeared to be consistent with fibers found at the crime scene and 5) items secluded under a blanket in his truck appeared to be personal items which belonged to the Chicks, including a camera and a portable Casio T.V. *Id*., at pp. 2257-2259.

which overlooks the valley to the north. And he described the vista as being approximately seventy-five yards from their campsite." *Id*, at p. 2261. Upon seeing the Chicks, Fields "put on his ghillie suit and took his [.22 caliber] rifle and went over in the woods and secreted himself in the woods near their campsite." *Id*. Fields could not say how long he watched and waited for them to come back from the vista; but he observed them for approximately fifteen minutes after they had returned to the picnic table at their campsite before he crept up, on his belly, closer to their campsite (taking another five minutes) and when he heard Mr. Chick say he was going to the tent, he fired a shot into Mr. Chick's head. *Id*., at pp. 2263-2267. After shooting Mr. Chick, Fields told Agent Graff he moved closer to the campsite; Shirley Chick had gotten up from the picnic table and was running towards the van, so he fired two to three shots at her as she ran. *Id*., at pp. 2267-2268. Fields approached the van and shot Ms. Chick in the head at least two times. *Id*. Thereafter, Fields told the FBI that he went back to the picnic table and because he thought Mr. Chick might still be alive, he shot him in the head a second time. *Id*., at p. 2268. Further, Fields stated he then removed forty dollars from Mr. Chick's pants pocket, which he kept. *Id*., at p. 2270. Fields continued his confession to the FBI, indicating he went back to his truck, took off his ghillie suit and drove back to the Chicks' campsite, picked up a rock, broke the window of the van and took personal items of the Chicks from the van. *Id*. Following his interview with the defendant, the FBI agent wrote a synopsis of what Fields had said. It was introduced as Government's Exhibit 131 and read to the jury. The written confession stated the following:

> I, Edward L. Fields, have been advised of my Miranda warnings pursuant to my arrest for shooting Charles and Shirley Chick resulting in their deaths. I waive my Miranda rights and voluntarily provide the following written statement.
>
> On approximately Tuesday, July 8th, 2003, I observed a man and woman, whom I later determined to be Charles and Shirley Chick, camping at the Winding Stair Campground. My purpose for being there was to use the bathroom. The Chicks appeared to be using a tent and a blue van.

> During the evening hours of July 10th, a Thursday, I returned to Winding Stair Campground to use the bathroom. Just before dark, I observed the Chicks at the vista approximately seventy-five yards from their campsite. I dressed myself in a guillie (sic) suit, and with a .22 caliber rifle crept up close to their campsite and waited for them to return.
>
> I had been short of money all week and intended to rob the Chicks. The main reason I was short of money was because of child support payments I have to pay. My intent was to rob the Chicks at gunpoint, tie them up, and leave.
>
> The Chicks returned from the vista and were sitting at the picnic table at their campsite. I remained concealed in the woods for about fifteen minutes after their returning to the campsite.
>
> At one point Charles Chick said he was going to the tent. I shot Charles Chick with one shot to the head. I then shot at Shirley Chick a couple of times. I followed Shirley Chick to the van and shot her twice in the head. I then returned to Charles Chick and shot him once in the head. I removed forty dollars cash from Charles' pants pocket.
>
> I returned to my truck, a blue Chevrolet, parked about seventy-five yards away, and brought my truck over to the Chicks' campsite. I broke the driver's side window out of the Chicks' van using a rock. I removed the Chick's van -- I removed from the Chicks' van two backpacks, a camera with a long lens, a mini television, Charles Chicks' wallet, a battery charger, two mini flashlights and a radar detector. One mini flashlight, the camera, the mini television, and the radar detector remain in my truck at the present time. I disposed of one of the backpacks, which included the battery charger at Kerr Lake. I disposed of the other backpack which contained Charles Chick's wallet, Shirley chick's purse and a rock in Lake Wister. I recovered $300 from Shirley Chick's purse before I disposed of it.
>
> Both Charles and Shirley Chick were dead when I left their campsite the evening of July 10th. After leaving the Chicks' campsite, I returned to my campsite located near Lake Wister. Between the hours of 7:00 and 8:00 a.m. on Friday, July 11th, I purchased gasoline at the Wal-Mart in Poteau using Charles Chick's credit card.
>
> During the week prior to July 10th, I had been very depressed. I had felt suicidal. I had no money, and I felt desperate. Since shooting the Chicks, I have felt very sick and very remorseful. I would like to tell the Chicks' family and relatives that I am sorry for this incident.
>
> I make the above voluntarily. The above statement, Pages 1 through 3, are true and accurate.
>
> Signed by Edward Fields, 7-18-03, witnessed by myself, Agent Jones and Donnie Long.

Id., at pp. 2280-2283.

In addition to the defendant explicitly admitting he had seen the Chicks two nights prior to the murders, that he stalked them for at least fifteen minutes before shooting them like animals, evidence supporting the substantial planning and premeditation aggravator was

introduced thru several other witnesses. First, Ms. Hairrell testified she helped make a "sniper suit"[19] for the defendant a few years before the murders. She asked the defendant several times what the suit was for and the defendant never would answer. *Id*., at pp. 2326-2331. On one occasion when Ms. Hairrell saw the defendant's rifle, the defendant said "[h]e could shoot anybody a hundred yards off." *Id.*, at pp. 2329.

Carol Lamb testified, on June 15, 2003, she accompanied the defendant to Atwoods where he purchased gunny sacks. Later that day, Ms. Lamb helped the defendant cut the gunny sacks into strips. When Ms. Lamb observed the defendant tying the strips to his rifle, she asked him what he was doing and "[h]e just kind of laughed it off and said, 'You don't want to know.'" *Id.*, at pp. 2238 and 2340. Additionally, the defendant admitted to Ms. Lamb that he had previously snuck up on a couple while wearing his ghillie suit. *Id*., at p. 2348.

On July 7, 2003, the defendant told his friend, Daniel Presley, he had seen a couple parked in a car and he had snuck up on them in his ghillie suit. *Id*., at p. 2377. Another witness, Brenda Stacy, also heard the defendant say "You don't really want to know" when asked what the ghillie suit in the bed of his truck was for. *Id*., p. 2421. Further, Marilyn Presley testified on July 7, 2003, the defendant also told her, he had donned his ghillie suit and watched a couple in a car for a few minutes. *Id.*, Vol. X, at p. 2463.

Charles Love testified about the defendant telling him he had worn his sniper suit "on Talimena Drive and had slipped upon on a couple of people on Talimena Drive." *Id*., at p. 2487. This incident occurred sometime in the spring of 2003. *Id*., ap p. 2486. Mr. Love indicated the defendant had told him that he got within 20 yards of this couple and they did

[19]This was the term the defendant used to refer to the ghillie suit. *Id*., at p. 2331. *See also*, Tr. of Jury Trial, Vol. X, at p. 2486.

not know he was there. *Id.* A couple of weeks after this incident, the defendant asked Mr. Love about making a silencer. *Id*., at pp. 2487-2488.

Finally, Dawn Michelle Bond testified the defendant called her from the Poteau Police Department to tell her "that he was in jail for murdering the people that I had joked with him about murdering." *Id*., at p. 2584. During the course of her testimony, Ms. Bond said the defendant had told her he had watched the victims have sex in their car on some day prior to the shootings. *Id*., at p. 2583.

All of this evidence establishes the defendant planned these murders for at least two days, if not substantially longer, prior to actually committing them. Even if Presley had testified about lawful uses of ghillie suits and rifles with scopes, that Fields had attached the scope to his rifle at least a year before the murders or that "lots of guys who use ghillie suits also ghillie their guns,"[20] it would not have lessened the impact of the evidence the jury heard regarding Fields ghillying his rifle less a month before the murders; his statements to so many people that they didn't want to know what his ghillie suit was for; the fact that the defendant became proficient in sneaking up on people while wearing his "sniper suit;" or finally, his statements that he drove to a secluded area, laid in wait for over fifteen minutes (even crawling closer on his belly) before killing two unsuspecting campers in cold blood. Each of these actions established the substantial and methodical planning and premeditation that went into the murders of these two innocent campers which the defendant ultimately carried out on July 10, 2003. Moreover, whether or not the defendant knew he was definitely going in for the kill when he told Ms. Tipton he would not be over because he would be going "fishing" with Presley, does nothing to lessen the substantial amount of planning which defendant engaged in to finally fulfill this human hunting expedition.

[20]Dkt. # 106, at p. 68 and Dkt. # 106-21 at p. 6.

Fields continues his attack on counsel's investigation by arguing counsel was ineffective for failing to consult an independent crime scene investigator. According to Fields, if counsel had consulted with such an expert, counsel could have introduced evidence contradicting an Oklahoma State Bureau of Investigation (O.S.B.I.) agent's testimony that Fields staged the robbery many hours after the shootings and/or suggested cross-examination questions to challenge the accuracy of the testimony regarding glass fragments and/or blood flow evidence at the scene. During the trial, Agent Dalley testified as a crime scene investigator, having expertise in blood stain pattern analysis and crime scene reconstruction. Tr. of Jury Trial, Vol. VIII, at p. 2080. Agent Dally indicated she was called to the scene on July 11, 2003, at which time she took numerous photographs of both of the victims and different areas of the victim's van. Many of the photographs taken at the scene were introduced in the trial. Agent Dalley explained each of the photographs to the jury and discussed gravity blood flow patterns depicted within those photographs, including pooling on the pavement , around the victims and in the victims' clothing. The agent also described blood spatter on Ms. Chick's face and while the photograph depicting this blood was not admitted into evidence, Dalley testified, after reviewing the photograph, she believed the only source for the blood on Ms. Chick's left cheek was from one of Mr. Chick's wounds. According to Dalley, Ms. Chick would have been approximately two feet from Mr. Chick when he sustained a gunshot wound thereby spraying high velocity spatter onto Ms. Chick. *Id.*, at pp. 2082-2091. Dalley further testified she observed glass fragments at the scene of the murders which were consistent with the broken driver's window of the van. Dalley surmised, because there was no blood stains on these fragments, that the glass had to have been shattered, at least an hour, after the murder in order to allow the blood to dry enough that it was not transferred to the glass on contact. *Id*., at p. 2099.

Petitioner now claims

> Agent Dalley's testimony that the glass fragments found resting on a dried pool of Mrs. Chick's blood were not stained with blood was contradicted by both Agent Dalley's own investigative report and photographs taken at the crime scene. In her report, Agent Dalley recorded no observations about these glass fragments, nor did she note whether she examined the fragments at the scene or collected them for later examination.

Dkt. # 14, at p. 66. *See also*, Petitioner's Exh. # 22, Dkt. # 106-23. Defense counsel, however, got Dalley to admit on cross-examination that she did not collect any of these glass fragments. Tr. of Jury Trial, Vol. IX, at p. 2216-2217.

Petitioner further claims the government argued he left the campground after shooting the Chicks and returned several hours later to stage a robbery and that this argument "was critical to the Government's case that the shootings were the result of substantial planning because it purportedly showed that Mr. Fields' true objective had been to kill, not steal." Dkt. # 106, at p. 71. Based upon the evidence in this trial, the court does not believe the length of time after the murders the robbery occurred was relevant to the jury's finding beyond a reasonable doubt that the "substantial planning and premeditation" aggravator applied to these murders. The defendant admitted in his confession that he took $40 from Mr. Chick's pocket right after the murders, then he left the victim's campsite, returning with his truck to complete the robbery. Nowhere does his confession indicate the length of time he was in his truck before he returned to the victim's campsite and completed the robbery, Tr. of Jury Trial, Vol. IX, at pp. 2281-2282; but, again, this was not relevant. As a result, the court finds it was not unreasonable for defense counsel to not consider hiring experts to contest evidence related to the robbery.

Next, petitioner argues trial counsel should have "attacked the Government's claim that Mr. Chick's body must have been moved from the picnic table to the ground six hours or more after he was shot." Dkt. # 106, at p. 76. Nowhere does Fields state that he advised

counsel that this evidence was not accurate; yet, Fields would have been the one person who would have known how long after the murders he moved the bodies. If counsel did not know of facts which would alert her to the need to conduct a particular investigation, a failure to investigate does not amount to deficient performance. *Alcala v. Woodford*, 334 F.3d 862, 892 (9th Cir. 2003). Moreover, the opinions now proffered by Robert Tressel regarding blood flow and lividity do not convince this court that any reasonable probability exists that his conclusions would have altered the jury's decision in this particular case regarding the substantial planning and premeditation aggravator. Since Tressel concedes Mr. Chick was found in full rigor 24 hours after his killing, there is no basis for this court to find Tressel's estimations regarding rigor would have undermined the testimony that the body was moved about six hours after death. In fact, the testimony at trial noted various factors which could have altered the timeline before full rigor mortis occurred and defense counsel adequately cross-examined the witnesses. *See*, Tr. of Jury Trial, at Vol. VIII, at pp. 2047- 2054; Vol. IX, at pp. 2196-2224; and Vol. XI, at pp. 2639-2650. Based on the record before the court, this court finds failure to hire an expert, like Robert Tressel, did not so undermine the proper functioning of the adversarial process such "that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S., at 686, 104 S.Ct., at 2064. Once again, how long it took the victim to "bleed out" and whether or not the victim was moved from the picnic table within an hour or after six hours is irrelevant to whether or not the defendant engaged in "substantial planning and premeditation" in relation to the actual murders. Regardless of the government's closing argument, what occurred after the victims were killed was relevant only to establish the defendant's mental state and/or state of mind after the murders.

2. Mental anguish

Petitioner also argues his attorneys were ineffective for not contesting the source of the blood spatter on Ms. Chick's face since it could have come from her own head wounds as opposed to being from Mr. Chick's head wounds. Petitioner claims this testimony would have rebutted the mental anguish aggravating factor because it was the only evidence used by the government, in conjunction with what he claims was "sheer speculation designed to inflame the passions of the jury,"[21] to provide a basis for the jury to find the mental anguish aggravating factor. Fields fails, however, to consider many of the facts known both by defense counsel, as she considered how to best defend this case, and the totality of the evidence heard by the jury. The evidence indicated the campground where these murders occurred was fairly rural and isolated. Tr. of Jury Trial, Vol. IX, at p. 2210. Defendant admitted that the victims were sitting at a picnic table when he silently approached and shot Mr. Chick in the head. Corroborating this confession, investigators found two partially empty beverage containers at the picnic table. *Id*., at pp. 2118-2119. The jury could use their common sense in determining that Ms. Chick would likely have heard the shot and seen her husband fall seconds before she began to run for her life, only to be shot in the foot as she attempted to escape to her van. She probably caught a glimpse of the ghillied up creature shortly before her death. While the prosecutor mentioned the blood spatter evidence in regard to this aggravator, his focus was on Ms. Chick's perceptions in the final moments of her life trying in vain to escape death. *See*, *id*., at Vol. XIV, pp. 3415-3418. These facts clearly allowed the jury to find beyond a reasonable doubt that Ms. Chick suffered mental anguish in the last moments of her life. Putting on an expert to opine as to the source of blood spatter

[21]Dkt. # 20, at p. 41.

on Ms. Chick's face would not have altered the jury's finding regarding the mental anguish aggravating factor.

Just as mitigating evidence can be important in a capital sentencing trial, defense counsel can not overlook the real risk of offending the jury by contesting points that, based upon a totality of the facts, are insignificant. This is never more important than in a case like this where the defendant is trying to convince the jury that his actions were the result of a manic flip from taking legally prescribed drugs, he has accepted full responsibility, and he wants the jury to believe that his apology to the victims' family was sincere.

There is no question that defense counsel could have hired more experts to contest the government's case. In the last twenty years, defense of criminal cases, especially capital cases, has become much more complex. Experts have sprung up for virtually every aspect of every case. Still all the high dollar experts money could buy would not have overcome the insurmountable task of convincing the jury in this particular case that the defendant deserved anything less than death for these two murders. The emails from defense counsel recognize she knew she was fighting an uphill battle to convince jurors to believe her mental health experts as jurors tend to distrust/discount expert testimony. Dkt. # 110-7. To have contested either the length of time which elapsed between the killings and the robbery or the source of the blood spatter on Ms. Chick's face with expert witnesses, would have been counter-productive in convincing the jury that the defendant deserved a sentence less than death if the murders were solely the result of a manic flip from taking a prescription drug. Accordingly, this court finds counsel was not ineffective in failing to investigate or present evidence to rebut these aggravating factors. Moreover, despite counsel "falling on her sword" and swearing she had absolutely no trial strategy, counsel's decision regarding her closing remarks fall within the broad range of reasonable trial conduct under *Strickland*. Counsel emphasized

the evidence she wanted the jury to remember in the jury room. Accordingly, no prejudice has been shown.

C. Failure to present defendant's social history through mitigation specialist or mental heath expert

Fields further argues counsel's presentation of his social history "was disjointed, incomplete and unpersuasive." Dkt. # 106, at p. 90. Fields admits trial counsel was aware that the defense mitigation specialist "had collected compelling evidence" that he "was raised in a highly dysfunctional family, and that dysfunction had a profound impact on his life, his mental health and his adult functioning." *Id*., at pp. 90-91. While it is relatively easy in hindsight to look at an unsuccessful trial strategy and recreate various scenarios of all the things which could have been done differently, this is the exact type of post-trial exercise the Supreme Court in *Strickland* cautioned courts from becoming entangled in. The defendant has a "heavy burden"[22] to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S., at 689, 104 S.Ct., at 2065 (citation omitted). This court recognizes that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*., 466 U.S., at 690, 104 S.Ct., at 2066. "For counsel's performance to be constitutionally ineffective, it must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.'" *Le v. Mullin*, 311 F.3d 1002, 1025 (10th Cir. 2002) (citations omitted).

Counsel's duty in regard to mitigation was to conduct a reasonable investigation since professional decisions and informed legal choices can only be made after an investigation of

[22]*Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002).

the options. In this case, there is no question that counsel had fully investigated petitioner's social history. Thus, despite Ms. O'Connell's affidavit that she had no strategic reason for not submitting Fields history through one of his doctors or through her mitigation specialist,[23] it is clear counsel fulfilled her duty to conduct a reasonable investigation into petitioner's social history. Decisions regarding which witnesses to call at trial are "quintessentially a matter of strategy for the trial attorney." *Boyle v. McKune,* 544 F.3d 1132, 1139 (10th Cir. 2008). Where it is shown that a particular decision was, in fact, an adequately informed strategic choice, the presumption that the attorney's decision was objectively reasonable becomes "virtually unchallengeable." *Strickland*, 466 U.S., at 690, 104 S.Ct., at 2066.

Moreover, submission of the evidence which Fields now suggests should have been introduced into evidence would not have changed the jury's verdict. Rather, it would have actually undermined the defense theory that the Effexor caused an anomaly, a one-time switch to flip in Petitioner's brain thereby leading an otherwise law abiding citizen to commit these horrific murders. The decision not to submit evidence that these murders were, in some way, the product of a long-standing lack of socialization or empathy, caused by a less than idyllic family life approximately twenty years earlier, would have diluted the defense theory that the crime was Effexor driven as opposed to the product of the defendant's sociopathic tendencies. Furthermore, evidence Fields was emotionally estranged from his family would have directly contradicted the defense arguments that the death of defendant's father and his mother's illness caused the defendant to experience severe emotional disturbances. Similarly, evidence the defendant had difficulty forming relationships would have undermined the notions that the defendant was remorseful and that he was a loved relative and friend. Simply put, presentation of additional evidence that petitioner had a dysfunctional upbringing, or was

[23]Dkt. # 106-2, at pp. 13-14.

cruel and violent toward his relatives, would have substantially weakened, as opposed to strengthening, the defense's mitigation case. Fields has not met his burden to establish counsel's decision to not call the mitigation specialist or put more social history evidence before the jury through a mental health expert was an unreasonable trial strategy.

D. Failure to object to the government's closing argument deprived the petitioner of his right to individualized sentencing, due process and a fair trial

Petitioner claims the Government misstated the law regarding the weighing of mitigating and aggravating circumstances so as to improperly increase the defense's burden of persuasion and decrease its own burden; it denigrated the jury's discretion to show mercy; and it invited the jury to sentence Fields to death based upon irrelevant and inflammatory societal concerns. Dkt. # 14, at pp. 89-90; and Dkt. # 106, at p. 102. Additionally, petitioner claims the prosecutor improperly vouched for its own expert witnesses while denigrating defense witnesses; launched *ad hominem* attacks against petitioner that were irrelevant to any issues in the trial; misrepresented the record and the testimony of witnesses; made arguments not supported by the evidence; and recited Biblical scripture at length. Thus, petitioner claims because this was a "close case,"[24] these alleged errors, individually and cumulatively, resulted in a fundamentally unfair trial thus rendering his death sentence "arbitrary and capricious." Most of the alleged prosecutorial conduct which Petitioner now challenges was not objected to at trial. Of course, "many lawyers refrain from objecting during opening and closing argument, absent egregious misstatements." *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir 1993). One reason to refrain from objecting is counsel may simply be calling the jury's attention to something which counsel, observing live jury reaction to, is not overly

[24]Petitioner defines "close case" as one in which he "presented a significant case for life and the jury found mitigation to exist." Dkt. # 14, at p. 103.

concerning. *Phyle v. Leapley*, 66 F.3d 154 (8th Cir. 1995). As a result, the failure to object during closing argument is considered within the "wide range" of permissible professional legal conduct. *Necoechea*, 986 F.2d, at 1281. In an effort to overlook this arguably permissible conduct, petitioner asserts appellate counsel were ineffective for failing to raise these issues on direct appeal. Petitioner further argues, because of counsel's ineffective assistance, he was "deprived of his right under the Eighth Amendment to have a jury consider and give effect to all relevant mitigating evidence." *Id*. Petitioner also argues his Fifth Amendment rights were violated because the government presented false and misleading testimony to support the substantial planning aggravating factor. The government argues Fields' claims of prosecutorial misconduct are procedurally barred.

In an effort to bolster his ineffective assistance of counsel claims, Petitioner complains of prosecutorial misconduct. Inappropriate prosecutorial comments, standing alone, will not justify reversal since the statements must be reviewed in context. *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1048, 84 L.Ed.2d 1 (1985). In a § 2255 action, relief for prosecutorial misconduct is only appropriate "when the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "[F]or due process to have been offended, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 3109, 97 L.Ed.2d 618 (1987).

> To establish that a prosecutor's remarks were so inflammatory that they prejudiced substantial rights, a petitioner must overcome a high threshold: he or she must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that absent the remarks, the jury would not have imposed the death penalty.

Short v. Sirmons, 472 F.3d 1177, 1195 (10th Cir. 2006).

As previously indicated, however, § 2255 "is not available to test the legality of matters which should have been raised on appeal." *United States v. Khan*, 835 F.3d 749, 753 (10th Cir. 1987), *cert. denied*, 487 U.S. 1222, 108 S.Ct. 2881, 101 L.Ed.2d 915 (1988). As can be seen, to overcome this procedural bar, petitioner argues he received ineffective assistance of appellate counsel. The Sixth Amendment does not require an attorney to raise every nonfrivolous argument on appeal. Rather, the relevant questions in this proceeding are whether appellate counsel was "objectively unreasonable" in failing to raise these issues on direct appeal and, if so, whether there is a reasonable probability that, but for his counsel's unreasonable failure to raise these claims, he would have prevailed in his direct appeal. *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue on appeal, the court considers the merits of the omitted issue. *Id*. (citations omitted). Therefore to resolve this claim, this court will focus on the merits of the alleged prosecutorial-misconduct claims.

Initially, Fields argues the prosecutor misstated the law regarding the weighing of mitigating and aggravators, this court erred in overruling the objection of trial counsel and appellate counsel was ineffective for failing to raise this issue on appeal. The specific rebuttal portion of the closing arguments challenged by Fields contained the following statements:

> MR. SPERLING: . . . . . .Let's remember and honor the two people who are unable to be here. The aggravating factors have been proved beyond a reasonable doubt. The mitigating factors, even if accepted as proved, cannot outweigh the premeditated murder of Charlie. The mitigating factors - - (Interrupted)
>
> MR. DERRYBERRY: Objection to that based on the law.
>
> THE COURT: Overruled.
>
> MR. SPERLING: The mitigating factors - - and I submit all of this to you based on the evidence that has been admitted - - do not begin to outweigh just one of the steps that Shirley took in a terrorized flight from the Defendant. She sought to

> escape the monstrous form the Defendant had chosen to assume in the final moments of her life.

Tr. of Jury Trial, Vol. XIV, at pp. 3462-3463.

While petitioner argues the prosecutor's comments seemed to imply the mitigating factors had to outweigh the aggravating factors, taken in context this does not appear to be what the prosecutor was saying. Rather, the prosecutor was attempting to emphasize how, despite the mitigating evidence, the crime was so calculatingly heinous that the jury should easily find the aggravating factors outweighed all mitigating factors. Moreover, the court properly instructed the jury on how to weigh the aggravating and mitigating evidence, stating:

> The second step involves a weighing process. You must decide whether the proved aggravating factors outweigh the proved mitigating factors sufficiently to justify the death sentence. (If you do not find any mitigating factors, you still must decide whether the aggravating factors are sufficient to justify imposition of a death sentence). If you determine as a result of this weighing process that the factors do not justify a death sentence, such a sentence may not be imposed, and your deliberations are over.

Cr. Dkt. # 227, at p. 6; Tr. of Jury Trial, Vol. XIV, at p. 3384. The court also instructed the jury: "You must determine whether the proven aggravating factor[s] sufficiently outweigh any proven mitigating factor[s] to justify a sentence of death." *Id*., at p. 28; and p. 3403. Therefore, this court finds counsel's failure to raise this issue on direct appeal was not objectively unreasonable.

Next, Fields argues his counsel was ineffective for failing to object to prosecutorial comments during closing arguments regarding defendant's plea for mercy. In particular, Fields focuses on the following comments of the prosecutor:

> Ladies and gentlemen, in closing, just remember the victims in this case, Charles and Shirley and their family and what they went through. The defense is going to talk to you and they're going to ask you to show mercy for this Defendant. What I want you to do is think back on July 10th of 2003. How much mercy was shown then? The Defendant wants you to look at this Defendant and what he's done for the last two and a half years and say, oh,

> there's a life that can be had. This case is about what happened on July 10th of 2003, not what happened since then.

Tr. of Jury Trial, Vol. XIV, at p. 3430. Thereafter, during rebuttal, the prosecutor said:

> Well, can justice be served by life in prison? The Defendant wants to be sent to his room as punishment. If he's allowed to live, he will have their percs, (sic) like workouts and visitors and phone calls and mail and tv and recreation. Don't let this Defendant be a hero to his incarcerated criminal inmates. All with a civilized core must recoil with revulsion of what the Defendant did to act as the executioner of the innocent. Don't give this Defendant what he wants. In the name of justice, give him what he deserves.
>
> **The Defendant wants to choose a sentence.** He wants to live. Now, how unjust is that? Just what choice did he give Charles Chick? Just what choice did he give Shirley Chick? You know, the Defendant made Shirley do something she would never have done, never have done, unless she knew there was absolutely nothing she could do for her dying husband, her best friend. This Defendant made her do something she would never have done unless she knew her life was in absolute, absolute jeopardy. And if we have to go much farther down the aggravating factor road that (sic) Shirley's fightingly horrible murder, there is something really wrong with us. This disturbing criminal conduct is far beyond the capital line. The Defendant didn't need to commit this murder. Even if we concede that the robbery was the motive, he said he had $500 in Michelle's panty drawer. Danny said he had seen the Defendant more broke. Michelle told him that he could move in within a day or so. He wanted the thrill of the kill. And even if we concede that robbery was a motive, the most we could argue is that he thought with premeditation and deliberation if I'm going to rob them and kill them, I may as well kill them and rob them. That's no excuse.
>
> Sympathy. It's hard not to feel sympathy for the Defendant's family members. He abandoned them though. He abandoned them. Only resurrecting contact with them conveniently now that he's in jail. . . . . What did his former wife say about him? Do you remember that one word? Selfish. Selfish. Narcicisstic. (sic) It's all about him. That's an understatement. He would have left them all perhaps by the easy way out. Typical for him. The Defendant wouldn't help his on (sic) widowed mother move halfway across this country. Remember this, here in court the Defendant continues to victimize his own family by reducing them to props in an effort to escape justice. Remember also that Charlie didn't get an opportunity to plead for his life. We can only imagine what Shirley must have said in the waning moments of her life. She came face to face with a killer who wore this suit. The Defendant's best friend now is down to a monthly phone call. Whatever he does for other people is far outweighed by what he has done. He has paid for membership in the club of the most hardened, the worst group of criminals. Remorseless, wanton, senseless, without any empathy or feeling, no emotion for a wonderful man and woman whose lives he extinguished that with six semi-automatic gun shots.

Id., at p. 3457-3459 (emphasis added by petitioner).

Petitioner argues these comments urged the jury to reject mercy based on the evidence and invited the jurors to sentence him to death simply for exercising his Eighth Amendment right to individualized sentencing. This court disagrees. These comments simply focused the jury's attention on the aggravating nature of these crimes and was based upon the evidence before the jury. Moreover, the jury was instructed they could consider mercy (and petitioner's own trial counsel advised the jury - "Mercy is not precluded."),[25] the defendant's lack of remorse, the mental anguish the defendant inflicted on Shirley Chick, his value as a friend, his value as a family member and the impact his death would have on his relatives and friends. *See,* Cr. Dkt. # 227, at pp. 6, 23, and 25-26. Attorneys are given wide latitude during closing arguments and challenged remarks must be evaluated in the context of the trial as a whole. *United States v. Lawrence*, 735 F.3d 385, 431 (6th Cir. 2013). Since each of these subjects were before the jury, the court finds they were proper topics for the prosecutor to touch upon during closing arguments and such comments did not result in a fundamentally unfair trial.

Fields continues his challenge to the prosecutor's closing arguments by alleging the prosecutors improperly "invoked societal concerns about lenient sentences and recidivism." Dkt. # 106, at p. 105. Fields focuses this argument on the following comments of the prosecutors:

> Ladies and gentlemen, when you look around this courtroom you see a lot of people. They haven't come here to see me or Mr. Sperling or defense counsel or not even the judge. They've come here to see justice. They've come here to see what you are going to do today. Because today you are justice. You decide what is right. You decide what is wrong. You can't ever walk out of here again and say, boy, I can't believe they gave such a light sentence or I can't believe they gave such a heavy sentence. I can't believe they gave probation to a child molester. You know (sic) longer have that luxury. We ask you to do what's right, ladies and gentlemen.

[25]Tr. of Jury Trial, Vol. XIV, at p. 3443.

Tr. of Jury Trial, Vol. XIV, at p. 3431. These comments were made right as the prosecutor's first closing arguments concluded. Although the court does not really understand the reference to giving "probation to a child molester," it is clear all the prosecutor was telling the jury was that the decision as to an appropriate sentence in the case was solely their decision. Fields continues, however, that "these sentiments were echoed in later comments, invoking popular opinion that prison was to easy on criminals." Dkt. # 106, at p. 105. The rebuttal comments to which Fields objects seem designed to convince the jury that petitioner's crimes warranted greater punishment than lifetime incarceration and have already been discussed by this court. Furthermore, this court finds the prosecutor's comments suggesting incarceration would be an inadequate sentence, was an appropriate response not only to the defense counsel's suggestion that life imprisonment would be spent in a space smaller than the jury box[26] but also to the testimony during trial of Daniel Presley[27] which described various things inmates could do in prison such as working, receiving visitors, receiving and sending mail, reading and watching television.

Claiming the mental health experts' credibility was a "critical aspect of the trial," Petitioner continues his attacks on the prosecutor's closing arguments by arguing the prosecutor improperly embellished and bolstered the testimony of its mental health experts and improperly vouched for their credibility, while denigrating the defense experts. Dkt. # 106, at p. 106. To support his argument, petitioner highlights terms contained in the prosecutors' arguments, such as "high dollar shrinks," "hired guns," "from the left coast," "an axe to grind" and "an honest opinion." Dkt. 14, at p. 80.

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[26]Tr. of Jury Trial, Vol. XIV, at p. 3442.

[27]Tr. of Jury Trial, Vol. IX, at pp. 2405-2406 and 2408-2409.

To the extent that there is no bright red line separating acceptable advocacy from improper advocacy, prosecutors have sometimes breached their duty to refrain from overzealous conduct by commenting on a defendant's guilt or offering unsolicited personal views on the evidence. *United States v. Young*, 470 U.S. 1, 7-8, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985). As a result, the federal courts have been required to police prosecutorial misconduct. In order to assist the courts, the legal profession has developed Codes of Professional Responsibility. *Id.* The American Bar Association's Standing Committee on Standards for Criminal Justice has complemented these efforts by developing Criminal Justice Standards, one of which states:

> The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

ABA Standards for Criminal Justice 3-5.8 (b)(3rd ed. 1993). The Unites States Attorney acts as a representative of a sovereignty whose obligation is to govern impartially. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 632, 79 L.Ed. 1314 (1935). In this role, a federal prosecutor becomes a

> servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not a liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id.

Use by a prosecutor of "we know" statements in closing arguments should generally be avoided because such statements can blur the line between improper vouching and legitimate summary. *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). An argument will be considered improper vouching "only if the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness' credibility, either through explicit

personal assurance of the witness' veracity or by implicitly indicating that information not presented to the jury supports the witnesses' testimony." *United States v. Magallanez*, 408 F.3d 672, 680 (10th Cir. 2005)(quoting *United States v. Bowie*, 892 F.2d 1494, 1498 (10th Cir. 1990)). "[I]t is not improper for a prosecutor to direct the jury's attention to evidence that tends to enhance or diminish a witness's credibility." *Thornburg v. Mullin*, 422 F.3d 1113, 1132 (10th Cir. 2005).

The prosecutor in this case said the following, during the first closing remarks, in regard to the expert witnesses:

> Our doctors came in, ladies and gentlemen, and told you a number of different things also and I'll just run through those quickly because obviously they had a different opinion. They thought most of the Defendant's problems were based upon his depression. Kind of look at - - who do I believe? Which is the one for me? Who am I going to believe out of this? What does Dr. Price tell you? He tells you he's done hundreds of these things. And over half the time, 60 percent of the time, he testifies for the defendant. He told you he fully expected to find some type of mental illness here but didn't. He has a lot of credibility. He's not somebody who every time comes in and testifies for the defendant. We didn't have to go out to the left (sic) coast to find somebody who testified for the defense every time. We got people in our own back yard who were credible, who would give an honest opinion who were not hired guns. Dr. Mitchell - - and he may be the best one of all, one because he's never been a witness before in a criminal case. He's in charge of a well-recognized psychiatric care center. He comes in and he says I've never testified before. I'm just doing the best I can. But I did this evaluation and, yeah, I did give some credence to the voices. I thought the voices may be part of his problem. Whether or not he actually heard them I can't tell you, but they may be part of it. He even tells you with that knowing with the voices, he had the ability to conform his conduct to the requirements of the law. These were volitional choices on this Defendant's part. Dr. Mitchell who has no axe to grind here, ladies and gentlemen.

Tr. of Jury Trial, Vol. XIV, at pp. 3429-3430. During rebuttal arguments, the prosecutor returned to topic of experts stating:

> . . . . The facts here clearly compel the conclusion the Defendant was entirely responsible and not impaired by his volitionally, his purposefully, acquired sadness. He was just emotionally variable. Even united bipolarities, Dr. Price, I'm mostly on the low side, he says. High dollar shrinks were hired by the defense and we paid ours as well. I respectfully submit, thought (sic), that

> Randy Price and Jeff Mitchell were straight shooters. Not hired guns. The defense got to substantially determine the parameters, we were told, of Dr. Price's exam. They both came into this case with an open mind, open to the prospect that the defense might be right. They found them wrong. Sure, the Defendant was depressed, but no evidence exists of bipolarity or mania. He now wants us to bail him out after he wrecked his life. People who experience traumatic, even depressing circumstances in their life are obligated at a minimum not to lash out at innocent people. The defense experts, one from far away, with a 60 to zero record, he has never testified for the Government. Every single time he testifies, sixty to zip, is for the Defendant. There's no evidence of mania here. The spending spree was a rational criminal effort to impress Michelle.

Id., at p. 3452.

While this court might have sustained an objection, if it had been made as soon as the prosecutor stated, in regards to Dr. Price: "He has a lot of credibility";[28] the comment was immediately followed by a statement derived from evidence in the record which established that Dr. Price did not always testify for the defense. In context, this statement was not error. The prosecutor went farther, however, by stating: "We got people in our own back yard who were credible, who would give an honest opinion who were not hired guns." *Id*. This statement shows how quickly an argument can enter into the "gray zone"[29] between acceptable and improper advocacy. When considered, however, in context with the evidence introduced in this particular case this court finds the prosecutor's comments did not render petitioner's trial fundamentally unfair. Rather, this court concludes the comments, as a whole, were designed to remind the jury of its duty to scrutinize and weigh all of the witnesses' testimony, including that of the experts. *See, United States v. Franklin-El*, 555 F.3d 1115, 1127 (10th Cir. 2009) (finding no prosecutorial misconduct where the prosecutor stated in rebuttal, "The defendants had to go all the way to Missouri to find some blow hard expert who talked a lot

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[28]Tr. of Jury Trial, Vol. XIV, at p. 3429.

[29]*United States v. Young*, 470 U.S., at 7, 105 S.Ct., at 1042.

but said very little of significance in this case.") As can be seen, the government began by urging the jury to decide who was the most believable. To focus the jury's thoughts, the prosecutor discussed the experts' experience based upon testimony presented in the trial.[30] In particular, the evidence established that Dr. Price was licensed to practice in the field of psychology in Texas and Oklahoma. Tr. of Jury Trial, Vol. XII, at p. 3094. Dr. Price had extensive experience in murder cases, having consulted on close to 200 cases. *Id*, at p. 3097. Dr. Price indicated he was retained by the defense in about 60% of those cases. *Id*. Dr. Price testified he began his evaluation of Fields anticipating that there was

> probably going to be some brain dysfunction, something there to have people evaluating him for this. And I thought there was going to be a mental illness there, probably more than the depression. I thought there was going -- you know, I didn't know what effect it was going to - - it would have had on the crime, but I thought there was going to be evidence of those things.

Id., at 3154. And, he was open to considering that the defense experts might be right. *Id.* The evidence further established Dr. Mitchell was a clinical assistant professor at the University of Oklahoma College of Medicine, practicing at Laureate, a large psychiatric hospital in Tulsa, Oklahoma, and vice president of St. Francis Health Care System. *Id*., Vol. XIII, at pp. 3248-3250. Dr. Mitchell testified he had never previously testified in a criminal case for either side. *Id*., at p. 3352. Dr. Mitchell indicated he gave Fields the benefit of the doubt regarding whether or not he was hearing voices. *Id*., at p. 3284. It was proper for the prosecutor to contrast this evidence with the testimony of the defense expert, Dr. Woods, who testified his primary office was in Oakland, California. *Id*., at Vol. XII, at p. 3000. Additionally, Dr. Woods testified approximately 40% of his practice was devoted to forensics and he had been qualified as an expert approximately 60 times. *Id*., at p. 3001. Dr. Woods indicated he had never been retained by the United States or by a state government in a

[30]Tr. of Jury Trial, Vol. XII, at pp. 2938-3068; 3091-3162; Vol. XIII, at pp. 3171-3356.

criminal prosecution. *Id.*, at p. 3002. After commenting on the differences in the doctors' qualifications, it was not inappropriate for the prosecutor to say that Dr. Mitchell had no "axe to grind" and this court finds the comment was not "improper vouching." Rather, it was simply one way for the prosecutor to direct the jury's attention to evidence from which the jury could determine the expert witnesses' credibility. Similarly, while stating the defense hired "high dollar shrinks," the government immediately admitted they too had paid their shrinks. Thus, it could not have unfairly characterized only the defense experts. While it is true, not all defense experts were from the west coast, this court finds, based upon the evidence at trial, that it was not improper for the government to emphasize that the expert from the west coast had always testified on behalf of the defense.

Fields also argues the government "grossly misrepresented the testimony of Dr. Woods, Dr. Grinage and other witnesses on several factual issues critical to the assessment of Mr. Fields' mental state." Dkt. # 14, at p. 81. After reviewing the closing arguments in light of the evidence presented at trial, this court finds the comments of the government attacked by Fields were supported by the record or appropriate inferences to be made therefrom.

Finally, petitioner argues the government improperly invoked Biblical Authority in support of a sentence of death. Dkt. # 14, at p. 84. The comments, which petitioner complains of were contained in the following passage of the rebuttal argument of the government:

> Thousands of years ago the kind of the world's greatest then existent civilization and most powerful empire held a great feast for thousands of his ruling friends. They ate, they drank from golden and silver goblets that they had stolen from the temple of a subdued and now enslaved nation. They drank wine and they worshiped pagan idols. All of a sudden the fingers of a hand began to write on the palace wall. The king saw the hand and was so frightened, he was so scared, that his clothing literally came loose. He became white. He shook. His knees banged together. He cried out: Bring the

> astrologers, bring the wise men of the nation. Whoever interprets this saying on the wall will become the third most powerful member of my government. He will have great riches. The wise men came in. They studied, they deliberated, they conversed, they conferred and they thought. But they couldn't read much less interpret the writing on the wall. The king's face turned ashen. The queen, though, remembered a forgotten man. She called for him after talking to the king. And the king made the man the same offer. The man, though he turned down all of the riches, all the honor and all of the prestige. The man bravely interpreted the writing on the wall. And the writing on the wall said in three words, your kingdom has come to an end, your kingdom will be divided and given to your neighboring enemies, and then the prophet said the writing said you have been weighed in the balance and found wanting. Sure enough, that night the king was killed. His kingdom was separated among his neighboring enemies.
>
> The Defendant weighed his options on July 10, 2003. Under the Court's instructions and the law given by the court, the Defendant should be, as it were, weighed in the balance and found wanting.

Tr. of Jury Trial, Vol. XIV, at pp. 3466-3467.

Fields argues these remarks were similar to an arguments held improper and highly prejudicial in *Sandoval v. Calderon*, 241 F.3d 765, 775 (9th Cir. 2000).[31] In *Sandoval*, the prosecutor's language was "eloquent, powerful, and unmistakably Biblical in style." *id*., at 778; "[t]he lay juror would readily understand the words as referring to Scripture", *id.*; and the message was clear: those who have opposed the ordinance of God should fear the sword-bearing state, whose task, as an avenging minister of God, is to bring wrath upon those who, like Sandoval, practice evil." *Id*. The *Sandoval* court recognized that "[t]hose learned in the New Testament would recognize the argument as closely following the thirteenth chapter of the Book of Romans." *Id*. Additional comments made by the prosecutor following this

[31]Petitioner also cites to *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) to support his argument that the prosecutor's analogy was improper. While the *Cunningham* court condemned the prosecutor's closing arguments, the case was reversed for other reasons. Further, the closing arguments in *Cunningham* were significantly worse than any comments in this case where statements found offensive included comments that the prosecutor was "'offended' that Cunningham had exercised his Sixth Amendment right to a trial by jury in the guilt-innocence phase of the trial;" "improperly implied that Cunningham had abused our legal system in some way by exercising his Sixth Amendment right to a jury trial;" "questioned whether Cunningham was even entitled to his Sixth amendment rights;" and "made numerous appeals to religious symbols and beliefs, at one point even drawing an analogy to Judas Iscariot." *Id*. (footnote omitted).

portion of his summation told the jury they were "not playing God" but were "doing what God says." *Id*., at 779.

Despite religious arguments being condemned by both state and federal courts, relief is not warranted unless the remarks prejudiced Fields chances of receiving life without the possibility of parole instead of the death penalty. *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998)(recognized argument that Bible condones capital punishment was inappropriate, but did not constitute reversible error). The remarks in this case are clearly distinguishable from those discussed by the court in *Sandoval*. While the analogy given by the prosecutor may have been paraphrased from the "writing on the wall" sermon in the Book of Daniel, the argument was not delivered in biblical style. The prosecutor did not argue that God or any other religious authority justified the death penalty in this case. Rather, the prosecutor used a story devoid of any religious connotation, to emphasize the defendant knew what could happen to him when he decided his course of action on July 10, 2003 and it was now up to the jury to impose the appropriate sentence based upon the court's instructions, which included a balancing (*i.e.*, weighing) of the aggravating and mitigating factors. Moreover, unlike *Sandoval*, where the jury deliberated over three days before advising "it was hopelessly deadlocked," *id*., only to later return to court with a unanimous verdict; this was a case where the defendant pled guilty to murdering two people by randomly stalking them while wearing a ghillie suit; shooting them while hidden in the woods; and then stealing from them. The jury rendered their sentencing verdict in less than four hours. *See*, Criminal Docket sheet minutes for July 22, 2005, indicating the bailiff was sworn at 11:40 a.m. and the jury returned its verdict in open court at 3:38 p.m.

Accordingly, this court finds none of the prosecutorial arguments, either individually or collectively, would have warranted reversal of the sentence on appeal. Therefore, appellate counsel was not ineffective for failing to raise these issues on appeal.

E. Failure to object to instructions and verdict form

Fields claims in his sixth ground for relief that trial counsel were ineffective for failing to object to the jury instructions and the use of a single verdict form which allowed the jury to approve a general verdict of death based on the combined weighing of aggravating factors applicable to two separate murder counts. According to Fields, the jury was allowed to consider all seven of the aggravating factors argued by the Government, including five factors which applied to only one of the two counts of murder thereby allow the jury to improperly aggregate factors in their weighing analysis.

As the Government points out in its motion for summary judgment, however, the thrust of the defense was to characterize the murders as a single behavioral irregularity caused by the manic-flip nature of the psychotropic drug - Effexor. *See*, Dkt. # 110-20, at p. 1; and Dkt. # 110-2, at p. 37. Separating the verdict form would have emphasized the separate protracted nature of the two murders. Moreover, separate verdict forms would have required the jury to focus more on the aggravating facts of the case since they would have been required to consider them twice. Thus, this court finds it was a sound strategic choice by defense counsel to request a unitary verdict form.

Furthermore, since Fields pled guilty to both murders, this is not a case where one count could have been reversed on appeal and the sentence on that count had to be vacated. The jury was given a single basis for imposing a death sentence and they unanimously found that the aggravators outweighed the mitigators. If the jury had been required to make separate findings, it is possible the jury could have returned a sentence of life without possibility of

release on one of the murders and a death sentence on the other. But, as pointed out by the Tenth Circuit,

> [t]he jury was not presented with alternative routes to the death penalty; it was given a single basis for imposing a death sentence the jury had to unanimously find that the aggravators (themselves unanimously found) collectively outweighed the mitigators. Thus, we know what the basis for the jury's verdict was and that it was unanimous.

United States v. Fields, 516 F.3d at 939-40. There can be no question that all twelve jurors, after weighing the aggravating factors that they found to exist, concluded Fields should be put to death for at least one, if not both, of the murders. The suggestion by counsel that the jury might have returned two life sentences had it used separate verdict forms has no basis in fact and is nothing more than unsupported conjecture and speculation. Even assuming counsel was ineffective for failing to request two separate verdict forms, this court finds petitioner has failed to establish prejudice. Accordingly, this claim is denied.

II. Alleged Brady violations

The seventh ground for relief alleges the government withheld exculpatory, material evidence from the defense in violation of due process and trial counsel was ineffective for failing to investigate and present exculpatory evidence. Specifically, petitioner argues certain evidence would have corroborated the defense's argument that Fields had taken an increased dose of Effexor before the offense and emails and other items on his computer would have tended to help establish he was mentally ill. Finally, petitioner argues the government withheld certain witness statements or interviews which would have been helpful to his defense. To the extent the government had no duty to disclose this evidence, petitioner claims his counsel were ineffective for failing to investigate, discover and present this evidence.

The Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). In *Strickler v. Green*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the Supreme Court identified three components or essential elements of a *Brady* prosecutorial misconduct claim as follows: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [government], either willfully or inadvertently; and prejudice must have ensued." *Id*., 527 U.S., at 281-282, 119 S.Ct., at 1948. To show evidence was 'material,' there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 91995). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S., at 434, 115 S.Ct., at 1566.

If a defendant knew or should have known the essential facts permitting him to take advantage of the exculpatory evidence, *Brady* does not compel disclosure because no suppression occurred. *United States v. Erickson*, 561 3d 1150, 1163 (10th Cir. 2009). *See also*, *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998)(*Brady* violation does not occur when defendant "knew or should have known the essential facts permitting him to take advantage of exculpatory information" or where the evidence was available to him from another source).

A. Bottle of effexor pills

In his reply (Dkt. # 20) and in his answer to government's motion for summary judgment, petitioner concedes "[t]he bottle containing the remaining prescription pills was provided to Muskogee County Detention Center by the FBI after it was found in Petitioner's truck." Dkt. # 119, at p. 49. Petitioner goes so far in his reply to state that the "fourteen Effexor pills he consumed while at the Muskogee County Detention Center came from the bottle in his truck." Dkt. # 20, at p. 70. Petitioner has not established that the government took an inventory of the number of pills contained within the pill bottle prior to delivering the same to the jail and then failed to release that information to them. The government had no obligation to provide information to the petitioner that was never collected. Moreover, Fields is the only one who can say exactly how many pills from that the bottle he actually took. As a result, the information regarding the Effexor pills was information the defendant knew or should have known. Accordingly, this court finds no *Brady* violation occurred in relation to this bottle of Effexor pills.

Furthermore, assuming counsel was ineffective for failing to inspect the bottle of pills pre-trial and/or submit the bottle as evidence in trial to establish that Fields had taken the prescribed amount of pills or possibly more, this court finds Petitioner has failed to establish prejudice.

B. Seized computers

Fields summarily claimed in his motion to vacate that the "hard drives . . . . contain exculpatory mental health and other evidence that should have been disclosed to the defense, including information in the almost 16,000 documents and 7,000 emails." Dkt. # 1-3, at p. 62. Additionally, he stated the "exculpatory evidence withheld by the Government was material." *Id*., at p. 63. During the course of these proceedings, Fields has made no effort to supplement these conclusory statements with any facts which would establish what information contained on these computers, if any, was relevant to his criminal case. Therefore, this court finds petitioner has failed to establish any *Brady* violation in regard to the two seized computers.

III. Execution issues

In ground two of his amended motion, Petitioner argues he is not competent to be executed and, therefore, his execution would violate the Eighth Amendment to the United States Constitution and international law. In his ninth ground for relief, Petitioner argues his execution would violate the Eighth Amendment to the United States Constitution. Petitioner submits no facts to support these claims. Moreover, Petitioner admits these issues are not ripe for review.

Article III of the United States Constitution only extends the judicial power of this court to real cases or controversies. U.S. Const. art. III, § 1. "Under Article III of the Constitution, [this court] may hear only cases involving a live case or controversy, and this requirement adheres at all stages of judicial proceedings." *United States v. Quezada-Enriquez*, 567 F.3d 1228, 1231 (10th Cir. 2009) (citations omitted). Courts have routinely held that claims of incompetency are not ripe for review until the execution is imminent. *See*,

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998). Further, even if the claims were justiciable, Petitioner has failed to identify any facts which might give rise to relief under the Eighth Amendment. Accordingly, these claims are denied.

IV. Cumulative Errors

Cumulative-error analysis evaluates only the effect of matters determined to be error, not the cumulative effect of non-errors. *U.S. v. Rivera*, 900 F.2d 1462 (10th Cir. 1990). In considering cumulative error, the Tenth Circuit has indicated a reviewing court should conduct the same inquiry as for individual errors were the defendant's substantial rights affected; with the focus being on "the underlying fairness of the trial." *United States v. Woods*, 207 F.3d 1222, 1237 (10th Cir. 2000). Since this court has found Petitioner has failed to prevail on any of the claims he raises, cumulative-error analysis is not appropriate. Accordingly, this claim is denied.

CONCLUSION

For the reasons stated herein, the Petitioner's Motion to Vacate, Set Aside, or Correct a Sentence, pursuant to 28 U.S.C. § 2255, is hereby denied. Furthermore, this Court finds the Petitioner has failed to establish that he has been deprived of any constitutional rights. 28 U.S. § 2253(c)(2). Therefore, pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, this Court hereby declines to issue a certificate of appealability.

Dated this 15th day of December, 2016.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit

March 9, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD LEON FIELDS, JR.,

Defendant - Appellant.

No. 17-7031
(D.C. No. 6:10-CV-00115-RAW)
(E.D. Okla.)

ORDER

Before **MURPHY**, Circuit Judge.

In accordance with matters discussed and resolved at the case management conference held in this appeal, and upon careful consideration of the parties' supplemental submissions, the court directs as follows:

1. The issues to be raised in the opening brief are:

A. Ground One (C) and (E), whether Mr. Fields's trial counsel ineffectively developed, presented, and litigated mitigating mental health evidence, by failing to investigate and present evidence of his organic brain damage, and by failing to properly cross-examine the government's expert witness, Dr. Price;

B. Ground Four, whether Mr. Fields's trial counsel ineffectively failed to present his social history as a mitigating factor;

C. Ground Five, whether the Government's penalty phase closing arguments violated Mr. Fields's constitutional rights (limited to the prosecutor's story drawn from the Book of Daniel); and

D. Ground Eight, whether the cumulative effect of these errors denied Mr. Fields due process, effective assistance of counsel, and a reliable sentencing hearing.

The Certificate of Appealability granted on these issues includes whether an evidentiary hearing should have been provided, to the extent such a hearing would be necessary to resolve the issue.

2. Appellant's opening brief shall be filed by September 10, 2018 and shall consist of no more than 24,000 words.

3. Appellee's answer brief shall be filed by March 11, 2019 and shall consist of no more than 24,000 words.

4. Appellant's reply brief shall be filed by April 22, 2019 and shall consist of no more than 10,000 words.

5. The merits panel assigned to this appeal will determine the date and time for oral argument. The Clerk's Office will notify counsel through CM/ECF when the matter is calendared for oral argument.

6. A Certificate of Appealability is GRANTED on the issues set forth in Paragraph 1. Any request for leave to grant additional issues in the Certificate of Appealability must be raised by written motion filed not later than ten days after the date of this order. Appellee may file a response to such a request not more than ten days after

the request is filed. The Clerk shall submit motions for modification of the Certificate of Appealability to the merits panel for decision. Unless otherwise ordered by the merits panel, no issue shall be included in the briefs other than those set forth in Paragraph 1 of this order.

Any objection to the contents of the scheduling order must be raised by written motion of not more than five pages filed not later than ten days after its date. Motions for extension of time or to alter the briefing limitations of this order are discouraged and will be considered only in the most crucial circumstances.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

by: Chris Wolpert
Chief Deputy Clerk

APPENDIX C

949 F.3d 1240
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Edward Leon FIELDS, Jr., Defendant - Appellant.

No. 17-7031
|
FILED December 30, 2019

Synopsis

Background: Defendant moved to vacate, set aside, or correct his sentence after he pleaded guilty to first degree murder, using firearm during federal crime of violence causing death of person, and assimilative crime, was sentenced to death, and completed direct appeal process, 516 F.3d 923. The United States District Court for the Eastern District of Oklahoma, Ronald A. White, Chief Judge, 2016 WL 7264579, denied defendant's motion, denied motion to alter or amend the judgment, 2017 WL 1030713, and denied certificate of appealability (COA). Defendant appealed and was granted COA.

Holdings: The Court of Appeals, Briscoe, Circuit Judge, held that:

evidentiary hearing was required for defendant's claim that his trial counsel was ineffective for failing to adequately investigate and present evidence of his organic brain damage;

defendant had not been prejudiced, and therefore evidentiary hearing was not required to resolve disputes of fact on ineffective assistance claim regarding whether trial counsel made strategic decision in penalty phase proceeding to forego presenting social history evidence; and

prosecutor's arguments invoking religious authority during closing argument, though perhaps misguided, ultimately were harmless.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***1243 Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. Nos. 6:10-CV-00115-RAW and 6:03-CR-00073-RAW-1)**

Attorneys and Law Firms

Hunter Labovitz, Assistant Federal Defender (Katherine Ensler, Assistant Federal Defender, with him on the briefs), Capital Habeas Unit, Federal Community Defender Office for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania, appearing for Appellant.

Jeffrey B. Kahan, Deputy Chief, Capital Case Section, United States Department of Justice, Washington, DC (Brian A. Benczkowski, Assistant Attorney General, United States Department of Justice, Washington, DC; Brian J. Kuester, United States Attorney, Christopher J. Wilson, Assistant United States Attorney, and Linda Epperley, Assistant United States Attorney, Office of the United States Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, with him on the brief), appearing for Appellee.

Before BRISCOE, McHUGH, and CARSON, Circuit Judges.

Opinion

BRISCOE, Circuit Judge.

This is a federal death penalty case arising from two murders committed in a national forest in Oklahoma. Petitioner Edward Leon Fields pleaded guilty in federal court to two counts of first degree murder, two counts of using a firearm during a federal crime of violence causing the death of a person, and two counts of assimilative crime. Fields was sentenced, following a penalty phase proceeding before a jury, to death on each of the two murder convictions, and to significant terms of imprisonment on each of the remaining convictions.

After completing the direct appeal process, Fields initiated these proceedings by filing a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The district court denied Fields's petition, and also denied him a certificate of appealability (COA). We subsequently granted Fields a COA with respect to four issues. Now, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand to the district court with directions to conduct an evidentiary hearing on Fields's claim that his trial counsel was ineffective for failing to adequately

investigate and present at trial evidence of his organic brain damage.

I

Fields's criminal conduct

We previously, in addressing Fields's direct appeal, outlined the underlying facts of Fields's crimes:

> Edward Leon Fields killed Charles and Shirley Chick at the Winding Stair ***1244** Campground in the Ouachita National Forest on July 10, 2003. He had seen the couple there days earlier and drove there the evening of July 10 with a homemade ghillie suit (a covering for head and body made to resemble underbrush that Fields referred to as his sniper suit) and a camouflaged and powerfully scoped rifle in his truck. He found the Chicks on a vista some distance from their campsite. He retrieved the rifle, put on the ghillie suit, and hid near their campsite as it grew dark. In time, the Chicks came back to the campsite and sat at a table. Fields waited and watched them for about twenty minutes. When Charles told Shirley he was going to the tent, Fields shot him in the face. As Charles slumped to the table, Shirley got up and began running toward the couple's van. Fields shot at her and a bullet tore through her foot. She reached the passenger door of the van, but was shot again, on the side of her head. Fields caught up and shot her once more, in the back of the head, in the doorway of the van. Shirley died as a result of both head wounds. Fields returned to the table and shot Charles a second time in the head. Charles also died as a result of both of his wounds.
>
> Physical evidence indicated that Fields then left the campsite and only returned hours later, when he broke the driver's window of the van and stole some items. He rummaged through only the driver's area of the van; the rest of the van and the Chicks' tent were untouched. A tip eventually led police to Fields'[s] truck, where they found the rifle, the ghillie suit, and some of the items stolen from the Chicks' van. In the meantime, Fields had been taken in for questioning. He initially denied any connection to the crime, but confessed when confronted with the evidence taken from his truck.

United States v. Fields, 516 F.3d 923, 927 (10th Cir. 2008) (*Fields I*).

The trial proceedings and sentencing

On August 1, 2003, a federal grand jury in the Eastern District of Oklahoma returned a six-count indictment charging Fields with: two counts of first degree murder (Counts 1 and 3), in violation 18 U.S.C. §§ 1111(a) and (b), 7(3) and 13; two counts of use of a firearm in a federal crime of violence causing the death of a person (Counts 2 and 4), in violation of 18 U.S.C. §§ 924(c)(1)(A), (d), (j), 7(3) and 13; one count of assimilative crime – robbery with a firearm (Count 5), in violation of 18 U.S.C. §§ 7(3) and 13; and one count of assimilative crime – burglary of an automobile (count 6), in violation of 18 U.S.C. §§ 7(3) and 13.

On June 30, 2005, Fields entered pleas of guilty as to all six counts alleged in the indictment. Shortly thereafter, the district court began death penalty qualification of potential jurors. On July 13, 2005, the penalty phase proceeding, which was conducted pursuant to the Federal Death Penalty Act of 1994 (FDPA), began. "At the conclusion of the proceeding, the jury determined that Fields was eligible for a death sentence under §§ 3591(a)(2) and 3593(e)(2) by finding, unanimously and beyond a reasonable doubt, (1) that he possessed the requisite homicidal intent, and (2) the presence of one (here, two) statutorily defined aggravating factors ('statutory aggravators'): substantial planning and premeditation to cause death (§ 3592(c)(9)), and multiple intentional killings committed in a single episode (§ 3592(c)(16))." *Fields I*, 516 F.3d at 927.

"The jury then turned to the ad hoc non-statutory aggravators framed and formally noticed by the government under § 3593(a)." *Id.* "The jury found, again unanimously and beyond a reasonable ***1245** doubt, that Fields (1) posed a future danger to the lives and safety of other persons; (2) caused permanent loss to Charles Chick's family, friends, and community; (3) caused permanent loss to Shirley Chick's family, friends, and community; and (4) inflicted mental anguish on Shirley Chick before her death." *Id.* at 927–28.

"Next, the jury considered a host of mitigating factors offered by the defense" and made a number of findings. *Id.* at 928.

> At least one juror found, by the required preponderance of the evidence, that (1) Fields did not have a significant prior criminal history; (2)

> Fields served in and was honorably discharged from the Navy; (3) Fields had worked as a state prison guard; (4) Fields has special talents in cooking, art, and computers; (5) Fields is a loved father; (6) Fields is a loved brother; (7) Fields is a loved son; (8) Fields is a valued friend; (9) Fields'[s] father died months before the offenses; (10) Fields'[s] mother moved away weeks before the offenses; (11) Fields'[s] ex-wife and their children moved away months before the offenses; (12) Fields'[s] ex-wife recently had cancer that may or may not be in remission; (13) Fields'[s] death will impact his children, family, and friends; (14) Fields cooperated with authorities after his arrest; (15) Fields confessed to the crimes; (16) Fields pled guilty to the crimes; and (17) Fields sought treatment for mental illness. All jurors, however, rejected several mitigators, including that (1) Fields'[s] capacity to appreciate the wrongfulness of his conduct and conform his conduct to the law was significantly impaired; (2) Fields committed the offenses under severe mental or emotional disturbance; (3) Fields expressed remorse for the crimes; and (4) Fields will not present a future danger to society by being imprisoned for life without possibility of release.

Id.

"Finally, pursuant to § 3593(e), the jury weighed all of the aggravating and mitigating factors to determine whether the aggravators sufficiently outweighed the mitigators to justify a sentence of death." Id. "The jury concluded, unanimously, that they did." Id. "Thereafter, the district court imposed death sentences on both murder counts." Id.

On November 8, 2005, the district court sentenced Fields to death on Counts 1 and 3, 405 months on Counts 2 and 4, to be served consecutively to one another and consecutively to any other term of imprisonment imposed, 405 months on Count 5, and 84 months on Count 6.

The direct appeal

Fields filed a direct appeal asserting thirteen propositions of error. These included a challenge to "the jurisdictional basis for his federal conviction, which [wa]s a matter not waived by his guilty plea," and "many other objections with respect to the sentencing proceeding." Id. On February 28, 2005, we issued a published opinion "conclud[ing] that federal jurisdiction was properly exercised and that no reversible error occurred in the proceedings." Id.

Fields filed a petition for writ of certiorari with the United States Supreme Court. That petition was denied on April 6, 2009. *Fields v. United States*, 556 U.S. 1167, 129 S.Ct. 1905, 173 L.Ed.2d 1060 (2009).

The § 2255 proceedings

On April 6, 2010, Fields, through appointed counsel, initiated these proceedings by filing a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The motion asserted nine ***1246** general grounds for relief, as well as numerous sub-issues.

In October 2015, following years of extensive discovery, Fields filed an amended brief in support of his § 2255 motion, and the government in turn filed a motion for summary judgment.

On December 15, 2016, the district court issued an opinion and order denying Fields's § 2255 motion in its entirety. The district court entered final judgment on that same date.

Fields filed a motion to alter or amend the judgment. The district court denied that motion.

Fields filed a timely notice of appeal. A judge of this court subsequently issued an order granting Fields a COA on four issues that we shall proceed to address.

II

Standards of review

Section 2255(a) provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

"[A]s a general rule, federal prisoners may not use a motion under 28 U.S.C. § 2255 to relitigate a claim that was previously rejected on direct appeal." *Foster v. Chatman*, —— U.S. ——, 136 S. Ct. 1737, 1758, 195 L.Ed.2d 1 (2016). Instead, relief under § 2255 is generally confined to situations where (a) the "convictions and sentences [were] entered by a court without jurisdiction," (b) the sentence imposed was outside of the statutory limits, (c) a constitutional error occurred, or (d) a non-constitutional error of law or an error of fact occurred that constituted a fundamental defect which inherently resulted in a complete miscarriage of justice, i.e., that rendered the entire proceeding irregular and invalid. *United States v. Addonizio*, 442 U.S. 178, 185–186, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979).

Section 2255(b) states, in pertinent part, that "[u]nless the [2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the [district] court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." The Supreme Court has interpreted this statutory language to mean that a hearing is unnecessary in those instances (a) "where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court," or (b) where the motion alleges circumstances "of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." *Machibroda v. United States*, 368 U.S. 487, 494–95, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962). In contrast, where "[t]he factual allegations contained in the petitioner's motion and affidavit" are "put in issue by the affidavit filed with the Government's response" and "relate[ ] primarily to purported occurrences outside the courtroom and upon which the record could ... cast no real light," a hearing is reqnired under the statute. *Id.*

"On appeal from the denial of a § 2255 motion, ordinarily we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015) (quotations omitted). ***1247** "Where, as here, the district court does not hold an evidentiary hearing, ... our review is strictly de novo." *Id.* (quotations and brackets omitted). That "review proceeds in two steps." *United States v. Herring*, 935 F.3d 1102, 1107 (10th Cir. 2019). "First, we ask whether the defendant's allegations, if proved, would entitle him to relief, an inquiry we conduct de novo." *Id.* (citations omitted). "If so, we then determine whether the denial of the evidentiary hearing constituted an abuse of discretion." *Id.*

Issue One – ineffective assistance of trial counsel for failing to adequately investigate and present evidence of Fields's organic brain damage

In his first issue on appeal, Fields argues that the district court abused its discretion by failing to conduct an evidentiary hearing on his claim that his trial counsel was ineffective for failing to investigate and present evidence of Fields's organic brain damage. To resolve this claim, we begin by outlining the legal standards that are applicable to the claim. We then review Fields's allegations of ineffective assistance and determine whether, if proved, they would entitle him to relief under the applicable legal standards. Finally, we review the evidence presented by both parties that is relevant to the claim and determine whether the district court abused its discretion by rejecting the claim without benefit of an evidentiary hearing. Given the applicable legal standards, we separate this final portion of our analysis into two components: whether trial counsel's performance was deficient and whether Fields was prejudiced by the allegedly deficient performance. As we shall proceed to explain, we ultimately conclude that the district court abused its discretion by failing to conduct an evidentiary hearing on both of these components, and

therefore remand the case to the district court to conduct an evidentiary hearing on Fields's claim.

a) Law applicable to Fields's claim

The seminal Supreme Court case addressing claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland,* the Court held that "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Id.* at 687, 104 S.Ct. 2052. "First," the Court held, "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 by the Sixth Amendment." *Id.* "Second," the Court held, "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." *Id.* "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.*

b) Fields's allegations of ineffective assistance regarding evidence of organic brain damage

Fields alleged in his amended § 2255 motion that, "[a]t the time of the offenses," he "suffered from organic brain damage." ROA, Vol. 11 at 36. He further alleged that his "[t]rial counsel failed to discover the full extent of his brain damage because they arranged for [him] to receive only limited neuropsychological testing and then, after that testing indicated frontal lobe dysfunction, they ignored their neuropsychologist's recommendation to conduct further testing." *Id.* Fields alleged that even the limited neuropsychological ***1248** testing that was actually performed "showed that [his] frontal lobes were impaired" and "[t]hese impairments affected his executive functioning in areas such as judgment and impulse control." *Id.* Fields alleged that "[e]vidence of this damage would have been mitigating in its own right and also would have bolstered the defense that [he] experienced a manic flip at the time of the offenses." *Id.* Fields in turn alleged that "[b]ecause [his] trial counsel did not fully investigate and discover this brain damage, the jury never heard this crucial mitigating mental health evidence." *Id.* at 36-37. Lastly, Fields alleged that, "[h]ad the jury known that [he] suffered from organic brain damage, there is a reasonable likelihood that the jury's verdict would have been different." *Id.* at 50.

Considering these allegations in light of the applicable legal standards outlined in *Strickland*, we have little trouble concluding that the allegations, if ultimately proven by Fields, would entitle him to federal habeas relief from his sentence. Therefore, we proceed to review the evidence that was submitted by the parties in support of and in opposition to these allegations.

c) The performance prong of the Strickland test

We begin by outlining the evidence relevant to the issue of trial counsel's performance. This includes evidence contained in the record of the trial proceedings, as well as extra-record evidence obtained by Fields and presented in support of his § 2255 motion, including a post-conviction declaration from Fields's lead trial attorney.

"*Strickland* requires a reviewing court to 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S.Ct 2574, 91 L.Ed.2d 305 (1986) (quoting *Strickland*, 477 U.S. at 690, 106 S.Ct. 2734). The Supreme Court emphasized in *Strickland* that "[t]here are countless ways to provide effective assistance in any given case." 466 U.S. at 689, 104 S.Ct. 2052. Consequently, Fields "must overcome the strong presumption that [his] counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Sanders*, 372 F.3d 1183, 1185 (10th Cir. 2004). In determining whether Fields has overcome this strong presumption, we must consider "counsel's overall performance, before and at trial," and not focus exclusively on the "particular [alleged] act or omission" giving rise to the claim of ineffective assistance. *Kimmelman*, 477 U.S. at 386, 106 S.Ct. 2574.

Fields's lead trial attorney was Julia O'Connell, who at that time was an assistant federal public defender in the Northern and Eastern Districts of Oklahoma. O'Connell was assisted by three other attorneys: Isaiah Gant, a federal public defender from Nashville, Tennessee, and Michael Able and Barry Derryberry, both of whom worked in O'Connell's office.

In July 2004, O'Connell retained neuropsychologist Dr. Michael Gelbort "to conduct a forensic neuropsychological evaluation of ... Fields." ROA, Vol. 11 at 504. Gelbort "met with ... Fields on August 11, 2004 at the Muskogee County

Jail," "conducted a clinical interview[,] and administered a battery of neuropsychological tests." *Id.* at 505. Based on the interview and testing, Gelbort concluded that "Fields suffer[ed] from brain dysfunction and cognitive impairments ... focused in the frontal lobes." *Id.* "Frontal lobe damage," according to Gelbort, "is well-known to adversely impact executive function, which acts in part as the 'brakes' for a person's actions." *Id.* at 506. The deficits caused by this frontal lobe damage, according to Gelbort, "impact[ed] [Fields's] ***1249** ability to think in a logical, adaptive and goal-directed manner" and "also affect[ed] his social functioning." [1] *Id.* at 507.

Gelbort "relayed [his] preliminary finding of brain dysfunction focused on the frontal lobe to Ms. O'Connell on August 24, 2004." *Id.* Gelbort "provided a preliminary report to ... O'Connell on November 10, 2004," and "provided an updated report to [her] on March 8, 2005." *Id.* Gelbort concluded, in pertinent part, that Fields "display[ed] a pattern often found in individuals with frontal lobe or non-dominant hemisphere neurocognitive dysfunction and brain damage with further evaluation warranted." ROA, Vol. 9 at 227.

In June 2005, O'Connell asked Gelbort if he "could do additional testing" of Fields, and Gelbort responded by asking "what kind of additional testing [she] wanted [him] to conduct." ROA, Vol. 11 at 507. According to Gelbort, "[h]ad [O'Connell] followed up and asked [him] to conduct additional neuropsychological testing, [he] would have told [her] it was unnecessary and would have instead suggested that a qualified expert conduct medical testing such as PET scan or EEG to analyze ... Fields's brain from a physical standpoint." *Id.* Gelbort alleges that O'Connell never got back to him on this issue. *Id.* O'Connell alleges in her post-conviction declaration that she "can offer no tactical or strategic reason for not having the additional testing performed" by Gelbort. *Id.* at 164.

"On June 19, 2005, ... O'Connell requested [Gelbort's] final report, which [he] provided to her." *Id.* "On July 1, 2005, ... O'Connell informed [Gelbort] that she would need [him] to testify at trial and that the defense case could begin as early as July 18, 2005." *Id.* at 508. On July 3, 2005, O'Connell "sent ... Gelbort a contract to cover his anticipated testimony" and "informed him [again] that he would be needed to testify around July 18, 200[5], and also would be needed to consult about the cross-examination of" the government's expert witness, Dr. J. Randall Price. *Id.* at 43.

O'Connell, in her post-conviction declaration, alleged that "[t]he evening before trial testimony was to begin, ... Gelbort notified [her] that he was going to be traveling and would not be available on the dates of trial that had been set." *Id.* at 164. O'Connell alleges that she "made no motion to continue the trial" and "had no strategy or tactic for abandoning the specific factor of organic brain damage." *Id.* Instead, O'Connell alleges that she "was overwhelmed with the trial in progress." [2] *Id.* Gelbort, in his own post-trial declaration, alleges that "[o]n July 11, 2005, [he] sent a reminder e-mail to ... O'Connell, letting her know that [he] could testify on July 18 or July 19, but that [he] was leaving the country on the evening of July 20." *Id.* at 508. Gelbort further alleges that he "ha[s] no recollection or record of any contact with ... O'Connell or any other trial counsel representing ... Fields after July 11, 2005." *Id.*

***1250** The government, for its part, points to various emails sent by O'Connell that contradict her affidavit and suggest she may have intentionally decided to forego any reliance on frontal lobe impairment and instead focus on evidence that Fields suffered from a mood disorder and had a "manic flip" or "manic switch" just shortly prior to the murders. For example, on June 18, 2005, O'Connell sent an email to Dr. George Woods, a neuropsychiatrist who she presented as an expert witness at trial. In that email, O'Connell noted that she "didn't let Gelbort administer any personality testing" to Fields, "although [Gelbort] REALLY wanted to do the MMPI, so badly that he left a test and answer sheet with [her] to have someone administer it to [Fields] if [O'Connell] changed her mind." ROA, Vol. 12 at 160. O'Connell asked Woods in the email if she should allow Fields to undergo any personality testing by the government's expert, to which Woods responded: "The answer is no. Price [(the government's expert)] is dangerous. We need to see what he has put together so far." *Id.* One week later, on June 25, 2005, O'Connell sent an email to another attorney asking for advice about her presentation of Fields's mental health history. In that email, O'Connell stated, in pertinent part: "Most of my mitigation case is mental health evidence. Some evidence of frontal lobe impairment, but largely the compelling stuff is the manic-flip nature of Effexor treatment." *Id.* at 122. This email suggests that O'Connell may have made a strategic decision, or was at least considering making a strategic decision, to focus on the "manic-flip" theory favored by Woods and to abandon any reliance on Gelbort's theory of frontal lobe impairment.

Additional evidence pointed to by the government indicates that O'Connell had reservations about Gelbort and his preliminary report. For example, on March 9, 2005, O'Connell sent an email to other attorneys stating that Woods was her "real mental health expert," that Woods's "report w[as] far more comprehensive (and valuable)," and that she would "rather rely on" Woods than Gelbort. *Id.* at 170. O'Connell also noted in that email: "The potential brain damage [identified by Gelbort] has some value, but it's not a huge part of my mitigation. It just enters the equation, complicating the client's ability to make it through his hypermanic state." *Id.* In another email dated March 24, 2005, O'Connell said, referring to Gelbort: "anyone asks you about him, tell them not to hire him. He sucks. Not because he's not smart, or doesn't know his field, but because he's too difficult to work with. I think it's because he's smarter than all of us, if you know what I mean." *Id.* at 171. And, in an email dated January 27, 2005, O'Connell stated that she was "not a fan [of Gelbort] at th[at] point" and she described Gelbort's written report as follows: "[E]ven though it's a 'draft,' his report is one of the crappiest I have ever seen. No, I take that back. It is THE crappiest one I've ever seen." *Id.* at 178.

The record also indicates that, in February of 2005, approximately five months prior to trial, O'Connell advised the prosecution that the cost of a PET scan was $35,000 and suggested that the prosecution should absorb this cost. *Id.* at 580. The district court in these § 2255 proceedings construed this evidence as indicating that "the cost of a brain imaging scan clearly played a role in [O'Connell's] decision to rely on the[ ] expert testimony and forego conducting a brain scan." *Id.*

During the penalty phase proceeding, each side presented expert witnesses who had evaluated and diagnosed Fields. Dr. Brad Grinage, a psychiatrist retained and presented by the defense, opined that Fields suffered from bipolar disorder with psychotic features, and that this disorder ***1251** caused significant impairment in his ability to behave in a particular way. Similarly, Woods opined that Fields suffered from one of two types of mood disorders—schizoaffective disorder or bipolar disorder with psychotic features—either of which resulted in him exhibiting poor judgment. Woods also opined that, at the time of the murders, Fields was unable to conform his conduct to the law because of his mood disorder. Both Grinage and Woods opined that Effexor, an antidepressant that had been prescribed to Fields by his personal physician (a non-psychiatrist) shortly prior to the murders, could have caused him to "flip" or "switch" from a depressed state to a manic state, which in turn could have further impaired his judgment.

The government presented testimony from Price, who is a clinical and forensic neuropsychologist. Price testified that he conducted a neuropsychological evaluation on Fields, including the administration of an adult IQ test. Price testified that Fields scored average to high average on the IQ test, including scores of 98th percentile in expressive vocabulary, 84th percentile in comprehension, and 9th percentile in arithmetic. Price diagnosed Fields with a dysthymic disorder (i.e., depression that is chronic but relatively mild) and a personality disorder not otherwise specified with anti-social and psychopathic narcissistic and dependent traits and features. Price testified that he disagreed with the defense experts who diagnosed Fields as suffering from a mood disorder. Price further testified that, in his opinion, Fields had the ability, at the time of the murders, to conform his actions to the requirements of the law, and that he acted in a very controlled and selfish manner, and with a lack of empathy and remorse. On cross-examination by defense counsel, Price testified that Fields exhibited some minor impairment on some of the tests that Price administered. Price testified, however, that he did not see much neuropsychological impairment of the type that had been identified by Gelbort. During his direct examination, Price testified that there is no treatment for a personality disorder, and that a structured environment is probably the best way to prevent such a person from making poor choices and manipulating people.

At the conclusion of the evidence, the jury found, in pertinent part, that Fields intentionally killed both of the Chicks, that he committed both murders after substantial planning and premeditation, and that he posed a future danger to the lives and safety of other persons, as evidenced by his lack of remorse. The jury declined to find that Fields's capacity to appreciate the wrongfulness of his actions was impaired, or that Fields committed the offenses under severe mental or emotional disturbance.

Subsequently, during preparation of Fields's § 2255 motion, Fields's post-conviction counsel contacted Gelbort and provided him with additional records and information, including Price's preliminary report, Price's raw data, and a September 15, 2015 declaration from Dr. Alan Kaufman. *Id.*, Vol. 11 at 508–510. Kaufman, a clinical professor of psychology at the Child Study Center of the Yale University School of Medicine, "concluded to a reasonable degree of scientific and professional certainty that Dr. Price did not

conduct a competent evaluation of ... Fields's intelligence because of: (1) administration errors, (2) scoring errors, (3) interpretation errors, and (4) judgment errors."[3] *Id.* at 525. Gelbort, after reviewing this information, *1252 similarly concluded that Price "made significant errors in his testing" of Fields, including "scoring errors on the WAIS-III [(the Wechsler Adult Intelligence Scale)] that ma[de] ... Fields seem less impaired than he actually is." *Id.* at 510. Gelbort "agree[d] with" Kaufman "that Dr. Price's neglect in administration of the WAIS-III raise[d] significant concerns about the reliability of his expert opinion." *Id.* at 510–511. For example, Gelbort concluded that "Price's ... conclusions ... understate[d] the impact that the impairments had on ... Fields's behavior." *Id.* at 510. Gelbort also, in his declaration, noted that "[f]rontal lobe damage" of the type exhibited by Fields "is well-known to adversely impact executive function, which acts in part as the 'brakes' for a person's actions," and thus "affect[s] his ability to adequately judge and comprehend a given situation, to reflect and reason before making decisions, and to fully recognize the consequences of those decisions." *Id.* at 506.

Fields's post-conviction team also obtained declarations from three additional experts: Grinage and Woods (the two experts who testified for the defense at trial) and Dr. Daniel Martell. Grinage alleged in his declaration that, had he been presented with the information from Gelbort and Martell regarding "Fields'[s] organic brain dysfunction and ... been asked to consider [Fields's] 'cognition,' " he "would have testified that [Fields's] organic brain damage, focused in his frontal lobes, [wa]s a mitigating factor." ROA, Vol. 11 at 181. Woods alleged in his declaration that, "[r]egardless of whether one accepts [his] opinion about a manic switch, the presence of frontal lobe impairments is highly significant" because "[p]eople with frontal lobe impairments as severe as those present in ... Fields experience disinhibition—that is, an impaired ability to control one's impulses." *Id.* at 172. "They also," Woods alleged, "experience impairments in social judgment." *Id.* "By itself," Woods alleged, "this type of impairment is a highly mitigating factor." *Id.* Lastly, Martell alleged in his declaration "that any reasonable neuropsychologist looking at Dr. Price's neuropsychological data would have identified the presence of significant impairments [in] ... Fields'[s] brain functioning, primarily involving frontal lobe functioning." *Id.* at 282. Martell further alleged that Price, "[i]n his reports and during his testimony[,] ... (a) minimized ... Fields'[s] actual neurobehavioral impairments, and (b) over-reported his actual level of functioning." *Id.* Martell alleged that "[i]t [wa]s apparent from the current testing that ... Fields ha[d] experienced a catastrophic loss of brain function over the past five years" and that "the most likely disease process would appear to involve the cerebral vasculature, including the possibility of atherosclerosis and/or ischemic brain disease (transient ischemic attacks and/or stroke) leading to a multi-infarct dementia." *Id.* at 286. Martell concluded that "an MRI study of [Fields's] brain [wa]s strongly indicated to aid in proper differential neurodiagnosis and treatment." *Id.*

The government, in its response to Fields's § 2255 motion, submitted a post-conviction report prepared by neuropsychologist James Seward. Seward stated in his report that "an MRI of [Fields's] brain [was] conducted in 2011" and that the results were "normal." ROA, Vol. 12 at 259. Seward further stated that "the available testing" of Fields "exhibit[ed] no findings reflective of frontal lobe or other meaningful brain damage." *Id.*

Seward concluded, after examining "both ... Gelbort's 2004 evaluation and ... Price's 2005 evaluation," "that the majority of the scores were within normal limits, with no pattern emerging that would be indicative of 'significant impairments.' *1253 " *Id.* at 254. Seward noted that "Fields did display generally improved scores when seen by ... Price versus ... Gelbort," and he opined that "[t]his may have been a manifestation of a practice effect, a variable level of effort, changes in his affective status, or other situational or transitory factors." *Id.* Seward stated that "Fields gave indications of inadequate effort in the course of [Seward's] evaluation of him." *Id.* "Even given [Fields's] lack of full effort," Seward opined, "Fields's scores on measures of executive functioning ranged from borderline abnormal to average, with no clearly impaired scores." *Id.* at 255. Seward also noted that the "pertinent collateral history," including standardized testing scores from school and the Navy, was "not consistent with the presence of 'significant impairments [in] ... Fields's brain functioning.' " *Id.* For example, Seward noted, "in school [Fields's] scores on standardized testing, including the GED, clustered in the average range." *Id.* Seward also noted that the "MRI of the brain conducted in 2011 was normal," and that "the available testing exhibit[ed] no findings reflective of frontal lobe or other meaningful brain damage." *Id.* at 259. These MRI results, Seward opined, undercut Martell's suggestion that Fields had suffered a catastrophic decline in functioning. *Id.* at 260. Seward noted, relatedly, that "[i]f ... Fields indeed ha[d] a major neurodegenerative condition causing a 'catastrophic decline' in his mental functioning, this should be readily apparent in

all aspects of his life that are in any way dependent upon intact brain functioning," but that "[n]o such monumental decline ha[d] been noted in ... Fields's functioning, either through formal evaluations or in his day-to-day life." *Id.* at 260–61. Seward concluded that "[t]he most evidence-based DSM 5 diagnosis for ... Fields [wa]s Other Specified Personality Disorder." *Id.* at 265 (footnote and emphasis omitted). Seward also concluded, based upon his review of the records, that the "evidence d[id] not allow one to conclude with psychological certainty whether or not ... Fields ever heard voices." *Id.* at 268. Indeed, Seward noted, "FBOP mental health staff, who monitored ... Fields's psychiatric status for the past eight years, have expressed doubts over the veracity of his reported auditory hallucinations and other atypical symptoms (i.e., visual hallucinations and amnestic periods)." *Id.* "What [wa]s apparent," Seward concluded, "[wa]s that any such voices did not rise to the level of a disorder; they were not manifested in his day-to-day functioning, and people who had close contact with him were unaware of any such condition." *Id.* Ultimately, Seward concluded that the assertions of the defense experts, including Martell, were "entirely fictional" in nature. *Id.* at 279.

d) Our conclusion regarding the performance prong

The district court did not reach a conclusion regarding the performance prong of the *Strickland* test; instead, it rested its decision exclusively on the prejudice prong of the *Strickland* test. For our part, we conclude, given the conflicting evidence discussed above, that "the files and records of the case" do not "conclusively show that" O'Connell's performance fell "within the wide range of reasonable professional assistance." 28 U.S.C. § 2255(b); *Sanders*, 372 F.3d at 1185. In other words, we conclude that the evidence presented by Fields, including most notably O'Connell's declaration, relates "to purported occurrences outside the courtroom," and creates a genuine issue of material fact regarding whether O'Connell made a strategic decision to forego the use of Gelbort's testimony or otherwise rely on evidence of Fields's possible brain damage. *Machibroda*, 368 U.S. at 494, 82 S.Ct. 510.

***1254** *e) The prejudice prong of the Strickland test*

Before deciding whether a remand for an evidentiary hearing is necessary, however, we must first consider the prejudice prong of the *Strickland* test. More specifically, we must determine whether the district court erred by resolving the issue of prejudice on the merits, without benefit of an evidentiary hearing. That determination hinges on whether Fields's "motion and the files and records of the case conclusively show that" Fields was not prejudiced by his trial counsel's failure to fully investigate and present testimony from Gelbort. 28 U.S.C. § 2255(b).

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92, 104 S.Ct. 2052. "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692, 104 S.Ct. 2052.

"Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

The district court, in its opinion and order denying Fields's § 2255 motion, noted that O'Connell "presented a strong case in mitigation premised on several theories of mental illness, including the testimony of" Grinage and Woods. *Id.* at 577. The district court further noted that, "during closing argument, [O'Connell] addressed all aspects of Fields['s] mental health discussing his depression and how it affected everything in his life, his inability to control what was going through his mind continually because of 'rushing thoughts,' and counsel implored the jury to show empathy for Fields since he had already accepted responsibility for his actions." *Id.* at 578. O'Connell also argued, the district court noted, that Fields's "mental disease impaired his abilities" and "emphasized the bipolar flip theory" that was posited by Grinage, "pointing out to the jury that the Effexor" that was prescribed by Fields's local physician shortly before the murders "built up like it was supposed to and then it hit a tipping point so bad that a girl friend [sic] of Fields called the prescribing doctor worried about either suicidal or homicidal behavior." *Id.*

The district court concluded that, "regardless of the reasons [defense] counsel did not followup [sic] with an MRI, in light

of the results of the 2011 MRI, ... [Fields] ... failed to establish prejudice based upon [O'Connell's] failure to investigate and/or present evidence of his alleged organic brain damage." *Id.* at 580. The district court explained:

> To support his argument that counsel was ineffective for failing to investigate and present evidence of his organic brain damage, [Fields] submitted a neuropsychological examination report dated April 1, 2010, by Daniel A. Martell, Ph.D., Dkt. # 106–10. Dr. Martell claims the report of Dr. Price unequivocally demonstrates organic impairment in the frontal lobes. In that report, Dr. Martell indicates "any reasonable neuropsychologist looking at Dr. Price's neuropsychological data would have identified the presence of significant impairments (sic) ***1255** Mr. Fields'[s] brain functioning, primarily involving frontal lobe functioning", *id.*, at p. 13, and "Mr. Fields has experienced a catastrophic loss of brain function over the past five years." *Id.*, at p. 17. Dr. Martell goes on to state that "[t]his apparent degenerative brain disease process also raises important questions about his behavior at the time of the instant offense, as there is evidence in the test data from the time of trial that there was something abnormal and deteriorating about his neurocognitve (sic) functioning." *Id.* In addition, [Fields] submits an affidavit from Dr. Grinage, which state[s] "[it] is highly likely that [Fields] has frontal lobe impairment that would affect his bipolar behavior and treatment." Dkt. # 106–4. To rebut Field's [sic] argument that he has significant brain impairments which trial counsel failed to follow up on, the government had the right to rely on current psychological testing, including an MRI of his brain. To hold otherwise, would allow post-conviction counsel to make arguments which could never have been proven at trial even if trial counsel had taken the steps which post-conviction counsel argue they should have taken. While [Fields] cites to[ ] *United States v. Gonzalez*, 98 Fed. Appx. 825, 832 (10th Cir. 2004), an unpublished Tenth Circuit opinion, for the proposition that this court cannot resolve differences among the parties [sic] mental health experts without an evidentiary hearing, [Fields] submits nothing to contradict or rebut the evidence submitted by the government which shows an MRI conducted in 2011 was normal.

Id. at 581–82.

In short, the district court concluded that Fields could not establish prejudice in light of the fact that the 2011 MRI of Fields's brain, which was submitted as evidence by the government, was deemed "normal." *Id.* at 574, 582. Although the district court did not expressly say so, it apparently found, or perhaps simply assumed, that a "normal" MRI of the brain precludes any finding of organic brain damage, and that, consequently, Gelbort was wrong in his findings.

Fields argues in his appeal that "[n]othing in the record or scientific literature supports the district court's assumption that a purportedly normal brain scan contradicts, let alone conclusively negates, the neuropsychological testing showing [his] brain impairment." Aplt. Br. at 43. Indeed, Fields asserts that this assumption "is scientifically wrong." *Id.* at 45. Fields notes, for example, that Seward, the post-conviction expert relied on by the government, "did not contend that a 'normal' MRI precludes ... Fields from having brain damage." *Id.* "Presumably," Fields argues, "if the MRI in 2011 was dispositive on the impairment issue, ... Seward would not have needed to 'administer[ ] a variety of psychological and neuropsychological tests to ... Fields'[s] over the course of three days in 2013." *Id.* Nor, Fields argues, would Seward "have spent six pages in his report discussing how that psychological testing as well as collateral records and anecdotes—all apart from the MRI—led him to his opinion." *Id.* "Instead," Fields notes, "Seward briefly mentioned the purportedly normal MRI result once, only to state it was 'not surprising[ ]' given his opinion." *Id.* at 45–46 (quoting ROA, Vol. 12 at 259). Fields also asserts, citing to two different authorities, that "[b]rain imaging such as an MRI is *not* determinative of brain damage, particularly where, as here, neuropsychological testing shows otherwise." *Id.* at 46 (emphasis in original). In sum, Fields asserts that, contrary to the conclusion reached by the district court, "[a]n individual can have a normal MRI and still have brain damage based on neuropsychological testing and evaluation." *Id.* Fields also argues, relatedly, that "for capital ***1256** mitigation purposes, neuropsychological testing is distinct from, and more probative than, neuroimaging." *Id.* at 47. Lastly, Fields argues that "[n]oticeably absent from any of the Government's district court pleadings was any argument that [his] MRI report precludes a finding of brain damage." *Id.* at 49.

Based upon the record before us, we agree with Fields. At a minimum, we conclude there is a genuine issue of material fact regarding whether an individual, such as Fields, can have organic brain damage that is revealed by neuropsychological testing, but that does not otherwise appear on an MRI of the brain. Therefore, we in turn conclude that the district court erred in basing its conclusion of no prejudice solely on the 2011 MRI results.

That of course still leaves a key question that was not addressed by the district court: assuming that the results of the 2011 MRI do not effectively undermine Fields's organic brain damage theory, is there a reasonable probability that, had O'Connell presented that organic brain damage evidence at trial, the result of the proceeding would have been different? On that point, Fields asserts that O'Connell "omitted evidence that is among the most persuasive types of mitigation evidence, particularly in comparison to the case the jury heard." Aplt. Br. at 20. In support, Fields argues that "available experts could have testified about [his] brain damage and how it interfered with his judgment, reasoning, and behavior." *Id.* Such expert testimony, Fields argues, "would have humanized [him] and explained why he 'c[a]me to participate in a violent, murderous event.' " *Id.* at 21 (quoting *Anderson v. Sirmons*, 476 F.3d 1131, 1147 (10th Cir. 2007)). In addition, Fields argues that O'Connell could have used the evidence of his brain damage "to enhance [the defense's] bipolar-based mitigation presentation in support of the two state-of-mind mitigating circumstances, as well as the 'other factors' mitigator." *Id.* at 22. Fields also argues that presenting evidence of his organic brain damage "would have strengthened another mitigating factor that the jury unanimously rejected: [that he] 'w[ould] not present a future danger to society by being imprisoned for life without possibility of release.' " *Id.* at 23.

It is true, as a general matter, that we have noted "that evidence of mental impairments 'is exactly the sort of evidence that garners the most sympathy from jurors,' " *United States v. Barrett*, 797 F.3d 1207 (10th Cir. 2015) (quoting *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004)), and that "[o]rganic brain damage is so compelling ... because 'the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action.' " *Id.* (quoting *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012)). But we must examine the evidence in the record on appeal to determine whether, in this specific case, Fields was prejudiced by O'Connell's failure to present Gelbort's testimony.

We begin with the written report that Gelbort prepared and submitted to O'Connell prior to trial. That report stated, in pertinent part:

> Measures of higher cognitive abilities found mildly slowed to mildly impaired processing speed for verbally mediated tasks. Impulsivity of mild proportions was also found. Higher level reasoning tasks demonstrated mild impairment (performance in the bottom three percent of the population) with better performance noted on some of the more difficult tasks and worse performance on some that were easier. Again, deficits or impairments in functional attention and concentration abilities appear to be the ***1257** most likely cause of these suppressions in performance.
>
> Overall, Mr. Fields is an individual who demonstrated overall measures of intellectual functioning toward the lower portion of the average range with specific tests of freedom from distractibility and processing speed being lower. Tests of learning and memory found a similar pattern with new learning/memory adversely affected as a result. The patient has a history of emotional upset, turmoil, and treatment which has been less than optimally effective. He displays a pattern often found in individuals with frontal lobe or non-dominant hemisphere neurocognitive dysfunction and brain damage with further evaluation warranted. The nature and pattern of his deficits is long-standing and affects his every-day life, thought processes, and behavior.

ROA, Vol. 9 at 227. Respondent asserted below, and we tend to agree, that Gelbort's "report of 'mild' symptoms did not suggest this was a potentially rich vein of untapped mitigation evidence," *Id.* at 683. And, indeed, the email evidence that was submitted by respondent suggests that both O'Connell and Woods viewed Gelbort's report in a similar manner.

Gelbort's post-trial declaration, however, is more compelling and, we assume, reflects how Gelbort would have testified had he actually been adequately prepared by O'Connell and presented as a witness at the penalty phase proceeding. To begin with, Gelbort notes in his declaration that Fields's organic brain damage "affect[s] [Fields's] ability to adequately judge and comprehend a situation, to reflect and reason before making decisions, and to fully recognize the consequences of those decisions." ROA, Vol. 11 at 506. Gelbort further notes that "[s]tressful situations exacerbate ... Fields's inability to control his actions and solve problems in a reasonable manner." *Id.* Gelbort's declaration also contains a critique of Price's testing and conclusions. "For instance," Gelbort states in his declaration, Price "repeatedly made scoring errors on the WAIS-III that make ... Fields seem less impaired then he actually is," and that "[t]hese errors call into question the validity of ... Price's testing results and the competency of his trial testimony." *Id.* at 510. In our view, discrediting Price would have been critical

to the defense, since Price, in contrast to the defense experts who testified at trial, opined that Fields suffered from an untreatable personality disorder with anti-social and psychopathic narcissistic and dependent traits and features.

We turn next to the post-conviction psychological evaluation report prepared by Martell. In that report, Martell stated that he performed a neuropsychological examination of Fields in early 2010 and, as part of that examination, administered "[a] comprehensive neuropsychological test battery." *Id.* at 286. Martell stated that "Fields'[s] test performance overall was in the range of moderate-to-severe brain damage, and [that] this represent[ed] a catastrophic decline in functioning over the five years since he was seen by Dr. Price." *Id.* Martell further stated that "[i]mpairment was seen in almost all areas of function," the only exceptions being "preserved or spared abilities in visual organization ... and pure motor speed with the non-dominant hand." *Id.* According to Martell, "Fields'[s] executive control functioning was the most profoundly impaired area tested," and "[h]is scores on diverse measures of discreet frontal lobe functions were all moderately to severely impaired, including ... impulse control" and "disinhibition." *Id.* at 287.

As part of his report, Martell also commented on Price's findings and testimony. To begin with, Martell concluded that "Price: (1) minimized Mr. Fields'[s] actual ***1258** neurobehavioral impairments, and (b) over-reported his actual level of functioning." *Id.* at 288. Martell in turn concluded that "[t]he jury in this case was never provided with a countervailing opinion that there was a *pattern of impairments* in his test performances suggestive of brain damage," nor was the jury "told about impairments found in ... Gelbort's data that got worse by the time of ... Price's testing (e.g., WAIS-III Arithmetic, Trails B)." *Id.* at 288–89 (emphasis in original). "Regarding the issue of ... Price over-estimating ... Fields'[s] level of functioning," Martell opined that this was the result of " 'practice effects' in neuropsychological testing, whereby individuals who are tested twice in a relatively short period of time will show artificially inflated scores the second time, due to the effects of prior experience and practice with the test stimuli." *Id.* at 289. Martell also stated that "Price repeatedly offered the opinion that Mr. Fields was malingering auditory hallucinations, which the objective record strongly contradicts," and he opined that Price's "testimony could have been challenged with rebuttal using ... Price's own prior inconsistent statements that he found ... Fields to be cooperative and effortful, that his test results were valid and reliable and that he impressed ... Price as, [sic] 'trying hard.' " *Id.* (citations omitted). Martell opined that Price also testified outside his expertise. Specifically, Martell opined that Price "went beyond where [psychologists] generally are qualified to go in testifying about the specific effects and side effects of various psychotropic medications." *Id.* at 290. In his summary, Martell stated: "It is apparent from the current testing that ... Fields has experienced a catastrophic loss of brain function over the past five years," and that Fields's "pattern of impairments" was "strikingly consistent with the pattern of brain impairments detected in [his] mother, Mary Margaret Fields, in September of 2001." *Id.* at 292. This pattern, Martell opined, raised "the possibility of an inherited vulnerability to brain dysfunction and the need for a more comprehensive neurodiagnostic workup, including MRI and neurological examination." *Id.* Martell further opined that, "[i]n light of his family history and the results of the present examination, the most likely disease process would appear to involve the cerebral vascalature [sic], including the possibility of atherosclerosis and/or ischemic brain disease (transient ischemic attacks and/or stroke) leading to a multi-infarct dementia." *Id.* Martell conceded, however, that Fields's "overall level of cognitive functioning was significantly higher at th[e] time" he was evaluated by "Gelbort and Price." *Id.* at 293.

The problem with Martell's report and his opinions, however, is that Martell was only a post-conviction witness, and, as we have noted, Fields does not claim that O'Connell should have investigated and presented testimony from Martell. Rather, Fields argues only that O'Connell should have presented at trial expert testimony from Gelbort, and in turn asked Woods and Grinage to testify "about the connection between ... Fields's brain damage and his criminal behavior." Aplt. Br. at 14. Thus, Martell's declaration is, at best, of limited value in assessing the prejudice prong of *Strickland*.

Lastly, we turn to the post-conviction declarations prepared by Woods and Grinage, the two defense experts who testified at trial. Woods stated in his declaration that "[p]eople with frontal lobe impairments as severe as those present in Mr. Fields experience disinhibition – that is, an impaired ability to control one's impulses," as well as "impairments in social judgment." ROA, Vol. 11 at 183. Woods further stated that "[if] this impairment [wa]s added to [his] clinical opinion that Mr. Fields ***1259** underwent a manic switch, then we see a situation where Mr. Fields'[s] already impaired ability to control himself made him even less able to negotiate the flight into mania that I believe occurred." Id. Grinage,

in his declaration, noted that, "[a]t the time of trial, [he] was provided only with the raw data from ... Gelbort's neuropsychological testing," and that, because he is "not expert in the interpretation of psychological test data," he "rel[ied] on reports written by psychologists to provide such interpretation." *Id.* at 190–91. Grinage in turn stated that it was his understanding, based on the report of Martell, that "Fields was moderately impaired at the time of trial and now is severely impaired with some kind of degenerative or progressive neurological disease." *Id.* at 191 Grinage stated that, "[i]f [he] had been presented with th[at] information ... and ... been asked to consider [Fields's] 'cognition,' " he "would have testified that [Fields's] organic brain damage, focused in his frontal lobes, [wa]s a mitigating factor." *Id.*

The problem with the statements from Woods and Grinage is that the opinions contained therein are based on a combination of both Gelbort's pretrial evaluation of Fields and Martell's post-conviction evaluation of Field. In other words, the declarations fail to distinguish between Woods's and Grinage's reliance on information provided by Gelbort versus information provided by Martell. As a result, for example, it is unclear if Woods believes that the alleged impairments found by Gelbort prior to trial were sufficient, standing alone, to contribute to Woods's "manic switch" theory.

Ultimately, considering all of the evidence submitted by Fields and discounting portions of it, we are still left with some evidence that is relevant to the issue of prejudice and supportive of Fields's allegations. Importantly, that evidence "relate[s] primarily to purported occurrences outside the courtroom and upon which the record could ... cast no real light." *Machibroda*, 368 U.S. at 494–95, 82 S.Ct. 510. Further, that evidence has been "put in issue by the" evidence submitted by respondent. *Id.* at 494, 82 S.Ct. 510. Consequently, we are unable to say that "the files and records of the case conclusively show that" Fields was not prejudiced by his trial counsel's failure to present Gelbort as a witness at trial. 28 U.S.C. § 2255(b). This is, of course, not to say that we are of the view that Fields will be able to establish prejudice. Rather, we conclude simply that the circumstances outlined by Congress in § 2255(b) under which a motion may permissibly be decided without benefit of an evidentiary hearing are not present in this case with respect to the issue of prejudice.

f) Conclusion

For the reasons outlined above, we must remand the case to the district court to conduct an evidentiary hearing on Fields's claim that his trial counsel was ineffective for failing to adequately investigate and present at trial the testimony of Gelbort. As discussed, we conclude that, as to this claim, genuine issues of material fact exist regarding both the performance and prejudice prongs of the *Strickland* test. It will therefore be the district court's task on remand to "make findings of fact and conclusions of law with respect" to those two prongs. *Machibroda*, 368 U.S. at 494, 82 S.Ct. 510 (quotations omitted).

Issue Two – Ineffective assistance of trial counsel for failing to present Fields's social history as a mitigating factor

In his second issue on appeal, Fields challenges the district court's rejection of his claim that his trial counsel was ineffective for failing, during the penalty phase proceeding, to present his social history as a mitigating factor. According to ***1260** Fields, the district court's "holdings under both prongs of *Strickland* were erroneous," and it also abused its discretion by failing to conduct an evidentiary hearing on the claim. Aplt. Br. at 50.

Because this claim is subject to the same general legal standards as the previous claim, we begin our analysis by reviewing Fields's allegations of ineffective assistance and determining whether, if proved, they would entitle him to relief under the applicable legal standards. We then review the evidence submitted by the parties that is relevant to the claim. Lastly, we determine whether the district court erred in rejecting the claim on the merits, without first conducting an evidentiary hearing. As discussed below, we conclude that the district court properly rejected this claim on the merits and did not abuse its discretion by failing to conduct an evidentiary hearing.

a) Fields's allegations of ineffective assistance

In his amended § 2255 motion, Fields alleged that "[t]he defense's presentation of [his] social history evidence was disjointed, incomplete and unpersuasive." ROA, Vol. 11 at 103. Fields alleged that "[a] handful of witnesses told bits and pieces of his life history, and none of this testimony even remotely suggested that he was raised in anything but a typical family." *Id.* "Yet," Fields alleged, "the defense's mitigation specialist had collected compelling evidence that, contrary to the impression created with the jury, [he] was raised in

a highly dysfunctional family, and that dysfunction had a profound impact on his life, his mental health and his adult functioning." *Id.* at 103–04. Fields argued that "[t]rial counsel should have presented this evidence through a mitigation specialist or mental health expert, who would have testified about information gleaned from many sources, including relatives, friends and institutional records." *Id.* at 104. "Such a witness," Fields argued, "could then have explained that information to the jury as part of a coherent, compelling mitigation theme" *Id.* Fields argued that "[t]rial counsel also should have argued to the jury that ... Fields's social history mitigated the offenses." *Id.* Lastly, Fields alleged that he "was prejudiced by trial counsel's deficient performance" because, "[h]ad the jury heard evidence of [his] dysfunctional family background, there is a reasonable likelihood that the jury would have returned a verdict of life rather than death." *Id.* at 114.

We conclude, after considering these allegations in light of the standards for ineffective assistance of counsel outlined in *Strickland*, that Fields would be entitled to federal habeas relief from his sentence if he were able to prove the allegations. We therefore proceed to review Fields's detailed allegations of family dysfunction and the evidence in the record on appeal that is relevant to Fields's allegations.

b) The social history evidence cited by Fields

According to Fields, both of his parents "grew up under challenging conditions." Aplt. Br. at 52. Fields alleges that his paternal grandfather died prematurely "in a truck fire," and "his paternal grandmother developed a brain tumor that left her blind and [ultimately] kill[ed] her." *Id.* As a result of his paternal grandmother's tumor "and her then-husband's sexual abuse of her daughters," Fields's father, Leon, "and his siblings were separated from [each other] and put in foster care or put up for adoption during their formative years." *Id.* Fields alleges that his maternal grandparents "had an unhappy marriage, which often included arguments and verbal fights." *Id.* (quotations omitted). His maternal grandmother, Fields alleges, "received electroshock treatment for her mental health problems, and one of her sisters ***1261** was 'disturbed' while another had unspecified mental problems." *Id.* Fields alleges that his mother Margaret, an only child, "suffered from depression her entire life, was diagnosed with bipolar disorder, and, as an adult, placed her own emotional needs above those of her children." *Id.* at 52–53.

Fields allegedly had a "near-death experience at the time of his birth." ROA, Vol. 11 at 187. According to his mother, "he had a 'hollow membrane disorder' " that made it difficult for him to breathe at birth. *Id.* Fields "almost died and ultimately was sent to another specialized hospital where he spent about one week." *Id.* These facts, Fields alleges, "raise[ ] the possibility of organic brain damage at the time of birth, secondary to oxygen deprivation." *Id.*

During Fields's childhood, "[h]is family moved often because of his father's jobs." *Id.* at 186. This included four moves before Fields reached high school. Id. at 426–28. "His father was largely absent from ... Fields's day-to-day life due to the long work hours his job required." *Id.* at 186. "His mother was emotionally turbulent and self-centered." *Id.* "She jealously guarded her relationship with her husband to the extent that she literally kept the father from the children so as to maximize her private time with him." *Id.* "As a result, the relationship between the parents and ... Fields and his sister (Cherie), was distant, cold and unemotional." *Id.*

Both Fields and Cherie related "bizarre discipline inflicted by either parent, but always at the command or insistence of the mother." *Id.* at 186–87. This included their father, at their mother's direction, beating them on the bare bottoms with a belt "until [they would] cry and scream." *Id.* at 442. Further, according to Cherie, their parents never "showed [them] any physical affection." *Id.* at 441. More specifically, their parents never hugged them "and they would never say that they loved [them]." *Id.* When Cherie was in the ninth grade, their mother "had a hysterectomy and" Cherie "remember[s] [her father] saying that he was thinking about putting [Fields] and [Cherie] on a train and getting rid of [them]." *Id.* Cherie also alleges that their "mother took pleasure in making sure [that Fields] and [Cherie] stayed at each other's throats" and was also "very good at dividing [them] and separating [them] from emotional comfort or security." *Id.*

"Fields suffered from life-long depression." *Id.* at 187. "He was predominantly described by those who knew him as 'unhappy,' 'moody' and 'strange.' " *Id.* "He did not maintain interest in any particular activities and changed jobs frequently without apparent reasons." *Id.* "He seemed to move from one activity or relationship to another, without any obvious motivation for doing so." *Id.* "Medical records document that he was variously diagnosed as 'depressed,' 'anxious' and as having mood problems." *Id.* "He reported sleep disturbances, weight loss and lack of energy as a result

of his mood problems." *Id.* at 187–88. "At times, he reported hearing voices ...." *Id.* at 188.

Fields has also "rarely been able to express emotions or been encouraged to express emotions during his life." *Id.* As a result, he "has been almost universally perceived as an emotionally flat or cold individual." *Id.*

As a teenager, Fields allegedly "exhibited behavioral problems." *Id.* The only specific event that is mentioned in the record, however, is his suspension from high school during the eleventh grade.[4] ***1262** *Id.* at 428. Fields "reported the reason [for the suspension] was because he was disrespectful to the principal; his mother reported it was because he was 'making out with a girl.' " *Id.* Fields "did not return to high school" after the suspension and instead "received his GED." *Id.* Fields apparently left home at that point and "began living with a woman he described as a 'biker tramp,' who was considerably older than he" was. *Id.* Fields "reported that during the period of time he lived with this woman, he drank and smoked marijuana for the first time." *Id.*

At some point, Fields's mother responded to his behavior by taking "him to the same psychiatrist who was seeing her for 'therapy.' " *Id.* at 188. "[T]his was short-lived," however, and Fields "was soon pushed by his family into joining the Navy as a way of addressing the 'problem.' " *Id.* Although Fields completed his commitment to the Navy and actually reenlisted one time, he thereafter was unable "to stay at one job for long." *Id.* at 189.

c) Trial counsel's efforts to gather and present social history evidence

Prior to trial, Fields's defense team retained a Memphis-based private investigation firm, Inquisitor, Inc., "to provide capital mitigation services for the defense." *Id.* at 184. Gloria Shettles, an employee of Inquisitor, was assigned to the case. *Id.* Shettles has a masters degree in guidance and counseling, worked for a time for the "Tennessee Board of Paroles," and began working for Inquisitor in 1993 as an investigator and mitigation specialist. *Id.* According to Shettles, she "began working on the Fields case ... in August, 2003." *Id.* at 185. She began by "identify[ing], locat[ing] and interview[ing] as many individuals as possible who knew about ... Fields'[s] background." *Id.* She "also ordered and eventually obtained as many documents as possible about ... Fields'[s] life, including medical, mental health and school records." *Id.* Shettles "took direction from" O'Connell and "interviewed only those people to whom [she] was directed by ... O'Connell." *Id.* Shettles "brought to the attention of ... O'Connell" what Shettles believed to be "a variety of potential mitigating factors and themes." *Id.* at 189. Shettles alleges that she "was present throughout the trial," but "was never called to testify and much of the mitigating factors that [she] found were either not presented at all to the jury or were presented in isolated fashion and without providing an overall mitigating context." *Id.* In a post-conviction declaration, O'Connell states that she "had no tactical or strategic reason for not presenting th[is] [social] history either through one of the doctors or through ... Shettles." *Id.* at **166.**

Despite not calling Shettles as a witness, O'Connell presented some evidence regarding Fields's social history through three other witnesses. The first of those witnesses was Fields's sister Cherie. She testified that their mother was a full-time homemaker and that their parents provided well for her and Fields. She further testified that she and Fields attended Catholic schools through the eighth grade. She testified that Fields was very intelligent, but rejected authority as a teenager, would often start something and then quit, didn't finish high school, and instead received a GED. In addition, she testified that when they were growing up, she was fearful that Fields would physically hurt her. She testified that Fields joined the Navy at age seventeen. She testified that Fields, as an adult, did not take his role as a father seriously, was not pleasant to be around, was always "bumming" money from their parents, and did not provide ***1263** much emotional support for anyone. Notwithstanding her negative portrayal of Fields, Cherie testified that she loved him and wanted him to remain alive.[5]

The second witness to offer descriptions of Fields's social history was Teresa Fields, Fields's ex-wife and the mother of his two children.[6] She testified that they married when he was in the Navy and that, at one point, she thought he was going to make a career out of the Navy because he reenlisted and worked as a recruiter during his reenlistment period. She testified, however, that Fields subsequently left the Navy and proceeded to take and leave a number of menial jobs. She testified that he worked for several years as a prison guard and that that was the longest period of time that he held the same job.

Teresa painted a bleak picture of their married life together. In particular, she testified that he sometimes shoved her when they argued and, on one occasion, tried to choke her. She also testified that he would sometimes throw things when

he got mad, was moody and grouchy, and would often lock himself in his room for long periods of time. In addition, she testified that he did not take financial responsibility during their marriage and would often purchase things for himself before he would take care of family obligations.

Teresa had a few complimentary things to say about Fields. For example, she testified that after they separated, he continued to maintain health insurance for her and their children and that the insurance was critical for her because she was diagnosed with Stage 3 breast cancer. She also testified that, after Fields regularly started taking medication in jail, his behavior was different and that he expressed interest in their children.

The third and final witness to testify about Fields's social history was Woods, the neuropsychiatrist retained by Fields's defense team. Woods testified that Fields has a family history of mood disorders. In particular, Woods noted that Fields's mother was being treated with antidepressants and anti-anxiety agents, his maternal grandmother had electroshock therapy in the 1930s and 1940s, and that Fields's sister was also being treated with antidepressants. Woods also testified that there were two times in Fields's life when Fields functioned well: when he was in the Navy and when he worked as a correctional officer. Both of these jobs, Woods noted, were very structured.

As Fields notes in his opening brief, defense counsel did not allege or argue any mitigating factors related to "his family dysfunction." Aplt. Br. at 56. Instead, Fields's defense counsel focused on twenty-two other alleged mitigating factors, including: his lack of any other serious criminal offenses; events that occurred in Fields's life shortly prior to the murders (e.g., the death of his father; his ex-wife and children moving away from Oklahoma; his mother moving from Oklahoma to Virginia); his mental illness (as testified to by Grinage and Woods) and the fact that he sought treatment for it; his skills and work history; the fact that he had friends and family members who loved or cared for him; and the fact that he confessed to the murders and cooperated with authorities. As previously noted, O'Connell alleges in her post-conviction declaration that she "had no tactical or strategic reason for not presenting" more evidence of Fields's social ***1264** history and arguing Fields's social history as a mitigating factor. ROA, Vol. 11 at 166.

d) The district court's analysis of this claim

The district court rejected on the merits Fields's argument that his trial counsel was ineffective for failing to present evidence of his social history through a mitigation specialist or a mental health expert. In doing so, the district court first addressed the performance prong of the *Strickland* test and noted that "there [wa]s no question that [defense] counsel ... fully investigated [Fields's] social history." ROA, Vol. 12 at 598. The district court thus concluded that defense "counsel fulfilled her duty to conduct a reasonable investigation into [Fields's] social history." *Id.* The district court also noted that "[d]ecisions regarding which witnesses to call at trial are quintessentially a matter of strategy for the trial attorney," and that such strategic choices are "virtually unchallengeable." *Id.* (quotations omitted). Although the district court did not directly say so, it appears to have implicitly concluded that O'Connell's performance was not deficient, i.e., that she knowingly decided, for strategic reasons, to forego presenting all of the available social history evidence.

The district court also addressed the prejudice prong of the *Strickland* test and concluded that "submission of the evidence which Fields now suggests should have been introduced into evidence would not have changed the jury's verdict." *Id.* "Rather," the district court concluded, "it would have actually undermined the defense theory that the Effexor" that was prescribed to Fields shortly prior to the murders "caused an anomaly, a one-time switch to flip in [Fields's] brain thereby leading an otherwise law abiding citizen to commit these horrific murders." *Id.* The district court concluded that "[t]he decision not to submit evidence that these murders were, in some way, the product of a long-standing lack of socialization or empathy, caused by a less than idyllic family life approximately twenty years earlier, would have diluted the defense theory that the crime was Effexor driven as opposed to the product of the defendant's sociopathic tendencies." *Id.* "Furthermore," the district court concluded, "evidence Fields was emotionally estranged from his family would have directly contradicted the defense arguments that the death of [his] father and his mother's illness caused the defendant to experience severe emotional disturbances." *Id.* "Similarly," the district court stated, "evidence [Fields] had difficulty forming relationships would have undermined the notions that [he] was remorseful and that he was a loved relative and friend." *Id.* "Simply put," the district court stated, "presentation of additional evidence that [Fields] had a dysfunctional upbringing, or was cruel and violent towards his relatives, would have substantially weakened, as opposed to strengthening, the defense's mitigation case." *Id.* at 597–98. Ultimately, the

district court concluded that Fields failed to "me[e]t his burden to establish counsel's decision to not call the mitigation specialist or put more social history evidence before the jury through a mental health expert was an unreasonable trial strategy." *Id.* at 598.

Fields moved to alter or amend the judgment and, in that motion, asked the district court to "reconsider its ruling denying relief without a hearing on" his claim "that trial counsel was ineffective in failing to present [his] social history." *Id.* at 620. In denying Fields's motion, the district court stated:

> While the court fully understands defense counsel's desire to prevent her client from receiving the death penalty at all costs, when counsel's memory does not accurately depict what, based upon ***1265** contemporaneous documents, occurred in the case, the court does not need to hold an evidentiary hearing. Contrary to petitioner's allegations, a review of Ms. O'Connell's declaration when considered with various emails which were written contemporaneously with trial preparation convinces this court that Ms. O'Connell's memory was not as clear on March 30, 2010 [when she signed her declaration], as it was during trial preparation and/or the actual trial in 2005. As pointed out in the Opinion and Order denying relief, Ms. O'Connell claimed she did not have adequate assistance of counsel which was contradicted by various records in the case. *See*, Dkt. # 125, at pp. 10-11. Similarly, Ms. O'Connell claimed she had no "tactical or strategic reason for not presenting [Fields's social] history either through one of his doctors or through Ms. Shettles." Dkt. # 106-2. Her emails, however, belie this statement. In an email discussing trial strategy regarding a mental health expert, counsel explained:
>
> > ....I recognize that experts can cancel each other out in juror's minds. And, many of them won't care about mental health.
> >
> > .....I want to keep the 'crap' away from the jury if at all possible. I think its going to be hard enough to get them to feel sympathy for client. If they get to hear all the other junk, it may tip the scales (if we have any hope at all).
>
> Dkt. # 110-7. A few days later, Ms. O'Connell sent an email to another attorney who she was consulting with regarding Petitioner's case. After providing this consultant with her case and client in a nutshell, including a substantial description of the social history of her client, Ms. O'Connell stated:
>
> > My client has absolutely no criminal record. But the government believes he is a psychopathic retrobate [sic]. They gathered all the garbage they could on him, by going to the community and asking what they'd heard, about a month after the murders. The town is tiny, and there was nothing to talk about except the client. So the FBI guys got all the dirt. The gov't wanted to use the dirt in aggravation. The judge has ordered that most of it stays out. I'll list most of it here; don't laugh:
> >
> > Client has always been considered a little strange. He was always coming on to women, some of whom say he was 'creepy.' He often bragged of his sexual prowess. In fact, he dated 2 women at the same time, unbeknownst to either of the women, and spoke of marriage to both. He had a webcam that he told people he jacked off in front of, with over 1000 visitors to his site, or so he bragged, anyway. (And, as mentioned above, there was the fascination with pornography during his marriage.) He chatted with women on the internet, and then went to meet them!
> >
> > Client liked to fish more than anything in the world. Once he took a device to work--it was locked in his truck, in the parking lot. It was like a pipe bomb, with a kitchen timer. But it had no detonator or explosive material. In the parking lot, he showed it off to a couple guys, and explained it was for fishing. He also took a rifle to work one day, again-- locked in the car. He'd just purchased it at Wal-Mart, and didn't have time to take it home before his shift started. He showed it off to a buddy. (The bomb thing got him fired.) He had a burmese python for a pet, and hunted rattlesnakes for extra cash (40 cents a foot).
> >
> > A distant relative believes he hung a cat over a limb when he was four ***1266** years old. Jump ahead 34 years-- Someone else saw him put a stray cat in a burlap bag and twirl the bag around until the cat got dizzy. He told a co-worker he shot a cat that was keeping him awake at night. Another co-worker reported that he said he fed baby kittens to his snake. And, no kidding, a (sic) witnessed him hit a cow and curse at it.
> >
> > As also related above, client had some domestic violence in his life. Some people reported that his mother was afraid of him. One said he kept loaded guns by every door in the house.

* * *

Judge says virtually all of this stays out, as long as I don't open the door. Only stuff the gov't can use to support non-statutory aggravator of future danger is the growing interest in camoflauge (sic) and in stalking people. None of the cat hanging, cow slapping, minor violence, snake loving, creepy stuff. Most of my mitigation case is mental health evidence. Some evidence of frontal lobe impairment, but largely the compelling stuff is the manic-flip nature of Effexor treatment. The gov't has 2 docs, the examinations were taped. I have listened, and know the outcome, because the docs had been front-loaded with the creepy-crawly stuff. Lots of questions about his womanizing, probing inquiry into why someone would make up the cat hanging incident. So, I can anticipate all the "junk" will play a role in any determination made by the gov't docs. Most of that crap isn't true (like hanging a cat), or has been largely exaggerated (the bomb thing has turned into threatening people at work with a bomb). But I'm worried that, through my mental health evidence, all of it will somehow come in, because the govenrment's (sic) experts will say they reviewed it, it helped them reach their conclusions, whatever.

Whatever I don't put on the table with my mental health testimony, they will want to get it in the back door, as justification for their docs' opinions.

Dkt. 129-1, at pp. 3-4.

> Given Ms. O'Connell's express desire to rely on psychopharmacology evidence while avoiding all of the "crap," this court finds Ms. O'Connell had clearly developed a reasonable trial strategy to keep this evidence from the jury. Moreover, since Ms. O'Connell had investigated and discussed the petitioner's social history with a mitigating specialist prior to trial, she knew how difficult a job she had. With all of these things in mind, Ms. O'Connell did everything she could to portray the murders as an aberration caused by a "SICK" individual who, upon receiving the proper medication, was no longer dangerous. Ms. O'Connell was able to elicit positive attributes of petitioner through his sister, Cherie Fields; his ex-wife, Teresa Fields; a co-worker, Jovanna Fields; his son, Andrew Thomas Fields; and his daughter, Amanda Fields, while preventing the government from asking these same witnesses to explain why Petitioner's mother was scared of him.

Id. at 644–47 (footnotes omitted).

The district court in turn noted that "[e]ven though a troubled childhood is the kind of evidence which garners the most sympathy from jurors, no case dictates that counsel must always introduce the evidence especially where, as here, the evidence could potentially backfire." *Id.* at 648 (citation and quotations omitted). The district court further noted that, "[w]hile trial counsel's strategy ultimately failed to convince the jury that Petitioner's life was worth sparing, this court believes it was a well thought out and sound trial strategy." ***1267** *Id.* The district court therefore concluded that Fields "ha[d] failed to establish he received ineffective assistance of counsel," or that he was prejudiced by counsel's failure to present the social history evidence. *Id.*

e) Fields's appellate arguments

In this appeal, Fields argues that "[t]he district court's failure to conduct a hearing and its holdings under both prongs of *Strickland* were erroneous." Aplt. Br. at 50. With respect to the performance prong of *Strickland*, Fields argues that, "[t]aking his proffer as true," he "has proven that [his] trial counsel ineffectively failed to present [his] history of family dysfunction and mental illness." *Id.* at 51. In support, he points to O'Connell's post-conviction statement "that she had no reasonable strategic basis for failing to present" this evidence at trial. *Id.* at 56. With respect to the prejudice prong of *Strickland*, Fields argues that, "[g]iven the importance of social history evidence in capital sentencing trials, [his] counsel's deficient performance prejudiced [him]." *Id.* He asserts, in support, that "[w]hile a few isolated biographical facts were told to the jury, some of the most mitigating aspects of [his] life—his upbringing in a home filled with abuse, emotional deprivation and dysfunction—were never coherently presented to the jury through any of the defense

witnesses." *Id.* at 56–57. He further asserts that his "social history could have been utilized by ... Grinage to bolster his testimony related to the defense's theory because a 'collateral history is critical in assessing and presenting a complete picture of the patient/defendant ... to explain his mental state at the time of the incident.' " *Id.* at 57 (quoting ROA, Vol. 11 at 180). He also asserts that "presentation of [his] complete social history could have provided the jury an explanation for his seeming lack of emotion or remorse, which the jury relied on in sentencing [him] to death." *Id.* Fields argues that, had his defense counsel presented evidence of his social history, "there is a reasonable probability that at least one juror would have voted for a life sentence." *Id.* Finally, Fields argues that the district court erred in refusing to hold an evidentiary hearing on the claim because his "detailed averments and proffer of evidence, if true, would require relief." *Id.* at 59. According to Fields, "[t]he district court should have resolved any disputed facts through adversarial testing rather than summary dismissal." *Id.*

Turning first to the issue of defense counsel's performance, we tend to agree with the district court that the evidence in the record appears to refute O'Connell's post-conviction declaration that she did not make a strategic decision to forego presenting Fields's complete social history. But we need not reach a final conclusion regarding the performance prong of the *Strickland* test because, as we shall proceed to discuss, we agree with the district court that Fields was not prejudiced by his counsel's failure to present evidence of his complete social history.

Although presenting the social history evidence that Fields has identified in these § 2255 proceedings might have supported the existence of additional mitigating factors, it also, as the district court aptly noted, quite clearly would have undercut the main theme of O'Connell's defense strategy: that Fields was a normal, law-abiding citizen who, due to medication-induced mania, committed a horrible crime and has since confessed and shown remorse for that crime. The social history evidence would also have been contrary to the following specific arguments made by O'Connell during her closing: that (a) "he has a ton of people who love him"; (b) his mental illness "impaired his abilities"; (c) he "brought joy to some people"; (d) he "excelled in his job"; and (e) "[h]is support system had evaporated" ***1268** due to the death of his father, his ex-wife and children moving away, and his mother moving to live with his sister. ROA, Vol. 5 at 3435, 3436, 3441. The social history evidence would instead have portrayed Fields as an individual who, from late high school through the time of the crimes, acted selfishly and irresponsibly, and not only failed to develop meaningful relationships with his family, but either took advantage of or neglected multiple family members and girlfriends on multiple occasions. We therefore firmly agree with the district court that there is not "a reasonable probability" that, had the social history evidence been presented at trial, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

We in turn conclude that the district court did not abuse its discretion by dismissing this claim of ineffective assistance without first conducting an evidentiary hearing. There are, of course, disputes of fact regarding whether or not O'Connell made a strategic decision to forego presenting the social history evidence. But, importantly, the evidence of Fields's social history is essentially undisputed. Thus, an evidentiary hearing was unnecessary for the district court, or in turn for us, to conclusively resolve the issue of prejudice.

Issue Three – the government's invocation of religious authority during closing argument and defense counsel's failure to object thereto

In his third issue on appeal, Fields argues that his constitutional rights were violated when the prosecutor, during closing arguments, invoked what Fields calls "religious authority." Fields also argues that his trial counsel was ineffective for failing to object to the prosecutor's improper argument. The district court rejected these arguments. Fields now appeals from that ruling and also argues that the district court erred in violation of § 2255(B) in failing to conduct an evidentiary hearing on this claim of ineffective assistance.

We begin our analysis of this claim by reviewing the prosecutor's closing argument that is now being challenged by Fields. We in turn review the district court's rulings on Fields's claims. Lastly, we address Fields's challenges to the district court's rulings. As discussed below, we conclude that Fields was not prejudiced by the prosecutor's allegedly improper arguments, that he was not prejudiced by his trial counsel's failure to object to those arguments, and that the district court did not abuse its discretion in failing to conduct an evidentiary hearing.

a) Facts relevant to the claim

At the conclusion of the evidence at the sentencing proceeding, the prosecutor gave two closing arguments: an initial closing that preceded defense counsel's closing argument, and a final closing that followed defense counsel's closing argument. Near the end of the final closing, the prosecutor stated, in pertinent part:

> Thousands of years ago the king of the world's greatest then existent civilization and most powerful empire held a great feast for thousands of his ruling friends. They ate, they drank from golden and silver goblets that they had stolen from the temple of a subdued and now enslaved nation. They drank wine and they worshiped pagan idols. All of a sudden the fingers of a hand began to write on the palace wall. The king saw the hand and was so frightened, he was so scared, that his clothing literally came loose. He became white. He shook. His knees banged together. He cried out: Bring the astrologers, bring the wise men of the nation. Whoever interprets this saying on the wall will become the third most powerful member of my government. He will have great riches. The ***1269** wise men came in. They studied, they deliberated, they conversed, they conferred and they thought. But they couldn't read much less interpret the writing on the wall. The king's face turned ashen. The queen, though, remembered a forgotten man. She called for him after talking to the king. And the king made the man the same offer. The man, though, he turned down all of the riches, all the honor and all of the prestige. The man bravely interpreted the writing on the wall. And the writing on the wall said in three words, your kingdom has come to an end, your kingdom will be divided and given to your neighboring enemies, and then the prophet said the writing said you have been weighed in the balance and found wanting. Sure enough, that night the king was killed. His kingdom was separated among his neighboring enemies.

ROA, Vol. 5 at 3466-67. The prosecutor then went on to say: "The Defendant weighed his options on July 10, 2003. Under the Court's instructions and the law given by the Court, the Defendant should be, as it were, weighed in the balance and found wanting." *Id.* at 3467. Fields's trial counsel did not object to any of these statements.

b) Fields's presentation of the claim to the district court

Fields first challenged the prosecutor's statements in his § 2255 motion. Fields characterized the prosecutor's statements as "relat[ing] to the jury the well-known 'writing on the wall' sermon from the Book of Daniel, in which God finds King Belshazzar wanting and condemns him to death." ROA, Vol. 9 at 143. Fields argued that "[t]he Government's invocation of biblical support for its position invited the jurors to decide the question of [his] punishment on matters other than the evidence properly presented in court, and was designed to inflame the passions of the jurors and incite feelings of vengeance." *Id.* at 144. Fields in turn argued that his "[t]rial counsel's failure to object ... was deficient performance, and trial counsel could have had no strategic reason for their failure to do so." *Id.* at 144–45. Fields argued that he "suffered prejudice from [his] trial counsel's failure to make meritorious objections to the Government's improper closing arguments." *Id.* at 145. "As a result," he argued, "the jury was encouraged to ignore the substantial mental health evidence presented by [him], which it did in refusing to find that [he] committed the offenses under severe mental or emotional disturbance." *Id.* "[T]he jury also found," Fields argued, "that [he] committed the offenses after substantial planning and premeditation, and that [he] inflicted mental anguish upon Mrs. Chick." *Id.* Ultimately, Fields argued that "[i]f [his] trial counsel had objected ... , there [wa]s a reasonable likelihood that the verdict would have been different." *Id.*

c) The district court's resolution of the issue

The district court, in addressing this issue, acknowledged that "religious arguments [are generally] condemned by both state and federal courts," but noted that "relief [wa]s not warranted unless the remarks prejudiced Fields['s] chances of receiving life without the possibility of parole instead of the death penalty." ROA, Vol. 12 at 612. The district court

found that "[w]hile the analogy given by the prosecutor may have been paraphrased from the 'writing on the wall' sermon in the Book of Daniel, the argument was not delivered in biblical style." *Id.* The district court noted, in particular, that "[t]he prosecutor did not argue that God or any other religious authority justified the death penalty in this case," and instead "used a story devoid of any religious connotation ... to emphasize [Fields] knew what could happen to him ***1270** when he decided his course of action on July 10, 2003," and that "it was now up to the jury to impose the appropriate sentence based upon the court's instructions, which included a balancing (*i.e.*, weighing) of the aggravating and mitigating factors." *Id.* The district court also noted that "this was a case where the defendant pled guilty to murdering two people by randomly stalking them while wearing a ghillie suit; shooting them while hidden in the woods; and then stealing from them." *Id.* Lastly, the district court noted that "[t]he jury rendered their sentencing verdict in less than four hours." *Id.* The district court concluded that "none of the prosecutorial arguments, either individually or collectively, would have warranted reversal of the sentence on appeal." *Id.* at 48. The district court also, therefore, rejected the claim of ineffective assistance of counsel.

d) Fields's arguments on appeal

Fields argues in this appeal that "the Government violated its duty to seek justice when it concluded its closing argument in support of the death penalty with a lengthy reference to the well-known 'writing on the wall' sermon from the Book of Daniel." Aplt. Br. at 67. More specifically, Fields argues that "the prosecutor's Bible references had a substantial prejudicial effect on [his] Eighth Amendment right to a fair and reliable sentencing." *Id.* at 70. Fields also argues that his "[t]rial counsel was ineffective for failing to object to the Government's improper argument." *Id.* at 67. And, lastly, Fields argues that the district court abused its discretion by failing to conduct an evidentiary hearing on this claim of ineffective assistance of counsel.

Addressing these arguments in order, we note that Fields, in asserting the impropriety of the prosecutor's arguments, relies heavily on the Ninth Circuit's decision in *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000). But the facts at issue in *Sandoval* were substantially different than those at issue in Fields's case. The California state prosecutor in *Sandoval*, "[a]t the close of the penalty phase" of the trial, "argued to the jury that the death penalty was sanctioned by God." 241 F.3d at 775. "His argument paraphrased Romans 13:1–5, a passage from the Bible's New Testament commonly understood as providing justification for the imposition of the death penalty." *Id.* "The prosecutor told the jurors that God sanctioned the death penalty for people like Sandoval who were evil and have defied the authority of the State." *Id.* at 775–76. The prosecutor "explained that by sentencing Sandoval to death, the jury would be 'doing what God says.' " *Id.* at 776. "The prosecutor added that imposing the death penalty and destroying Sandoval's mortal body might be the only way to save Sandoval's eternal soul." *Id.*

The Ninth Circuit in *Sandoval* "agree[d] with Sandoval that the argument was both improper and highly prejudicial." *Id.* To begin with, the Ninth Circuit concluded that "[t]he prosecutor's argument frustrated the purpose of closing argument, which is to explain to the jury what it has to decide and what evidence is relevant to its decision." *Id.* The Ninth Circuit noted that "[a]rgument urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper," and "any suggestion that the jury may base its decision on a 'higher law' than that of the court in which it sits is forbidden." *Id.* The Ninth Circuit further noted that, "[i]n a capital case," "the prosecution's invocation of higher law of extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict." *Id.* The Ninth Circuit concluded that "[t]he Biblical concepts of vengeance invoked by the prosecution" in ***1271** Sandoval's case "d[id] not recognize such a refined approach." *Id.* The Ninth Circuit also concluded that "[a]rgument involving religious authority ... undercuts the jury's own sense of responsibility for imposing the death penalty," and that in Sandoval's case, "delegation of the ultimate responsibility for imposing a sentence to divine authority undermine[d] the jury's role in the sentencing process." *Id.* at 777.

The Ninth Circuit in turn concluded "that the prosecutor's remarks actually prejudiced Sandoval" by reducing his "chances of receiving life without possibility of parole instead of the death penalty." Id. at 778. In reaching this conclusion, the Ninth Circuit noted:

> This is not a case where the evidence overwhelmingly supported the jury's verdict. The issue was life or death and the jury was sharply divided. After over three days of deliberations, the jury informed the trial judge that it was hopelessly deadlocked. It was divided 6–6 on two of the counts and 7–5 on the other two. In response to the

judge's question whether the jury could possibly reach a result if it deliberated further or perhaps had portions of the transcript read back to it, each juror individually answered "no." Upon being returned to its deliberations, the jury took only an hour and forty minutes to go from a deadlock to four unanimous verdicts.

We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death on the Marlene Wells count. The evidence in aggravation was countered with considerable mitigating evidence. That the jury deadlocked evenly after deliberating over three days exemplifies the difficulty of the sentencing decision.

The State argues that a finding of prejudice here would be out of step with cases from our sister circuits that have considered similar prosecutorial argument to be harmless error. There is no discord, for the cases are very record-specific.

In *Bennett v. Angelone*, for example, the Fourth Circuit held that a prosecutor's religious argument was error, but that, in light of the total context of the trial, the error did not render the defendant's trial unfair. 92 F.3d 1336, 1346 (4th Cir. 1996). In that case, the prosecutor told the jury that " 'Thou shall [sic] not kill' is a proscription against an individual; it is not against Government. Because Government has a duty to protect its citizens." *Id.* (sic in original). The court found that religious arguments were improper but held that the prosecutor's comments did not deny the defendant due process because there was strong evidence of the defendant's guilt and eligibility for the death penalty. *See id.* In that case the defendant's guilt trial lasted one day and defense counsel put on no evidence. *See id.* at 1341. After the penalty phase, the jury took less than an hour to return a death sentence. *See id.* Sandoval's trial was considerably longer and more complex, with the jury deliberating for over three days before reaching a verdict.

In *Coe v. Bell*, the Sixth Circuit held that argument that the Bible condones capital punishment was inappropriate, but that it did not in and of itself constitute reversible error. 161 F.3d 320, 351 (6th Cir. 1998). The court did not explain why, but we observe that the prosecutor in that case did not argue that the Bible commanded capital punishment for the defendant. *See id.*

The First Circuit in *United States v. Giry*, held that the prosecutor's comparison of the defendant's testimony to "Peter who for the third time denied ***1272** Christ" was improper, but that its prejudicial impact was significantly reduced by the trial judge's instructions and the strength of the evidence against the defendant. 818 F.2d 120, 132–34 (1st Cir. 1987). *Giry* was not a capital case and defense counsel did not contemporaneously object to the prosecutor's statements. *Id.* at 122–23, 133.

> The prosecutor in this case, although reminding the jury on various occasions that its duty was to determine whether the evidence in aggravation substantially outweighed the mitigating evidence and to follow the trial court's instructions, clearly intended to appeal to religious authority and did so repeatedly. The prosecutor meant this argument to have an effect on the jury. We think it did. At a minimum, we have grave doubts about the harmlessness of the error and therefore grant relief. *See Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc) ("Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted.").

Id. at 779–80.

The district court in this case concluded, and we agree, that there are at least three important differences between the prosecutor's arguments in Fields's case and the prosecutor's arguments in *Sandoval*. First, the prosecutor's arguments in Fields's case, unlike the prosecutor's arguments in *Sandoval*, did not effectively "urg[e] the jury to decide the matter based upon factors other than those it [wa]s instructed to consider." Id. at 776. Rather, the prosecutor in Fields's case concluded his argument by stating: "Under the Court's instructions and the law given by the Court, [Fields] should be, as it were, weighed in the balance and found wanting." ROA, Vol. 5 at 3467. By expressly referring to the law and instructions given by the trial court, the prosecutor seems to have been suggesting to the jury only that it should weigh the aggravating factors against the mitigating circumstances, find that the aggravating factors outweighed the mitigating circumstances, and ultimately find that Fields should be sentenced to death. Importantly, nothing about that suggestion was contrary to the trial court's instructions. Second, and relatedly, there was no reference by the prosecutor in Fields's case to any "higher law," nor any other suggestion by the prosecutor that the jury should ignore the law and instructions given to them by the trial court. Third, the arguments by the prosecutor in Fields's case did not seek to "undercut[ ] the jury's own sense of responsibility for imposing the death penalty." *Sandoval*, 241 F.3d at 777. More specifically,

the prosecutor's arguments in Fields's case did not seek to "delegat[e] ... the ultimate responsibility for imposing a sentence to divine authority." *Id.* Rather, the prosecutor expressly asked the jury at the conclusion of his argument to follow the trial court's instructions, conduct the required weighing of aggravating and mitigating factors, and find the death sentence to be appropriate for the two murder convictions.

Fields's case is also distinguishable from *Sandoval* in terms of prejudice. That is, even assuming that the prosecutor's arguments in Fields's case were improper, it is clear to us that, unlike the situation in *Sandoval*, they did not prejudice Fields's "chances of receiving life without possibility of parole instead of the death penalty." *Id.* at 778. Unlike the prosecutor's arguments in *Sandoval*, the prosecutor in Fields's case did not, by way of his challenged arguments, "cloak[ ] the State with God's authority," nor did he "invo[ke] ... divine authority to direct [the] jury's verdict." *Id.* at 779. Further, unlike the situation in *Sandoval*, the evidence presented at Fields's sentencing proceeding "overwhelmingly supported the jury's verdict," ***1273** and the jury quickly reached a unanimous verdict. *Id.*

For these reasons, we conclude that the prosecutor's arguments, though perhaps misguided, were ultimately harmless.

That still leaves Fields's arguments that his trial counsel was ineffective for failing to object to the prosecutor's arguments, and that the district court abused its discretion by failing to conduct an evidentiary hearing on this claim of ineffective assistance. Having concluded that the prosecutor's arguments were harmless, we likewise conclude that Fields was not prejudiced by his trial counsel's failure to object to the arguments. And we in turn conclude that the district court did not abuse its discretion by refusing to conduct an evidentiary hearing on this claim of ineffective assistance.

Issue Four – cumulative error

In his fourth and final issue on appeal, Fields argues that his trial "counsel's errors had the cumulative effect of preventing the jury from hearing a powerful mitigation case while simultaneously allowing the jury to consider misleading evidence and improper argument in support of aggravation." Aplt. Br. at 75. "In particular," Fields argues, "absent counsel's deficient performance, the jury could have heard a mitigation case built not just on a single-episode manic flip, but also on evidence of brain damage that affected [his] executive functioning as well as a history of family problems." *Id.* "At the same time," Fields further argues, "counsel could have greatly diminished the Government's case by challenging the testimony of its mental health expert and the evidence it presented in support of aggravating circumstances, as well as by objecting to the Government's grossly improper argument to the jury." *Id.* at 75–76.

It is unnecessary, and indeed impossible, for us to resolve this cumulative error claim at this point, since we are reversing the district court's denial of Fields's claim that his trial counsel was ineffective for failing to adequately investigate and present evidence of his organic brain damage, and remanding that claim to the district court for an evidentiary hearing. If, on remand, the district court ultimately denies that claim of ineffective assistance following an evidentiary hearing, it will in turn have to reconsider Fields's claim of cumulative error. In conducting that cumulative error analysis, the district court will have to include the two ineffective assistance of counsel claims that we resolved in this appeal on the prejudice prong of the *Strickland* test (i.e., counsel's failure to present the social history evidence and counsel's failure to object to the prosecutor's allegedly improper closing argument) and the claim directly challenging the allegedly improper remark made by the prosecutor during closing argument, since we resolved that claim on the basis of harmlessness. In addition, if the district court denies the remanded ineffective assistance claim (failure to investigate and present evidence of organic brain damage) on the prejudice prong of the *Strickland* test, it will have to include that claim in its cumulative error analysis as well.

III

The judgment of the district court is AFFIRMED in part, REVERSED in part, and the case is REMANDED to the district court for further proceedings consistent with this opinion.

All Citations

949 F.3d 1240

Footnotes

1 According to the evidence compiled by Fields's post-conviction counsel, Fields suffered from neonatal respiratory distress syndrome shortly after he was born. ROA, Vol. 11 at 37. This syndrome, according to the record, "creates a serious risk of brain damage." *Id.* The record also indicates that "Fields experienced a number of head injuries and losses of consciousness before the age of twenty," including "a sleigh-riding accident" that occurred when he was thirteen years old and resulted in him losing "consciousness for several minutes." *Id.* at 38.

2 O'Connell alleges in her declaration that her "errors were a result of [her] being overburdened by essentially functioning without co-counsel in this complex and difficult case." ROA, Vol. 11 at 169. O'Connell explains that Gant was appointed "as Learned Counsel in th[e] case," but failed to "carry[ ] his share of the work." *Id.* at 154–55.

3 Kaufman did not offer an opinion in his report regarding what he believed Fields's IQ actually was.

4 While attending high school in Virginia, Fields was allegedly "advised ... he had a particularly high IQ." ROA, Vol. 11 at 428. Further, prior to his suspension from high school, "a guidance counselor [allegedly] took it upon herself to make application for [Fields] to Harvard, and other prominent universities, to which he was accepted, but could not afford to attend." *Id.*

5 Cherie represented a stark contrast to Fields because she was a successful business person who owned three Wendy's franchises in Virginia.

6 Fields's two children both briefly testified, but did not offer any details regarding Fields's social history.

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Respondent, -v- EDWARD LEON FIELDS, JR., Petitioner.	CIV-10-115-RAW CAPITAL 2255 PROCEEDINGS HONORABLE RONALD A. WHITE

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF PURSUANT TO 28 U.S.C. SECTION 2255 OR IN THE ALTERNATIVE PURSUANT TO 28 U.S.C. SECTION 2241

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PRELIMINARY STATEMENT

On April 6, 2010, Petitioner Edward Leon Fields, Jr. filed a *Motion for Relief Pursuant to 28 U.S.C. Section 2255 or in the Alternative Pursuant to 28 U.S.C. 2241* (*"Motion"*) challenging his convictions and sentences of death for two homicides in the Ouachita National Forest in 2003.

On June 29, 2010 the Court granted Mr. Fields' request for an opportunity to submit a memorandum of law in support of the *Motion* (the "*Memorandum*") and ordered him to file the *Memorandum* on or before July 30, 2010 (Dkt. # 11).

As in the *Motion*, in this *Memorandum* the transcript of the trial proceedings are cited as "*TR*" followed by a page citation. Other proceedings are cited as *TR* followed by the date of the proceeding and page number. Mr. Fields also cites a number of documents that are not currently of record. These documents are included in the *Appendix* that accompanied the *Motion*, and, as in the *Motion*, are cited as "*A*" followed by an exhibit number. Documents that are of record are not included in the *Appendix* but are cited. Mr. Fields is filing with this Memorandum a brief *Supplemental Appendix*. Entries from it are cited as "*SA*" followed by the document number.

Petitioner is referred to as Mr. Fields, and the United States of America is referred to as the Government. Parallel citations are omitted. All other citations are either self-explanatory or are explained in the *Memorandum*. All emphasis is supplied unless otherwise indicated.

STANDARD OF REVIEW OF CLAIMS OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Under 28 U.S.C. § 2255(a), a federal conviction and sentence must be vacated if obtained in violation of the Constitution or laws of the United States.

The majority of Mr. Fields' grounds for relief allege violations of his right to the effective assistance of counsel as guaranteed by the Sixth Amendment. These claims are governed by

Strickland v. Washington, 466 U.S. 688 (1984), which provides that counsel is ineffective where: (1) his or her performance fell below objective standards of reasonableness and therefore was deficient, and (2) as a result of that deficiency, the petitioner suffered prejudice. Id. at 694.

In determining whether counsel's performance was deficient, the Supreme Court has repeatedly cited the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. Feb. 2003) ("ABA Guidelines"), as guides for determining the reasonableness of counsel's conduct.[1] "Although they are 'only guides,' ... and not 'inexorable commands,' ... these standards may be valuable measures of the prevailing professional norms of effective representation ...." Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010) (quoting Strickland, 466 U.S. at 688; Bobby v. Van Hook, 130 S.Ct. 13, 17 (2009)). The Guidelines relied upon herein were promulgated in 2003, before the offenses. Accordingly, "they describe the professional norms prevailing when the representation took place." Van Hook, 130 S.Ct. at 16; see also Wiggins v. Smith, 539 U.S. 510, 523 (2003) (applying 1989 Guidelines in existence at time of trial where "[c]ounsel's conduct similarly fell short of the standards for capital defense work articulated by the [ABA Guidelines] standards to which we long have referred as 'guides to determining what is reasonable'") (quoting Strickland at 688).

Prejudice is established when a petitioner shows that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Wiggins, 539 U.S. at 534. Such a probability can be shown by less than a preponderance of the evidence:

The result of a proceeding can be rendered unreliable, and hence the proceeding

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[1] The ABA Guidelines are published in 31 Hofstra L.Rev. 913 (2003) and are available online at www.ABAnet.org.

> itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland, 466 U.S. at 694. With regard to sentencing phase ineffectiveness, prejudice is established if there is a reasonable probability that even one juror would have voted for life imprisonment instead of death. Wiggins, 539 U.S. at 537.

Claims of ineffective assistance of counsel properly are pursued in a section 2255 proceeding and are not waived even though they were not presented on direct appeal. United States v. Massaro, 538 U.S. 500, 509 (2003) ("failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255").[2]

[2] Mr. Fields does not address in this Memorandum any procedural defenses, such as procedural bar or waiver, that may be asserted by the Government. Mr. Fields does not believe that the Government has available to it any such procedural defenses. In any event, the Government is obliged to raise any such defenses, if they exist, and the failure to do so may constitute a waiver of such defenses. Trest v. Cain, 522 U.S. 87, 89 (1997) (quoting Gray v. Netherland, 518 U.S. 152, 166 (1996) ("procedural default is normally a 'defense' that the [Government] is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'")). Accordingly, should the Government raise procedural defenses to any of Mr. Fields' grounds for relief, he will address them in a Reply Memorandum, which is permitted by Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

ARGUMENT

GROUND ONE

THE SIXTH AMENDMENT WAS VIOLATED WHEN TRIAL COUNSEL INEFFECTIVELY INVESTIGATED, PRESENTED AND ARGUED MITIGATING MENTAL HEALTH EVIDENCE. THE EIGHTH AMENDMENT WAS VIOLATED WHEN THE JURY SENTENCED MR. FIELDS TO DEATH WITHOUT HAVING FOUND AND GIVEN MITIGATING EFFECT TO UNCONTESTED MENTAL HEALTH-RELATED MITIGATING EVIDENCE.

The Eighth Amendment guarantees a capital defendant the right to individualized sentencing. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987). This includes the constitutionally secured right to the presentation of all available mitigating evidence. Wiggins, 539 U.S. at 524-25.

Such mitigating evidence includes the defendant's mental health deficits (e.g., emotional disturbance, presence of organic brain damage), as well as evidence of a difficult upbringing. See, e.g., Porter v. McCollum, 130 S.Ct. 447 (2009); Rompilla v. Beard, 545 U.S. 374 (2005) ("It goes without saying that the undiscovered "mitigating evidence [including evidence of organic brain damage, emotional disturbance and difficult upbringing], taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability") (internal citations omitted); Williams v. Taylor, 529 U.S. 362 (2000), Eddings, 455 U.S. at 115 ("Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. ... Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. See McGautha v. California, 402 U.S. 183, 187-188 . . . (1971)."); see also Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007); Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004).

At the time of his sentencing hearing, Mr. Fields had suffered a lifetime of mental illness and

emotional disturbance. He suffered from the effects of a difficult and dysfunctional upbringing.[3] All of this evidence was available to counsel, and it should have been presented and argued to the jury as mitigating facts pursuant to Lockett and its progeny, as well as the Federal Death Penalty Act (FDPA) (18 U.S.C. § 3591, et seq.). Yet trial counsel were ineffective with regard to nearly every aspect of Mr. Fields' mental health mitigation defense:

- Trial counsel ineffectively failed to argue to the jury that the largely uncontested evidence of Mr. Fields' pre-offense history of depression and auditory hallucinations as well a post-offense diagnosis of bipolar disorder possessed mitigating value independent of the "manic flip" diagnosis testified to by the defense's mental health experts. Even with this uncontested evidence, the jury found no mental health mitigation.

- Trial counsel ineffectively failed to discover and present evidence that Mr. Fields suffered from a progressive neurological disease which at the time of his sentencing hearing had already caused him organic brain damage localized in his frontal lobes. Trial counsel failed to do so even though they had an expert ready to testify to the existence of neurological damage and cited this neurological damage in arguing to the Department of Justice that it should not seek the death penalty against Mr. Fields.

- Trial counsel ineffectively failed to present the testimony of local medical professionals who treated Mr. Fields both before the offenses and at the Muskogee and Tulsa County Jails after his arrest. These medical professionals would have rebutted the Government's claim that Mr. Fields was malingering his illness and supported his manic flip defense.

- Trial counsel ineffectively opened the door to a Government expert's damaging and erroneous testimony that Mr. Fields did not have significant neurological impairments.

- Trial counsel ineffectively failed to investigate, present and argue readily available evidence that Effexor an antidepressant Mr. Fields had been prescribed in the weeks before the offenses was

[3] Trial counsel's failures to present Mr. Fields' dysfunctional upbringing are discussed in Ground Four, below.

associated with aggressive and violent behavior.

- Trial counsel ineffectively prepared the defense's mental health experts for their testimony, damaging their credibility with the jury even though Mr. Fields' defense largely depended on the jury believing this expert testimony.

Trial counsel's failure to effectively investigate, present and argue mitigating mental health evidence violated Mr. Fields' right to the effective assistance of counsel guaranteed by the Sixth Amendment,[4] while the jury's verdict, that was rendered without finding and giving mitigating effect to uncontested mental health evidence, violated his right to reliable sentencing guaranteed by the Eighth Amendment.

A. Trial Counsel Ineffectively Failed to Argue that Mr. Fields' Uncontested Mental Illness Was Mitigating and Failed to Request Instructions to That Effect

Mr. Fields' lawyers presented to the jury significant mental health-related mitigating evidence, including his pre-offense history of chronic depression and auditory hallucinations and a post-offense diagnosis of bipolar disorder. The Government agreed that much of it existed. Despite asking for jury instructions on twenty-two mitigating factors, including, for instance, that Mr. Fields was a good cook, and then arguing the existence of each of these twenty-two factors, trial

[4] Trial counsel's ineffectiveness with regard to this, and other claims alleging ineffective assistance of counsel, stems in large part from the overall dysfunction of the defense team. Federal Public Defender Julia O'Connell effectively was Mr. Fields' only trial lawyer. She assumed the lion's share of pre-trial preparation and she alone examined the thirty-two witnesses who testified at Mr. Fields' complex sentencing hearing and delivered the opening statement and closing argument. Her assigned "Learned Counsel," Isaiah Gant of the National Capital Resource Counsel Project, performed little, if any, actual work, inside or outside of the courtroom, and what work he did was often more harmful than helpful. This breakdown of the defense team violated both the letter and the spirit of the ABA Guidelines, which emphasize that "the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines." ABA Guideline 10.4 (The Defense Team), cmt. at 65. See also ABA Guideline 10.4(D) ("Counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for post-conviction review.").

counsel neither argued nor requested jury instructions on the uncontested mental health evidence they presented. *Motion*, ¶ 14. This was ineffective:

> Eddings [v. Oklahoma] makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The **sentencer must also be able to consider and give effect to that evidence in imposing sentence**. ... Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (citation omitted).

1. The Evidence the Defense Presented to the Jury Regarding Mr. Fields' Mental Health Impairments and Trial Counsel's Limited Argument on the Mitigating Effect of Only a Portion of That Evidence

The defense presented two psychiatrists, Dr. Bradley Grinage and Dr. George Woods, to establish that Mr. Fields suffered from bipolar disorder and that he was improperly treated with the antidepressant Effexor, which caused him to experience a manic flip at the time of the offenses. *TR*, 2775, 2812, 2973, 2989. Dr. Grinage and Dr. Woods also testified that Mr. Fields had a history of depression as early as age sixteen; that for many years prior to the offenses he had been treated with a number of antidepressants, including Paxil, Wellbutrin, Celexa, Lexapro and Effexor; and that in the months before the offenses he suffered from sleeplessness, command auditory hallucinations and dramatic weight loss. *TR*, 2778, 2800, 2974, 2981, 2745, 2804, 2974, 2987.

The Government conceded much of the defense's mental health evidence. Government rebuttal experts Dr. Jeffrey Mitchell, a psychiatrist, and Dr. Randall Price, a psychologist, agreed that Mr. Fields suffered from severe depression. See, e.g., *TR*, 3263-64, 3220. Dr. Mitchell also agreed that Mr. Fields' history of hearing voices was "credible," *TR*, 3284, see also *TR*, 3315, while Dr. Price admitted he could not rule out that Mr. Fields' hallucinations were genuine. *Tr.*, 3221, 3228. In closing argument, the Government acknowledged that Mr. Fields suffered from severe and

chronic depression. *TR*, 3425, 3428.

The Court instructed the jury on each of the twenty-two separate mitigating factors that were requested by the defense. Trial counsel argued these factors more or less as the Court charged them. Yet, of these twenty-two mitigating factors, the **only** mental health mitigation trial counsel argued was that, at the time of the offenses, Mr. Fields experienced a manic flip that "significantly impaired" his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law pursuant to 18 U.S.C. § 3592(a)(1).[5] At no time was the jury told by either the Court or trial counsel that it could:

- find and give mitigating effect to a diagnosis of manic flip under the severe mental or emotional disturbance mitigating factor pursuant to 18 U.S.C. § 3592(a)(6)[6] or the "catch-all" mitigating factor pursuant to 18 U.S.C. § 3592(a)(8);[7]
- find and give mitigating effect to a diagnosis of bipolar disorder under the (a)(1), (a)(6) or (a)(8) mitigating factors;
- find and give mitigating effect to Mr. Fields' uncontested depression under the (a)(1), (a)(6) or (a)(8) mitigating factors; or
- find or give mitigating effect to Mr. Fields' largely uncontested history of auditory hallucinations under the (a)(1), (a)(6) or (a)(8) mitigating factors.

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[5] Section 3592(a)(1) provides that it is mitigating if "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge."

[6] Section 3592(a)(6) provides that it is mitigating if "[t]he defendant committed the offense under severe mental or emotional disturbance." While trial counsel did argue this mitigating factor, it was based, not on any mental health issues, but on the circumstances of Mr. Fields' life, including his rocky relationships, his separation from his family, his father's recent death and his homelessness. *TR*, 3440.

[7] Section 3592(a)(8) provides that a defendant may argue "[o]ther factors in the defendant's background, record, or character or any other circumstances of the offense that mitigate against imposition of the death sentence."

Thus, the jury was left without an option by which to give mitigating effect to any mental health evidence except the manic flip diagnosis under the (a)(1) mitigating factor.

2. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to argue or to request jury instructions that would allow the jury to give mitigating effect to Mr. Fields' mental health impairments, independent of the manic flip theory under the (a)(1) mitigating factor. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

a. Deficient performance

Trial counsel were deficit for failing to argue, and request jury instructions on, Mr. Fields' mental health impairments. These were mitigating factors independent of manic flip under the (a)(1) mitigating factor. Thus, the jury was denied an opportunity to give full mitigating effect to that evidence. Trial counsel presented evidence of bipolar disorder, severe depression, and auditory hallucinations. Much of this evidence was uncontested. As the Supreme Court has observed, there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." Boyde v. California, 494 U.S. 370, 382 (1990) (internal quotations and emphasis omitted); Eddings, 455 U.S. at 115. Thus, mental illnesses, emotional disturbances and childhood dysfunction, such as the ones Mr. Fields suffered, are plainly mitigating, **even if they do not explain the offenses or rise to the level of significantly impaired capacity**. Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) (in finding the Florida death penalty statute unconstitutional which permitted consideration only of statutory mitigating factors such as impaired capacity, but not non-statutory factors such as those presented here the Court stated, "We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing

judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. 1, (1986), Eddings [] and Lockett ...."); see also Coble v. Quarterman, 496 F3d 430, 446-47 (5th Cir. 2007) (holding that evidence of bipolar disorder constituted "relevant mitigating information" that required special instruction); Antwine v. Delo, 54 F.3d 1357, 1368 (8th Cir. 1995) (discussing bipolar disorder as a mitigating factor that should have been presented to jury); Worthington v. Roper, 619 F. Supp. 2d 661 (E.D. Mo. 2009) (same); Brewer v. Quarterman, 550 U.S. 286, 292-93 (2007) (holding that special issues under Texas law impermissibly prevented jury from considering mitigating evidence of defendant's depression); Blanco v. Singletary, 943 F.2d 1477, 1504 (11th Cir. 1991) (finding counsel ineffective for failing to present evidence of defendant's depression as mitigation); McNeill v. Branker, 601 F. Supp. 2d 694 (E.D. N.C. 2009) (discussing depression as a mitigating factor that should have been presented to sentencing jury); Ben-Sholom v. Ayers, 566 F. Supp. 2d 1053 (E.D. Ca. 2008) (same); Harris by and Through Ramseyer v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994) (same); Delap v. Dugger, 890 F.2d 285, 306 (11th Cir. 1989) ("there was substantial non-statutory mitigating evidence presented which could have led to a recommendation of a lesser sentence by the jury," including " expert psychological testimony as to Delap's mental and emotional problems caused in part by his organic brain syndrome"). Indeed, such illnesses are mitigating **even if they do not rise to the level of significantly impaired capacity or are otherwise related to the offenses**. See, e.g., Brewer, 550 U.S. at 289, 292-93 (jury should have been permitted to consider as mitigation evidence that defendant suffered from bout of depression three months before murder).

Even though all of Mr. Fields' mental health impairments were broadly mitigating, trial counsel inexplicably argued **only** the mitigating value of manic flip under the (a)(1) mitigating

factor. Section 3592(a)(1) arguably is more difficult to prove than (a)(8) or even (a)(6) because it requires proof generally presented through expert testimony that the defendant was "significantly impaired" at the time of the offense. There were other ways that Mr. Fields' mental health impairments should have been argued to the jury.

First, trial counsel should have asked the Court to instruct the jury that, if it believed Mr. Fields experienced a manic flip but that flip did not "significantly impair" him, it could still find the manic flip diagnosis mitigating under either the (a)(6) severe mental disturbance mitigating factor or the (a)(8) "catch-all" mitigating factor.

Second, trial counsel should have asked the Court to instruct the jury that, if it believed Mr. Fields suffered from bipolar disorder but did not experience a manic flip, it could still find that disorder mitigating under the (a)(1) significantly impaired mitigating factor, the (a)(6) severe mental disturbance mitigating factor or the (a)(8) "catch-all" mitigating factor.

Third, trial counsel should have asked the Court to instruct the jury that the uncontested evidence of severe depression was mitigating under the (a)(1) significantly impaired mitigating factor, the (a)(6) severe mental disturbance mitigating factor or the (a)(8) "catch-all" mitigating factor, regardless of whether the jury believed Mr. Fields experienced a manic flip or suffered from bipolar disorder.

Finally, trial counsel should have asked the Court to instruct the jury that the largely uncontested evidence of auditory hallucinations was mitigating under the (a)(1) significantly impaired mitigating factor, the (a)(6) severe mental disturbance mitigating factor or the (a)(8) "catch-all" mitigating factor, regardless of whether the jury believed Mr. Fields experienced a manic flip or suffered from bipolar disorder.

Trial counsel neither asked the Court for any such instructions nor argued the mitigating

nature of Mr. Fields' mental health impairments independent of the defense's manic flip theory under (a)(1). Because trial counsel failed to argue these alternative means of considering Mr. Fields' mental health impairments, the jury was left with no other way to give expression to the mitigating value of that evidence.

The fact that trial counsel adduced evidence of Mr. Fields' mental health impairments did not relieve them of their duty to explain the mitigating value of that evidence to the jury. "A jury which does not understand that the evidence and argument presented to it can be considered in mitigation of punishment cannot give a capital defendant the individualized sentencing hearing which the Constitution requires." Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir. 1986). Thus, the jury must receive clear instructions which not only do not impede its consideration of mitigating factors, Lockett, but also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender ...." Jurek v. Texas, 428 U.S. 262, 274 (1976). That did not happen in Mr. Fields' case.

Trial counsel's failure to request alternative mental health mitigation instructions, and to argue that Mr. Fields' demonstrated mental health impairments and history of childhood dysfunction met those mitigating circumstances, violated their constitutional obligation to ensure that their client received individualized sentencing consideration. Trial counsel perform deficiently when they fail to request that a capital jury be instructed on applicable mitigating factors. See, e.g., Woodard v. Sargent, 806 F.2d 153, 157 (8th Cir. 1986) (counsel rendered deficient performance by failing to request instruction on lack of prior criminal history mitigating circumstance that was applicable to defendant); Ben-Sholom, 566 F. Supp. 2d at 1129 (counsel rendered deficient performance by failing to request instructions on statutory mitigating circumstances of extreme mental or emotional disturbance, substantial domination, and impairment due to mental disease or defect). All of the

instructions discussed above were applicable to Mr. Fields, but trial counsel never asked the Court to give those instructions to the jury.

Trial counsel's failure to request and argue alternative instructions to manic flip under (a)(1) also violated the standards of professional conduct for capital counsel as set out in the ABA Guidelines. As previously noted, the ABA Guidelines are "guides to determining" the adequacy of capital counsel's investigation. Wiggins, 539 U.S. at 522-25 (quoting Strickland and Williams). Guideline 10.11(K) which were in effect at the time of Mr. Fields' sentencing hearing provides, "Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to **all** relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions." In Mr. Fields' case, this standard of professional conduct went unmet. Trial counsel failed to request instructions and a verdict form that ensured the jury gave full mitigating effect to evidence of bipolar disorder, severe depression and auditory hallucinations.

There was no tactical or strategic reason for trial counsel's failure to request all applicable mental health mitigation instructions and to argue the mitigating nature of Mr. Fields' bipolar disorder, depression, auditory hallucinations and dysfunctional childhood. By arguing only manic flip under the (a)(1) mitigating factor, trial counsel made it far less likely that the jury would find any mitigating mental health evidence, which is the opposite of what reasonable counsel seeking to avoid a death sentence for her client would have intended. Thus, Mr. Fields' interests were not advanced by trial counsel's failure to request alternative mental health mitigation instructions and to argue those instructions to the jury. See Eze v. Senkowski, 321 F.3d 110, 129 (2d Cir. 2003) (strategy must "advance the client's interest"). Moreover, trial counsel concede that they had no tactical or strategic reason for proceeding in this way. Ms. O'Connell acknowledges, "I should have

told the jury that they could find these facts as mitigating and ask the Court to charge them on those facts as separate mitigating factors." Declaration of Julia O'Connell, Esq. ("O'Connell Dec."), *A* 1, ¶ 18.

b. Prejudice

Mr. Fields was prejudiced by trial counsel's deficient performance. In the context of a capital sentencing proceeding, a petitioner shows a reasonable probability of a different outcome by demonstrating that, but for counsel's errors, at least one juror would have recommended a life sentence. Wiggins, 539 U.S. at 537. Trial counsel presented significant evidence of Mr. Fields' history of mental illness and current diagnoses. Some of this evidence was accepted by the Government's own rebuttal mental health experts. Both Government experts conceded that Mr. Fields suffered from depression, and one agreed that he experienced command auditory hallucinations. See, e.g., *TR*, 3263-64, 3220, 3284, 3315. It is likely that at least one juror would have found this evidence to be mitigating had he or she been given a way to express such a finding. Evidence of such mental illness "is exactly the sort of evidence that garners the most sympathy from jurors." Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004).[8] Had trial counsel argued to the jury that it could find Mr. Fields' mental health impairments mitigating independent of the (a)(1) mitigating factor, then, there is a reasonable likelihood that the verdict would have been different.

This is especially true because there is evidence that, although the jury rejected the manic flip-based impaired capacity mitigating factor, it found credible at least some evidence that Mr.

[8] The Tenth Circuit credited the conclusions of death penalty litigation expert Dr. Craig Haney, who testified at the evidentiary hearing in district court that "[j]uries respond to and find mitigating [this type of evidence,] and [they] are more likely to vote for life rather than death sentences in cases where there is ... clear and clearly presented evidence that the defendant has suffered from some form of mental illness...." 379 F.3d at 942.

Fields suffered from mental illness. One of the seventeen mitigating factors the jury found was that Mr. Fields "sought treatment for his mental illness." *TR*, 3482. This finding assumes that Mr. Fields in fact suffered from mental illness, since there would be nothing to treat if the illness did not exist. Clearly, then, the jury was persuaded that Mr. Fields suffered from mental illness. Due to trial counsel's deficient performance, however, the jury did not understand that this mental illness itself was mitigating, and it was given neither argument nor instruction as and thus could not give effect to this evidence.

3. The Jury's Death Verdict Violated the Eighth Amendment Because the Jury did not Find Uncontested and Important Mitigating Evidence

The Eighth Amendment "requires that the jury be able to consider and give effect to all relevant mitigating circumstances offered by petitioner." Boyde v. California, 494 U.S. 370, 377-78 (1989) (citing Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. at 111-12; Penry v. Lynaugh, 492 U.S. 302 (1989)). A sentence imposed in violation of this requirement results in the arbitrary and capricious imposition of the death penalty. E.g., Lewis v. Jeffers, 497 U.S. 764, 782 (1990) (discussing "the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty"); Lockett, 438 U.S. at 601, Gregg v. Georgia, 428 U.S. 153, 188 (1976).

The sentencing jury's death verdict in this case was arbitrary and capricious. This is because the jury did not find uncontested evidence that Mr. Fields suffered from severe depression, see, e.g., *TR*, 3263-64; *TR*, 3220, as well as largely uncontested evidence that he suffered auditory hallucinations. See *TR*, 3284, *TR*, 3315. Having not found uncontested mitigating evidence, the jury could not have given mitigating effect to this evidence, thus rendering the verdict arbitrary and capricious.

B. Trial Counsel Were Ineffective for Failing to Investigate and Present Evidence of Mr. Fields' Organic Brain Damage

The presence of organic brain damage is mitigating in a capital case. Porter, 130 S.Ct. at 453; Rompilla, 545 U.S. at 392-93; Williams, 529 U.S. 362, 370 (even evidence that a defendant "might have mental impairments organic in origin" is mitigating).

At the time of the offenses, Mr. Fields suffered from organic brain damage. The jury never learned this fact because trial counsel failed to discover the extent of his impairments after ignoring a defense neuropsychologist's recommendation to conduct further testing. The jury also never learned about the brain impairments trial counsel **did** discover: that Mr. Fields' frontal lobes were damaged, affecting his executive functioning in areas such as judgment and impulse control. Although this evidence would have been highly mitigating in its own right and also would have bolstered the defense theory that Mr. Fields experienced a manic flip at the time of the offenses, trial counsel neglected to present this evidence and argue it to the jury. Trial counsel's performance was ineffective.

1. The Defense's Inadequate Efforts to Develop and Present Neuropsychological Evidence

Trial counsel knew or should have known of red flags that Mr. Fields suffered from brain damage. When Mr. Fields was born, he was diagnosed as suffering from hyaline membrane of the lung (now known as neonatal respiratory distress syndrome). This condition can cut off oxygen to the brain for periods of time, creating a serious risk of brain damage. Trial counsel learned about this fact anecdotally, but failed to obtain legible medical records that would have confirmed the diagnosis as well as the seriousness of Mr. Fields' condition in the days after his birth. Declaration of Glori J. Shettles ("Shettles Dec."), *A* 4, ¶ 4.

Because of Mr. Fields' oxygen deprivation at birth, as well as his repeated head injuries and

losses of consciousness before the age of twenty, see Neurological Evaluation conducted by Michael M. Gelbort on August 11, 2004 ("Gelbort Report"), *A* 6, at 2, a full neurological evaluation was warranted to determine whether he had suffered from any brain damage. Trial counsel took a step in this direction by having Mr. Fields evaluated by Dr. Michael Gelbort, a neuropsychologist. Dr. Gelbort's testing found organic brain impairments in areas such as working verbal and visual memory, short-term memory, verbally mediated tasks, higher-level reasoning tasks and impulsivity control. Gelbort Report at 3-4.

Although Dr. Gelbort conducted limited testing, he suspected that Mr. Fields suffered from frontal lobe damage and reported to trial counsel that "further evaluation [is] warranted." Gelbort Report at 3. Trial counsel did not follow up on this recommendation and failed to arrange for further neuropsychological examinations of Mr. Fields even though they filed a number of court pleadings acknowledging that further neuropsychological testing was necessary. See *Defendant's Ex Parte Supplement to Motion for Extension of Time* at 1; *Defendant's Supplemental Ex Parte Application For Extension of Time to File Rule 12.2 Notice* at 6; see also *Defendant's Notice of Intent to Present Expert Testimony* (Rule 12.2 Notice) (indicating that experts at trial would include a neuropsychiatrist, a neuropsychologist and a pharmacologist). Trial counsel also argued to the Department of Justice that Mr. Fields' brain damage was a reason not to seek the death penalty in this case. Letter from Sheldon Sperling to Julie O'Connell, dated December 2, 2004, *A* 7, at 1, 2, 4.

On the eve of trial, the Government arranged for its own testing of Mr. Fields and produced its expert report to trial counsel. The Government's expert, Dr. Price, discovered that Mr. Fields was impaired on a number of significant neuropsychological tests and noted no malingering. Report of Neuropsychological Evaluation dated July 1, 2005 ("Price Report"), *A* 8, at 21-25. After

receiving this report, Ms. O'Connell turned it over to Dr. Gelbort, who told her that Dr. Price's data was consistent with his own, but that Dr. Price's conclusions understated Mr. Fields' impairments. O'Connell Dec., ¶ 16.

Mr. Fields never received further neuropsychological testing as recommended by Dr. Gelbort, O'Connell Dec., ¶¶ 10, 17, nor did Dr. Gelbort testify at Mr. Fields' sentencing hearing.

2. The Organic Brain Damage Evidence That Trial Counsel Never Presented and the Misleading Testimony of Dr. Randall Price

In the course of these post-conviction proceedings, Mr. Fields was evaluated by Dr. Daniel A. Martell, a neuropsychologist who routinely works for the prosecution.[9] Dr. Martell has determined that Dr. Price's data unequivocally demonstrates organic impairment in the frontal lobes and that more current testing shows Mr. Fields has experienced a "catastrophic decline in functioning over the five years since he was seen by Dr. Price." Report of Daniel A. Martell, Ph.D., ("Martell Report"), *A* 9, at 10. Dr. Martell notes that "some of his test performances were among the worst I have seen."[10] Id. In particular, Mr. Fields scored in the severely impaired range on the

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[9] See e.g., United States v. Gallegos, 2009 WL 1028273 (W.D. Mo. April 16, 2009) (finding that the defendant malingered his illness); United States v. Hammer, 404 F. Supp. 2d 676 (M.D. Pa. 2005); Cone v. Bell, 89 F. Supp. 2d 922 (M.D. Tenn. 2000) (noting his "impressive curriculum vitae" and that Dr. Martell testifies for both prosecution and defense but mostly for the Government); Hall v. Lance, 687 S.E.2d 809 (Ga. 2010); State v. Reid, 213 S.W.3d 792 (Tenn. 2006); State v. Holton, 126 S.W.3d 845 (Tenn. 2004); People v. Harris, 779 N.E.2d 705 (N.Y. 2002).

[10] As stated in the *Motion*, Dr. Martell has not yet determined the cause of Mr. Fields' progressive decline, although he believes it may be related to a tumor or stroke and recommends brain imaging. Martell Report at 17. After filing the *Motion*, current counsel moved for an order to have Mr. Fields transported to an appropriate imaging facility for further testing. *Petitioner's Motion for Non-Dispositive Omnibus Relief* (Dkt. # 4). The Court denied this motion, stating that "[a]fter all briefing has been conducted in this matter and this Court has an opportunity to determine if any of the issues raised merit an evidentiary hearing, the Court will then decide what, if any, discovery should be allowed herein." Order dated 6/29/10 at 4 (Dkt. # 11).

gold-standard of neuropsychological tests, the Halstead-Reitan battery, and his executive functioning was "among the most profoundly impaired area tests." Id. at 10. Based on his review of the reports of Dr. Gelbort and Dr. Price, Dr. Martell concludes that Mr. Fields' disease existed prior to the offenses. Id. at 16.

3. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to fully and properly develop and present evidence of Mr. Fields' organic brain damage, as well as for failing to rebut testimony presented by the Government claiming that Mr. Fields did not have any significant neuropsychological impairments. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

a. Deficient performance

Trial counsel rendered deficient performance because evidence that Mr. Fields' frontal lobes were damaged would have been valuable mitigating information for the jury to consider. Dr. Woods states that, had he known about Mr. Fields' brain impairments, he could have explained to the jury that persons with frontal lobe impairments suffer a loss of control over impulsivity and therefore such an impairment is "highly mitigating." Declaration of George W. Woods, M.D. ("Woods Dec."), *A* 2, ¶ 7; see also Declaration of Bradley D. Grinage, M.D. ("Grinage Dec."), *A* 3, ¶ 12 (stating that he could have told jury that damage to frontal lobes is a mitigating factor). Counsel are routinely found to have performed deficiently for failing to discover and present evidence of neurological damage that impedes impulse control or causes other frontal lobe dysfunction. See, e.g., Porter, 130 S.Ct. at 453 (counsel rendered deficient performance by failing to uncover and present neuropsychological evidence that defendant suffered from brain damage that could manifest

in impulsive and violent behavior).[11]

Furthermore, evidence of organic brain damage would have bolstered Mr. Fields' core defense that he experienced a manic flip at the time of the offenses. As Dr. Woods explains, "If this [organic brain] impairment is added to my belief that Mr. Fields underwent a manic flip, then we see a situation where Mr. Fields' already impaired ability to control himself made him even less able to negotiate the flip that I believe occurred." Woods Dec., ¶ 7. Dr. Grinage agrees that evidence of organic brain damage could have been offered as a factor that "exacerbated" Mr. Fields' bipolar disorder, an assessment that he believes is strengthened by the previously undiscovered legible records of Mr. Fields' birth. Grinage Dec., ¶ 12.

Counsel's performance in failing to discover the extent of Mr. Fields' organic brain damage was particularly deficient because they knew that additional testing was required but failed to follow up. Counsel perform deficiently when they ignore the need to conduct further expert evaluation.

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[11] See also Rompilla, 545 U.S. 374 (counsel rendered deficient performance by failing to review court records that contained reference to broad range of mitigating evidence that counsel had failed to develop through other investigative efforts, including red flags of brain damage); Williamson v. Ward, 110 F.3d 1508, 1517 (10th Cir. 1997) (counsel rendered deficient performance by failing to present history of mental illness, alcohol and drug abuse, and brain damage or neurological disorder); Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000) (counsel rendered deficient performance by failing to present mental retardation and abnormal neuropsychological tests indicating brain damage); Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000) (counsel rendered deficient performance by failing to present temporal lobe brain damage, head injuries, and possible schizophrenia); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (counsel rendered deficient performance by failing to investigate, develop and present evidence of brain damage); Bean v. Calderon, 163 F.3d 1073, 1079-80 (9th Cir. 1998) (counsel rendered deficient performance by failing to present brain damage and dysfunction from drug use); Armstrong v. Dugger, 833 F.2d 1420, 1433-34 (11th Cir. 1987) (counsel rendered deficient performance by failing to investigate, develop and present evidence of brain damage); Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) (same); Baxter v. Thomas, 45 F.3d 1501, 1512-15 (11th Cir. 1995) (counsel rendered deficient performance by failing to present low IQ, potential brain injury); Brewer v. Aiken, 935 F.2d 850, 857-60 (7th Cir. 1991) (counsel was deficient for failing to present brain damage and "blows to the head as a young boy"); Outten v. Kearney, 464 F.3d 401, 410-12, 422-23 (3d Cir. 2006) (same); Jacobs v. Horn, 395 F.3d 92 (3d Cir. 2005) (same).

See Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998) (counsel ineffective where they knew that experts needed additional information and testing but failed to obtain it).[12] Here, almost a year before Mr. Fields' sentencing trial, Dr. Gelbort informed counsel that he suspected frontal lobe dysfunction and recommended further testing. Gelbort Report at 3. Counsel indicated to the Court that they intended to conduct such testing, implying this could include CT, PET and MRI scans and an EEG. Yet they failed to do so, even though Ms. O'Connell "stayed in contact with Dr. Gelbort about conducting further testing" and Dr. Gelbort expressed his willingness to perform such testing. O'Connell Dec., ¶ 15.

Counsel had no tactical or strategic reason for failing to fully develop and present this evidence, as trial counsel acknowledges. O'Connell Dec., ¶ 17. She never considered organic brain damage to be inconsistent with a manic flip defense and agrees that "[p]resentation of brain impairments would have been an important part of our mitigation presentation." O'Connell Dec., ¶¶ 15, 17. Given the highly mitigating nature of organic brain damage, Mr. Fields' interests were not advanced by denying the jury information about his frontal lobe impairments. See Eze, 321 F.3d at 129 (strategy must "advance the client's interest").

Trial counsel also were deficient for not presenting Dr. Gelbort's findings of significant neuropsychological impairments indicating frontal lobe dysfunction. Even without full testing and

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[12] See also Glenn v. Tate, 71 F.3d 1204, 1208-11 (6th Cir. 1995) (counsel deficient for failing to obtain neuropsychological testing that would have confirmed that defendant suffers from organic brain damage, instead relying on incomplete evaluations that were less helpful and did not include such testing); Antwine, 54 F.3d at 1365-66 (counsel deficient for failing to obtain additional mental health evaluations after initial evaluation found no mental disease or defect but counsel was aware of numerous witness reports concerning defendant's odd behavior; psychological testing revealed that defendant suffers from bipolar disorder); Kenley v. Armontrout, 937 F.2d 1298, 1308 (8th Cir. 1991) (counsel deficient for failing to investigate further after receiving negative, but incomplete and inconclusive report from one mental health expert).

evaluation, Dr. Gelbort's testimony would have been highly mitigating by itself, and also would have bolstered the opinions of Dr. Woods and Dr. Grinage that Mr. Fields experienced a manic flip. Woods Dec., ¶ 7; Grinage Dec, ¶ 12. Counsel should present to the sentencer "all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." ABA Guideline 11.8.6 (1989). Here, there was no reason whatsoever to forgo this important mitigating evidence.

Dr. Gelbort's testimony also was essential to rebut the testimony of Dr. Price, the Government rebuttal witness who falsely testified that Mr. Fields did not suffer from brain dysfunction, even though his own testing showed significant impairment. See *TR*, 3154; Price Report at 21-25. "Counsel should ... object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence." ABA Guideline 10.11, cmt. at 115. After reviewing Dr. Price's report, Dr. Gelbort informed trial counsel that the Government's test results were consistent with his own data and that Dr. Price understated the importance of that data in his conclusions. O'Connell Dec., ¶ 16; see also Martell Report at 12-13 (opining that Dr. Price's testimony was misleading and could have been rebutted by any competent neuropsychologist). Thus, in light of the considerable contribution Dr. Gelbort could have made to the defense's mitigation presentation, trial counsel's failure to call him as a witness was deficient. See Kubat v. Thieret, 867 F.2d 351, 368 (7th Cir. 1989) (finding counsel ineffective where counsel knew of mitigation witnesses but failed to present them).

Counsel had no strategic or tactical reason for not presenting Dr. Gelbort's testimony. Trial counsel acknowledges that she "stayed in contact with Dr. Gelbort about ... his ability to testify" and that he indicated his willingness to do so. O'Connell Dec., ¶ 15. As late as the start of jury selection, it was still trial counsel's intention to call Dr. Gelbort as a witness. Id., ¶ 15. According

to trial counsel, at the last minute Dr. Gelbort informed her that he had travel plans which prevented him from testifying, but she acknowledges that she did not seek a continuance or otherwise attempt to remedy the problem. Id., ¶ 17. Moreover, trial counsel concedes that she had no strategic or tactical reason for not presenting Dr. Gelbort's testimony. Id.

Counsel's failure to take steps to ensure the attendance of their witness violated a core defense function to present their client's case. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of the accused to present witnesses in his own defense."); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (discussing defendant's right to present a defense); see also Tosh v. Lockhart, 879 F.2d 412, 414 (8th Cir. 1989) (counsel rendered deficient performance by failing to call alibi witness or to ask for continuance after assuring defendant and his family that the witness would be called); cf. Poindexter v. Booker, 301 Fed. App'x 522, 530-31 (6th Cir. 2008) (counsel rendered deficient performance by failing to ask court to reopen proofs for last-minute witness). Trial counsel made no such efforts to procure Dr. Gelbort's testimony.

b. Prejudice

Mr. Fields was prejudiced by trial counsel's failure to investigate and present evidence of organic brain damage. Organic brain damage is a highly mitigating condition. Jurors are "likely to react sympathetically when their attention is drawn to organic brain problems." Glenn, 71 F.3d at 1211. Had counsel presented this evidence, although some jurors may have been disinclined to employ mercy, it is equally as likely that at least one juror would have empathized with Mr. Fields, given the additional insight into his mental state.

Mr. Fields was further prejudiced by trial counsel's failure to rebut Dr. Price's testimony. That testimony was devastating, but trial counsel failed to challenge his conclusions in any

meaningful way, and actually elicited more harmful testimony on cross-examination.[13] Not only did the jury never learn that Mr. Fields was brain-damaged, but Dr. Price affirmatively misled it to believe he was **not** brain-damaged. The prejudice to Mr. Fields is particularly compelling when evidence of his organic brain damage is considered in combination with his other diagnosed mental illnesses and his use of the antidepressant Effexor. When assessing prejudice a reviewing court must consider **all** of the mitigating evidence that could have been presented to the sentencing jury including both the evidence that was presented at the trial and the evidence that was adduced in post-conviction proceedings. Sears v. Upton, 130 S.Ct. 3259, 3267 (2010) (citing Porter, 130 S.Ct. at 453-54). Both Dr. Woods and Dr. Grinage agree that Mr. Fields' frontal lobe impairment exacerbated his bipolar disorder and further inhibited his ability to control himself during his manic flip. See Woods Dec., ¶ 7; Grinage Dec., ¶ 12. Thus, when evidence of Mr. Fields' organic brain damage is added to the mix of mitigating factors that were presented, there is an even greater likelihood that at least one juror would have voted for life.

C. Trial Counsel Ineffectively Failed to Investigate and Present Local Medical Professionals Who Would Have Supported the Manic Flip Defense and Testified that Mr. Fields' Mental Illness was Genuine, Not Malingered

The Government gave no quarter to Mr. Fields' core defense that he committed the offenses while experiencing a manic flip. Prosecutors attacked the manic flip diagnosis as the opinion of "left coast ... hired guns" and argued that Mr. Fields was malingering when he reported experiencing auditory hallucinations. Trial counsel readily could have rebutted the Government's claims by calling the local medical professionals who treated Mr. Fields before and immediately after the

[13] Mr. Fields' claim that trial counsel were ineffective for eliciting damaging testimony during the cross-examination of Dr. Price is discussed in Part E, below.

offenses. These professionals would have eviscerated the Government's malingering charge and bolstered the defense's manic flip theory. Instead, trial counsel ineffectively failed to call them as witnesses, allowing the Government's "left coast ... hired guns" charge to stand unchallenged. As a result, the jury rejected the only mental health mitigation argued by the defense. Trial counsel's performance was ineffective.

1. The Government's Claims of Malingering and the Treating Medical Professionals Who Would Have Rebutted Those Claims

Dr. Price, the Government's expert rebuttal psychologist, testified that Mr. Fields was malingering when he reported hearing voices. *TR*, 3221-22. In closing, the Government argued that Mr. Fields' was malingering with regard to his reports of auditory hallucinations, *TR*, 3450-51, and that his suicide attempt after his arrest was simply a means of gaining attention and sympathy. *TR*, 3464. The Government told the jury, "We didn't have to go out to the left coast to find somebody who testified for the defense every time. **We got people in our own back yard who were credible**, who would give an honest opinion who were not hired guns." *TR*, 3429.

Trial counsel, too, did not have to "go out to the left coast" to find someone to support Mr. Fields' defense. Trial counsel could have called credible treating medical professionals "in [their] own back yard" to rebut the Government's claim that Mr. Fields was a malingerer and to endorse the manic flip defense.

First, the defense could have called Dr. Louise Bumgardner, a psychiatrist and life-time resident of Oklahoma who treated Mr. Fields at the Muskogee County Detention Center after the offenses. Dr. Bumgardner believes that Mr. Fields "was genuinely mentally ill," Declaration of Dr. Joyce Louise Bumgardner, *A* 10, ¶ 4, and agrees with the opinions of Dr. Grinage and Dr. Woods that Mr. Fields experienced a manic flip at the time of the offenses. Id. at ¶ 5.

Second, the defense could have called Dr. Larry Trombka, a psychiatrist employed by the Oklahoma Department of Corrections who treated Mr. Fields when he was transferred to the Tulsa County Jail. Dr. Trombka, like Dr. Bumgardner, believes that Mr. Fields heard voices, was schizoaffective, and gave no indication "that he was faking his illness, or that his complaints were not genuine ...." Declaration of Larry Trombka, M.D., *A* 11, ¶ 2.

Third, the defense could have called Dr. R.L. Winters, a physician at the Sparks Medical Foundation who treated Mr. Fields for chronic depression at various times in 2000 and saw no reason to believe he "was malingering his illness. To the contrary, I believe that Mr. Fields suffered from chronic depression." Declaration of R.L. Winters, M.D., *A* 12, ¶ 4.

Finally, the defense could have called Dean Anderson, a physician's assistant at the Heavener Clinic who treated Mr. Fields for depression in 1999. Mr. Anderson is "confident" that Mr. Fields' symptoms "were genuine" and does not believe "he was in any way malingering these conditions or complaints." Declaration of Dean Anderson, *A* 13, ¶ 11.

Although Dr. Bumgardner, Dr. Trombka, Dr. Winters and Mr. Anderson all were ready and willing to testify, the defense failed to call any of these four local medical practitioners to support Mr. Fields' defense.

2. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to present the testimony of Mr. Fields' treating medical professionals to rebut the government's allegations of malingering and to bolster the defense's manic flip theory. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

a. Deficient performance

Trial counsel's performance was deficient because Mr. Fields' reports of auditory hallucinations were important to the defense's claim of manic flip, as well as to establishing other mental health mitigating factors. After the Government called Dr. Price to rebut this evidence, the defense needed to counter this charge of malingering. The views of medical professionals who worked in local jails and personally treated Mr. Fields would have been viewed by the jury as highly credible. Yet trial counsel failed to call them, relying instead on nothing more than a few speculative inferences that Dr. Woods was able to draw from Mr. Fields' medical records. See *TR*, 2979-80. Trial counsel also failed to call Dr. Bumgardner to bolster the manic flip opinions of Dr. Grinage and Dr. Woods, even though those opinions went to the heart of Mr. Fields' mitigation defense.

Trial counsel had a duty to rebut the Government's claims and to bolster Mr. Fields' core mitigation defense. See Chambers, 410 U.S. at 302 ("Few rights are more fundamental than that of the accused to present witnesses in his own defense."); Crane, 476 U.S. at 690 (discussing defendant's right to present a defense). The ABA Guidelines also provide that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ABA Guideline 10.11. According to the commentary to this guideline, "Counsel should ... object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence." ABA Guideline 10.11, cmt. at 115. That did not happen here. Instead, trial counsel failed to adequately respond with available witnesses to the Government's allegations of malingering and left the manic flip theory vulnerable to the Government's claim that it was nothing more than an excuse

cooked up by "left coast ... hired guns." See *TR*, 3429.

As trial counsel admits, she had no tactic or strategy for not investigating or presenting these witnesses. O'Connell Dec., ¶¶ 13-14. By not presenting local medical professionals who could rebut the Government's claims of malingering and bolster the manic flip theory, trial counsel made it less likely not more that the jury would accept Mr. Fields' core defense. Thus, Mr. Fields' interests were not advanced by neglecting to present the testimony of Dr. Bumgardner, Dr. Trombka, Dr. Winters and Mr. Anderson. See Eze, 321 F.3d at 129 (strategy must "advance the client's interest").

b. Prejudice

Mr. Fields was prejudiced by trial counsel's failure to call the medical professionals who treated him to rebut the Government's allegations that he was malingering. In closing, the Government argued these allegations at length. This argument not only undermined the defense's claim that Mr. Fields suffered from impaired capacity at the time of the offenses, but it also suggested that he was fabricating an excuse for his behavior, and thus showed consciousness of guilt. *TR*, 3451 ("The voices like the robbery and burglary were a convenient afterthought."). In short, by failing to call important witnesses "counsel effectively acquiesced in the case being tried as a neat three-act play" directed by the prosecution. Cargle v. Mullin, 317 F.3d 1196, 1214 (10th Cir. 2003) (finding that counsel's failure to call witnesses who could have contradicted prosecution's evidence made a "persuasive case for Strickland prejudice"). Moreover, prejudice is established because the jury's acceptance of the Government's argument that Mr. Fields fabricated a defense unquestionably effected its weighing of those mitigating factors that it did find.

Thus, there is a reasonable likelihood that, had trial counsel called these witnesses at least

one juror would have voted for life.

D. Trial Counsel Were Ineffective for Eliciting Damaging Testimony During the Cross-Examination of Dr. Price

Not only did trial counsel fail to present readily available evidence that Mr. Fields was brain-damaged, but they actually elicited from the Government's rebuttal expert his opinion that Mr. Fields was **not** brain-damaged. Trial counsel exacerbated the harm by failing to either object to this expert's improper testimony on direct examination or to meaningfully challenge that testimony on cross-examination. Trial counsel's performance was ineffective.

1. The Direct and Cross-Examination Testimony of Dr. Price

Trial counsel neglected to present any evidence demonstrating that Mr. Fields suffered from organic brain damage. For this reason, prior to Dr. Price's rebuttal testimony, trial counsel argued that, since the defense offered no evidence of brain injury, Dr. Price should not be permitted to opine on that subject. *TR,* 3080. Declining to rule in a vacuum, the Court stated it wanted to hear Dr. Price's testimony before ruling on the defense motion. *TR*, 3083-84.

When the Government then elicited harmful but limited testimony regarding brain damage, the defense failed to object. See, e.g., *TR*, 3106 (Dr. Price observed that Mr. Fields' "cognitive processes ... were intact"); *TR*, 3116 (recounting health history of Mr. Fields, including respiratory distress syndrome at birth, and concussion at age 16); *TR*, 3154 (stating, "But I thought there was probably going to be some brain dysfunction, something there to have people evaluating him for this."). Trial counsel also failed to object when, on direct examination, Dr. Price a psychologist with no expertise in pharmacological matters testified that overdosing on Effexor would not "have an effect on behavior immediately." *TR*, 3129.

More astonishing, however, on cross-examination trial counsel directly elicited from Dr.

Price his opinion he "did not see much neuropsychological impairment, not significant neuropsychological impairment ...." *TR*, 3204-5. Thus, through the actions of Mr. Fields' **own counsel**, the jury heard unchallenged expert testimony that Mr. Fields did not have any real organic brain damage when in fact he suffered from significant frontal lobe impairments.

2. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for eliciting harmful testimony from Dr. Price that Mr. Fields did not suffer from any organic brain damage and for failing to use readily available information to impeach his testimony. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

a. Deficient performance

It was unquestionably counter to Mr. Fields' interests to disprove that he suffered from highly mitigating organic brain damage particularly since the data proves the contrary. When trial counsel asked Dr. Price whether he saw much impairment in Mr. Fields, she **knew** that his answer would be damaging. Prior to the sentencing hearing, counsel received a copy of Dr. Price's report, which stated, "Performance on neuropsychological testing is inconsistent with either an acute or chronic neurological condition including a brain injury and/or a frontal lobe disorder." Price Report at 27; see also O'Connell Dec., ¶ 16. Counsel's elicitation of harmful testimony is deficient. See Freeman v. Class, 95 F.3d 639, 642-42 (8th Cir. 1996) (counsel rendered deficient performance by presenting evidence that his own client stole a police car); Berryman v. Morton, 100 F.3d 1089, 1100 (1996) (counsel deficient in rape trial when eliciting that co-defendant was a suspect in a robbery/homicide investigation).

Trial counsel's opening the door to evidence that his client was not brain-damaged was

similarly found deficient in Hooper v. Mullin, 314 F.3d 1162 (10th Cir. 2002). There counsel showed the defense's psychologist a neuropsychological report about the defendant that had been prepared as part of pre-offense anger management counseling. Id. at 1167-68. The psychologist then wrote a one-page report opining that the data from the neuropsychological report suggested mild brain damage. Id. at 1168. At trial, counsel called the psychologist as a mitigation witness, who told the jury that, since he did not personally evaluate the defendant, the author of the original neuropsychological report was the best source of information on this subject. Id. In rebuttal, the prosecution called the author of the neuropsychological report, who testified that the defendant had no brain damage. Id. The Tenth Circuit called the testimony that the defendant was not brain-damaged "disastrous." Id. at 1171.

Mr. Fields' counsel's errors were even more egregious. Hooper noted, "[A]lthough the defense did not intend to call [the author of the neuropsychological report] as a mitigation witness, defense counsel should have foreseen that the State might use him in rebuttal after the defense specifically relied on his report as mitigating evidence." 314 F.3d at 1171. Here, trial counsel did not merely fail to foresee that Dr. Price might give damaging testimony, but affirmatively elicited that testimony from him.

Moreover, trial counsel should have presented Dr. Gelbort in anticipation of or rebuttal to Dr. Price's testimony. Trial counsel were aware that evidence of Mr. Fields' organic brain damage had mitigating significance. O'Connell Dec., ¶ 17. Trial counsel also were aware that Dr. Price's opinion regarding Mr. Fields' lack of organic brain damage was vulnerable to impeachment because Dr. Gelbort had told Ms. O'Connell before trial that Dr. Price's data was consistent with neurological impairment. O'Connell Dec., ¶ 16.

Nevertheless, trial counsel failed to demonstrate to the jury that Dr. Price minimized Mr. Fields' actual neuropsychological impairments and overreported Mr. Fields' actual level of functioning. See Martell Report at 12-13. While trial counsel did question Dr. Price about individual tests on which Mr. Fields scored poorly, see *TR*, 3195-96, they failed to show that these scores amounted to "a pattern of impairments suggestive of brain damage." Martell Report at 12-13. This could have been accomplished either through more probing cross-examination or by presenting the testimony of Dr. Gelbort, or another competent expert, who concluded that Mr. Fields "displays a pattern often found in individuals with frontal lobe or non-dominant hemisphere neurocognitive dysfunction and brain damage with further evaluated warranted." Gelbort Report at 4. See ABA Guideline 10.11, cmt. at 115 ("Counsel should ... object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence.").

Furthermore, trial counsel failed to attack Dr. Price's overestimation of Mr. Fields' level of functioning by questioning him about the "practice effect" in neuropsychological testing. Martell Report at 13. The "practice effect" occurs when individuals are administered the same testing instruments in a relatively short period of time and, as a result, show artificially inflated scores on the second administration due to the effects of prior experience with the test and practice with the test stimuli. Id.; see also id. at n.3 (listing neuropsychological texts describing the "practice effect"). Dr. Price's opinion was vulnerable to impeachment on this front because he repeated many of the tests that Dr. Gelbort administered ten months earlier. Id. Cf. Middleton v. Evatt, 855 F. Supp. 837, 846-47 (D. S.C. 1994) (failure to cross-examine prosecution's expert on "practice effect" deficient however, no prejudice because that information was elicited during cross-examination of defense's expert).

Trial counsel also failed to object to Dr. Price's testimony regarding the effects that Effexor had on Mr. Fields. *TR*, 3129-30. As Dr. Martell points out, Dr. Price is a psychologist and is not an expert on the effects of such medications. Indeed, Dr. Price acknowledged as much when he refused to answer a question on cross-examination about the effects of the medication because of his lack of expertise in this area. *TR*, 3206. Thus, trial counsel ineffectively let the prosecution have it both ways. Dr. Price gave a harmful opinion on direct examination that Effexor could not "have an effect on behavior." This improper opinion was not objected to, even though Dr. Price later admitted that he was not expert in this area.

Trial counsel had no reasonable basis for eliciting harmful testimony from Dr. Price and failing to meaningfully challenge his flawed opinion that Mr. Fields did not suffer from organic brain damage. Prior to the sentencing hearing, trial counsel sought to limit the scope of Dr. Price's testing of Mr. Fields. See generally *Defendant's Response to Government's March 24th, 2005, Motion Regarding Mental Health Evidence* (filed March 31, 2005). Then, just before the Government called Dr. Price as a rebuttal witness, trial counsel specifically attempted to preclude Dr. Price from testifying about organic brain damage, arguing that this subject was beyond the scope of the evidence presented by the defense. *TR*, 3080. There can be no strategic reason for undercutting these efforts by bringing to the jury's attention without meaningful response the very evidence trial counsel sought to exclude. Cf. Green v. Johnson, 2006 WL 3746138, at *21 (E.D. Va. Dec. 15, 2006) (concluding that counsel's failure to file motion for mitigation specialist after remand was "not strategic" where counsel notified prosecution that defense intended to refile all previously filed motions and later claimed on appeal that court's denial of motion was error).

b. Prejudice

Mr. Fields was prejudiced by trial counsel's elicitation of harmful testimony that he did not

suffer from organic brain damage and failure to impeach or otherwise counter the questionable testimony of Dr. Price. It was bad enough that the defense failed to present highly mitigating evidence that Mr. Fields suffered from significant frontal lobe damage. Trial counsel made the situation far worse by eliciting Dr. Price's opinion that he did not have any significant neuropsychological impairment. See Hooper, 314 F.3d at 1171(characterizing counsel's opening the door to testimony that client was not brain-damage "disastrous"). Had trial counsel not elicited this harmful testimony, or if trial counsel had properly attacked his opinion with readily available evidence of its flaws, there is a reasonable likelihood that the verdict would have been different.

E. Trial Counsel Were Ineffective for Failing to Investigate and Present Evidence of Compulsive Aggression in Effexor Patients

Mr. Fields' core defense was that his capacity to conform his actions to the requirements of the law and to appreciate the wrongfulness of his actions was significantly impaired after he experienced a manic flip as a result of taking an increased dosage of the antidepressant Effexor, while suffering from then-undiagnosed bipolar disorder. The Government countered that his behavior before and after the offenses indicated volition, contradicting the defense's claim of mania. However, trial counsel never investigated the fact that Effexor could have triggered another adverse effect: compulsive aggression. This evidence would have further and better explained to the jury how Mr. Fields' violent behavior could have been induced by medication, even though his actions appeared on the surface to be volitional.

1. Mr. Fields' Effexor Defense and Uninvestigated Evidence of Effexor-Related Compulsive Aggression

The antidepressant Effexor was at the center of Mr. Fields' defense. Both Dr. Grinage and Dr. Woods testified that Mr. Fields committed the offenses while experiencing a manic flip caused by the improper administration of the antidepressant Effexor. *TR*, 2812, 2990. In closing, trial counsel argued that Mr. Fields was impaired because his Effexor "built up like it's supposed to" and "was like a wave and he got to the tipping point." *TR*, 3438.

The Government challenged the defense's theory by arguing that the circumstances surrounding the offenses demonstrated that Mr. Fields' judgment and concentration were not impaired. According to the Government, he took deliberate steps to plan and carry out the homicides by donning the ghillie suit, waiting in the woods for his opportunity, taking a precise shot and concealing his homicidal objective by staging a robbery many hours later. *TR*, 3413-22. As the prosecutor told the jury, "The Defendant had no delusions. It's impossible, virtually impossible, for Effexor to trigger a single manic episode. The facts here clearly compel the conclusion the Defendant was entirely responsible and not impaired by his volitionally, his purposefully, acquired sadness." Id. at 3451-52.

The jury apparently was persuaded by the Government's argument because it rejected the impaired capacity mitigating factor. *TR*, 3480-81. Since impaired capacity was the only mental health mitigator argued by trial counsel, the jury found no other mental health mitigation.

Had trial counsel conducted a reasonable investigation into the heart of their defense how Effexor affected Mr. Fields' behavior they would have learned that patients treated with this drug experience increased rates of compulsive aggression. Compulsive aggression, unlike impaired judgment or concentration, would have been more consistent with the Government's view that Mr.

Fields was able to deliberate before and after the offenses. Mr. Fields could have been compelled by an irrational need to commit a violent act that impaired his capacity to conform his conduct to the requirements of the law, while still being able to take the steps necessary to carry out that violent act, such as donning the ghillie suit and waiting in the woods to shoot the Chicks. Such an Effexor-induced compulsion would thus have been mitigating as significant impairment pursuant to 18 U.S.C. § 3592 (a)(1), as a severe mental or emotional disturbance pursuant to under 18 U.S.C. § 3592 (a)(6), or as catch-all mitigation under 18 U.S.C. § 3592 (a)(8).

Evidence of an association between increased rates of compulsive aggression among Effexor users was readily available to trial counsel. See, e.g., Peter Breggin, *Suicidality, Violence and Mania Caused by Selective Serotonin Reuptake Inhibitors (SSRIs): A Review and Analysis*, 16 International Journal of Risk & Safety in Medicine (2003/2004) ("Breggin Article"), *A* 14, at 36 (discussing "relatively sudden onset and rapid escalation of the compulsive aggression against self and/or others," an "extremely violent and/or bizarre quality to the thoughts and actions," and an "obsessive, compelling, unrelenting quality to the thoughts and actions."); FDA Public Health Advisory dated Mar. 22, 2004 ("PHA"), *A* 15 (recommending "close observation" of patients being treated with Effexor and other drugs for increased depression or suicidality and noting that "[a]nxiety, agitation, panic attacks, insomnia, irritability, **hostility**, impulsivity, akathisia, hypomania, and mania have been reported in adult and pediatric patients being treated with antidepressants for major depressive disorder as well as other indications, both psychiatric and nonpsychiatric.").

The PHA in particular was widely reported in the general media, and Wyeth Pharmaceuticals, Inc., the manufacturer of Effexor, responded to it by changing the drug's

Medication Guide to include the warnings requested by the FDA. Wyeth advised patients, their families and caregivers to be alert to "hostility" and "aggressiveness," among other behaviors, "especially during early antidepressant treatment and **when the dose is adjusted up or down**." Effexor Medication Guide (2004), *A* 19, at 12.

2. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to present evidence that patients treated with SSRI-type medications, such as Effexor, can experience increased rates of compulsive aggressiveness. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

a. Deficient performance

Trial counsel's performance was deficient because the defense's theory that Mr. Fields experienced a manic flip which impaired his capacity to conform his actions to the requirements of the law or to appreciate the wrongfulness of his actions was vulnerable to the Government's argument that his actions before and after the homicides appeared to be deliberate. The Tenth Circuit has noted the importance of mitigation evidence that explains to the jury why a defendant acted as he did in committing the offense. Smith, 379 F.3d at 943. Evidence that Effexor caused or added to Mr. Fields' sudden compulsive aggressiveness would have been highly mitigating because it would have helped the jury understand how he could have committed the offenses even though he had no criminal record. Cf. Lockhart v. Warden, Maine State Prison, Slip Copy, 2010 WL 610708, *7 (D. Me. Feb. 19, 2010) (had the sentencer "credited that Lockhart was in fact experiencing aggression and hostility as a side effect of Effexor, this would have been a mitigating factor to some degree at sentencing").

It was particularly deficient for trial counsel not to pursue this investigation because Mr. Fields' behavior around the time of the offenses closely matched the kinds of obsessive aggression observed in SSRI patients. This included a "relatively sudden onset and rapid escalation of the compulsive aggression against self and/or others," an "extremely violent and/or bizarre quality to the thoughts and actions," and an "obsessive, compelling, unrelenting quality to the thoughts and actions." Breggin Article at 36. In addition, on July 7, 2005 three days before the homicides his Effexor dosage was increased from 75 mg to 150 mg. *TR*, 2809-10; *TR*, 3127. There was evidence that Mr. Fields filled this prescription the day before the homicides.[14] This evidence is consistent with Wyeth's warning that adverse effects were more likely to occur after an upward adjustment to the Effexor dosage. Effexor Medication Guide (2004) at 12.

Counsel could not have possessed a tactical or strategic reason for not investigating this avenue as it was entirely consistent with the defense that counsel did investigate and present. See Richards v. Quarterman, 566 F.3d 553, 564-66 (2009) (affirming district court's finding of ineffective assistance where counsel failed to present evidence of alternative theory of circumstances of the offense that was consistent with counsel's chosen strategy of self-defense).

b. Prejudice

Mr. Fields was prejudiced by trial counsel's deficient performance. Compulsive aggression would have explained the factual circumstances of this case and supported the statutory impaired capacity mitigator. Had the jury known that patients treated with Effexor experience increased rates of compulsive aggression, there is a reasonable likelihood that at least one would have voted for life.

[14] Mr. Fields' claim that the Government withheld exculpatory and material evidence regarding the amount of Effexor that Mr. Fields consumed is discussed in Ground Seven, below.

In a similar case involving counsel's failure to present expert evidence about the side-effects of prescription medication, the Tenth Circuit found Strickland prejudice. In Sallahdin v. Gibson, 275 F.3d 1211, 1238 (10th Cir. 2002), the petitioner claimed that counsel ineffectively failed to present expert testimony that "a substantial and consistent scientific literature had already accumulated, showing that anabolic steroids could cause severe psychiatric effects ... in some individuals." The Court noted that this evidence "could have explained how Sallahdin could have been transformed from an allegedly mild-mannered, law-abiding individual into a person capable of committing the brutal murder with which he was found guilty." Thus, it "conclude[d] there is a reasonable probability that the presentation of [this expert] testimony could have altered the outcome of the sentencing phase ...." However, the Court was unable to determine whether counsel had a strategic reason for not presenting this evidence and remanded for an evidentiary hearing.

G. Trial Counsel Ineffectively Failed to Adequately Prepare the Two Mental Health Experts Who Testified for the Defense

Capital counsel have an obligation, not merely to present necessary expert testimony, but to adequately prepare their experts to give such testimony. Counsel may not simply hire an expert and then abandon all further responsibility. "[A]n attorney ha[s] a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request." Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999); see also Sechrest v. Ignacio, 549 F.3d 789, 816-17 (9th Cir. 2008).

Trial counsel were ineffective for inadequately preparing Dr. Grinage and Dr. Woods for their testimony, which enabled the Government to damage their credibility on cross-examination and undercut the heart of Mr. Fields' defense. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

1. Deficient Performance

Both Dr. Grinage and Dr. Woods acknowledge they were not properly and adequately prepared. Grinage Dec., ¶¶ 5-12, Woods Dec., ¶¶ 4, 8. Ms. Shettles and Ms. O'Connell concur with this assessment. Shettles Dec., ¶ 14; O'Connell Dec., ¶¶ 11-12. For instance, trial counsel failed to provide Dr. Grinage with a copy of the transcript of Mr. Fields' change of plea hearing. O'Connell Dec., ¶ 11; Grinage Dec., ¶¶ 6-7. Trial counsel also failed to educate Dr. Woods that the statutory impaired capacity mitigator required only that Mr. Fields' ability to appreciate the wrongfulness of his conduct or to conform to the requirements of the law be "significantly impaired." O'Connell Dec., ¶ 12; see also 18 U.S.C. § 3592(a)(1). This was deficient. See Antwine, 54 F.3d at 1366-68 (finding counsel ineffective for failing to investigate mental issues and adequately prepare mental health expert); Glenn, 71 F.3d at 1210 n.5 ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant"); Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997) ("counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance").

2. Prejudice

Mr. Fields was prejudiced by trial counsel's deficient performance. Because Dr. Woods and Dr. Grinage were not adequately prepared to testify, their credibility with the jury was damaged. For instance, because trial counsel failed to provide Dr. Grinage with a copy of the transcript of Mr. Fields' change of plea hearing, on cross-examination he contradicted some of the answers he gave on direct examination. *TR*, 2816-18; see also O'Connell Dec., ¶ 11; Grinage Dec, ¶ 7. Because trial counsel failed to educate Dr. Woods that the statutory impaired capacity mitigator required only that

Mr. Fields' ability to appreciate the wrongfulness of his conduct or to conform to the requirements of the law be "significantly impaired," Dr. Woods testified incorrectly that Mr. Fields was "unable" to conform his behavior to the requirements of the law, *TR*, 2999, exposing him to impeachment by the Government on cross-examination. *TR*, 3048; see also O'Connell Dec., ¶ 12.

In this case, the credibility of the parties' experts was paramount. These errors singularly, or when viewed in combination with the other ways in which counsel compromised the credibility of their witnesses and theory, were highly prejudicial to the defense case. Trial counsel placed Mr. Fields' life almost entirely in the hands of the defense's mental health experts and their diagnosis that he suffered a manic flip at the time of the offenses. The jury plainly did not credit the testimony of Dr. Woods and Dr. Grinage, since it rejected the manic flip diagnosis that formed the core of Mr. Fields' defense. Had Dr. Woods and Dr. Grinage been properly prepared, they likely would not have been impeached on issues that caused the jury to doubt their credibility. There is a reasonable likelihood that the jury's verdict would have been different, undermining confidence in the result. See Worthington, 619 F. Supp. 2d at 688 ("Based on a review of the totality of the evidence that was presented at the penalty hearing, the Court finds that had the trial judge heard testimony from properly prepared defense experts, there is a reasonable probability that petitioner would have received a different sentence.").

GROUND TWO

THE EIGHTH AMENDMENT AND INTERNATIONAL LAW BAR MR. FIELDS' EXECUTION BECAUSE HE IS NOT COMPETENT TO BE EXECUTED AND BECAUSE THE DEATH PENALTY IS PRECLUDED BY HIS DETERIORATING MENTAL HEALTH.

A sentencing process that offends "the evolving standards of decency that mark the progress of a maturing society" violates the Eighth Amendment's bar against excessive and cruel and unusual punishment. Gregg, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Mr. Fields' execution would violate this standard and thus is prohibited by the Eighth Amendment as well as by international law.

A. Mr. Fields Will not be Competent to be Executed

If Mr. Fields' execution becomes imminent, he will not be competent to be executed at that time. As set forth in Ground One above, Dr. Daniel Martell has identified a progressive neurological process causing Mr. Fields to experience a "catastrophic" decline in function. Martell Report at 10. Although the cause of the process is not yet clear, and the precise rate of Mr. Fields' decline has yet to be determined, it is likely that he will be incompetent at the time of his execution. "The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane." Ford v. Wainwright, 477 U.S. 399, 407 (1986). Thus, Mr. Fields' execution will be barred.

B. Mr. Fields' Execution is Precluded by his Mental Illness

Regardless of whether Mr. Fields is incompetent by the time of his scheduled execution, he is ineligible for the death penalty because of his mental illness. Although the Supreme Court has not yet held that the Eighth Amendment precludes the execution of the mentally ill, two recent cases interpreting the Eighth Amendment command such a conclusion.

In Atkins v. Virginia, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishment prohibits the execution of individuals with mental retardation. A person with mental retardation is both less culpable and less able to be deterred because of his "diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Id. at 318.

In Roper v. Simmons, 543 U.S. 304 (2005), the Court held that the execution of juveniles who commit crimes while under age eighteen also violates the Eighth Amendment. As in Atkins, the Court reasoned, "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.... [T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Id. at 571-72 (internal quotations omitted).

The Atkins and Roper bars on the death penalty for mentally retarded and underage offenders are grounded in the same concerns that ought to prevent the execution of the severely mentally ill. Such individuals, like Mr. Fields, share those characteristics that make the execution of mentally retarded and underage individuals inconsistent with the retributive and deterrence functions of the death penalty, such as a diminished capacity for understanding, impulse control, and ability to engage in meaningful cost-benefit analysis. See ABA, *Special Feature: Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, MENTAL & PHYSICAL DISABILITY LAW RPT'R 668, 670 (2006).

In addition, the execution of the mentally ill offends the "evolving standards of decency"

protected by the Eighth Amendment. Eighth Amendment analysis is "informed by objective factors" such as the views of professional "organizations with germane expertise." Atkins, 536 U.S. at 312, 316 n.21. The leading legal professional organization in the country, the American Bar Association, unequivocally expresses the view that "[d]efendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law." American Bar Resolution 122A, unanimously passed on Aug. 8, 2006; ABA, 30 MENTAL & PHYSICAL DISBILITY LAW RPT'R at 668.

Similarly, nearly every major mental health association in the United States has published a policy statement addressing the issue of the execution of mentally ill offenders, and all of those organizations advocate either an outright ban on executing **all** mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented.[15]

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[15] See American Psychiatric Association, *Moratorium on Capital Punishment in the United States* (approved October 2000), APA Document Reference No. 200006; American Psychological Association, *Resolution on the Death Penalty in the United States*, National Alliance for the Mentally Ill, *The Criminalization of People with Mental Illness*; National Mental Health Association, *Death Penalty and People with Mental Illness* (approved March 10, 2001). Specifically, the National Mental Health Association (NMHA) found that the fact-finding portion of capital trials "fails to identify who among those convicted and sentenced to death actually has a mental illness." NMHA, *Death Penalty and People with Mental Illness.* Similarly, the American Psychological Association (APA) argued that too many "[p]rocedural problems, such as assessing competency," render capital punishment unfair to the mentally ill. APA, *Resolution on the Death Penalty in the United States*. Such procedural inadequacies fall far short of the "basic requirements of due process," according to the American Psychiatric Association (AMPA). AMPA, *Moratorium on Capital Punishment in the United States*. Thus, the NMHA, APA, and AMPA believe that the criminal justice system routinely executes many mentally ill individuals without realizing that any illness existed and, therefore, without considering that illness as a mitigating factor. The National Alliance for the Mentally Ill (NAMI) advocates an outright ban on death sentences for individuals with any type of brain disorder. NAMI, *The Criminalization of People with Mental Illness*.

In addition, just as in Atkins and Roper, where international law and opinion weighed against the execution of persons with mental retardation, international law and opinion also weigh against the execution of the mentally ill. The execution of the severely mentally ill is forbidden by Article 6, § 1 of the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (1966). In the case of Francis v. Jamaica, Communication No. 606/1994 U.N.H.R.C., on August 12, 1994, the United Nations Human Rights Committee held that the execution of an individual who was mentally disturbed, but examined and found not to be "insane," amounted in that case to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR.

Finally, Mr. Fields' execution would violate principles of international law that this Court is constitutionally bound to enforce. The exemption of the severely mentally ill and brain-damaged from capital punishment is a long-recognized and entrenched norm of international humanitarian law, which applies to this Court through treaty and convention. As a customary norm of international humanitarian law, the prohibition on the execution of the severely mentally ill has acquired the character of jus cogens, a peremptory norm of general international law accepted and recognized by the international community of states as a binding obligation from which no derogation is permitted, regardless of the circumstance. The United States has ratified the ICCPR, thereby recognizing the binding nature of its provisions. These international rules prohibiting cruel, inhuman or arbitrary punishments are a part of United States law, as set forth in United States treaty obligations. As such, they are directly enforceable in United States courts and are available as an alternate basis for granting the relief requested in the *Motion*. Treaties create binding obligations on the United States, and the courts must give full effect to these rules.

C. Ripeness

By their very nature, Eighth Amendment and international law analyses are constantly evolving to reflect the evolving standards of decency on both a national and international level. Thus, portions of this claim may not be ripe for litigation at this time. See Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) (recognizing that death-sentenced prisoner properly raises a Ford claim after a warrant for his execution has been issued). Nevertheless, Mr. Fields raises these issues here in order to preserve the claim for future review and avoid any assertion by the Government that the claim has been waived. He is prepared to litigate this claim and present his proofs at an evidentiary hearing should this Court conclude that it is appropriate to do so at this time.

GROUND THREE

THE SIXTH AMENDMENT WAS VIOLATED BECAUSE TRIAL COUNSEL INEFFECTIVELY FAILED TO INVESTIGATE, PRESENT AND ARGUE EVIDENCE THAT WOULD HAVE REBUTTED THE SUBSTANTIAL PLANNING AND MENTAL ANGUISH AGGRAVATING FACTORS, AND THE FIFTH AMENDMENT WAS VIOLATED BECAUSE THE GOVERNMENT PRESENTED FALSE AND MISLEADING TESTIMONY AND ARGUMENT TO SUPPORT THE SUBSTANTIAL PLANNING AGGRAVATING FACTOR.

"The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (citing Jurek, 428 U.S. 262). In the federal capital sentencing regime, aggravating circumstances must be proven beyond a reasonable doubt.[16] 18 U.S.C. § 3593(c).

In Mr. Fields' case, the Government sought to prove, among other aggravating

[16] In addition, where enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires their proof beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 609 (2002).

circumstances, the statutory aggravating factor that Mr. Fields shot Mr. and Mrs. Chick after substantial planning and premeditation, and the non-statutory aggravator that he inflicted mental anguish on Mrs. Chick. The jury found both of these aggravating circumstances. See United States v. Fields, 516 F.3d 923, 927 (10th Cir. 2009).

Trial counsel neglected their constitutional duty to challenge the aggravating factors that made Mr. Fields eligible for the death penalty. The Government's evidence of substantial planning and mental anguish was deeply flawed, yet trial counsel failed to attack the Government's witnesses on cross-examination and failed to present their own rebuttal experts who could have helped them expose the vulnerabilities of this evidence. Even more remarkably, in closing argument trial counsel failed to utter a single word about why the Government had failed to prove the aggravating factors beyond a reasonable doubt.

Moreover, with regard to the substantial planning aggravating factor, the Government presented testimony and argument that was at best misleading testimony and at worst false. The Government presented the false and misleading testimony of a law enforcement official to establish that Mr. Fields purportedly staged a robbery many hours after shooting the Chicks and endorsed that false and misleading testimony in its closing argument; selectively and misleadingly elicited facts from a witness to bolster its claim in closing argument that Mr. Fields attempted to set up a false alibi for his whereabouts on the evening of the homicides; and twisted Mr. Fields' long-time interest in hunting squirrels into a methodical plan to kill human beings.

Trial counsel's failure to challenge the substantial planning and mental anguish aggravating factors violated Mr. Fields' right to the effective assistance of counsel guaranteed by the Sixth Amendment, and the Government's knowing presentation of false and/or misleading evidence in

support of the substantial planning aggravating factor violated his right to due process guaranteed by the Fifth Amendment.

A. The Substantial Planning Aggravating Factor

1. The Government's Evidence

To prove the substantial planning aggravating factor,[17] the Government alleged that, a year or more prior to the homicides, Mr. Fields conceived a plan to become "a predator, a sniper" and shoot human beings. TR, 3406-07. As evidence of this purported scheme, the Government elicited from Daniel Presley, a friend of Mr. Fields, that Mr. Fields went squirrel hunting in a ghillie suit, that he attached a powerful scope to his .22 rifle (which he also ghillied), and that he was a "[g]reat shot." *TR*, 2378-79, 2384-85.

The Government further alleged that, a few days before July 10, 2003, Mr. Fields met the Chicks and decided to put his plan into action. As evidence of this "plan," the Government first called Mr. Presley to testify that on the evening of July 10, 2003, he had plans "to go to the casino in Pocola, Oklahoma with my sister who was in town." *TR*, 2382. The Government then called Dawn Michelle (Tipton) Bond, Mr. Fields' former girlfriend, to testified that Mr. Fields called her on the morning of July 10, 2003, and told her he had plans to go fishing with his friend Mr. Presley

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[17] The statutory aggravating factor of substantial planning and premeditation (18 U.S.C. § 3592(c)(9)) provides as follows:

> (c) Aggravating factors for homicide In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:
>
> (9) Substantial planning and premeditation The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

that evening so "he wouldn't be right home." *TR,* 2558-59. From these facts, the Government argued that Mr. Fields did not really have a plan to go fishing with Mr. Presley and instead was attempting to create an "alibi" for his whereabouts. *TR*, 3412-13.

The Government also presented evidence that Mr. Fields returned to the campsite hours after shooting the Chicks and "staged robbery" to make it appear that Mr. Fields' motive was to steal, not to kill. *Tr.*, 3421, 3422; see also *Tr*, 2019.

To support this "staged robbery" theory, the Government relied on the testimony of Agent Iris Dalley, an Oklahoma State Bureau of Investigation ("OSBI") crime scene agent, and Dr. Ronald DiStephano, a medical examiner for the state of Oklahoma. First, Agent Dalley testified that the driver's side window of the Chicks' van had been broken and that several glass fragments from this window rested upon a pool of dried blood in the well of the front passenger door. *TR*, 2099. According to Agent Dalley, because these glass fragments had no blood on them, they must have landed on the blood in the well after it had dried. *TR*, 2098-99. Second, Agent Dalley and Dr. DeStephano both testified that lividity patterns on Mr. Chick's body indicated that his body was moved from the picnic table to the ground at least six hours after he was shot. *TR*, 2026-32, 2111-15.

2. The Rebuttal Evidence That the Defense Never Presented

a. Evidence that Mr. Fields did not shoot the Chicks after Substantial Planning

Had trial counsel conducted a reasonable investigation, they would have discovered evidence refuting the Government's allegations that Mr. Fields shot the Chicks after substantial planning. If asked, Mr. Presley a cooperative witness who made himself available to the defense would have told trial counsel that the evidence the Government relied on in arguing that Mr. Fields had a long-

standing plan to hunt human beings were in fact entirely innocuous. According to Mr. Presley:

- Ghillie suits and ghillied weapons were common among hunters in the area, Declaration of Daniel Presley ("Presley Dec."), *A* 20, ¶¶ 4, 5;

- It was not unusual for hunters like Mr. Fields who ate the squirrels they shot to attach large scopes to their .22 rifles because it prevented the meat from being ruined by shot; and

- Mr. Fields attached the scope to his rifle at least a year before the homicides. Presley Dec., ¶ 5.

Mr. Presley also could have provided the defense with crucial information destroying the Government's claim that Mr. Fields tried to set up an alibi for the night of the homicides. Had he been asked by trial counsel, Mr. Presley would have told them that Mr. Fields came over to his house after work on the day of the shootings and **asked him to go snake-hunting that night**. Presley Dec., ¶ 3. Mr. Presley and Mr. Fields frequently went snake hunting at night. Id. On this particular occasion Mr. Presley declined to go because he had plans to go to the casino with his sister that evening. Id. Thus, had trial counsel been properly prepared, on cross-examination they could have elicited from Mr. Presley that Mr. Fields **did** hope to do something with Mr. Presley on the evening of the homicides, as he told Ms. Tipton, and was not trying to fabricate an "alibi." This information also would have demonstrated that, just a short time before the shootings took place, Mr. Fields still had no plan to go to the Winding Stairs Campground to kill the Chicks.[18]

b. Evidence that Mr. Fields did not stage a robbery many hours after the shootings

Had trial counsel conducted a reasonable investigation including consulting with an

[18] Although Mr. Presley initially believed Mr. Fields came to his house sometime after 4:00 p.m, see FD-302 Interview of Daniel Presley dated August 7, 2003 ("Presley Interview"), *A* 21, at 3, his wife Marilyn testified that Mr. Fields stopped by "around 6:30, quarter to seven," *TR,* 2462, a fact that Mr. Presley acknowledged in his testimony. *TR*, 2382.

independent crime scene investigator they would have discovered evidence refuting the Government's allegations that Mr. Fields returned to the crime scene many hours after the shootings and staged a robbery .

Agent Dalley's testimony that the glass fragments found resting on a dried pool of Mrs. Chick's blood were not stained with blood was contradicted by both Agent Dalley's own investigative report and photographs taken at the crime scene. In her report, Agent Dalley recorded no observations about these glass fragments, nor did she note whether she examined the fragments at the scene or collected them for later examination. OSBI Crime Scene Investigation Report dated August 1, 2003, *A* 22, at 3. Trial counsel never cross-examined her about why, if the glass fragments were such important evidence, she failed to note in her report that they were free of blood, as she told the jury two years later.

Moreover, one of the crime scene photographs taken by Agent Dalley shows that at least one glass fragment resting on the dried pool of Mrs. Chick's blood has a red stripe consistent with blood. Declaration of R. Robert Tressel ("Tressel Dec."), *A* 23, ¶ 8. Thus, contrary to Agent Dalley's testimony that the glass fragments landed on Mrs. Chick's blood after it had dried, at least one fragment must have landed on the blood while it was still viscous. Id., ¶ 9.

Even if other glass fragments had no blood on them, this could have been accounted for by the fact that Agent Dalley had to open the passenger door of the van to view the interior, TR, 2098, at which time she likely disturbed a number of glass fragments and caused them to fall onto the dried blood. Tressel Dec., ¶ 12. This conclusion is supported by another photograph taken by Agent Dalley which shows that at least one glass fragment appears to have fallen from the van door to the pavement below. Id.

Evidence related to Mr. Chick's body also suggests that he was not moved many hours after he was shot, as the Government alleges. As Tressel, or another competent crime scene investigator, could have told the defense:

- Government's Exhibit 51, a photograph depicting Mr. Chick's right hand, shows pine needles and other ground debris attached to a thin layer of blood coating his fingers and the top half of his hand, but no debris attached to the blood-free portion of his hand and wrist. This indicates that Mr. Chick was moved from the picnic table to the ground before the blood on his hand dried. Tressel Dec., ¶ 16.

- Another crime scene photograph shows a considerable pool of blood around Mr. Chick's head. Given the cool evening temperature and the heavy volume of blood that flowed from his head, his body must have been moved relatively soon after he was shot. Tressel Dec., ¶ 17.

- Although the Government's theory that Mr. Chick's body was moved more than six hours after he was shot was based on livor patterns on the body, see, e.g., *TR*, 2031-32, 2177, trial counsel failed to cross-examine Dr. DiStephano and Agent Dalley on the fact that a number of livor patterns on Mr. Chick's body also were **consistent** with lividity having become fixed while Mr. Chick was lying where he was found and **inconsistent** with lividity having become fixed while Mr. Chick was slumped at the picnic table. Tressel Dec., ¶ 18. Trial counsel could have impeached the lividity testimony of Dr. DiStephano and Agent Dalley by demonstrating that at least some livor was inconsistent with the Government's theory, thereby creating reasonable doubt that Mr. Chick's body was moved long after he was shot.

B. The Mental Anguish Aggravating Factor

1. The Government's Evidence

To prove the nonstatutory mental anguish aggravating factor,[19] the Government argued that Mrs. Chick was close enough to her husband when he was shot that she was "splattered" with his blood "all over h[er] face." *TR*, 3415-16. As evidence to support this argument, the Government presented the testimony of Agent Dalley. Agent Dalley testified that she observed high velocity blood spatter on Mrs. Chick's face, particularly on her left check, and that high velocity spatter can

[19] Non-statutory aggravating factors are permitted under 18 U.S.C. § 3953(a).

travel up to two feet and still remain visible. *TR*, 2088-91. According to Agent Dalley, Mr. Chick had to be the source of the high velocity spatter on Mrs. Chick's face, *TR*, 2090, although the spatter was never tested to confirm that claim. *TR*, 2213.

2. The Rebuttal Evidence That the Defense Never Presented

Had trial counsel conducted a reasonable investigation by consulting with a blood spatter expert, they could have rebutted the Government's claim that Mrs. Chick was sitting just two feet from her husband and was spattered with his blood when he was shot. Mrs. Chick was shot in the left frontal region of her head, resulting in two wounds: an entrance wound and a nearby exit wound. Tressel Dec., ¶ 26. Either of these wounds could have created high velocity blood spatter, and this spatter could have landed on Mrs. Chick's face. Id. Significantly, most of the spatter observed by Agent Dalley was on Mrs. Chick's left cheek, the same side as her frontal bullet wound. Id., ¶ 25.

C. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to fully investigate the Government's claims that Mr. Fields carried out these crimes with substantial planning and premeditation and inflicted mental anguish on Mrs. Chick and to adequately challenge those claims at the sentencing hearing. Trial counsel's performance was deficient and Mr. Fields was prejudiced by that deficient performance. See Strickland, 466 U.S. at 687.

1. Deficient Performance

Trial counsel were deficient because they had an obligation to rebut the aggravating factors presented by the Government. "[C]ounsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." ABA Guideline 10.11(A); see also ABA Guideline

10.11(I)[20] ("Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible."). Notwithstanding these duties, the Government's evidence of substantial planning and mental anguish went unrebutted.

Had trial counsel mounted a reasonable investigation, they could have discovered ample evidence with which to rebut the Government's aggravating circumstances. For instance, Mr. Presley could have testified that ghillie suits and scoped rifles were commonly used for hunting, placing the Government's evidence on those matters in its proper context. He also could have demolished the Government's "alibi" claim by informing the jury that Mr. Fields asked him to go snake hunting on the night of the offenses. Trial counsel should have discovered this information in particular because, in Mr. Presley's statement to the FBI, he mentioned that, just hours before the offenses, Mr. Fields asked him if he "wanted to do something." Presley Interview at 3. That statement, which was produced to the defense in discovery, should have prompted trial counsel to inquire what exactly Mr. Fields wanted to do with Mr. Presley. Yet trial counsel never followed up on the matter with Mr. Presley. Presley Dec., ¶ 3.

A crime scene investigator or other appropriate expert also should have been called to cast reasonable doubt on the Government's claim that Mr. Fields staged a robbery hours after the shootings and inflicted mental anguish on Mrs. Chick by causing her husband's blood to be spattered on her face. At the very least, trial counsel should have consulted with such an expert to assist in

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[20] See also ABA Guideline 10.11(I), cmt. at 111 ("Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase. Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted or undercut.").

cross-examining the Government's witnesses. See Richter v. Hickman, 578 F.3d 944, 955-961 (9th Cir. 2009) (counsel deficient for failing to consult with blood spatter experts before settling on trial strategy and to present expert testimony at trial).[21] Yet trial counsel acknowledges that she did not even consider retaining a crime scene investigator or pathologist and concedes that "I could have presented such an expert on my case or, at a minimum, to advise me about how to prepare and conduct my cross-examination of the Government's witnesses." O'Connell Dec., ¶ 22.

Not only did trial counsel fail to attack the Government's evidence supporting the substantial planning and mental anguish aggravating factors with readily available affirmative evidence of their own, but in closing argument failed to utter a single word about these aggravating factors. It was, in short, a nearly complete capitulation by the defense. Under these circumstances, trial counsel's performance was deficient. See Battenfield v. Gibson, 236 F.3d 1215, 1228 (10th Cir. 2001) (counsel's performance was "constitutionally deficient" because he was "wholly unprepared to rebut the aggravating factors argued by the prosecution"); Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005) (counsel rendered deficient performance by failing to rebut aggravating evidence).

Trial counsel admits that she had no strategic or tactical reason for not consulting or presenting a crime scene investigator or other appropriate expert to rebut the Government's claims. O'Connell Dec., ¶ 22. Nor could there could be any reasonable basis for failing to investigate and attack the Government's theory that Mr. Fields committed these crimes with substantial planning

[21] See also Draughon v. Dretke, 427 F.3d 286, 296 (5th Cir. 2005) (counsel deficient where "the failure to investigate the forensics of the fatal bullet deprived [the defendant] of a substantial argument, and set up an unchallenged factual predicate for the State's main argument .... [The defendant] became the sole source of evidence available to counter the prosecution's theory."); Gersten v. Senkowski, 426 F.3d 588, 607-08 (2d Cir. 2005) (counsel deficient when he "failed to call as a witness, or even to consult in preparation for trial and cross-examination of the prosecution's witnesses, any medical expert on child sexual abuse").

and premeditation and inflicted mental anguish on Mrs. Chick. These aggravating factors were factors that made Mr. Fields eligible for the death penalty, and trial counsel had every reason to rebut them or argue that they did not sufficiently outweigh the mitigating factors.

2. Prejudice

Mr. Fields was prejudiced by trial counsel's deficient performance. The Government presented expert testimony and vigorously argued that this testimony supported both the substantial planning and mental anguish aggravating factors. See, e.g., *TR*, 3406-13, 3415-16, 3420-22, 3454, 3456. That testimony and argument went unchallenged by the defense. Yet trial counsel could have injected reasonable doubt into the jury's deliberations by effectively cross-examining the Government's witnesses, presenting their own expert testimony in rebuttal, and arguing why the Government had not proven these aggravating factors beyond a reasonable doubt. See Richter, 578 F.3d at 962 ("Because expert testimony that contradicted that offered by the prosecution was in fact available, and strongly persuasive, the harm caused by counsel's failure to make any effort to obtain it is readily apparent, and devastating."). Given that the Government had the burden of proof beyond a reasonable doubt, 18 U.S.C. § 3593(c), there is a reasonable likelihood that, had trial counsel attacked the Government's evidence in these ways, the verdict would have been different.

D. The Government's Due Process Violations

"[C]ontrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." Mooney v. Holohan, 294 U.S. 103, 112 (1935). For this reason, the Supreme Court has long recognized that a conviction obtained through the use of false evidence violates due process. Napue v. Illinois, 360 U.S. 264, 269 (1959) (citing Holohan, Pyle v. Kansas, 317 U.S. 213

(1942) and Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958)). Such a conviction violates due process regardless of the prosecution's good faith or bad faith. Napue, 360 U.S. at 269 (due process violated where prosecution knew or should have known of false testimony); United States v. Agurs, 427 U.S. 97, 103 (1976) (same).

Here, the Government violated Napue and its progeny by presenting false and misleading testimony and argument to persuade the jury that Mr. Fields killed Mr. and Mrs. Chick after substantial planning and deliberation.

1. False and Misleading Testimony and Argument About a Purportedly Staged Robbery

As noted, the Government argued that, after Mr. Fields shot the Chicks, he left the campground and returned more than six hours later to stage a robbery to make it appear that his objective had been to steal, not to kill. *TR*, 3421, 3422. This theory supported the Government's claim that the shootings were the result of substantial planning and deliberation, a statutory aggravating circumstance that made Mr. Fields eligible for the death penalty and was weighed by the jury. See, e.g., *TR*, 2019 (explaining relevance of "staged robbery" theory to statutory aggravating factor). Establishing these facts also tended to contradict Mr. Fields' mental health-related evidence.

The Government's "staged robbery" theory relied in significant part on Agent Dalley testimony that the driver's side window of the Chicks' van had been broken and that several glass fragments from this window rested upon a pool of dried blood in the well of the front passenger door. *TR*, 2099. According to Agent Dalley, she found these glass fragments "significant" because they had no blood on them, and therefore must have landed on the blood in the well after it had dried. Id. at 2098-99. The Government argued in closing that this testimony supported the

substantial planning aggravating circumstance. *TR*, 3456.

Agent Dalley's testimony was false and misleading. Her claim that she "noted was there are some of these fragments on top of the blood, and those glass fragments are not stained" is contradicted by (1) her own crime scene investigation report, and (2) photographs she took at the crime scene. She made no mention of any lack of blood staining in the report she prepared approximately two weeks after the homicides, nor did she collect the glass fragments for later examination. OSBI Crime Scene Investigation Report dated August 1, 2003, 3, 7-9. Thus, she had no basis upon which to testify two years later that the glass fragments were free of blood.

Moreover, Agent Dalley's claim that the glass fragments lacked any blood staining is refuted by the photographs she herself took at the crime scene. In one photograph, at least one glass fragment resting on the dried pool of Ms. Chick's blood shows a red stripe consistent with blood. See OSBI Photograph (CR03527CD40085.jpg), *A* 24. This photograph directly contradicts Agent Dalley's testimony. Significantly, during Agent Dalley's direct examination, the Government never showed her this particular photograph even though it reveals more detail than Government's Exhibit 43, the photograph prosecutors did show her.

The prosecutors knew or should have known that Agent Dalley's testimony was false and misleading. The Government had both Agent Dalley's crime scene report and the photographs she took at the scene, and thus the false and misleading nature of Agent Dalley's testimony should have been readily apparent to the prosecutors. Even if the prosecutors did not elicit Agent Dalley's false and misleading testimony, they unquestionably had a duty to correct it. Napue, 360 U.S. at 269 ("[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."); US v. Biberfeld, 957 F.2d 98, 102 (3d Cir. 1992) ("If a prosecutor

uses testimony it knows or should know is perjury, it is fundamentally unfair to an accused .... The same is true when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial.").

2. Misleading Testimony and False and Misleading Argument About Mr. Fields' Purported "Alibi"

As also noted, the Government argued that Mr. Fields attempted to construct an alibi for his whereabouts on the night of the offenses. This argument was based on the testimony of two witnesses, Mr. Presley and Ms. Tipton. The Government first called Mr. Presley to testify that on the evening of the homicides he had a plan to go to the casino in Pocola, Oklahoma with his sister. *TR*, 2382. The Government then called Ms. Tipton to testify that Mr. Fields called her on the morning of July 10, 2003 and told her that he had "plans" with Mr. Presley for that evening and that "[t]hose plans those plans were for him and Danny [Presley] to go fishing and him not he made it very clear to me he would not be home right after work." *TR,* 2558-59.

Based on this testimony, the Government argued in closing that Mr. Fields had attempted to set up an alibi for the night he planned to shoot the Chicks:

> He knew this was the day. **He had already set up us [sic] alibi**. If you remember, Michelle Tipton told you, yeah, he called me on that day. He said he was going fishing with Dan Presley, not to expect him over at her house later that evening, that he'd be late. Well, we know that's not true because Dan Presley was at his house and sleeping for a period of time with the Defendant there, certainly not fishing with him. **He's already set up the alibi because he knows on this night that would be the last night that the Chicks have on this earth**.

TR, 3412-13.

The Government knew or had reason to know that Mr. Fields never tried to "set up [an] alibi," as it falsely and misleadingly argued to the jury. In August 2003, Mr. Presley told the FBI that, on the day of the offenses, Mr. Fields came to his house sometime after 4:00 p.m. and asked

him if he "wanted to do something." Presley Interview at 3. Mr. Presley replied that he had "plans to play the casino in Fort Smith." Id. This statement was memorialized in a FBI 302 Report and provided to the prosecutors. Id. During Mr. Presley's direct examination, the Government selectively asked him about only **part** of this statement that he planned to go to the casino to create the misimpression that, contrary to what Mr. Fields told Ms. Tipton, he had no plans with Mr. Presley for that evening. The Government failed to ask Mr. Presley about the exculpatory fact that Mr. Fields suggested they "do something" together, which is why Mr. Presley mentioned his casino plans to the FBI in the first place and thus was necessary to place this information in proper context.

It was clear from Mr. Presley's complete statement to the FBI that Mr. Fields **did** intend or at least hoped to do something with Mr. Presley on the evening of the homicides, just as he had told Michelle Tipton. What Mr. Fields said to Ms. Tipton was not an alibi, but an intention. This evidence would have shown that he had no plan to shoot the Chicks at the time he made this statement to Ms. Tipton, nor did he have such a plan when he suggested to Mr. Presley that they go snake hunting which likely occurred right before he went to the Winding Stair Campground. The Government argued to the jury that Mr. Fields tried to set up an alibi knowing that this claim simply was not true.

3. The False and Misleading Testimony and Argument Could Have Affected the Judgment of the Jury

Where false and misleading testimony and argument are used to obtain a conviction, such testimony and argument are material if "if there is any reasonable likelihood that the false testimony **could** have affected the judgment of the jury." Agurs, 427 U.S. at 103. Accord Giglio v. United States, 405 U.S. 150, 154 (1972); Napue, 360 U.S. at 271. See also Strickler Greene, 527 U.S. 263, 299 (1999); United States v. Bagley, 473 U.S. 667, 678-80 & n.9 (1985); United States v. Barham,

595 F.2d 231, 242-43 (5th Cir. 1979).

There is a reasonable likelihood that the judgment of the jury **could** have been affected by the Government's presentation of false and misleading testimony and argument. This testimony and argument were important to the Government's efforts to prove the substantial planning aggravating factor, which was one of the aggravating factors that made Mr. Fields eligible for the death penalty. The Government's presentation of Agent Dalley's false and misleading testimony, and its closing argument endorsing that testimony, could have persuaded the jury that the homicides were the product of substantial planning and premeditation because Mr. Fields staged a robbery hours after killing the Chicks to conceal his intent to kill. The Government's selective and misleading presentation of Mr. Presley's testimony, and its closing argument that the evidence proved Mr. Fields set up an alibi many hours before killing the Chicks, also could have persuaded the jury to find the substantial planning aggravating circumstance. Had the jury not been presented with this false and misleading testimony and argument, it could have rejected the substantial planning aggravating circumstance and concluded that the proven aggravating circumstances did not outweigh the proven mitigating factors.

The impact of the false and misleading evidence used in this case was exacerbated by the fact that it not only helped prove an aggravating circumstance, but also undercut the defense's argument that Mr. Fields was not capable of planning out the crimes because he suffered a manic flip at the time of the offenses. Courts readily find that there is a reasonable likelihood that the jury's judgment could have been affected when the prosecution's misrepresentations undermine the defense position. See, e.g., United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995) (finding Napue/Giglio error where government witness' "testimony about the statement [defendant] made

while being interviewed did serious damage to the duress defense .... [The defendant's] attempt to repair that damage and salvage his only defense by explaining the statement was seriously undermined by the representations [the prosecutor] made to the court and the jury representations which [the prosecutor] later learned were false."); United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993) (finding Napue/Giglio error because prosecution's argument and evidence "weakened immeasurably" the defense case).

Moreover, in determining whether suppressed exculpatory evidence or false and misleading evidence is material for purposes of Brady and Napue, the cumulative effect of that evidence must be considered. See Kyles, 514 U.S. at 436 (suppressed evidence to be considered "collectively, not item-by-item"). Thus, even if a single violation does not rise to a deprivation of the right to a fair trial, the effect of all violations considered together may undermine confidence in the outcome of the trial and deprive a defendant of a fair trial. See id. at 434. Here, the combined effect of all these due process violations, as well as the due process violations discussed in Ground Seven, below, denied Mr. Fields his right to due process, even if each due process violation considered individually was not material.

GROUND FOUR

THE SIXTH AMENDMENT WAS VIOLATED BECAUSE TRIAL COUNSEL INEFFECTIVELY FAILED TO PRESENT MR. FIELDS' SOCIAL HISTORY THROUGH THE TESTIMONY OF A MITIGATION SPECIALIST OR MENTAL HEALTH EXPERT AND TO ARGUE THAT SOCIAL HISTORY AS A MITIGATING FACTOR.

Capital counsel has an "obligation to conduct a thorough investigation" for mitigating evidence. Williams, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). A constitutionally adequate investigation must include "efforts to discover all reasonably available mitigating evidence," including information about "family and

social history." Wiggins, 539 U.S. at 524 (quoting ABA Guidelines, §§ 11.4.1(C), 11.8.6 (1989) (emphasis omitted)); accord Rompilla, 545 U.S. 380-81.

Although the defense's mitigation specialist thoroughly investigated Mr. Fields' social history, the information she gathered was never told to the jury. What passed for a social history was a disjointed presentation of random events in Mr. Fields' life that misled the jury into believing he had been raised in a typical family. The truth was far different.

Contrary to the impression created with the jury, Mr. Fields was raised in a highly dysfunctional family, and that dysfunction had a profound impact on his life, his mental health and his adult functioning. While this information would have been mitigating in its own right, it also would have helped a mental health expert explain his mental state at the time of the offenses. Trial counsel should have presented this evidence through a mitigation specialist or mental health expert, who would have testified about information gleaned from many sources, including relatives, friends and institutional records. Such a witness could then have explained that information to the jury as part of a coherent, compelling mitigation theme. Trial counsel also should have argued to the jury that Mr. Fields' social history mitigated the offenses. Instead, the jury deliberated over Mr. Fields' fate knowing little about the events and forces that shaped his life.

Trial counsel's failure to present a comprehensive social history and to argue that social history as a mitigating factor violated Mr. Fields' right to the effective assistance of counsel guaranteed by the Sixth Amendment.

A. The Incomplete and Misleading Evidence of Mr. Fields' Family Background That the Jury Heard

Nearly all of the truncated evidence the jury heard about Mr. Fields' childhood and family background came from his sister, Cherie Fields. On direct examination, trial counsel asked her

about relatively benign topics. Trial counsel elicited the places her family lived, *TR*, 2674-76; her fighting with Mr. Fields, which she described as "normal teenage type stuff," *TR*, 2676; her father's long hours at work and the fact that he did not spend much time with his children, *TR*, 2677-78; the impact of her grandfather's death on the family, *TR*, 2679-80, her mother's physical ailments, *TR*, 2680-82; life with her mother in the months before the offenses, *TR*, 2682; the impact of her father's death on her mother, *TR*, 2682-85; the work Mr. Fields did for his father when he was sick, *TR*, 2685-86; and her relationship with Mr. Fields' children. *TR*, 2687. Trial counsel never asked her any questions that would have revealed the extent of family dysfunction, abuse, and emotional neglect that characterized Mr. Fields' upbringing.

Trial counsel also never asked the defense's mental health experts, Dr. Grinage and Dr. Woods, about Mr. Fields' history of family dysfunction. Indeed, very little social history information made its way to Dr. Grinage and Dr. Woods. See Grinage Dec., ¶ 10; see also Dr. Grinage's Forensic Mental Health Evaluation, dated June 24, 2005, *A* 28, at 2; Shettles Memo Preliminary Assessment, dated September 11, 2003 ("Shettles Memo"), *A* 25, at 2; Letter from Dr. George Woods to Julia O'Connell dated June 25, 2005, *A* 28, at 1. Thus, their opinions were not informed by the wealth of family and social history uncovered by the defense's mitigation specialist, Glori Shettles.

Because trial counsel did not present evidence of Mr. Fields' family dysfunction, they never argued this evidence as a mitigating factor. Of the twenty-two mitigating factors raised by the defense, not a single one addressed his childhood, family background or family dysfunction. *TR*, 3400-01.

B. Mr. Fields' Full – But Unpresented – Social History Shows Significant and Mitigating Family Dysfunction

In reality Mr. Fields was raised in a severely dysfunctional family a fact that never emerged from Cherie Fields' limited testimony. His parents were themselves raised in physically and sexually violent households. Shettles Dec., ¶ 5; Shettles Memo at 4-5, 7. His mother suffered from depression her entire life and failed to give her children the emotional support they needed. Shettles Dec., ¶ 5. The problem was compounded by the fact that, when Mr. Fields' largely absentee father was around, he and Mr. Fields' mother spent most of their time together to the exclusion of the children. Id., ¶ 6; see also Declaration of Cherie Fields ("Fields Dec."), *A* 26, ¶ 3. Mr. Fields' mother played him and his sister against each other, Fields Dec., ¶ 5, creating a triangle of coldness between Mr. Fields, his sister and their parents. Shettles Dec., ¶ 6. At the command of their mother, Mr. Fields' father whipped Mr. Fields and his sister with belts. Id., ¶ 6.

Mr. Fields' family had lived in four different states by the time he reached high school. Although Cherie Fields testified about her family's various moves, *TR*, 2674-76, the jury never learned that the family's nomadic lifestyle made it difficult for Mr. Fields to make and keep friends and increased his sense of isolation. As he approached his teenage years, he began exhibiting signs of chronic depression, causing others to dismiss him as lazy. Shettles Dec., ¶¶ 8, 10. His sister recalls that he was "getting weirder and weirder," Fields Dec., ¶ 9, and that by the time they moved to Virginia he "was sick and as strange and depressed and unpredictable as he had ever been." Id., ¶ 7.

It is more likely than not that Mr. Fields' mental health problems have a genetic component. Intergenerational mental health and neurological issues have plagued Mr. Fields' family, particularly on his mother's side. Shettles Dec., ¶ 8. His mother and his daughter have been diagnosed as

suffering from bipolar disorder, his grandmother, Pat Ginnaman, received electroshock treatments, and two sisters of Ms. Ginnaman were known to have been mentally ill. Fields Dec., ¶ 8. Mr. Fields' mother reported having brain lesions. Shettles Memo at 2. On his father's side, Mr. Fields has a cousin who is bipolar, hears voices and has received in-patient treatment for significant periods of time, and his father's mother died of a brain tumor. Id. at 3-4.

C. Trial Counsel's Ineffective Assistance

Trial counsel were ineffective for failing to present a complete and comprehensive social history of their client including family dysfunction and other mitigating evidence through the testimony of a mitigation specialist such as Ms. Shettles, or a mental health expert such as Dr. Woods or Dr. Grinage. Trial counsel also were ineffective for failing to argue that Mr. Fields' social history was a mitigating factor and to provide this evidence to the defense's mental health experts to help evaluate his mental state at the time of the offenses. As these are among the more core duties expected of capital counsel, trial counsel's failures in this regard were ineffective. See Strickland, 466 U.S. at 687.

1. Deficient Performance

Trial counsel performed deficiently by failing to present a complete social history and to argue that social history as a mitigating factor. It is axiomatic that the development of social history evidence is crucial to an effective mitigation defense at capital sentencing. See, e.g., Wiggins, 539 U.S. at 524 (counsel ineffective for failing to generate and present capital defendant's "social history"); Glenn, 71 F.3d at 1208 (capital counsel must fully investigate and develop "their client's social history" and are ineffective if they fail to do so); Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) ("In cases where sentencing counsel did not conduct enough investigation to formulate

an accurate profile of a defendant," counsel's representation has consistently been held "beneath professionally competent standards."). A necessary corollary is that the evidence developed must be presented at sentencing as part of a compelling narrative that helps the jury understand the "diverse frailties of humankind" that make the defendant a unique human being. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Moreover, "it is critically important to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors." ABA Guidelines 10.11, cmt., p. 108. None of this happened in Mr. Fields' case.

The defense's social history presentation was woefully inadequate and distorted the real picture of Mr. Fields' family. Part of the problem stemmed from trial counsel's inadequate preparation of Cherie Fields, who now acknowledges that at the time of her testimony she did not understand why it was important for the jury to hear about family dysfunction. Fields Dec., ¶ 12. According to Cherie Fields, "It is very hard to admit that there was so much strange behavior and strange violence in our house and I wish that the lawyers for Eddie before had been more specific and clear about why it was important to tell the gory details." Id.

The problem was far greater than just trial counsel's poor preparation of Cherie Fields, however. As Ms. Shettles, who attended the entire sentencing hearing, describes:

> [W]hile some isolated social history facts were provided to the jury, there was never a comprehensive social history that would really "humanize" Mr. Fields or place into proper context the inter-related factors about his life. Counsel never considered these problems, nor did they consider for development and presentation, the significant mitigation that I had collected. There was simply no effort given to contextualizing those isolated life and social history facts that were incidentally provided to the jury.

Shettles Dec., ¶ 14.

To properly contextualize Mr. Fields' life, trial counsel should have called, not just Cherie

Fields, but a mitigation expert such as Ms. Shettles or a mental health expert such as Dr. Woods or Dr. Grinage to relate this information to the jury. Ms. Shettles, Dr. Woods or Dr. Grinage could have developed this information into compelling mitigation themes of parental abandonment, emotional and physical abuse, family dysfunction, and mental illness. Had trial counsel asked any of these witnesses to present Mr. Fields' social history, the jury would have learned information that came from many relatives and family acquaintances, not just Cherie Fields. The jury also would have learned information that came from documentary sources such as school, hospital and other institutional records. All of these facts could then have been woven into coherent mitigation themes: that Mr. Fields was raised without parental attachment; that his parents placed their own relationship ahead of their relationship with their children, that he was emotionally and physically abused; that his family's transience made it difficult for him to form friendships; that his family was dysfunctional, that his mother was chronically depressed; and that he suffered significant losses in his life. See, e.g., Shettles Dec., ¶ 11.

Moreover, Dr. Woods and Dr. Grinage should have been given this information and asked about how it affected their opinions of Mr. Fields' state of mind at the time of the offenses. The commentary to the ABA Guidelines discusses the importance of having the meaning of a defendant's social history explained to the jury by an appropriate expert:

> Since an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and, in any event, are almost always crucial to explain the significance of the observations. **For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.** Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose"

expert who may have insufficient knowledge or experience to testify persuasively. ABA Guidelines 10.11, cmt., p. 108-109.

Had trial counsel asked Dr. Woods and Dr. Grinage to have provided the jury with this kind of understanding, they would have done so. According to Dr. Grinage, "It is axiomatic that collateral history is critical in assessing and presenting a complete picture of the patient/defendant as I seek to explain his mental state at the time of the incident." Grinage Dec., ¶ 10. Yet Dr. Woods and Dr. Grinage were not even supplied all of the social history evidence uncovered by Ms. Shettles, much less asked to explain the significance of that evidence to the jury. Id., ¶ 10; Forensic Mental Health Evaluation, dated June 24, 2005, *A* 28, at 2; Letter from Dr. George Woods to Julia O'Connell dated June 25, 2005, *A* 28, at 1.

Trial counsel acknowledges that she had no tactical or strategic reason for failing to present a complete social history through Ms. Shettles or one of the defense's expert psychiatrists. O'Connell Dec., ¶ 19. Nor could there be any reasonable basis for failing to do so. Trial counsel clearly understood the value of social history evidence particularly evidence of Mr. Fields' childhood and family background because they retained Ms. Shettles to investigate his social history and then called Cherie Fields to testified about that background. Having chosen to present this kind of evidence to the jury, trial counsel had a duty to do so in a manner reasonably calculated to effectuate Mr. Fields' interests. Trial counsel's scattered and incomplete social history presentation failed to accomplish that result.

2. Prejudice

Mr. Fields was prejudiced by trial counsel's deficient performance, "As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense

counsel gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant." Romano v. Gibson, 239 F.3d 1156, 1180 (10th Cir. 2002). Mr. Fields' jury learned relatively little about Mr. Fields beyond what the prosecution wanted it to know, making it more likely to vote for death.

Although trial counsel presented a few random biographical facts, *TR*, 3400-01, some of the most compelling aspects of Mr. Fields' life his upbringing in a home filled with abuse, emotional deprivation and dysfunction were never coherently presented to the jury.[22] Moreover, because Cherie Fields was not properly prepared to give testimony (i.e., by being informed about the purpose of social history evidence), she "pulled her punches" and downplayed the dysfunction in her family. The complete story had it been told by an objective narrator with the ability to weave a compelling narrative would have powerfully mitigated the offenses. Had trial counsel presented that information, there is a reasonable likelihood that the jury would have returned a verdict of life rather than death. See Wiggins, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); see also Bean v. Calderon, 163 F.3d 1073, 1080-81 (9th Cir. 1998) (finding Strickland prejudice where counsel presented a family portrait in mitigation that was an "unfocused snapshot" that failed to show abuse experienced by defendant as a child).

The prejudice Mr. Fields suffered from trial counsel's deficient performance was compounded because the defense's meager social history presentation left the jury to conclude that

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[22] The fact that trial counsel presented some mitigating evidence does not end the prejudice analysis under Strickland. Sears, 130 S.Ct. at 3266 ("We certainly have never held that counsel's effort to present **some** mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant."); see also Williams, 529 U.S. at 398.

there was nothing particularly mitigating about his childhood and that he was, as the Government claimed, simply a "sociopath" who manipulated and mistreated his family. For instance, the Government argued that Mr. Fields "abandoned" his family until he needed their help after being arrested, that he "envied his hard working, high achieving sister's success" and that he "wouldn't help his o[w]n widowed mother move halfway across this country." *TR*, 3458-59. Because there was no defense evidence putting Mr. Fields' family relationships into accurate context, the Government's argument had credibility with the jury. See Anderson v. Sirmons, 476 F.3d 1131, 1146-47 (10th Cir. 2007) (finding prejudice resultant from counsel's inadequate mitigation presentation because "the case in mitigation presented by trial counsel played into the prosecution's theory that the only explanation for the murders was that Anderson was simply an 'evil' man. The prosecution seized on Anderson's case in mitigation to assert during closing arguments that there was no excuse for Anderson's conduct because he grew up in a 'good family' and was never abused as a child.").

GROUND FIVE

MR. FIELDS WAS DENIED HIS RIGHT TO INDIVIDUALIZED SENTENCING, DUE PROCESS, A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE GOVERNMENT'S CLOSING WAS RIFE WITH IMPROPER ARGUMENT, MOST OF WHICH WAS NOT OBJECTED TO BY TRIAL COUNSEL, AND APPELLATE COUNSEL INEFFECTIVELY FAILED TO RAISE THIS ISSUE ON DIRECT APPEAL.

A prosecutor's proper concern in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Hinson, 585 F.3d 1328, 1338 & n.4 (10th Cir. 2009) (expressing the Court's concern that "the important message contained in Berger is being forgotten" and "remind[ing] all U.S. Attorney's Offices that ... [their] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

shall be done."). Thus, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Berger, 295 U.S. at 88.

As part of the duty to see that justice is done, the prosecutor has a special duty to avoid improper argument to the jury:

> It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id.; see also Cargle, 317 F.3d at 1218 ("As the State's official representative prosecuting the case on the public's behalf, the prosecuting attorney 'carries a special aura of legitimacy about him.' Thus, 'the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own.' Further, the prosecutor's personal 'experience in criminal trials may induce the jury to accord unwarranted weight to [his opinions regarding the defendant's guilt]. Finally, the jury might think that the prosecutor's opinion is based on evidence beyond that presented at trial.") (citations omitted); Le v. Mullin, 311 F.3d 1002, 1018 (10th Cir. 2002) ("Like the Court in Berger, we are especially aware of the imprimatur of legitimacy that a prosecutor's comments may have in the eyes of the jury.").

The United States Supreme Court has subjected closing arguments in capital cases to a greater degree of scrutiny. Caldwell v. Mississippi, 472 U.S. 320 (1985); see also Hooks v. Workman, 606 F.3d 715, 746 n.29 (10th Cir. 2010); Douglas v. Workman, 560 F.3d 1156, 1194 (10th Cir. 2009) (stating that in death penalty cases court will "apply a heightened concern for fairness ... where the state is prepared to take a man's life"); Lesko v. Lehman 925 F.2d 1527, 1541 (3d Cir. 1991) ("Because of the surpassing importance of the jury's penalty determination, a

prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices."). These principles are particularly important in the penalty phase of a capital case, where the Eighth Amendment's requirements of heightened "reliability in the determination that death is the appropriate punishment," Woodson, 428 U.S. at 305, and that the sentencing process "minimize the risk of wholly arbitrary and capricious action" by the sentencing jury, Gregg, 428 U.S. at 189, together with the "highly subjective" nature of the sentencing decision, Caldwell, 472 U.S. at 340-41 n.7, require that special scrutiny be given to prosecutorial argument.

"When specific guarantees of the Bill of Rights are involved, [the Supreme Court] has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Thus, a petitioner may receive relief by demonstrating that the prosecutor's improper argument "had a substantial prejudicial effect" on a specific constitutional right, without having to prove that the entire proceeding was unfair. Paxton v. Ward, 199 F.3d 1197, 1217-18 (10th Cir. 1999) (affirming grant of habeas relief where prosecutor's penalty phase argument "had a substantial prejudicial effect" on petitioner's right to present mitigating evidence); see also Cargle, 317 F.3d at 1207 ("claims of prosecutorial misconduct ... require a showing of fundamental unfairness in order to provide habeas relief, unless they involve violation of specific constitutional rights, in which case the principles governing such rights control"); Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir. 1990) ("While, ordinarily, claims of prosecutorial misconduct and other trial errors are reviewed on habeas [under the DeChristoforo fundamental fairness standard], when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair").

When "specific constitutional guarantees are [not] implicated, 'a prosecutor's misconduct will require reversal of ... a conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair, and, therefore, a denial of due process.'" Cargle, 317 F.3d at 1220; see also Paxton, 199 F.3d at 1217 (holding that DeChristoforo fundamentally unfair standard applies to improper prosecutorial arguments that do not effectively deprive defendant of specific constitutional right); Mahorney, 917 F.2d at 472 (same).

Where individual remarks by themselves do not justify relief, their cumulative effect may do so. Cargle, 317 F.3d at 1206-07; see also id. at 1224-25 (granting penalty phase relief where "the death sentences imposed in this case were substantially influenced by cumulative error"). "'A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.'" Id. at 1206 (quoting United States v. Toles, 297 F.3d 959, 972 (10th Cir. 2002)); see also United States v. Garza, 608 F.2d 659, 665 (5th Cir. 1979) ("While any single statement among those we have isolated might not be enough to require reversal of the conviction and, indeed, some clearly would not, we think it beyond question that the prosecutor's improper comments, taken as a whole, affected the substantial rights of the defendant").

A. The Government's Closing Arguments Were Rife with Improper Conduct, Denying Mr. Fields' Rights Under the Fifth and Eighth Amendments

During Mr. Fields' capital trial, the United States Attorney repeatedly struck "foul blows," crossing the line of acceptable trial advocacy into inflammatory argument and prosecutorial misconduct. The Government's improper arguments included: (a) misstating the law regarding the weighing of mitigating and aggravating circumstances so as to increase Mr. Fields' burden of persuasion and decrease that of its own, denigrating the jury's discretion to show mercy, and inviting

the jury to sentence Mr. Fields to death based upon irrelevant and inflammatory societal concerns; (b) vouching for its own expert witnesses while denigrating the expert witnesses presented by Mr. Fields; (c) launching *ad hominem* attacks on Mr. Fields that were irrelevant to any of the issues at trial; (d) misrepresenting the record and the testimony of witnesses; (e) making arguments without factual basis in the record; and (f) reciting Biblical scripture at length. See *Motion*, Ground 5, ¶¶ 175, 177-79, 182-93. The cumulative effect of the Government's improper closing arguments was to render Mr. Fields' trial fundamentally unfair and to substantially prejudice his constitutional right to jury consideration of all relevant mitigating evidence and to the imposition of a death sentence only under a statutory process that "channel[s] the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death .'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations omitted).

1. Improper Arguments Regarding the Weighing of Aggravating Factors and Mitigating Evidence

The Government's closing arguments "had a substantial prejudicial effect," Paxton, 199 F.3d at 1217, on Mr. Fields' specific constitutional right to jury consideration of all relevant mitigating information and to a sentence based only upon the objective, specific and reviewable standards set forth by the federal capital sentencing statute. Id. at 1218 (affirming grant of penalty phase relief where improper prosecutorial closing argument deprived petitioner of right to present mitigating evidence). One of the bedrock requirements of the Eighth Amendment is that a capital sentencing jury must be permitted to consider and give effect to all relevant mitigating evidence. E.g., Hitchcock, 481 U.S. at 394; Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings, 455 U.S. at 110; Lockett, 438 U.S. at 605. Another is that the sentence must be based upon a clear, reviewable

process set out by law that channels the discretion of the sentencer so that the imposition of death is not arbitrary and capricious. Godfrey, 446 U.S. at 427-28; Maynard v. Cartwright, 486 U.S. 356; Gregg, 428 U.S. at 196.[23] Here, the Government diminished and denigrated the jury's ability to weigh the significant mitigating evidence presented by Mr. Fields, and injected irrelevant and inflammatory societal concerns into the weighing process.

The Government misstated the law regarding one of the central aspects of the federal death penalty statutory scheme, the weighing of aggravating and mitigating factors, twice placing its burden of persuasion on Mr. Fields and incorrectly telling the jury that the mitigating factors must outweigh the aggravating factors in order to justify a sentence of life without parole. Compare *TR*, 3463-64 ("The mitigating factors ... cannot outweigh the premeditated murder of Charlie. ... The mitigating factors ... do not begin to outweigh just one of the steps that Shirley took in a terrorized flight from the Defendant.') with 18 U.S.C. § 3593(e). This misstatement of law was improper. Mahorney, 917 F.2d at 473 ("A misstatement of law that affirmatively negates a constitutional right or principle is often, in our view, a more serious infringement that the mere omission of a requested instruction.").

The Government also repeatedly and improperly contrasted Mr. Fields' life with the deaths of Mr. and Mrs. Chick, in order to denigrate the jury's discretion to show mercy and suggest that,

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[23] McCleskey v. Kemp, 481 U.S. 279, 305-6 (1987) ("[O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. ... Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.").

by seeking a punishment of life without parole, Mr. Fields was acting injustly. See *TR*, 3430 ("[J]ust remember the victims in this case, Charles and Shirley and their family and what they went through. The defense is going to talk to you and they're going to ask you to show mercy for this Defendant. What I want you to do is think back on July 10th of 2003. How much mercy was shown then? The Defendant wants you to look at this Defendant and oh, there's a life that can be had."); *TR*, 3457 ("The Defendant wants to choose a sentence. He wants to live. Now, how unjust is that? Just what choice did he give Charles Chick? Just what choice did he give Shirley Chick?"); *TR*, 3459 ("Remember this, here in court the Defendant continues to victimize his own family by reducing them to props in an effort to escape justice. Remember also that Charlie didn't get an opportunity to plead for his life.") Such tactics are improper, and "[r]epeated attempts by the prosecution to contrast the living defendant with the dead victim might encourage the jury not to consider mitigating evidence, in violation of the Eighth Amendment." Le, 311 F.3d at 1002 (citing Tuilaepa v. California, 512 U.S. 967, 972 (1994)).

Additionally, the Government infringed Mr. Fields' Eighth Amendment right to a sentence of death imposed in a manner that is not arbitrary and capricious, by invoking improper societal concerns and making light of the punishment of life imprisonment without parole. See *TR*, 3431 ("I can't believe they gave probation to a child molester"); *TR*, 3457 ("Well, can justice be served by life in prison? The Defendant wants to be sent to his room as punishment. If he's allowed to live, he will have their percs [sic], like workouts and visitors and phone calls and mail and tv and recreation. Don't let this Defendant be a hero to his incarcerated criminal inmates."). Such comments were improper. See Bland v. Sirmons, 459 F.3d 999, 1027 (10th Cir. 2006) ("We regret to observe that in death-penalty case after death-penalty case, Oklahoma prosecutors have made

speeches to the jury making light of the penalty of life in prison to demonstrate that the only proper punishment for a defendant's crime was death.").

These instances of prosecutorial misconduct had a substantially prejudicial effect on Mr. Fields' right to full jury consideration of mitigating evidence, including the sentencer's unlimited "discretion ... to extend mercy" based upon the evidence presented, Callins v. Collins, 510 U.S. 1141 (1994) (Scalia, J., concurring in the denial of certiorari),[24] and to a sentence of death that is not arbitrary and capricious because it is based upon clear, objective, reviewable standards, Godfrey, 446 U.S. at 427-28.

2. Improper Arguments Regarding Mr. Fields' Mental Health

One of the central issues of Mr. Fields' capital trial was whether his mental state at the time of the offenses was mitigating did Mr. Fields suffer from an Effexor-induced manic flip at the time of the offenses, thus substantially impairing his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law? The Government's closing arguments included a barrage of comments designed to distort the evidence on this central issue and inflammatorily invoke the fear, emotions and passions of the jury, rendering his trial fundamentally unfair.

The Government's strategy at trial was to contest Mr. Fields' evidence of his mental illness

[24] See also Penry v. Lynaugh, 492 U.S. 302, 326-27 (1989) (a capital sentencing jury must be able to give effect to feelings of mercy to the defendant arising out of the evidence in the case); Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989) ("The Constitution prohibits the imposition of the death penalty without adequate consideration of factors which might evoke mercy."), adopted in pertinent part by Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1994); Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985) ("the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases") (citing Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978)); cf. Nelson v. Nagle, 995 F.2d 1549 (11th Cir. 1993) ("mercy is an implicit sentencing consideration in many United States Supreme Court decisions in capital cases").

and Effexor-induced manic flip, and to portray him as a "manipulative," *TR*, 3450, "parasitic," id., "narcissistic," *TR*, 3459, 3460, "sociopath," *TR*, 3428, 3449, who was "unalterably and fundamentally different from most human beings," *TR,* 3455, and had planned all along to hunt and kill people. While in its closing arguments the Government could have emphasized appropriate methods for presenting this strategy, such as its presentation of any counter-evidence or its cross-examination of Mr. Fields' witnesses, it instead chose to improperly vouch for its own expert witnesses while denigrating those presented by Mr. Fields, launch irrelevant *ad hominem* attacks on Mr. Fields, misrepresent testimony, and make arguments without factual basis in the record.

A large and crucial portion of the evidence regarding Mr. Fields' mental state, including the existence and likelihood of an Effexor-induced manic flip, was presented through the testimony of expert witnesses, and thus the credibility of these experts was a critical part of the jury's consideration of the evidence. The Government engaged in a series of attempts to enhance the appearance of its own experts' credibility, improperly vouching for their credibility and expressing the prosecutor's personal belief in their honesty, which rendered Mr. Fields' trial fundamentally unfair. See *Motion*, Ground 5, ¶¶ 182-83; see also United States v. Young, 470 U.S. 1, 7-8 (1985) (citing the ABA Standards for the proposition that a prosecutor may not "express his or her personal belief or opinion as to the truth or falsity of any testimony"); Douglas v. Workman, 560 F.3d 1156, 1179 (10th Cir. 2009) ("Under Young, vouching for the credibility of witnesses is equally as improper as other methods of 'offering unsolicited personal views on the evidence'"; finding that prosecutor's comments in closing argument expressing personal opinion of truthfulness of witness were error but AEDPA deference prevented grant of relief); Cargle, 317 F.3d at 1219.

The jury could reasonably infer from these comments that the prosecutors were expressing

their personal beliefs in the credibility of Dr. Price and Dr. Mitchell, from the repeated use of "we" to the suggestion that the Government easily found experts to support its position, a suggestion not based upon evidence of record. Such vouching for the witnesses is improper. United States v. Bowie, 892 F.2d 1494, 1498 (10th Cir. 1990) (stating that it is "impermissible vouching" if the prosecution "implicitly indicat[es] that information not presented to the jury supports the witness' testimony"); Douglas, 560 F.3d at 1179-80; Cargle, 317 F.3d at 1219.

The impropriety of the Government's witness vouching is emphasized by its corresponding denigration of Mr. Fields' expert witnesses. Dr. Woods and Dr. Grinage were disparaged as "high dollar shrinks," *TR*, 3452, and "hired guns," *TR*, 3429, from the "left coast," id., who had an "axe to grind," *TR*, 3430, and did not give "an honest opinion," *TR*, 3429. The Government's "left coast" "hired gun" attack is especially improper given its falsity Dr. Grinage was from Kansas, and like the Government's witness Dr. Mitchell, had never before testified in a capital case. Moreover, the Government's suggestion that the jury should trust expert witnesses from "our own back yard" over those from the "left coast" is a naked attempt to inflame the jury's passions and prejudice, and is antithetical to the traditional view of the federal courts as a safe harbor from "local prejudice." Cf. Hertz Corp. v. Friend, 130 S.Ct. 1181, 1188 (2010) (noting that basic rationale for diversity jurisdiction was to "open[] the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties"); City of Greenwood v. Peacock, 384 U.S. 808, 836-40 (1966) (Douglas, J., dissenting) (discussing history of provision of federal forum to protect against "local passions and prejudices").

In addition to this improper vouching and unprofessional name-calling, the Government grossly misrepresented the testimony of Dr. Woods, Dr. Grinage and other witnesses on several

factual issues critical to the assessment of Mr. Fields' mental state. First, the Government contended that Mr. Fields had previously used the ghillie suit to sneak up on other people in practice for eventually killing the Chicks, and that this undermined Mr. Fields' contention that he killed the Chicks in an Effexor-induced manic state. Instead of relying on any evidence in the record of this contention, the Government chose to twist the testimony to falsely support its position. The Government argued that Dr. Woods and Dr. Grinage testified that they were unaware that Mr. Fields had used the ghillie suit to sneak up on other people, an argument that is false and flatly contradicted by the record.[25] Additionally, the prosecution misrepresented the testimony of lay witness Daniel Love, see *Motion*, Ground 5, ¶ 190, painting Mr. Fields in a far worse light than the evidence indicated.[26] Such misrepresentations were error, and are of special concern "given the weight with which jurors generally view a prosecutor's remarks." Le, 311 F.3d at 1020 ("Since jurors usually have no access to the testimonial record during deliberation, the risk that the prosecutor's characterization would be remembered in lieu of the correct statement ... is increased.").

Second, the Government repeatedly and falsely claimed that Mr. Fields was diagnosed as a sociopath by doctors hired by the defense, in order to elicit fear of Mr. Fields and to undermine the true diagnosis of bipolar disorder that was made by defense expert witnesses. See *Motion*,

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[25] Dr. Woods testified that he "was aware" that Mr. Fields had admitted to doing so, *TR*, 3024, and Dr. Grinage was never questioned about the issue, by the Government or otherwise.

[26] Mr. Love's actually testimony suggests that Mr. Fields was upset by what Mr. Love said, explaining Mr. Fields' later refusals to tell people why he had a ghillie suit, contrary to the Government's argument that Mr. Fields did not want to tell anyone he planned to use the ghillie suit to kill people. *TR*, 3409. The Government also elicited from Carol Lamb that Mr. Fields said, "You don't want to know" when she asked him why he was ghillieing his rifle. *Tr.* 2340. Neither the Government nor trial counsel elicited from Ms. Lamb that, according to her statement to the OSBI, Mr. Fields often refused to tell her things. See OSBI Transcript of Interview of Carol Lamb dated 7/18/03 at 18.

Ground 5, ¶ 186. The prosecution's attempts to elicit any testimony to support this statement were met with failure, and the record contradicts the Government's assertions. See id. Dr. Grinage denied that Mr. Fields exhibited any such traits, *TR*, 2841-46, and Dr. Woods was never cross-examined on the subject. The Government also sought to elicit an alleged diagnosis through a lay witness, see *Motion*, Ground 5, ¶ 186 n. 29, but was unable to do so. *TR,* 3086. The allegation that Mr. Fields was a sociopath was particularly harmful by itself, see, e.g., Walbey v. Quarterman, 309 Fed. App'x 795, 804, 806 (5th Cir. 2009) (observing that antisocial personality disorder was "an aggravating diagnosis"; concluding that if trial counsel's investigation and preparation had not been deficient, "he could have offered a rebuttal to [the prosecution]'s argument that [petitioner] is a sociopath"; and granting relief on that basis), but coupled with the assertion that his own doctors believed him to be a sociopath, it was devastating. Given that the jury views a prosecutor as "'carr[ying] a special aura of legitimacy about him,'" Cargle, 317 F.3d at 1218, these misstatements of fact were "apt to carry much weight against [Mr. Fields] when they should properly carry none." Berger, 295 U.S. at 88.

3. Improper Arguments Designed to Inflame the Passions and Prejudices of the Jury

The Government's closing arguments also sought to invoke the fear and inflame the passions of the jury, by concocting prejudicial theories without factual basis in the record and engaging in a series of *ad hominem* attacks on Mr. Fields.

The Government contended that the killing of the Chicks was not caused by an Effexor-induced manic flip but rather was the act of a sniper after a year's worth of practice and preparation, starting with Mr. Fields' construction of the ghillie suit and his hunting of squirrels, and culminating with his using the Winding Stair Campgrounds to scout potential victims. See *Motion*, Ground 5,

¶ ¶ 187, 191. The Government's story that Mr. Fields "had mastered his craft, he had practiced with squirrels, and now he was moving to humans," *TR*, 3414, was a flight of fancy worthy of a horror film and completely without factual support in the record. The undisputed testimony at trial was that Mr. Fields' purpose in making the ghillie suit was to use it for hunting squirrels, and nothing more.[27] See *Motion*, Ground 5, ¶ 188. Indeed, the testimony reflected that Mr. Fields was prepared to abandon the ghillie suit weeks before the offenses. *TR*, 2656-57. Moreover, there was absolutely no evidence to support the argument that Mr. Fields "[k]ept track of when people are [at the campground], who's staying there, when they're staying there, what the habits are." *TR*, 3410. The Government further engaged in abject speculation, coupling this theory of calculating and escalating violence with an equally unfounded description of the death of Mrs. Chick, claiming that "she was begging and pleading for her life" and that "this was not ... a silent murder," *TR*, 3417, 3462, although there was no evidence of record from which this could have even been a reasonable inference. The Government's highly speculative and misleading storytelling was calculated to scare and inflame the passions of the jury.

To complement the scary story the Government sought to tell in its closing arguments, the prosecutors launched a series of irrelevant, *ad hominem* attacks on Mr. Fields, inviting the jury to sentence Mr. Fields to death, not because any of the noticed aggravating factors were proven, but because he was a fundamentally bad person. See, e.g., *TR*, 3450 ("He lied. He was trying manipulative, a con artist."); *TR*, 3450 ("And was financially irresponsible, parasitic and

[27] The Government suggested that Mr. Fields' best friend and hunting partner, Daniel Presley, said that Mr. Fields' ghillie suit and rifle were unnecessary for squirrel hunting. Mr. Presley provided no such testimony, and he disavows any suggestion that the Government's arguments correctly interpreted his testimony. See *Motion*, Ground 5, ¶ 189.

promiscuous."); *TR*, 3455 ("The Defendant is unalterably and fundamentally different from most human beings.'); *TR*, 3459 ("Selfish. Selfish. Narcissistic."); *TR*, 3465 ("That tells you who the Defendant will chose to be near. A child abuser.'); *Motion*, Ground 5, ¶ 185. The prosecutors' statements were not relevant to any of the aggravating factors properly noticed,[28] nor were they proper rebuttal of any of mitigating evidence presented.[29]

Just as a prosecutor may not use closing argument to inflame the passions and prejudices of the jury, see Young, 470 U.S. at 8 n.5, here, the Government used scary stories and personal attacks to do just so.

4. Improper Invocation of Biblical Authority in Support of a Sentence of Death

The Government concluded its closing arguments by relating the well-known "writing on the wall" sermon from the Book of Daniel, and then argued that Mr. Fields similarly should be weighed and found wanting. *TR*, 3466-67 ("[T]he prophet said the writing said you have been weighed in the balance and found wanting. Sure enough, that night the King was killed."). This appeal to religious authority was improper. Sandoval v. Calderon, 241 F.3d 765, 777 (9th Cir. 2001) (observing that "religious arguments have been condemned by virtually every federal and state court to consider their challenge" and citing cases); Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir.

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[28] The noticed aggravating factors were substantial planning and premeditation to cause the death of both Mr. and Mrs. Chick, multiple intentional killings in a single episode, future dangerousness, permanent loss to the family, friends and community of Mr. and Mrs. Chick, and the infliction of mental anguish upon Mrs. Chick before her death.

[29] Even if these comments were considered to be proper rebuttal which they should not no cautionary instruction was given to limit their consideration as rebuttal only. Without such limitation, it would swallow whole the statutory provision that a death sentence be based only upon the aggravating factors noticed and proven at trial. See 18 U.S.C. § 3593(c), (d).

1991) (finding prosecutor's appeals to religious beliefs, including comparison of defendant and Judas Iscariot, to be improper).

Not only was the Government's extended recitation of scripture intended to inflame the passions of the jury, it also substantially prejudiced Mr. Fields' right to a sentence of death imposed only under the dictates of the Eighth Amendment. "In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict." Sandoval, 241 F.3d at 776 (citing Godfrey, 446 U.S. at 428).

B. Individually and Cumulatively, These Errors Rendered Mr. Fields' Trial Fundamentally Unfair and Substantially Prejudiced his Eighth Amendment Rights to Individualized Sentencing and a Death Sentence That is not Arbitrary and Capricious

Although many of the prosecutors' comments were sufficiently egregious on their own to warrant relief, the cumulative effect of the prosecutorial misconduct throughout the Government's closing argument was to deny Mr. Fields a fair trial in violation of his right to due process of law, and to substantially prejudice his right to a fair and reliable sentencing proceedings in comport with the specific dictates of the Eighth Amendment.

Unlike the instances in which courts have found prosecutors' comments to be improper but did not render the trial fundamentally unfair, see, e.g., Le, 311 F.3d at 1020 (finding prosecutor's misrepresentation of testimony to be error, but denying relief because of overwhelming evidence of guilt and in support of aggravating factors), the Government's case here for death was not overwhelming. Mr. Fields presented a significant case for life, including the hotly contested testimony of a forensic psychiatrist and a neuropsychiatrist, as well as seven lay witnesses, and

elicited mitigating information from a number of witnesses presented by the Government. See, e.g., *TR*, 2361-65 (cross-examination of Carol Lamb); *TR*, 2398-2406 (cross-examination of Daniel Presley); *TR*, 2471-73, 2474-76 (cross-examination of Marilyn Presley); *TR*, 2492-94 (cross-examination of Daniel Love); *TR*, 2597-61 (cross-examination of Michelle Bond). The jury found seventeen mitigating factors to be present, although these factors were based largely upon uncontested fact, e.g., his cooperation with authorities, confession and guilty plea; his prior service in the Navy; his lack of criminal history.

The mitigating factors not found by the jury — indeed, the core of Mr. Fields' defense — were the factors most likely to have been affected by the Government's misconduct in its closing arguments. The rejected mitigating factors focused on Mr. Fields' mental state at the time of the offenses, and his mental health in general: (1) his capacity to appreciate the wrongfulness of his conduct and conform his conduct to the law was significantly impaired; (2) he committed the offenses under severe mental or emotional disturbance; (3) he expressed remorse for the crimes; and (4) he will not present a future danger to society by being imprisoned for life without possibility of relief. The issues raised by these factors were precisely the subject of the Government's improper conduct — its argument that Mr. Fields was a "sociopath" and did not experience an Effexor-induced manic flip; its vouching for the credibility of Government expert witnesses who minimized Mr. Fields' mental health problems and disparagement of those defense experts who supported the mitigating circumstances; its personal attacks presenting Mr. Fields as an unrepentant "con artist" who engaged in "ploys," and "selfish[ly]" and "narcissistic[ally]" "put all of us here"; its bolstering of its claim that Mr. Fields did not commit these offenses under a mental disturbance, but instead planned them for over a year, with misstatements of the record and speculation.

Moreover, the Government's closing arguments skewed the jury's sentencing determination

by encouraging the jury to underweigh and ignore the mitigation it did find. Its improper comments increased Mr. Fields' burden with respect to the mitigating factors, telling the jury that the evidence in mitigation must outweigh the aggravating factors. Furthermore, it employed tactics that courts have condemned as attempts to convince the jury to ignore mitigation altogether. See Le, 311 F.3d at 1002 (criticizing prosecutor's repeated contrast of living defendant and dead victim); Bland, 459 F.3d at 1027 (criticizing prosecutorial "speeches to the jury making light of the penalty of life in prison to demonstrate that the only proper punishment for a defendant's crime was death."); Sandoval, 241 F.3d at 777 (noting widespread condemnation of religious arguments).

Mr. Fields' claim is not based upon a few isolated comments, but rather a pattern of argument designed to impede his rights, and to improperly influence and inflame the jury with misstatements of law and of the record, factually unsupported arguments, name-calling and personal attacks. Moreover, these instances of misconduct were committed by both attorneys who delivered closing arguments for the Government, with the improper themes repeated in both the opening and rebuttal arguments.

Trial counsel objected to two comments the Government's misstatement of law that the mitigating factors must outweigh the aggravating factors to justify a life sentence, and the comment that Mr. Fields' "own doctors are saying, yeah, he has the traits of a sociopath" and this Court overruled both objections, despite the impropriety of the comments.[30] "The official imprimatur thereby placed upon the prosecution's misstatements of law obviously amplified their potential prejudicial effect on the jury." Mahorney, 917 F.2d at 473; see also Mann v. Dugger, 844 F.2d

[30] The Court overruled the objection to the comment about Mr. Fields' doctors, despite previously sustaining an objection to the Government's question to Mrs. Presley on that very subject. *TR*, 3086.

1446, 1457 (11th Cir. 1988) ("When a trial court does not correct misleading [prosecutorial] comments ... the state has violated the defendant's ... rights because the court has given the state imprimatur to those comments; the effect is the same as if the trial court had actually instructed the jury that the prosecutor's comments represented a correct statement of the law."). No curative instructions were given, despite the request of defense counsel to have the Court reread its initial instruction on the weighing of aggravating and mitigating factors. *TR*, 3473.

Given that this was a close case, in which Mr. Fields presented a significant case for life and the jury found mitigation to exist, it is more likely that these errors had an effect. See Strickland, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.") Individually and cumulatively, the Government's improper arguments in closing rendered the trial fundamentally unfair, and denied Mr. Fields his rights to due process, to jury consideration of mitigating evidence, and to a death sentence that is not arbitrary and capricious.

C. Trial Counsel Were Ineffective for Failure to Object and Preserve These Issues at Trial, and Appellate Counsel Were Ineffective for Failure to Raise These Instances of Prosecutorial Misconduct on Appeal

Other than in the two instances noted above, trial counsel's failure to object to these unconstitutional instances of prosecutorial misconduct or to request a limiting instruction, and appellate counsel's failure to raise these issues on appeal, denied Petitioner his right to effective assistance of counsel.[31] Strickland, 466 U.S. 668. As discussed, the Government made a wide range of impermissible comments throughout its closing, and properly made objections would have been

[31] Appellate counsel denied Mr. Fields his right to effective assistance of counsel by failing to raise on direct appeal the two issues preserved by trial counsel, and by failing to raise the other instances of improper prosecutorial argument under the plain error standard.

meritorious.

1. Deficient Performance

Effective counsel do not fail to make meritorious objections. See, e.g., Kimmelman v. Morrison, 477 U.S. 365 (1986) (counsel's failure to file timely motion to suppress evidence was deficient performance); Claudio v. Scully, 982 F.2d 798, 805-06 (2d Cir. 1992) (appellate counsel ineffective for failing to challenge admission of statement on potentially meritorious state constitutional grounds); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (failure to raise objection and move for a mistrial on the basis of state law error constituted ineffective assistance of counsel); Wade v. White, 368 F. Supp. 2d 695 (E.D. Mich. 2005) (ineffective assistance of counsel for failure to object to inadmissible irrelevant testimony that was detrimental to the defense); see also ABA Guideline 10.11, cmt. at 1156 "counsel should . . . object to argument that improperly minimizes the significance of mitigating evidence.").

2. Prejudice

When a petitioner shows that counsel ineffectively failed to object to reversible error, he has shown prejudice. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990) (petitioner prejudiced by counsel's failure to raise valid double jeopardy defense); Mason v. Hanks, 97 F.3d 887, 892 (7th Cir. 1996) (petitioner prejudiced by counsel's failure to raise meritorious appealable issue); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (same); Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987) (same).

Had trial counsel objected to the Government's numerous instances of misconduct in closing and requested cautionary instructions, the jurors would not have deliberated with the Government's misstatements of law and fact, appeals to passion and prejudice, and denigration of the constitutionally-required sentencing proceeding in their minds, but rather would have assessed

punishment based upon a clear-headed consideration of the significant mitigating evidence presented, as well as the evidence in aggravation. Had the Government's improper and inflammatory arguments been corrected, Mr. Fields' trial would not have been rendered fundamentally unfair, his rights under the Eighth Amendment would not have been substantially infringed, and there is a reasonable likelihood that at least one juror would have found that the case for life presented by Mr. Fields justified a sentence less than death. Wiggins, 539 U.S. at 537.

GROUND SIX

TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO INSTRUCTIONS AND A VERDICT FORM THAT ALLOWED THE JURY TO APPROVE A GENERAL VERDICT OF DEATH BASED ON THE COMBINED WEIGHING OF AGGRAVATING FACTORS APPLICABLE TO TWO SEPARATE MURDER COUNTS.

Although Mr. Fields pled guilty to two counts of first degree murder, the jury sentenced him to a general verdict of death, not separate sentences on each count. In doing so, the jury was allowed to consider all seven of the aggravating factors argued by the Government including five factors that properly applied to only one of the two counts. This unified weighing process skewed the balancing of aggravating and mitigating factors in favor of death, rendered the resulting death sentence arbitrary and capricious, and denied Mr. Fields his right to a sentencing process in which the jury was able to give effect to his evidence in mitigation. Trial counsel not only failed to object to this unconstitutional general verdict, but in fact invited it they requested instructions and a verdict form that were, in the words of the Court of Appeals, "functionally the same" as the improper instructions and verdict form used by the Court. United States v. Fields, 516 F.3d 923, 939 (10th Cir. 2009). Accordingly, trial counsel rendered ineffective assistance in violation of the Sixth Amendment.

A. Trial Counsel Were Deficient By Requesting An Unified Weighing Process

Trial counsel were deficient by requesting instead of objecting to jury instructions and a verdict form that allowed the jury to engage in an unified weighing process and render a general verdict of death.

On direct appeal, the Court of Appeals explained:

> Although Fields was indicted, convicted and sentenced to death on two murder counts, the verdict form and instructions did not direct the jury to weigh the aggravating and mitigating factors relevant to each count and determine whether a death sentence was warranted for either murder. Rather, the jury was directed to weigh all of the aggravators and mitigators in the case at once and reach a single sentencing verdict.
>
> Specifically, the verdict form and associated instructions properly directed the jury to find those aggravators applicable to the murder of Charles Chick (substantial planning and premeditation; intentional killing of more than one person; future dangerousness; and victim impact relating to Charles) and those applicable to the murder of Shirley Chick (substantial planning and premeditation; intentional killing of more than one person; future dangerousness; victim impact relating to Shirley; and mental anguish of victim). The mitigators, which related to the defendant and thus did not vary with the victims, were properly found generally, without reference to each murder.
>
> At that point, instead of being told to weigh the aggravators and mitigators on each count and record the resultant sentences on separate forms, the jury was given a general form with these directions regard the "Weighing Process" and "Imposition of Sentence," respectively:
>
> > The question you must answer at this stage of your deliberations is whether the proven aggravating factor(s) sufficiently outweigh the proven mitigating factors and information to justify a sentence of death ... If you unanimously find that the weight of the aggravating factor(s) is sufficient to justify a sentence of death, answer _yes below [and] record your verdict on [the general verdict form for death] ... If you do not unanimously find that a death sentence is justified, answer no_ below, stop your deliberations [and] sign [the general verdict form for life imprisonment].
> >
> > * * *
> >
> > This is the last step in your deliberations. If you have made all of the findings necessary to make the defendant eligible for a death sentence

> and have unanimously concluded that such a sentence is justified and that a sentence of death is therefore appropriate in this case, record your decision by collectively signing the verdict [form for death] ... and notify the court that you have reached a decision. If you do not unanimously conclude that sentence of death is justified and therefore must be imposed, sign the verdict for life imprisonment ... and notify the court that you have reached a decision.
>
> The form specifying "that a sentence of death shall be imposed on the defendant"-without reference to any particular count-was signed by all of the jurors. The court's subsequent poll of the jurors, all of whom affirmed the verdict, was likewise unitary. **Pointing up the potential problem here, however, the Judgment and Commitment Order entered by the court reflected imposition of two separate sentences: "The defendant is hereby sentenced to Death on each of the Counts One and Three of the Indictment."**

516 F.3d at 938-39 (citations omitted). The verdict form and instructions given to the jury were "functionally the same" as those requested by trial counsel. Id. at 939.

Trial counsel should have objected to the unified process and instead requested that the jury consider separately and render separate verdicts for each of Count One and Count Three. See Wicks v. Lockhart, 569 F. Supp. 549 (E.D. Ark. 1983) (concluding that reasonably competent attorney would have known that separate verdict on each count "was required in order to protect the petitioner's basic constitutional rights").[32] ABA Guideline 10.11(k) which was in effect at the

[32] In the context of a jury's determination of guilt or innocence on a multi-count indictment or information, the law is clear that the jury must consider each count separately and render separate verdicts on each count. See, e.g., United States v. Dunn, 564 F.2d 348, 360 (9th Cir. 1977) ("the law is uniform that ... as to multiple counts against a single defendant, each count is to be considered separately"); United States v. McGrady, 508 F.2d 13, 21 (8th Cir. 1974) ("where there are separate counts in an indictment, there must be separate verdicts by the jury as to the guilt or innocence of each defendant on each count"); Wicks v. Lockhart, 569 F. Supp. 549, 561-62 (E.D. Ark. 1983) (listing cases). This rule is no less applicable in the context of a jury's determination of whether a defendant will be sentenced to death, where the Eighth Amendment requires heightened "reliability in the determination that death is the appropriate punishment in a specific case." Simmons v. South Carolina, 114 S.Ct. 2187, 2198 (1994) (Souter, J., concurring) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality op. of Stevens, J.)); Godfrey v. Georgia, 446 U.S. 420, 427- 28 (1980); Mills v. Maryland, 486 U.S. 367, 383-84 (1988)).

time of Mr. Fields' sentencing hearing provides that "trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions."

The federal death penalty statute, 18 U.S.C.A. § 3591 et seq., clearly anticipates that a defendant will receive a sentence of death or life without possibility of release for each death-eligible offense, that is, each murder. The statute repeatedly uses singular references such as "the victim," "the offense," and "the charge" that indicate an intent that a defendant be sentenced for each individual charge of murder. See, e.g., § 3591(a)(2)(A) ("intentionally killed the victim"); § 3591(a)(2)(B) ("the death of the victim"); § 3591(a)(2)(C) ("the victim died"); § 3592(a)(1) ("the charge"); § 3592(a)(2) ("the charge"); § 3592(a)(3) ("the charge"); § 3592(a)(6) ("the offense"); § 3592(c) ("an offense"); § 3592(c)(1) ("the death"); § 3592(c)(6) ("the offense" and "the victim"); § 3592(c)(9) ("the offense" and "the death of a person"); § 3592(c)(11) ("the victim"); § 3592(c)(14) ("the defendant committed the offense against ... a chief of state ... a foreign official ... a Federal public servant"); § 3593(e)(1) ("an offense"); § 3593(e)(2) ("an offense"); § 3593(e)(3) ("an offense"). Additionally, the statute makes a specific provision for when a defendant kills multiple victims the aggravating factor for "multiple killings or attempted killings" found in § 3592(c)(16). The inclusion of this specific provision indicates that Congress, in drafting the federal death penalty statute, intended that defendants receive separate sentences for each charge of murder. Based upon these statutory provisions, as well as the constitutional principles discussed below, trial counsel should have requested an instruction requiring separate consideration of and separate verdict forms for each of Counts One and Three.

Had the jury been properly instructed and given the appropriate verdict form requiring it to

return separate sentences for each count, it would have weighed five aggravating factors (two general, and three specific to Mrs. Chick) against the seventeen mitigating factors found by the jury in determining whether to sentence Mr. Fields to death for the murder of Mrs. Chick, and four aggravating factors (two general, and two specific to Mr. Chick) against the seventeen mitigating factors in determining a sentence for Mr. Chick.[33] Instead, the unified weighing process permitted the jury to consider all seven aggravating factors (two general, two specific to Mr. Chick, and three specific to Mrs. Chick) together in deciding whether to sentence Mr. Fields to death or life without parole.[34]

The erroneous unified weighing process was raised as court error on direct appeal. The Court of Appeals declined to review the issue, finding that trial counsel invited the error. Fields, 516 F.3d at 939; see also id. at 940 (declining to review claim that "the two instances of the [substantial planning] aggravator were improperly aggregated" in the unitary weighing process on basis of invited error). While the invited error doctrine may be an appropriate appellate basis for denying relief on a claim of court error, it leaves open the question of whether trial counsel were

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[33] The three factors applying exclusively to Count 1 were the murder of Mrs. Chick after substantial planning, victim impact related to the death of Mrs. Chick, and the infliction of mental anguish on Mrs. Chick. The two factors applying exclusively to Count 3 were the murder of Mr. Chick after substantial planning and victim impact related to the death of Mr. Chick. The other aggravating factors were killing more than one person in a single episode and future dangerousness.

[34] The Court instructed the jury to find the substantial planning and victim impact aggravating factors separately for each of the Chicks. *TR*, 3396, 3398-99, see also id. at 3478-80 (Special Findings Form). These instructions would have been proper if the jury was also instructed to determine, and given a mechanism to impose, separate sentences as to each count. Because of the jurors were asked to impose one sentence in a general verdict, however, the Court's instructions permitted the jury to consider two separate plans to kill the Chicks, even though the Government argued only that Mr. Fields had one plan to kill both in a single criminal episode, and allowed the jury to consider victim impact evidence related to the death of Mr. Chick in determining the sentence for killing Mrs. Chick, and vice versa.

ineffective for requesting and failing to object to the unitary weighing process, verdict form and instructions. See White v. Thaler, F.3d , 2010 WL 2595272, at *10, *14 (5th Cir. June 30, 2010) (granting habeas relief based upon counsel's "invited error"; counsel rendered ineffective assistance by opening door for impeachment of defendant with post-arrest silence); United States v. Alferahin, 433 F.3d 1148, 1162 (9th Cir. 2006) (finding counsel ineffective where court failed to instruct jury on element of crime and counsel "declined an offer by the judge to instruct the jury on the element").

B. As a Result of Trial Counsel's Deficient Request of an Unified Weighing Process, Mr. Fields' Sixth and Eighth Amendment Rights Were Violated, Rendering the Death Sentence Unconstitutional

Mr. Fields suffered prejudice from trial counsel's deficient performance. As a result of trial counsel's error in requesting an unitary sentencing process, the jury returned a general verdict of death which could have been based upon any one of three scenarios. Two of those three scenarios are invalid and unconstitutional, and thus his sentence cannot stand.

The jury's verdict can be interpreted in three ways. *First*, the jury could have, as instructed, weighed all seven aggravating factors against the evidence in mitigation, and returned a sentence of death because it determined that all seven aggravating factors substantially outweighed the mitigating factors. *Second*, it could have weighed the aggravating factors for Count One only against the mitigating factors, and separately weighed the aggravating factors for Count Three only against the mitigating factors, and returned a sentence of death based on the determination that the aggravating factors substantially outweighed the mitigating evidence for one of the two counts. *Third*, the jury could have weighed the aggravating factors for Count One only against the mitigating factors, and separately weighed the aggravating factors for Count Three only against the mitigating factors, and determined that death was appropriate because the aggravating factors substantially

outweighed the mitigating evidence for both counts. Only the third scenario is a constitutionally valid basis for the jury's general verdict of death.

The first scenario in which the jury returned a general verdict of death because it believed the seven aggravating factors together substantially outweighed the evidence of mitigation is invalid because the resulting death sentence is arbitrary. The jury was permitted to weigh aggravating factors that were unrelated to the particular count (i.e. weighing the victim impact related to Mr. Chick in determining the sentence for the death of Mrs. Chick, or the mental anguish inflicted upon Mrs. Chick prior to her death in determining the sentence for the death of Mr. Chick), and thus the process had no "inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey, 446 U.S. at 428-29; see also Tuilaepa, 512 U.S. at 973 ("Eligibility factors almost of necessity require an answer to a question with a *factual nexus to the crime* or to the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.'") (quoting Arave v. Creech, 507 U.S. 463, 471 (1993)). Because the jury did not distinguish between the crimes charged in Count One (the murder of Mrs. Chick) and Count Three (the murder of Mr. Chick) in considering all seven aggravating factors, the jury did not make an "individualized determination on the basis of the character of the individual and *the circumstances of the crime*." Zant v. Stephens, 462 U.S. 862, 879 (1983); see also Eddings, 455 U.S. at 110-12; Lockett, 438 U.S. at 601-5). This scenario is the most likely of the three, as it reflects the Court's instructions, and jurors are presumed to follow those instructions. Penry v. Johnson, 532 U.S. 782, 799 (2001) ("Penry II").

Furthermore, this scenario allowed the jury to give undue weight to the case for death, while giving short shrift to the evidence in mitigation. The jury could have concluded that the seven aggravating factors, considered together, substantially outweighed the evidence in mitigation. Thus,

the case for death was given greater weight by the unitary weighing process, while the mitigating factors were effectively undercounted, skewing the jury's determination in favor of death. Additionally, because all the aggravating factors for both counts were considered together, the jury was allowed to double count the substantial planning aggravating factor, even though it is not victim-specific.[35] United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996) (holding that the identically-worded former 21 U.S.C.A. § 848 (n)(8) was not victim-specific). Such double counting skewed the weighing process and rendered the resulting death sentence arbitrary and unconstitutional. Id. at 1111; see also id. at 1112 ("When the sentencing body is asked to weigh a factor twice in its decision, a reviewing court cannot 'assume it would have made no difference if the thumb had been removed from death's side of the scale.'") (quoting Stringer v. Black, 503 U.S. 222, 232 (1992)). In light of the significant case for life presented by Mr. Fields, it is possible that if the jury separated the two counts, and weighed only the aggravating factors applicable to each count with the mitigating evidence, at least one juror would have concluded that on neither count did the aggravating factors substantially outweigh the mitigating factors.

The second scenario in which the jury determines that death is appropriate for only one of the two counts is invalid because it violates Mr. Fields' Eighth Amendment right to a "vehicle for [the jury to] express[] its 'reasoned moral response' to [mitigating] evidence in rendering its sentencing decision.'" Penry II, 532 U.S. at 797 (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("Penry I")). The jury did not and could not make a determination of Mr. Fields' moral culpability for each murder count because the jury had no mechanism for separating the two counts. The verdict form did not allow the jury to make a finding of death as to one count and life without

[35] The jury separately found the substantial planning aggravating factor to be proven for both Count One and Count Three. However, this does not save the verdict because the jury did not separately weigh the aggravating and mitigating factors for each count.

possibility of release as to the other. Such a verdict was not merely a theoretical possibility the mental anguish aggravating factor applied only to Mrs. Chick, arguably making her death more egregious in the eyes of the jury, and thus the jury could have returned a sentence of death for the murder of Mrs. Chick only, concluding that the aggravating factors applicable to the death of Mr. Chick did not substantially outweigh the evidence in mitigation. Thus, if the jury concluded that death was an appropriate sentence for the murder of Mrs. Chick, the jury was not "able to 'consider and *give effect to* [Mr. Fields' mitigating] evidence in imposing [a] sentence'" of life without possibility of release for the death of Mr. Chick. Penry II, 532 U.S. at 797 (quoting Penry I, 492 U.S. at 319) (emphasis in original) (concluding that jury instructions violated Eighth Amendment because jury had no logical and ethical mechanism for giving effect to mitigation by voting for life sentence). Because trial counsel's actions left Mr. Fields without a vehicle for the jury to give effect to mitigating evidence, we cannot "be sure that the jury 'has treated [Mr. Fields] as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence'" for either Count One or Count Three. Penry II, 532 U.S. at 797 (quoting Penry I, 492 U.S. at 319 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976))); Abdul-Kabir v. Quarterman, 550 U.S. 233, 252 (2007) ("Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.") (quoting Franklin v. Lynaugh, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring)).

These two scenarios are unconstitutional. Although there is one possible interpretation of the jury's general verdict of death that avoids constitutional error, this is insufficient to save the sentence. As an initial matter, the most plausible interpretation of the jury's verdict is that the jury followed the instructions given by the Court and requested by trial counsel that the jury should

weigh all seven aggravating factors against the mitigating evidence in an unitary weighing process and this scenario is unconstitutional. Moreover, where a verdict "may have had a proper basis," but "'it is equally likely that the verdict … rested on an unconstitutional ground,'" a court may not choose between the proper and improper bases, and the verdict cannot stand. Boyde v. California, 494 U.S. 370, 380 (1990) (quoting Bachellar v. Maryland, 397 U.S. 564, 571 (1970)); see also Stromberg v. California, 283 U.S. 359, 368 (1931) ("It follows that instead of it being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."); cf. Presnell v. Georgia, 439 U.S. 14 (1978) (death sentence vacated where defendant was convicted of uncharged offense, noting that due process principle of Cole v. Arkansas, 333 U.S. 196 (1948), require that appellate court review verdict based upon case actually tried before and the jury "appl[ied] with no less force at the penalty phase of a trial in a capital case").

Trial counsel's request of and failure to object to improper jury instructions and verdict form placed Mr. Fields in an untenable situation in which his sentence is most likely based upon an unconstitutional unitary weighing process. On that basis alone, his sentence cannot stand. Additionally, given the not-inconsequential case for life presented by Mr. Fields, there is a reasonable likelihood that the jury would have returned a sentence of life on both counts if it had been properly instructed to engage in an individualized sentencing determination for each count that enabled it to give effect to the evidence in mitigation.

GROUND SEVEN

THE GOVERNMENT VIOLATED DUE PROCESS WHEN IT WITHHELD EXCULPATORY, MATERIAL EVIDENCE FROM THE DEFENSE IN VIOLATION OF DUE PROCESS, AND TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE.

Mr. Fields' right to due process was violated because the Government withheld information that was material to his punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963); see also Banks v. Dretke, 540 U.S. 668 (2004); Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 153-56 (1972).

A. Effexor Pill Bottle

In the *Motion*, Mr. Fields pled alternatively that the Government failed to disclose exculpatory evidence relating to the quantity of 150 mg Effexor pills Mr. Fields ingested prior to the offense, and trial counsel were ineffective for failing to investigate, discover and present this evidence. This alternative pleading was necessary because, based upon information provided to trial counsel, it was unclear what had happened to the bottle of 150 mg Effexor pills that were initially observed in Mr. Fields' truck by Oklahoma State Bureau of Investigation Agent Iris Dalley. See *A*-29.

Documents in the possession of trial counsel indicate that, during her search of Mr. Fields' truck on July 18, 2003, Agent Dalley discovered a pill bottle in Mr. Fields' truck with the label indicating it contained a prescription for thirty (30) 150 mg Effexor pills to be taken once daily, and a "pharmacy sack label" dated July 9, 2003, for the same prescription. Id. at 3. However, subsequent inventories of the contents of the truck by the United States Forest Service and a defense investigator made no mention of the pill bottle. See *A*-30, *A*-31. Documents also in the possession

of trial counsel indicated that Mr. Fields was administered 150 mg Effexor pills while in custody at the Muskogee County Detention Center. Med Sheet July 3, *SA-1*; Med Sheet Aug 3, *SA-2*.

In its response to Mr. Fields' *Motion for Non-Dispositive Omnibus Relief*, the Government informed Mr. Fields **for the first time** that the Effexor he was administered at the Muskogee County Detention Center **was from the bottle of Effexor pills found in his truck**. Docket #6, at 7. According to the Government's response, "the FBI has represented to the government's counsel that it delivered the bottle to the jail where Fields was held before trial, so that he could continue to take the medicine." Id.

The Government's admission is significant in two respects. First, it establishes that the FBI was in possession of the pill bottle.[36] Second, this admission, combined with information on the "Med Sheet" from the Muskogee County Detention Center, demonstrates that when the FBI turned the pill bottle over to the jail, it was half empty. The "Med Sheet" for July, 2003 indicates that Mr. Fields received his first 150 mg dosage of Effexor at the jail on July 19, 2003, the day after he was arrested. *SA-1*. All tolled, Mr. Fields was administered fourteen 150 mg pills while at the jail before his prescription ran out. The "Med Sheet" for August, 2003 indicates that Mr. Fields was administered his last 150 mg Effexor pill on August 5, 2003, and that the prescription was not refilled. *SA-2*. The "Med Sheet" also indicates that the prescription was discontinued on August 12, 2003, a date on which Mr. Fields saw a doctor. Email from Kim Shamblin of the Muskogee County Sheriff's Office to Aimee Karnes of the United States Marshal Service dated June 11, 2010,

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[36] To the extent this information was in the knowledge and possession of the FBI, the Government is charged with this knowledge. A prosecutor is responsible for disclosing "any favorable evidence known to the others acting on the government's behalf, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 438 (1995); see also Giglio v. United States, 405 U.S. 150, 154 (1972).

SA-3. Fourteen pills were administered at the jail out of a prescription for thirty,[37] and thus it would have been a highly reasonable inference for the jury to have drawn that he consumed sixteen pills between July 9, when the prescription was filled, and July 18, when he was arrested and the pill bottle was seen in his truck.

The Government's recent admission regarding the disposition of the bottle of 150 mg Effexor pills is material because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435; see also Bell v. Cone, 129 S. Ct. 1769, 1783 (2009) (same). At trial, counsel pursued the theory that the increased 150 mg Effexor dosage prescribed to Mr. Fields on July 7, 2003 caused Mr. Fields to suffer a manic flip that substantially impaired his capacity to conform his conduct to the law and. The Government countered this theory by eliciting from Mr. Fields' expert witnesses that there was no evidence that Mr. Fields took the increased dosage prior to the killings of Mr. and Mrs. Chick.[38] The Government

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[37] The fourteen pills had to have come from Mr. Fields' pill bottle, because he did not see a doctor at the prison regarding his mental health until July 24, 2003, five days after the jail began administering 150 mg Effexor pills to Mr. Fields. SA-3.

[38] Dr. Grinage was questioned as follows:

Q How do we know if he took any of those 150 milligram pills?
A He may not have.
Q He may then have been operating on July 10 under the same dosage that he had been carrying and taking for a period of time prior to that, correct?
A Well, yeah, clinically speaking. …
Q But, he was taking the same dosage on July 10, assuming he was taking it, as he was on July 9, wasn't he?
A If he filled it on July 9th he may have been taking it on July 10th. I can't answer that with any degree of accuracy.

* * *

Q And you don't know exactly when the Defendant took Effexor on July 8, 9 or 10 or in what dosages or amounts, do you?
A My understanding is that he was on 75 milligrams as documented by the records up until the 7th of July when he was prescribed 150 milligrams.
Q My question to you, Doctor, is you don't know how much and when he took

also questioned Dr. Woods regarding the absence of any evidence that Mr. Fields took the increased dosage of Effexor.[39]

The Government's admission demonstrates the FBI delivered a half-empty bottle of 150 mg Effexor pills to the jail. This undisclosed fact would have impeached the Government's suggestion in its cross-examination of Drs. Grinage and Woods that there was no indication that Mr. Fields had taken any of the increased dosage. This fact leads to the highly likely inference that Mr. Fields took the increased dosage, and in fact, took much more of the increased dosage than prescribed in the ten

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Effexor, do you?

A I can only testify to the records that I have read.

Q That's nowhere in the record. Or is there any record that reflects how much Effexor he took on July 8th, 9 or 10?

A I think it is generally perceived that if you are prescribed the medication, then you take it. In this case that may have not been. I can only go by what I read in the records.

TR, 2837-38, 2868-69.

[39] Dr. Woods was questioned as follows:

Q Are you aware that there's no evidence in this record apart from representations that the Defendant may have made to treating or to examining doctors that he even took any of the increased dosage?

A Yes.

Q Are you aware that in his truck there were still blister packs of the old dosage?

A Yes.

* * *

Q How do you know other than what the Defendant said when he took what medication in July 2003?

A I have no indication to say that he was not taking the medication, nor do I have an indication to say that he was taking it. …

Q If there were blister packs yet in his truck that were unused, it would indicate, certainly, that he had not used the medication that had previously been dispensed, wouldn't it?

A Not used all of the medication.

Q Yes, sir. …

TR, 3029-30, 3060-61.

days from when he filled the prescription until he was arrested.[40] This is at a minimum circumstantial evidence that Mr. Fields took the prescribed 150 mg dosage, and possibly more, on July 9 and July 10. Furthermore, the fact that Mr. Fields took more pills than he was prescribed (sixteen in ten days) indicates that at the time of the crimes and in the days immediately after he may have taken additional pills because his mental state was deteriorating. Thus, the undisclosed information regarding the FBI's possession and disposition of the pill bottle "strengthens the inference that [Mr. Fields] was impaired by [his mental illness] around the time his crimes were committed." Cone, 129 S. Ct. at 1783 (concluding that prosecution's suppression of information regarding defendant's drug addiction violated Brady because the information was material as to mitigating factor that defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to requirements of law was impaired). The best evidence to rebut the Government's claims that the OSBI found and the FBI possessed Mr. Fields' **half-empty** bottle of 150 mg Effexor pills was withheld by the Government.

Had the jury been aware that Mr. Fields' pill bottle was found half-empty on July 18, it could have reasonably inferred that Mr. Fields took the increased dosage of Effexor prior to killing Mr. and Mrs. Chick, and that his mental state was deteriorating at and around the time of the crimes. With these inferences in hand, there is a reasonable likelihood that at least one juror would have found the substantially impaired capacity mitigating factor to be present and concluded that the aggravating factors did not substantially outweigh this evidence in mitigation. Thus, there is a reasonable probability that, had the Government disclosed the suppressed information regarding the half-empty pill bottle, "the result of [Mr. Fields' sentencing] proceeding would have been different."

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[40] The prescription called for Mr. Fields to take one pill daily for thirty days. In the ten days spanning July 9 through July 18, Mr. Fields consumed sixteen pills.

Cone, 129 S. Ct. at 1783 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

Additionally, the Government's line of questioning in the cross-examinations of Drs. Grinage and Woods violated Mr. Fields' right to due process as set forth in Napue v. Illinois, U.S. 264 (1959). "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. at 269. Reversal is required whether the prosecution **knew or should have known** that the testimony was false. United States v. Agurs, 427 U.S. 97, 103 (1976) (defendant entitled to new trial where prosecution "knew or should have known" that its witness testified falsely); Jackson v. Brown, 513 F.3d 1057, 1075 (9th Cir. 2006) ("Napue applies whenever a prosecution 'knew or should have known that the testimony was false'"); United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994) (use of false testimony violates due process 'regardless of whether the Government solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected"). Here, the Government elicited testimony from Drs. Grinage and Woods that it knew or should have known was false, because it possessed information regarding the pill bottle that the defense witnesses did not.

Under Napue, Mr. Fields must demonstrate only that "there is **any reasonable likelihood** that the false testimony **could have affected** the judgment of the jury." Agurs, 427 U.S. at 103; Napue, 360 U.S. at 271. Again, for the reasons that this information was material under Brady, Mr. Fields meets this comparatively more lenient standard.

To the extent that trial counsel should have deduced that the pill bottle was half-empty from the Muskogee County Detention Center records in their possession and without the Government's admission, trial counsel was ineffective for failing to do so. See O'Connell Dec., *A*-1, ¶ 20. For the

same reasons that this evidence is material, trial counsel's failure to present to the jury that the pill bottle was found half-empty was prejudicial.

B. Emails and Documents from Mr. Fields' Computers

In response to the *Motion for Non-Dispositive Omnibus Relief*, the Government provided counsel with copies of the images of the hard drives of two computers used by Mr. Fields. Counsel has submitted these imaged hard drives to a forensic computer expert for data extraction and analysis. Given the volume of the data on the two imaged hard drives, Mr. Fields' expert was not able to complete her work in time for the filing of this memorandum, and thus counsel has been unable to review any material from the imaged hard drives. Counsel will file a supplementary memorandum on this aspect of Ground Seven promptly should the analysis reveal evidence helpful to his cause.

GROUND EIGHT

THE CUMULATIVE IMPACT OF ALL THESE ERRORS DENIED MR. FIELDS DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE SENTENCING HEARING.

Each of the claims presented herein individually entitles Mr. Fields to relief from his sentence of death. However, even if this Court finds that Mr. Fields is not entitled to relief on any particular claim, he is nevertheless entitled to relief because the cumulative effect of these errors was to deny him a fair capital sentencing proceeding and the heightened procedural safeguards constitutionally required in capital cases.

Courts have long recognized that all kinds of claims of constitutional error are to be considered both individually and cumulatively, and that cumulative error or prejudice may provide a basis for relief whether or not the effect of the individual errors warrants relief. See, e.g., Kyles, 514 U.S. at 437-38 (cumulative prejudice from state's failure to reveal multiple pieces of

exculpatory evidence undermined fairness of trial and entitled defendant to relief); Taylor v. Kentucky, 436 U.S. 478, 488 (1978) (cumulative prejudicial effect of prosecutor's misstatements and improper jury instructions undermined fairness of trial, necessitating relief); Cargle, 317 F.3d at 1224-25 (habeas relief warranted based upon cumulative errors during guilt and penalty phases; at penalty phase prosecutor engaged in improper argument and improper victim impact evidence was presented).[41]

If the court finds cumulative error or prejudice, it eliminates the need to analyze the individual prejudicial effect of each deficiency. See Cargle, 317 F.3d at 1223 (declining to decide issue of whether prosecutor's improper argument was so prejudicial as to render penalty-phase proceedings fundamentally unfair because "when considered with the other errors at the sentencing stage, we have no difficulty finding cumulative error"); Mak, 970 F.2d at 622 ("We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel [relief]"). Moreover, if the court finds itself in equipoise as to the effect of these cumulative errors, such that it "merely ha[s] 'grave doubt' as to the existence of prejudice," relief must be granted. Glenn, 71 F.3d at 1211 (quoting O'Neal v. McAninch, 115 S. Ct. 992, 994 (1995)).

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[41] See also Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1991) (cumulative prejudicial effect of prosecutor's penalty phase remarks entitled petitioner to new sentencing hearing, even if individually the remarks may not have been sufficiently prejudicial to warrant relief); Berryman v. Morton, 100 F.3d 1089 (3d Cir. 1996) (cumulative effect of each instance of counsel's deficient performance was sufficiently prejudicial to require relief); Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (granting relief for cumulative prejudicial effect of counsel's deficient performance); Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992) (granting relief for cumulative effect of errors including counsel's failure to present mitigating evidence, court's refusal to admit exculpatory evidence and improper sentencing-stage instructions); Kubat v. Thieret, 867 F.2d 351, 371 (7th Cir. 1989) (district court "appropriately considered the combined effect of counsel's errors"; Strickland "clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced").

The circumstances of this case demonstrate that the cumulative effect of counsel's deficient penalty phase representation, and the constitutional errors committed by the Court and the Government, so undermined the fairness of the sentencing proceedings that Mr. Fields's sentence of death should be vacated. Mr. Fields was denied his opportunity to present significant mitigation to the jury and to rebut the Government's evidence of the aggravating factors, while at the same time the jury was allowed to consider unfettered false and misleading testimony presented in support of the aggravating factors, and the Government's improper and prejudicial comments in its closing arguments. The verdict slip and instructions which permitted the jury to enter a general verdict of death, rather than separately sentencing him on each count of murder resulted in the jury double-counting the aggravating factors while depriving Mr. Fields of his right to have the jury give effect to the mitigating evidence he presented. These errors significantly weakened Mr. Fields's case in favor of life while bolstering the Government's position in favor of death. Where the combined effort of individual errors renders a defense "'far less persuasive that it might [otherwise] have been,' the resulting conviction violates due process." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (quoting Chambers, 410 U.S. at 294, 302-3 (granting habeas relief based upon cumulative prejudice from wrongful admission of testimony of prosecution witness and wrongful exclusion of portion of defense witness testimony because errors "left the jury with only half the picture").

Collectively and cumulatively, these errors denied Mr. Fields his rights to due process of law and his rights under the Fifth, Sixth and Eighth Amendments to the United States Constitution and require that he be afforded a new sentencing hearing.

GROUND NINE

THE MANNER IN WHICH THE GOVERNMENT WOULD CARRY OUT MR. FIELDS' EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT.

In the *Motion*, Mr. Fields alleged that the manner in which the Government would carry out his execution by lethal injection would violate the Eighth Amendment. He also pled that the litigation of this claim was not appropriate in at this time, and that he raised the claim in the *Motion* in order to avoid a later allegation that the claim was waived.

Mr. Fields stands by those suggestions as to why the so-called lethal injection claim ought not be litigated in this context at this time. Should the Court or the Government have a different view of this Ground, Mr. Fields will pursue it as directed.

CONCLUSION

For all of the above reasons, those set forth in the *Motion*, and based upon the entire record of these proceedings, Mr. Fields respectfully requests that the Court grant the relief sought in the *Motion*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael Wiseman, Esq., hereby certify that on this 30th day of July, 2010, the foregoing document was electronically filed and is available for viewing and downloading through the ECF system.

/s/ Michael Wiseman

Michael Wiseman