No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

RICHARD L. SEALEY,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

APPENDIX
Capital Case

David J. Sheehan
Seanna R. Brown
Baker & Hostetler LLP
45 Rockefeller Plaza, Suite 1400
New York, New York 10111
212-589-4200

*S. Jill Benton
Federal Defender Program, Inc.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
404-688-7530
Jill_Benton@fd.org

*Counsel of Record

Counsel for Richard Sealey

Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10565

D.C. Docket No. 1:14-cv-00285-WBH

RICHARD L. SEALEY,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

(March 31, 2020)

Before JORDAN, JILL PRYOR, and NEWSOM, Circuit Judges.

NEWSOM, Circuit Judge:

In 2002, Richard Sealey was convicted of murdering John and Fannie Mae Tubner with an axe and sentenced to death. After unsuccessfully pursuing post-conviction relief in Georgia state court, Sealey filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied relief.

Sealey was granted a certificate of appealability on four issues: (1) whether his counsel rendered ineffective assistance by failing to investigate mitigating evidence at sentencing; (2) whether the trial court denied him due process and a fair trial by refusing his request for a one-day continuance; (3) whether the jury's verdict was unconstitutional or in violation of Georgia's sentencing scheme; and (4) whether he was denied his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975).

We hold that the state habeas court's decision as to Sealey's ineffective-assistance-of-trial-counsel claim was neither contrary to nor an unreasonable application of federal law nor based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). We also conclude that we are barred from considering Sealey's other claims because he failed to raise them on direct appeal and cannot show "cause" and "prejudice" to overcome the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). We therefore affirm the district court's denial of Sealey's petition.

I

A

In the evening of January 23, 2000, Richard Sealey, Wajaka Battiste, Gregory Fahie, and Deandrea Carter drove to the home of Carter's grandparents—John and Fannie Mae Tubner. *Sealey v. State*, 593 S.E.2d 335, 337 (Ga. 2004).

The plan was for Sealey to keep the Tubners occupied while Carter tried to get money from them. When the four arrived at the Tubners' home, Sealey, Carter, and Fahie went inside while Battiste waited for them in his car. *Id.* Fahie, who testified against Sealey in exchange for a plea bargain, explained that he, Sealey, and Carter visited with the Tubners for 20 to 30 minutes. At that point, Fahie went to use the restroom; while he was doing so, Carter knocked on the door and said that Sealey was "tripping." *Id.* When Fahie exited the bathroom, Mr. Tubner was bleeding on the living room floor, and Sealey was holding Mrs. Tubner down while brandishing Mr. Tubner's handgun. *Id.* Sealey then dragged Mrs. Tubner, who was bound with duct tape, to a bedroom upstairs. *Id.* Fahie testified that Sealey told him to look for money in the house, but he didn't find any. *Id.*

When no money was found, Sealey instructed Carter to heat a fireplace poker, which he used to torture Mrs. Tubner into telling them where she and her husband kept their money. *Id.* Sealey then asked Carter to bring him a hammer so that he could kill Mr. and Mrs. Tubner, and Carter brought him an axe. *Id.* Sealey repeatedly struck Mrs. Tubner's head with the axe, and "then went downstairs and did the same to Mr. Tubner, who had crawled a short distance across the living room." *Id.*

According to Battiste, when Sealey, Carter, and Fahie returned to Battiste's car, Sealey told Fahie that he "had to do it" because the Tubners had mistreated

Carter and her mother and because "they seen our face." Sealey also told Battiste not to drive fast and that he had a gun. Sealey and Carter directed Battiste back to Sealey's motel. Before getting out of the car, Sealey told Battiste "you have never seen me" and "I'll out your lights," which Battiste took to mean that Sealey would hurt him.

B

1

Sealey was indicted by a Georgia grand jury on two counts of murder, fourteen counts of felony murder, two counts of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon.

John Beall was appointed to defend Sealey, and Beall chose Joseph Roberto to be his second chair.[1] As part of their sentencing-phase investigation, Beall, Roberto, and Jodi Monogue, a paralegal in Roberto's office, traveled to the island of St. Croix in the U.S. Virgin Islands, where Sealey was raised, to gather information about his background. The team went to Sealey's childhood home and the prison where he had spent time as a juvenile, and they also visited and requested records from the local hospital and police station. They tried to track

[1] The state habeas court acknowledged that Beall and Roberto both had experience with capital cases. It stated that Beall had tried four death penalty cases and that Roberto had been the second chair on two cases before Sealey's.

down Sealey's baseball coach and speech therapist, but they were unsuccessful. When they attempted to obtain Sealey's school records, the principal initially refused to provide them, despite having a release from Sealey. After Sealey's team pressed the issue, the principal told them that a "hurricane blew [the records] all away." Records produced during state habeas proceedings show that while in St. Croix, the team held strategy meetings to prepare for trial.

The defense team met with Sealey's half-sister, Pauline Corbitt, and two of his nephews, Ronald Tutein and Kareem Dennis, during the St. Croix trip. According to Sealey, "[a]ll three family members" whom the defense team interviewed in St. Croix "indicated that they were willing to testify on Sealey's behalf."[2] Roberto testified to the contrary: "[W]e had no one to come forward and say a damn thing about Richard that was good, not one person. Not his mother, not his sister. There were no friends. There was nobody."

Beall and Roberto also conducted a preliminary investigation into potentially mitigating mental-health evidence by having Sealey meet with Dr. Jack Farrar, a clinical and forensic psychologist. Dr. Farrar testified at the state habeas

[2] In an affidavit submitted to the state habeas court, Pauline Corbitt stated that she had told Sealey's attorneys that she would come testify at Sealey's trial but that, when they called her to come, it was on such short notice that she couldn't adjust her schedule. She stated that she "would've come to Atlanta to beg for [her] little brother's life if [she] had been given an opportunity." Ronald Tutein also submitted an affidavit stating that he told Sealey's lawyers that he would come to testify on Sealey's behalf. Kareem Dennis' affidavit states that, although Sealey's lawyers may have wanted him to be a character witness, he was never contacted about it after the interview in St. Croix.

proceedings that, after meeting with Sealey, he told Beall that "in [his] opinion there was something very, very wrong with" Sealey and that he likely "suffered from some kind of delusional, paranoid kind of disorder, perhaps even a psychoses, and that certainly a neurological kind of process, an organic brain problem needed to be evaluated." In response to Dr. Farrar's initial evaluation, Beall requested funds from the trial court for a complete evaluation, stating that "based on what Dr. Farrar said, Mr. Sealey needs two things: a full battery of psychological evaluations and . . . if he finds evidence of organic injury he may need a neurologist." Despite requesting—and, so far as we can tell, receiving—funding from the court, the defense team never had Sealey fully evaluated.[3]

2

In the months and days leading up to Sealey's trial, the state trial court held several hearings to address complaints that Sealey had lodged against his counsel. The first hearing took place three months before trial, after Sealey sent a letter to the state trial judge alleging that Beall and Roberto were ineffective—Beall for failing to move to recuse a member of the district attorney's office and Roberto for working only on the sentencing phase. At the hearing, counsel explained that they

[3] The state and Sealey disagree about why Dr. Farrar never conducted a full investigation. Transcripts show that on August 2, 2002—just ten days before trial—Beall told the trial court that Dr. Farrar had tried, but was unable, to meet with Sealey at the jail because of the jail's security policies. Dr. Farrar testified during the state habeas proceedings that he didn't remember being contacted by Beall regarding a follow-up examination.

were actively working on the recusal issue and that Roberto was focusing on the sentencing phase while Beall focused on the guilt phase. The court found no deficiency in Beall and Roberto's representation and denied Sealey's motion to remove them.

Ten days before trial, the state trial court held a hearing to address another request from Sealey that his counsel be removed. Sealey told the trial judge that there was a "major conflict" with Beall and Roberto.[4] Sealey was concerned that Beall had "given up all hope" in his case, citing a letter in which Beall had advised Sealey to accept the state's plea deal for life without parole.[5] Sealey said that he wanted to represent himself and proposed that another lawyer, Mike Mears, act as standby counsel, although Sealey wasn't sure that Mears would have adequate time to prepare. The court explained the dangers of self-representation and scheduled a *Faretta* hearing to take place four days later so that Sealey could consider the risks of proceeding without counsel.

[4] In addition to his concerns about a "conflict," Sealey also stated that Beall and Roberto failed to complete an investigation that he had requested (looking for a shoe on the roof of a store as possible evidence). Beall explained that the requested investigation had been completed, but nothing was found.

[5] In this letter, Beall stated that "[t]he primary defense to the case [was] no longer viable" because the district attorney had turned over to the defense a letter written by Sealey that implicated him "in a conspiracy to provide perjured testimony at trial." Beall warned Sealey that if he went to trial, the likely outcome would be the death penalty.

At that hearing—now six days before trial—Sealey reaffirmed that he wanted to represent himself with standby counsel, but he stated that he hadn't obtained new standby counsel and that having Beall or Roberto serve in that capacity would be a "conflict." The court decided that Sealey hadn't established "any legal grounds" for Beall and Roberto to be removed or for there to be a continuance to find new counsel. After conferring with Beall and Roberto, Sealey stated that he would "go ahead and have Mr. Beall and Mr. Roberto represent [him] as trial counsel," without waiving his rights as to the "conflict issue."

C

1

At trial, the state's case largely consisted of testimony from Sealey's co-defendants and physical evidence. Battiste and Fahie testified against Sealey, relaying the facts of the murders as described above. The state also introduced Mr. Tubner's handgun, jewelry discovered in Sealey's motel room, and testimony regarding blood found on the floor and sink in Sealey's motel bathroom. *Sealey*, 593 S.E.2d at 337.

As for the defense, Beall described the guilt-phase strategy as rooted in sowing "residual doubt." Defense counsel attempted to show inconsistencies in the testimonies of Battiste and Fahie and argued that Sealey's co-defendants had a personal motive in testifying for the state. The defense also pointed to Sherry

Tubner—Mr. Tubner's daughter—as a possible suspect and questioned her about her knowledge of the murders. Counsel tried to introduce Sherry's polygraph results—which indicated that she had lied when she said she didn't know about or have any involvement in the murders—but the trial court ruled that the polygraph was inadmissible.

On Friday, August 23, 2002—for reasons that will become clear, the timing matters—the jury found Sealey guilty of both murders. After the verdict was read, the trial court excused the jurors for the weekend and instructed them that the sentencing phase of the trial would commence on Monday.

2

The sentencing phase began on Monday, August 26, with the state's aggravation case, which lasted less than one day. The state attempted to link Sealey to another crime—the murder of William Kerry—by showing that Sealey used Kerry's credit card the day Kerry was murdered. The state also presented testimony from Rossie Neubaum, who said that Sealey had raped her by threatening to "blow [her] brains out" unless she engaged in intercourse with him. Finally, several witnesses described Sealey's misconduct and violence in prison. Law enforcement officials and correctional officers testified that, among other things, Sealey had turned a spork into a shank and hidden razor blades, used a sock full of dominoes to attack another inmate, and come at officers in an aggressive

and threatening manner. Defense counsel cross-examined each of the state's aggravation witnesses.

After the state rested its aggravation case on Monday, the defense was unprepared to present its case in mitigation. Ronald Tutein—Sealey's nephew and the defense's sole mitigation witness—wasn't present to testify. Defense counsel had arranged for Tutein, who lived in St. Croix, to arrive in time to testify on Wednesday, August 28. Beall explained to the court that Tutein had a "medical appointment" because of a recent surgery on his knees, such that he was "not . . . able to leave last week in order to get here on time." The defense requested a continuance until Wednesday to allow for Tutein's arrival.

The trial court denied the request. It decided that there was "ample opportunity to have [Tutein] brought forward." The court found that the issue wasn't brought to the court's attention until late on Monday and, further, that "[t]he defense was well aware that the exact day [Tutein] was needed might not be able to be ascertained and they might have to get [him] here a couple of days ahead of time." The trial court did, though, grant an overnight continuance. The court excused the jury and gave the defense until the next day so that Sealey and his counsel would have time to discuss whether Sealey would testify.

The defense presented its mitigation case on Tuesday, August 27. According to Beall, the defense team's goal was "[t]o use residual doubt" and to

"humanize" Sealey in mitigation, but when asked about sentencing strategy during the state habeas proceedings, Roberto answered that "[t]here wasn't one." Counsel entered as exhibits (without any meaningful explanation) pictures of Sealey's childhood home and the ballfield that Sealey played on in St. Croix, as well as a few letters written by Sealey. No witnesses testified on Sealey's behalf, and Sealey decided not to take the stand.

In closing argument, the state emphasized Sealey's past crimes and wrongdoings, stressing that he would be a danger to others in prison if not sentenced to death. For its part, the defense attempted to cast doubt on the testimony of Fahie and Battiste, framing the issue for the jury as "whether or not Gregory Fahie is believable enough to execute Richard Sealey." Beall cited historical examples—Jesus, Socrates, Alfred Dreyfus, Jeffrey Dahmer, the Scottsboro Boys, and Charles Manson—seemingly in an effort to show the risk of the death penalty being imposed arbitrarily.

The jury rendered its verdict the same day. The jury recommended a death sentence after finding beyond a reasonable doubt that the following aggravating circumstances existed:

> [T]he murders were both outrageously or wantonly vile, horrible, or inhuman in that they involved the torture of the victims, depravity of mind, and the aggravated battery of the victims, that the murders were both committed for the purpose of receiving money or any other thing of monetary value, that the murder of Mr. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery and

> aggravated battery, and that the murder of Ms. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery, aggravated battery, and kidnapping with bodily injury.

Sealey, 593 S.E.2d at 336–37 (citing Ga. Code Ann. § 17-10-30(b)(2), (4), and (7)). The trial court imposed a single death sentence for the two murders.

3

Sealey appealed to the Georgia Supreme Court. *Sealey*, 593 S.E.2d at 337. Because Sealey was still represented by the same lawyers, no ineffective-assistance-of-trial counsel claims were raised on direct appeal. Nor did he present any of the other claims that he raises here—*i.e.*, those concerning the denial of a continuance during the sentencing phase, the jury's verdict, or his right to self-representation. The Georgia Supreme Court affirmed Sealey's convictions and sentence. *Id.*

II

A

Sealey filed a petition for a writ of habeas corpus in Georgia state court, challenging various aspects of the trial proceedings and his counsel's performance. As relevant to his claims here, he argued (1) that his trial counsel rendered ineffective assistance during the sentencing phase, (2) that the trial court erred in denying his motion for a continuance during the sentencing phase, (3) that the

jury's sentence and verdict violated constitutional and statutory requirements, and (4) that he was denied the right to represent himself under *Faretta*.

1

During the state habeas proceedings, Sealey and the state presented evidence regarding (a) Sealey's mental health, (b) trial counsel's failure to present Ronald Tutein at sentencing, (c) Sealey's family life, background, and future dangerousness, and (d) the decision of the jurors in his case to impose the death penalty.

a

Both Sealey and the state put on mental-health experts who testified about their impressions of Sealey's background and their evaluations of him. Sealey presented Dr. Antonio Puente—an expert in neuropsychology. Based on an interview with Sealey's mother, Dr. Puente hypothesized that Sealey might have been a "blue baby"—that is, born with the umbilical cord wrapped around his neck such that he would have suffered from hypoxia, *i.e.*, a lack of oxygen—but he acknowledged that no medical records corroborated that hypothesis. As to Sealey's childhood, Dr. Puente testified that Sealey had a "chaotic upbringing" and that his life was "a series of . . . traumas"—from his problematic birth, to the separation of his parents, to his move to New York City as a pre-teen.

To evaluate Sealey's mental health, Dr. Puente administered 50 tests, giving about 15 of those tests twice to guard against "practice effect." On one of the tests that Dr. Puente administered twice—the Wechsler Adult Intelligence Scale (WAIS)—Sealey obtained full-scale IQ scores of 75 and 79, which placed him between the fifth and eighth percentiles. Dr. Puente concluded that Sealey suffered from "organic brain syndrome," which he said meant that "the brain is not working properly and something is happening to the individual's behavior or thinking."[6] He also noted that Sealey's prison records documented a "head injury" diagnosis, although he was unsure whether that diagnosis arose from psychological testing or from Sealey's self-reporting. Dr. Puente further believed Sealey had "borderline mental retardation or intellectual functions" and "arrested development," meaning his maturity was equivalent to a 14- or 15-year-old's.

From a review of Sealey's background, test results, and personal interviews, Dr. Puente inferred that Sealey was unable to form plans, meaning that Sealey "could be easily swayed." In Dr. Puente's view, Sealey's time in prison "contributed to his inability to develop a social compass or understanding on how the world worked," and when combined with pre-existing issues—such as "the

[6] Dr. Puente explained that "[t]echnically," under the Diagnostic and Statistical Manual of Mental Disorders, the diagnosis would be "dementia due to multiple ideologies [sic]," and under the International Classification of Diseases, "a diagnosis for head injury." The term "organic brain syndrome," he said, was just "an old-fashioned word that captures the concept."

lack of appropriate parenting, maybe the head injury, maybe the perinatal injury, maybe the cannabis abuse"—Sealey's lengthy incarceration left him with a "highly impaired paradigm."

The state countered Dr. Puente's testimony by presenting Dr. Glen King, a forensic psychologist who had also evaluated Sealey. With respect to Sealey's background, Dr. King testified that Sealey "described [his father] . . . as very loving" and his mother as "very strict." Dr. King stated that Sealey "certainly indicated that he never felt physically abused by his parents" and didn't describe his childhood as chaotic. When investigating possible head injuries, Dr. King testified that Sealey told him that he couldn't recall ever being hospitalized or receiving a blow to the head that left him unconscious. Sealey's medical records also didn't indicate that he had experienced any symptoms from a serious head injury. On the question whether Sealey suffered from hypoxia, Dr. King testified that he "saw no evidence from Mr. Sealey that he has any cognitive deficits that would be explained by something like that." In other words, Sealey had "no motor problems" and "no sensory difficulties," and although "he had some differential abilities, in terms of his cognitive functioning, . . . it would not be consistent with what we would expect from hypoxia."

Dr. King also challenged Dr. Puente's administration of the WAIS. When asked about Dr. Puente administering the WAIS test twice, Dr. King stated that

"[i]n all my years of practice I've not seen it done before"—except, he said, to measure a patient's progress after a head injury—and that other tests exist to specifically test for malingering. From reviewing the WAIS results, Dr. King also believed that "some of the questions . . . were, frankly, just not scored correctly." He stated that Dr. Puente evidently didn't ask follow-up questions when necessary that might have allowed Sealey to achieve higher scores and that Dr. Puente discontinued the testing too early. This indicated to Dr. King "that [Dr. Puente did] not administer[] the test properly," and "it call[ed] . . . into question all of the results that [Dr. Puente had] obtained." Dr. King observed that Sealey "generated a verbal comprehension index of 91" on the WAIS even though his math score was much lower. Dr. King took this as a signal that Sealey had "low average functioning or average functioning"—not borderline intelligence—because "[t]he people who have true borderline intellectual functioning generate index and IQ scores that are all quite consistent and low." But, all things considered, Dr. King stated that "the vast majority of [Dr. Puente's] test results appear to be pretty consistent, I think, with what I found and indicate normal functioning." None of Dr. Puente's test results suggested to Dr. King that Sealey suffered from organic brain damage.

So too, Dr. King testified that the results of his own testing undermined Dr. Puente's diagnosis that Sealey had borderline intellectual functioning and organic

brain syndrome. Because Dr. Puente had already administered the WAIS to Sealey twice, Dr. King testified that he couldn't also administer it due to "possible practice effects." So, Dr. King administered the Stanford-Binet intelligence test and the Wide Range Achievement Test IV to evaluate Sealey's ability in reading, writing, arithmetic, and comprehension. Dr. King scored Sealey's full-scale IQ at 82, which would be in the borderline-intelligence range, but he ultimately determined that Sealey functions in the low-average range (between 85 to 95) because half of the indices he obtained were in the borderline-intelligence range and half were in the average range. Dr. King believed that Sealey may suffer from a learning disability in math because Sealey's "word reading, sentence comprehension, and spelling . . . occur at the tenth grade to college level," while Sealey's "math is at the sixth grade level." Although some test results signaled to Dr. King that Sealey had a "poor processing speed," he testified that Sealey didn't have problems with "executive functioning" or frontal-lobe cognitive functions. Overall, Dr. King concluded that Sealey's results didn't indicate either borderline intelligence or that Sealey was functioning at a teenage level.

In sum, Dr. King "found no evidence in any record nor in any testing that has been done or anything that [he had] done that indicates that [Sealey] is mentally retarded or functions in the borderline range" and that there was no "evidence whatsoever for any brain damage." Dr. King testified that "Mr. Sealey

is certainly capable of planning, engaging in goal-directed behavior, listening to others and following their directions or giving directions to others" and that "[t]here's nothing that would indicate that he is . . . a follower all the time and lets everybody lead him around by the nose."

b

Some of the testimony and evidence at the state habeas hearing concerned trial counsel's failure to present Sealey's nephew, Ronald Tutein, at sentencing. Tutein testified that he didn't have a conflict that would have kept him from traveling to Georgia for Sealey's sentencing. Although he had recently had knee surgery, Tutein said that he was ready and willing to come testify on Sealey's behalf:

> Q[:] Do you recall ever having a conversation with the attorneys for Richard Sealey where you told them that you couldn't come for a doctor's appointment or for any other reason?
>
> A [Tutein:] No. I made it clear that whenever they needed me they can call me, I'll be ready anytime. I believe I was still on leave for my knee, so there was no conflict with my job. I could leave as soon as they let me know.
>
> Q[:] And were you ready, willing and able to come?
>
> A [Tutein:] I was. I was already packed when they called.
>
> …
>
> Q[:] And would you have been willing to plead for his life?

A [Tutein:] Yes, definitely.[7]

While he couldn't remember all the details, Roberto testified as follows: "[T]hat witness who I think was Tutein didn't make it because maybe we didn't have our act together and [get] him the plane ticket early enough or he couldn't really commit, and la-dah-dah. It just, he wasn't there." Beall testified that the defense "had planned on having live testimony, and at the very last minute that didn't happen." Sealey also produced notes showing that Roberto's office called Tutein on Tuesday, August 27—the day Sealey was sentenced. The notes stated: "prosecution ended one day early, not enough material to fill entire day, plane ticket bought, may come but . . . cannot testify as it will be too late."

As to the substance of Tutein's habeas testimony, he said that Sealey's voice was "loud and always laughing" and that Sealey once gave him advice not to fight with another person. Tutein related similar information in an affidavit submitted to the state habeas court. In that affidavit, Tutein also stated that Sealey would take him and his brother to play ball at the park, that Sealey tried "to discourage [him] and Kareem [Dennis] from going down the same path that he did," and that to him, Sealey "was not a violent or aggressive person."

[7] Tutein also stated in an affidavit that if Sealey's lawyers said that Tutein couldn't make it to testify because he had a follow-up appointment, "that is not true" and that he "would have been there no matter what."

c

Other witnesses testified about Sealey's family life, background, and future dangerousness. Sealey presented James Aiken as an expert on the Virgin Islands prison system. Aiken testified about the conditions that Sealey had likely faced while incarcerated as a juvenile in Anna's Hope and Golden Grove prisons: "Inmates were in control of other inmates," such that "[i]f you didn't fight, if you didn't act crazy, if you didn't inflict more violence on people, that violence will come to you." Aiken said that the Virgin Islands prison system was "dysfunctional" and that inmates "were inflicting physical as well as emotional violence against other inmates," including "sexual misconduct." Because "the political system turned their backs to this," he continued, "inmates had to fend for themselves." Although he admitted that there were no records of Sealey being abused in prison, he stated that it wasn't uncommon for abuse or allegations of abuse to go unrecorded. Aiken also testified as to Sealey's future dangerousness, stating that Sealey "could be adequately managed in a proper security level for the remainder of his life without causing undue risk of harm to staff and the inmates."

Sealey presented affidavit testimony from other witnesses, including his family members, elementary school teacher, baseball coach, and childhood friends. Many hadn't seen or spoken to Sealey for several years but recalled some details about Sealey's childhood. They testified that Sealey's mother and father didn't

actively parent him and that he was spoiled, that he struggled in school and had a stutter, and that he was a good athlete and popular. The affidavits also mentioned that Sealey had moved to New York with his mother as a pre-teen and had later returned to the Virgin Islands to live with his father, where he was given a BMW and left unsupervised. Several affiants recalled Sealey going to prison for a robbery and shooting that occurred in St. Croix.

d

Finally, Sealey presented the testimony of several jurors from his trial. One juror, Monique Sheffield, testified in an affidavit that "[e]ven after all this time and even with the crime being so terrible I am on the fence about my decision for the death penalty." She also stated that

> some members of the jury, me included, were waiting for the defense to give us some reason not to give Richard Sealey the death penalty. I was surprised they didn't get just one relative, or a friend, or somebody, to get up and say, this person is somebody I care about, please don't kill him. I was waiting for somebody to say that and it would have made a difference to me.

Sheffield and other jurors also testified, as relevant here, that they would have considered information about Sealey's background—such as Sealey's mental health and experiences in prison—had it been presented at sentencing.

2

After considering all the testimony and evidence, the state habeas court denied Sealey's petition. With respect to Sealey's ineffective-assistance claim, the

court held that Sealey could not show both (1) that trial counsel were deficient in their investigation and presentation of mitigating evidence and (2) that any errors would have changed the outcome of Sealey's trial. On Sealey's contention that the verdict and sentence were unconstitutional and in violation of Georgia statutes, the court denied the claim on the merits and, in the alternative, held that it was procedurally defaulted because Sealey failed to raise it at trial or on direct appeal. The court determined that the other claims that Sealey has presented here—that the trial court erred in denying his motion for a continuance and that he was denied the right to represent himself under *Faretta*—were procedurally defaulted.

Sealey filed a certificate of probable cause in the Georgia Supreme Court, which summarily denied review. The United States Supreme Court then denied Sealey's petition for a writ of certiorari. *Sealey v. Chatman*, 571 U.S. 1134 (2014).

B

Sealey next filed a petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254, which the district court denied. *Sealey v. Chatman*, No. 1:14-CV-0285-WBH, 2017 WL 11477455, at *39 (N.D. Ga. Nov. 9, 2017). Although the district court acknowledged that "at least at first blush," it "had grave concerns regarding the paucity of the case that trial counsel presented in mitigation," it ultimately denied Sealey's ineffective-assistance claims on the merits. *Id.* at *7. With respect to Sealey's argument that he was denied due

process and a fair trial when the state trial court denied his motion for a continuance, the district court held that this claim was procedurally defaulted and that Sealey hadn't shown cause and prejudice to overcome the default. *Id.* at *21. On Sealey's claims that the verdict was unconstitutionally arbitrary and that his right to self-representation was violated, the district court dismissed them as procedurally defaulted and, in the alternative, denied them on the merits. *Id.* at *20–23.

Sealey sought a certificate of appealability from the district court, which it granted on three issues: (1) whether Sealey's trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence at sentencing; (2) whether the verdict was unconstitutionally arbitrary; and (3) whether Sealey was denied his right to represent himself under *Faretta*. Sealey asked this Court to expand the COA to include several additional claims. We initially denied Sealey's request but later granted his motion for reconsideration and expanded the COA to include his claim challenging the trial court's denial of the continuance during sentencing.

III

"We review *de novo* the denial of a petition for a writ of habeas corpus." *Morrow v. Warden*, 886 F.3d 1138, 1146 (11th Cir. 2018) (quotation omitted). But the Antiterrorism and Effective Death Penalty Act of 1996 prescribes a deferential

framework for evaluating issues previously decided in state court. *Raulerson v. Warden*, 928 F.3d 987, 995 (11th Cir. 2019). Under AEDPA, a federal court may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d). The state court's factual determinations are presumed correct, absent clear and convincing evidence to the contrary. *Id.* § 2254(e)(1).

At issue here, primarily, is AEDPA's unreasonable-application-of-federal-law provision. The key word is "unreasonable," which is more than simply incorrect. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011); *Williams v. Taylor*, 529 U.S. 362, 410–11 (2000). "[A] state court's application of federal law is unreasonable only if no fairminded jurist could agree with the state court's determination or conclusion." *Raulerson*, 928 F.3d at 995–96 (quotation omitted). This is "a difficult to meet and highly deferential standard . . . , which demands that state-court decisions be given the benefit of the doubt." *Id.* at 996 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). We review "the last state-court adjudication on the merits." *Greene v. Fisher*, 565 U.S. 34, 40 (2011). Because

here the Georgia Supreme Court summarily denied Sealey's certificate for probable cause, we review the state trial court's habeas decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *see also Raulerson*, 928 F.3d at 996 ("[W]e '"look through" the unexplained decision' of the Supreme Court of Georgia to review the superior court's decision as if it were the last state-court adjudication on the merits." (quoting *Wilson*, 138 S. Ct. at 1192)).

IV

Sealey's appeal focuses primarily on whether the state habeas court's rejection of his ineffective-assistance claim constituted an unreasonable application of federal law under § 2254(d). The relevant federal law is the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Premo v. Moore*, 562 U.S. 115, 121 (2011) ("The applicable federal law [for AEDPA purposes] consists of the rules for determining when a criminal defendant has received inadequate representation as defined in *Strickland*."). To prove ineffective assistance under *Strickland*, a defendant must show both (1) deficient performance of counsel and (2) resulting prejudice. 466 U.S. at 687.

When considering the deficiency prong, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. As relevant to "counsel's duty to investigate"—a duty at issue in this case—"strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. While "[c]ounsel representing a capital defendant must conduct an adequate background investigation," we have held that "it need not be exhaustive." *Raulerson*, 928 F.3d at 997.

To prove prejudice, "[t]he 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*; *accord Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc), which is a lesser showing than a preponderance of the evidence, *see Williams*, 529 U.S. at 405–06. At the same time, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding" because "[v]irtually every act or omission of counsel would meet that test." *Strickland*, 466 U.S. at 693. In a capital case, the prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 935 (11th Cir. 2011) (alteration in original) (quoting *Strickland*, 466 U.S. at 695). An ineffective-assistance claim can be decided on either the deficiency or

prejudice prong. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

While the *Strickland* standard is itself hard to meet, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id*. This means that "[s]o long as fairminded jurists could disagree about whether the state court's denial of the claim was inconsistent with an earlier Supreme Court decision, federal habeas relief must be denied." *Johnson*, 643 F.3d at 910.

Sealey asserts that his trial counsel—Beall and Roberto—rendered ineffective assistance at sentencing by failing to do four things: (A) discover and present evidence of brain damage and borderline intellectual functioning; (B) ensure that the sole mitigation witness, Ronald Tutein, was available to testify; (C) discover and present evidence of Sealey's background; and (D) present the results of Sherry Tubner's polygraph. Sealey also contends that (E) he was prejudiced by the cumulative effect of counsel's errors. We examine each contention in turn.

A

We first address Sealey's argument that trial counsel failed to discover and present mitigating mental-health evidence. The state habeas court determined that

Sealey's lawyers' decision "not to pursue" mental-health evidence "was based upon a thorough and reasonable investigation" and "was not deficient." It further held that the lawyers "were not ineffective for not presenting [Sealey's] newly acquired mental health diagnoses" because there was "no reasonable probability that [Sealey's] trial would have had a different outcome given [its] unreliability." The court also concluded that at least some of Dr. Puente's test results were "unreliable" and found that his diagnoses were "the product of errant analysis."

1

Sealey contends that the state court's decision is both an unreasonable determination of the facts and an unreasonable application of Supreme Court precedent. On the facts, Sealey argues that the record doesn't support the state court's findings that Dr. Puente's results were "unreliable" or that his analysis was "errant" because multiple rounds of IQ testing all showed that Sealey was operating in the borderline range. Although the court took issue with the way that Dr. Puente administered the testing and his findings, Sealey argues that Dr. Puente is one of the test's developers, and that, as a neuropsychologist, he is more qualified than the state's expert, a forensic psychologist.

On the law, Sealey argues that, given the clear signs that he had mental-health issues, trial counsel's failure to further investigate and present evidence of these issues constituted deficient performance. According to Sealey, once Dr.

Farrar's preliminary investigation revealed that there was something "very, very wrong" with Sealey and that he likely "suffered from some kind of delusional, paranoid kind of disorder, perhaps even a psychoses, and that certainly a neurological kind of process, an organic brain problem needed to be evaluated"—an assessment that caused Beall to request funding for a full mental-health evaluation—counsel should have followed up. In addition to Dr. Farrar's initial opinion, Sealey contends that counsel knew from different members of his family that he had a complicated birth and behavioral problems, and that "Sealey men" struggled with mental illness. Sealey also points to Roberto's testimony during the state habeas proceedings that "Richard is not right," "not normal," and that he "[d]amn straight" had mental issues. And even if (as the state habeas court decided) counsel chose not to investigate Sealey's mental health because they did not personally think that he suffered from mental illness, Sealey asserts that they weren't excused from procuring an evaluation, which they needed to make an informed decision.

2

On the record before us, we find counsel's failure to further investigate Sealey's mental health deeply troubling. Beall and Roberto were put on notice by Dr. Farrar that something was "very, very wrong" with Sealey, that Sealey "suffered from some kind of delusional, paranoid kind of disorder, perhaps even a

psychoses," and "that certainly a neurological kind of process, an organic brain problem needed to be evaluated." Counsel also heard from Sealey's family that "Sealey men" suffered from mental-health issues, and Roberto himself acknowledged that Sealey was "not right" and "not normal." Dr. Farrar's comment, in particular, seemed to have made an impression on counsel, as it led Beall to request funds from the court for further evaluation. Even armed with all of this information though, counsel simply didn't follow through. We have recognized that "[i]n the context of penalty-phase mitigation in capital cases . . . it is unreasonable not to investigate further when counsel has information available to him that suggests additional mitigating evidence—such as mental illness . . . may be available." *Jones v. Sec'y, Fla. Dep't. of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016). Having said that, we needn't decide here whether counsel's performance was constitutionally deficient because we hold Sealey was not prejudiced by any deficiency on their part.

In short, Sealey cannot prove that "absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Johnson*, 643 F.3d at 935 (alteration in original) (quotation omitted). Dr. Puente testified that Sealey suffered from "organic brain syndrome and borderline mental retardation or intellectual functions," and that Sealey had a "highly impaired paradigm" and "could be easily

swayed." Had these findings been presented in mitigation, the state surely would have presented Dr. King (or another expert) to rebut Dr. Puente's testing and conclusions. Dr. King testified during the state habeas proceedings that Dr. Puente did "not administer[] the [WAIS] test properly" and that, in any event, most of Dr. Puente's results were "consistent" with his own and "indicate[d] normal functioning." The state habeas court seemingly credited Dr. King's testimony over Dr. Puente's when it found that the results of at least some of Dr. Puente's tests were "unreliable" and stated that Dr. Puente's diagnoses were not "supported by the record and [were] the product of errant analysis." While Sealey claims that the state habeas court's determination of the facts in this regard was unreasonable, he hasn't come forward with clear and convincing evidence to rebut the presumption of correctness we must give to the state court's findings under § 2254(e)(1). *See Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1292 (11th Cir. 2012) ("Our review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review." (quotation omitted)).

The state court's decision was reasonable, especially considering that Sealey's mental-health evidence—at least some of which was weakened by testimony from the state's expert—isn't nearly as compelling as mitigating evidence in cases where the Supreme Court has held that habeas relief was warranted. Take, for example, *Porter v. McCollum*, where the Court held that a

petitioner was prejudiced by his counsel's failure to present "(1) [his] heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." 558 U.S. 30, 41 (2009). When contrasted with a case like *Porter*, the new mental-health evidence presented here—of mild mental impairment—is insufficient to establish prejudice.

While the new mental-health evidence is debatable, the aggravating evidence presented against Sealey was powerful. The jury found Sealey guilty of a brutal double murder, committed with an axe. In recommending the death sentence, the jury found several aggravating circumstances to be present, including that the murders involved torture of the victims. More specifically, Sealey tortured Mrs. Tubner with a hot fireplace poker before murdering her, with the intention of discovering where she and her husband hid their money. During the sentencing phase, the state also presented evidence linking Sealey to another murder, testimony from a woman who alleged that Sealey had raped her while putting a gun to her temple, and several witnesses who described Sealey's misconduct and violence in prison. What the Supreme Court said in *Strickland* applies here as well: "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the

aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." 466 U.S. at 700; *see also Jones*, 834 F.3d at 1315 ("In the face of these powerful aggravators and the arguably limited mitigating value of [the doctor's] testimony, [the petitioner] has not come close to showing that the [state court] acted unreasonably in finding no prejudice on account of counsel's deficient performance.").

The state habeas court's conclusion that Sealey did not suffer prejudice because of counsel's failure to present mental-health evidence therefore was not an unreasonable application of *Strickland*.

B

We next address Sealey's argument that his trial counsel were ineffective in failing to present Ronald Tutein—Sealey's nephew and the defense's sole mitigation witness—at sentencing. The state habeas court rejected this part of Sealey's claim on prejudice grounds, without deciding deficiency, holding that Tutein's testimony on habeas "was neither compelling nor mitigating for the crimes . . . [Sealey] had committed and [that] there is no reasonable probability that this testimony would have changed the outcome of [Sealey's] trial." We therefore give § 2254(d) deference to the state court's holding on prejudice, which—as we will explain—likewise leads us to reject Sealey's claim here.

1

Sealey argues that counsel's failure to present Tutein at sentencing was "quintessential deficient attorney performance" and that "[r]easonable capital defense counsel would have made certain that their witness arrived sufficiently in advance of the proceedings." As to prejudice, Sealey presented the following testimony of a juror from his trial: "I was surprised they didn't get just one relative, or a friend, or somebody, to get up and say, this person is somebody I care about, please don't kill him. I was waiting for somebody to say that and it would have made a difference to me." Although the state court dismissed Tutein's testimony as "neither compelling nor mitigating for [Sealey's] crimes," Sealey contends that he "need only show a reasonable probability that at least *one* juror may have been swayed to exercise mercy," not that the "unpresented evidence explains or lessens the brutality of the crime." Sealey asserts that Tutein would have appeared credible to the jury—because he is a deputy marshal for the Superior Court of the Virgin Islands—and that his testimony would have made a difference.

2

Even if counsel's performance was deficient—an issue that we needn't decide—Sealey cannot prove that he was prejudiced at sentencing by counsel's failure to present Tutein. While prejudice can be proven if "there is a reasonable probability that at least one juror would have struck a different balance," *see*

Wiggins v. Smith, 539 U.S. 510, 537 (2003), the state court reasonably concluded that no juror would have been swayed by Tutein's weak testimony. Although Sealey put forward the affidavit of a juror from his trial suggesting that testimony from his family would have made a difference, the assessment of prejudice does "not depend on the idiosyncrasies of the particular decisionmaker." *Strickland*, 466 U.S. at 695. Rather, the inquiry under *Strickland* is an objective one. *Id.*; *see also Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008) ("The [Supreme] Court made clear [in *Strickland*] that the assessment [of prejudice] should be based on an objective standard that presumes a reasonable decisionmaker.").

When assessing prejudice under *Strickland*, courts "reweigh the evidence in aggravation against the totality of available mitigating evidence," *Wiggins*, 539 U.S. at 534, which appears to be exactly what the state habeas court did here. The state court acknowledged that most of Tutein's testimony was about Sealey's father, and the only testimony regarding Sealey was that "he was loud and always laughing and once discouraged [Tutein] from fighting" and that Sealey was a "good uncle" who was "always nice to [Tutein]." The court also considered Roberto's testimony that Tutein "was going to say a few kind words but there wasn't a lot of depth to" his testimony because Tutein hadn't spent a significant amount of time with Sealey. Against Tutein's relatively thin testimony, the state court weighed the "brutal torture and murder of Mr. and Mrs. Tubner," and had

before it the other aggravating evidence presented at sentencing—Sealey's implication in another murder, an allegation of rape, and Sealey's misconduct and violence in prison. *See supra* at 9–10, 32–33. Sealey cannot show that "no fairminded jurist" would have done as the state habeas court did in denying his claim. *See Raulerson*, 928 F.3d at 995–96 (quotation omitted); *see also Morrow*, 886 F.3d at 1152 (holding that the state court "reasonably concluded" that the petitioner's "new evidence would not have shifted 'the balance of aggravating and mitigating circumstances'" (quoting *Strickland*, 466 U.S. at 695)).

Accordingly, the state court's decision that Sealey suffered no prejudice as a result of his counsel's failure to present Tutein was not contrary to or an unreasonable application of clearly established federal law.

C

Sealey next asserts that his counsel were ineffective in failing to discover and present other evidence pertaining to his background. The state habeas court detailed the steps that counsel took to investigate Sealey's childhood—including their trip to St. Croix—and concluded that counsel weren't ineffective. The court wasn't persuaded by the additional affidavits produced on habeas from persons who said that they would have testified on Sealey's behalf. It noted that some affidavit evidence was contradictory, and some was aggravating. The court further stated that "none of the affiants state [that Sealey] was abused or mistreated nor do

they state [that Sealey's] needs of food, clothing, shelter or even love were neglected."

The state court decided some parts of this challenge on *Strickland*'s deficiency prong and others on both the deficiency and prejudice prongs.[8] Under § 2254(d), we defer only to determinations actually made by the state court and otherwise conduct *de novo* review. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing the prejudice prong *de novo* because the state court didn't reach it). We conclude that we needn't parse the state court's sub-holdings because, even under *de novo* review, Sealey has not shown that he was prejudiced by his counsel's failure to discover or present this background evidence.

1

Sealey argues that, although the state habeas court recited the steps that defense counsel took in investigating his background, it failed to acknowledge his argument that counsel didn't follow through by presenting the evidence at sentencing or by obtaining additional witness testimony. He points out that no matter how thorough counsel's investigation was, there's no disputing that it netted

[8] For example, the state habeas court decided both that counsel weren't deficient in failing to present the lay witness testimony acquired during the state habeas proceedings and that this failure didn't prejudice Sealey. But as to counsel's gathering of background records, their investigation of mitigating evidence in St. Croix, and their decision not to interview Sealey's mother, the state habeas court made no determination on prejudice, deciding the claims on deficiency instead.

just a few documents and photos, which were simply entered as exhibits and went unexplained by defense counsel. Sealey asserts that counsel failed to gather and present evidence about his life that a jury could find mitigating, such as his difficult childbirth, his stutter, his "chaotic" move from the Virgin Islands to the Bronx, and his incarceration in difficult prison conditions. Additionally, Sealey contends that he has family, friends, and former teachers that would have testified on his behalf had they been located and asked. To show that such evidence and witnesses would have made a difference, Sealey again cites the testimony of jurors who said that they were waiting for the defense to provide insight into Sealey's life and background.

2

When considering prejudice, the "issue is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Johnson*, 643 F.3d at 935 (alteration in original) (quotation omitted). We conclude that the background evidence presented during the state habeas proceedings wouldn't have tilted the aggravating-mitigating balance away from the death penalty. On the contrary, and as the state habeas court acknowledged, much of the evidence produced was contradictory and possibly even aggravating.

What little mitigating evidence could be gleaned in the affidavits wouldn't have altered the outcome at Sealey's sentencing. It suggests, at most, that Sealey's childhood was "chaotic," that his parents were unstable and emotionally absent, that Sealey had a learning disability and stutter, that he was moved from St. Croix to New York as a pre-teen, and that he was incarcerated as a juvenile in an adult prison. This isn't nearly as extreme as the troubled childhoods of petitioners in other cases in which prejudice was found and relief was granted. In *Wiggins v. Smith*, for example, the Supreme Court recognized that the mitigating evidence that went unpresented was "powerful":

> [The petitioner] experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time [the petitioner] spent homeless, along with his diminished mental capacities, further augment his mitigation case.

539 U.S. at 534–35. The Supreme Court held that if this mitigating evidence had been presented at the petitioner's trial, "there [was] a reasonable probability that [the jury] would have returned with a different sentence." *Id.* at 536; *see also Williams*, 529 U.S. at 395–96 (describing the petitioner's childhood as "nightmarish" because he suffered severe and repeated beatings, was committed to the custody of social services, spent time in an abusive foster home, and failed to advance beyond sixth grade).

Some of the evidence regarding Sealey's background and childhood—even the evidence that could be considered mitigating—is contradictory and therefore of questionable reliability. For example, the affiants testified (1) that Sealey's parents were absent and that his father "ruled the[] house with fear," but also that his parents did not give him any boundaries and spoiled him; (2) that Sealey grew up in a "pretty rough" neighborhood, but also that it was full of "middle class families"; (3) that Sealey struggled in school and suffered from a stutter, but also that he was a good athlete, popular, and intimidating; and (4) that Sealey was a follower, but also that he was big for his age and stood up for other children.

Further—and worse for Sealey's prejudice argument—much of the evidence presented in the affidavits could be considered aggravating. For example, the affidavits state that, in St. Croix, Sealey often committed petty crime, especially theft and vandalism, that he sold drugs, and that his father paid off the police so that they would look the other way. An affidavit from Doris Walton—a friend of Pauline Corbitt, Sealey's half-sister—explains that Sealey blew through thousands of dollars given to him by his family (through Walton, as the family's contact in Atlanta) and, at one point, came into her office unannounced, placed a bag of marijuana on her desk (putting her job at risk), and laughed. Most seriously, several witnesses testified about Sealey's supposed participation in a robbery and shooting in the Virgin Islands.

In conclusion, there isn't a reasonable probability that Sealey's sentence would have been different if this background evidence was presented. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Even under *de novo* review, we conclude that Sealey was not prejudiced.

D

Sealey next argues that counsel were ineffective in failing to present the results of Sherry Tubner's polygraph test during the sentencing phase. Part of defense counsel's "residual doubt" strategy was to suggest that Sherry Tubner—Mr. Tubner's daughter—was responsible for the murders. The results of a polygraph test indicated that Sherry had lied when asked whether she was involved with the Tubners' deaths. Defense counsel "tried 16 ways from Sunday" to get the polygraph admitted during the guilt phase, but it was deemed inadmissible by the state trial court. Counsel didn't attempt to admit it during the sentencing phase, which Sealey challenges as ineffective assistance.

The state habeas court rejected Sealey's argument for two reasons—one legal and one factual.[9] As a legal matter, the court held that counsel didn't perform

[9] The state habeas court also seemed to suggest that, in the alternative, this part of Sealey's claim was barred because the Georgia Supreme Court rejected it on direct appeal. But on Sealey's direct appeal, the Georgia Supreme Court reviewed only the exclusion of the polygraph results during the *guilt phase* because, as Sealey argues, "trial counsel did not seek, and therefore the trial court did not rule upon, their admissibility in the penalty phase." *See Sealey*, 593 S.E.2d at

deficiently in not attempting to admit the polygraph evidence at sentencing because, at the time of Sealey's trial, "polygraph results were inadmissible during the guilt/innocence phase and there was no precedent that allowed for their admission during the sentencing phase." The court cited *Baxter v. Kemp*—the prevailing law at the time of Sealey's trial—in which the Georgia Supreme Court concluded that counsel weren't ineffective for "failing to try to introduce inadmissible polygraph evidence at the sentencing phase." 391 S.E.2d 754, 756 n.4 (Ga. 1990), *overruled by Height v. State*, 604 S.E.2d 796, 798 (Ga. 2004). Although the Georgia Supreme Court held—after Sealey's trial—that polygraph results could be admitted at sentencing, *see Height*, 604 S.E.2d at 798, the state habeas court reasoned that Sealey's lawyers weren't required to predict developments in the law.

As a factual matter, the court also found that the polygraph was of questionable reliability because the report of Sealey's own expert, Walter Maddox, stated that Sherry might not have actually been lying. Thus, the court held that the evidence "would have, at the least been unreliable, and at the worst could have

339. Sealey's claim here, which pertains to admission of the polygraph during the *sentencing phase*, is thus properly before us.

further inculpated [Sealey] as the person wielding the axe and destroyed any reasonable doubt that may have existed from the guilt/innocence phase."[10]

1

Sealey challenges the state habeas court's legal reason for rejecting the claim, asserting that it was never the case that, under Georgia law, polygraph results were per se inadmissible during the *sentencing* phase. Sealey contends that counsel should have known that the rules of admissibility at sentencing are much more generous than during the guilt phase. Because defense counsel's sentencing strategy was "residual doubt," Sealey argues that the polygraph results were crucial to suggest Sherry's involvement. As to Maddox's report, Sealey maintains that it was privileged work product at the time of sentencing and that, accordingly, the state couldn't have used it against him.

2

The state habeas court's determination that Sealey's counsel weren't deficient was not an unreasonable application of *Strickland*. Legally, it seems to us that a plausible reading of *Baxter* at the time of Sealey's trial was that polygraph evidence was indeed inadmissible at sentencing. After all, *Baxter* held that the

[10] Because the state court clearly held that Sealey's counsel didn't perform deficiently, we give that holding deference under § 2254(d). The parties dispute whether the state court's determination that the polygraph would have been unreliable or possibly inculpatory if admitted constitutes a holding on prejudice. We needn't decide that here because, even under *de novo* review, Sealey's prejudice argument fails.

lawyers in that case didn't render ineffective assistance in "failing to try to introduce *inadmissible* polygraph evidence at the sentencing phase." 391 S.E.2d at 756 n.4 (emphasis added). Further, in *Height*—the case that overruled *Baxter*—the Georgia Supreme Court held that "to the extent that *Baxter v. Kemp* or any other case intimates that unstipulated polygraph results are per se inadmissible as mitigation evidence, it is hereby overruled." *Height*, 604 S.E.2d at 798 (citation omitted). That shows that before *Height* it was, at the very least, reasonable to interpret *Baxter* as precluding polygraph results during sentencing.

Even supposing that defense counsel should have surmised that the polygraph could be admitted at sentencing, that doesn't mean that they were deficient in failing to seek its admission. As a factual matter, knowing from the Maddox report that the polygraph's reliability was questionable, counsel could have strategically chosen not to present it for fear that it would be attacked and—as the state habeas court found—end up being more aggravating than mitigating. As counsel must have been aware, while there was no evidence tying Sherry Tubner to the crime scene, there was physical evidence implicating Sealey—including eyewitness testimony, the victim's gun and jewelry in Sealey's motel room, and the blood found in Sealey's motel bathroom.

Sealey's argument also fails because he cannot prove prejudice. Even if the state didn't have access to the Maddox report, it could have challenged the

reliability of the polygraph results in some other way or pointed to the physical evidence tying Sealey to the crime. Sealey has not shown that "there is a reasonable probability that . . . the result of the proceeding would have been different" had the polygraph results been admitted. *Strickland*, 466 U.S. at 694.

Thus, the state court's determination that counsel didn't perform deficiently wasn't an unreasonable application of *Strickland*. Moreover, Sealey cannot show, even on *de novo* review, that he was prejudiced.

E

The final aspect of Sealey's ineffective-assistance claim is that the state habeas court didn't "weigh the cumulative prejudice flowing from each of counsel's errors and omissions in the sentencing phase." Sealey contends that the evidence that counsel failed to discover and present at sentencing—expert testimony about his "brain impairment," witnesses to speak about Sealey's background, and the polygraph results—taken together, would have changed the vote of at least one juror.[11]

[11] It's unclear to us whether the state habeas court actually decided this claim. The court did hold that one of Sealey's claims—that "all claims combined resulted in an unfair trial and appeal, in violation of [Sealey's] constitutional rights"—failed to assert a state or federal constitutional violation and was non-cognizable because no cumulative-error rule existed in Georgia. Neither Sealey nor the state seem to address whether this part of the state court's holding affects our analysis. In any event, we take Sealey's argument before us to be different—that, while the state habeas court performed the aggravating-versus-mitigating balancing as to Sealey's individual ineffective-assistance claims, it didn't consider all the potentially mitigating evidence together.

In *Williams*, the Supreme Court held that the state habeas court's "prejudice determination was unreasonable [under *Strickland*] insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." 529 U.S. at 397–98. The mitigation evidence that the petitioner there presented, in total, "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. In sum, the state habeas court in that case "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.*

We conclude that we needn't decide whether the state court unreasonably applied *Strickland* by failing to balance the aggravating evidence against all available mitigating evidence because Sealey's argument would still fail under *de novo* review. *See Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1290–91 (11th Cir. 2012) (explaining that "we are entitled to affirm the denial of habeas relief" by considering a petitioner's claim under a *de novo* lens); *see also McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1266 (11th Cir. 2009) (explaining that if "a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d)," we perform "a *de novo* review of the record"). We cannot say "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The murders of Mr. and Mrs. Tubner were extremely brutal. Among other aggravating circumstances, the jury found beyond a reasonable doubt that both murders "involved the torture of the victims, depravity of mind, and the aggravated battery of the victims." *Sealey*, 593 S.E.2d at 336; *see* Ga. Code Ann. § 17-10-30(7). Sealey used a fireplace poker to torture Mrs. Tubner and bludgeoned both victims to death with an axe. The jury also had before it the rest of the state's aggravation case—allegations of another murder, an alleged rape, and misconduct and violence in prison. *See supra* at 9–10, 32–33. Compared to the aggravated nature of the case, the totality of mitigating evidence—both the sparse evidence that counsel presented during sentencing and the weak, contradictory, and potentially aggravating evidence produced on habeas—cannot lead us to conclude that "the balance of aggravating and mitigating circumstances did not warrant death." *Johnson*, 643 F.3d at 935 (quoting *Strickland*, 466 U.S. at 695) (analyzing the prejudice prong *de novo*).

* * *

In sum, Sealey has not shown that his trial counsel were constitutionally ineffective under *Strickland* during the sentencing phase. We affirm the district court's denial of Sealey's petition as to his ineffective-assistance claim.

V

We next consider Sealey's claims that the state habeas court and district court held to be procedurally defaulted because Sealey didn't raise them on direct appeal: (1) that the trial court's denial of a continuance at sentencing denied him due process and a fair trial; (2) that the death sentence was unconstitutionally arbitrary and in violation of Georgia's sentencing scheme; and (3) that he was denied his right to represent himself under *Faretta v. California*, 422 U.S. 806 (1975).[12] Sealey argues that he can overcome the procedural default of these claims by showing his appellate counsel were ineffective in failing to raise them on direct appeal. Before considering Sealey's ineffective-assistance-of-appellate counsel arguments, we'll briefly summarize the exhaustion requirement and the steps of our procedural-default analysis.

A

For a federal court to review a claim for habeas relief, a petitioner must "first properly raise the federal constitutional claim in the state courts"—*i.e.*, exhaust it. *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010) (citing 28 U.S.C. § 2254(b)). As relevant to Sealey's case, Georgia's appeal process requires that a petitioner seek a certificate of probable cause to appeal to the Georgia Supreme

[12] "We review *de novo* the determination of a district court that a habeas petitioner is procedurally barred from raising a claim in federal court." *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1230 (11th Cir. 2014).

Court; claims not raised in an application for a certificate of probable cause are considered unexhausted on subsequent federal habeas review. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 & n.22 (11th Cir. 2014); *see also Pope v. Rich*, 358 F.3d 852, 854 (11th Cir. 2004) (per curiam).

Relatedly, federal courts are barred from reviewing a habeas petitioner's claim "if a state court rejected it on a state procedural ground." *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1230 (11th Cir. 2014). Such a state-court ruling precludes federal review of the underlying claim so long as it "rests upon [an] 'independent and adequate' state ground."[13] *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). We can consider a defaulted claim, however, if a petitioner can show (1) "cause for the default" and (2) "actual prejudice resulting from the alleged constitutional violation." *Ward*, 592 F.3d at 1157 (citing *Wainwright*, 433 U.S. at 84–85).[14] A petitioner can establish "cause" by "identify[ing] 'some objective factor external to the defense' that impeded his ability to raise the claim

[13] We review *de novo* whether a claim has been procedurally defaulted, as it "is a mixed question of fact and law." *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017) (quotation omitted). Sealey doesn't seem to dispute that the state habeas court's ruling—that his claims were procedurally defaulted—"rests upon 'adequate and independent' state grounds." *Ward*, 592 F.3d at 1156 (quotation omitted); *see also id.* at 1176 (holding that "the state habeas court's procedural default ruling [applying Georgia's procedural default rule barring habeas review of claims not raised at trial or on direct appeal] rested on an adequate state law ground"). We therefore proceed to consider Sealey's argument that he has overcome the default.

[14] A petitioner can also overcome a procedural default by showing "a fundamental miscarriage of justice," *Holladay v. Haley*, 209 F.3d 1243, 1254 (11th Cir. 2000), but that exception isn't at issue here.

in state court." *Henry*, 750 F.3d at 1230 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To establish "actual prejudice," "a petitioner must demonstrate that the errors at trial actually and substantially disadvantaged his defense so that he was denied fundamental fairness." *Ward*, 592 F.3d at 1157 (quotation omitted).

A showing of ineffective assistance of appellate counsel in failing to raise a claim on direct appeal can constitute "cause" so long as the ineffective assistance "occur[red] during a stage when a petitioner had a constitutional right to counsel," *Payne v. Allen*, 539 F.3d 1297, 1314 (11th Cir. 2008), and the ineffective-assistance claim itself is "both exhausted and not procedurally defaulted," *Ward*, 592 F.3d at 1157 (citing *Hill v. Jones*, 81 F.3d 1015, 1031 (11th Cir. 1996)). No one disputes that Sealey had a right to counsel during his state-court trial and direct appeal. *See Payne*, 539 F.3d at 1314. We also conclude that Sealey properly exhausted[15] his ineffective-assistance-of-appellate-counsel claim because the state

[15] The state contests whether Sealey exhausted his ineffective-assistance-of-appellate-counsel claim. To properly exhaust an ineffective-assistance-of-appellate-counsel claim, Sealey must have "assert[ed] this theory of relief and transparently present[ed] the state courts with the specific acts or omissions of his lawyers that resulted in prejudice." *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004). Even though Sealey didn't develop his ineffective-assistance-of-appellate-counsel claim as well as he could have, we conclude that the claim is exhausted because the state habeas court "had an opportunity to address [Sealey's] claim[] in the first instance when it rejected the merits of his [ineffective-assistance-of-appellate-counsel] claim." *Holland v. Florida*, 775 F.3d 1294, 1316 (11th Cir. 2014) (quotation omitted); *see also Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984) ("There is no better evidence of exhaustion than a state court's actual consideration of the relevant constitutional issue.").

court actually considered and denied it.[16]

B

"[T]o determine cause and prejudice, we must ascertain whether [Sealey] has shown ineffective appellate counsel in not timely raising" the procedurally defaulted claims, and "to determine whether [Sealey] has shown ineffective appellate counsel, we must determine whether [he] has shown underlying meritorious . . . claims." *Id.*; *see also Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013) (holding that "because there is so little merit to the [defaulted] claim, [the petitioner] cannot demonstrate that his appellate attorneys were ineffective by failing to raise it on direct appeal"). As with any ineffective-assistance claim, the Supreme Court's decision in *Strickland* governs. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (stating that *Strickland* applies to ineffective-assistance-of-appellate-counsel claims); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (stating that, while "counsel's ineffectiveness in failing properly to

[16] The state habeas court held that Sealey "failed to present any evidence" to support his ineffective-assistance-of-appellate-counsel claim and that Beall spent a "considerable amount of time, 207 hours, preparing" for Sealey's motion for a new trial and direct appeal. Whether the state court's decision concerning the ineffective-assistance-of-appellate-counsel claim receives deference under § 2254(d) within this procedural default analysis is an issue that has divided courts. *Compare Visciotti v. Martel*, 862 F.3d 749, 768–69 (9th Cir. 2016) (noting the disagreement among circuits and deciding to review the ineffective-assistance claim within the procedural default context *de novo*), *with Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014) ("In our circuit, when we review a state court's resolution of an ineffective assistance claim in the cause-and-prejudice context, we apply the same deferential standard as we would when reviewing the claim on its own merits."). We needn't address the conflict here because even under *de novo* review, Sealey's ineffective-assistance-of-appellate-counsel claim fails.

preserve the claim for review in state court will suffice" as cause, "the assistance must have been so ineffective as to violate the Federal Constitution"). We have acknowledged that "[a]n attorney is not required under the Constitution or the *Strickland* standards to raise every non-frivolous issue on appeal," and that "there can be no showing of actual prejudice from an appellate attorney's failure to raise a meritless claim." *Brown*, 720 F.3d at 1335.

To assess ineffectiveness, therefore, we proceed to the underlying merits of Sealey's procedurally defaulted claims. We conclude that these claims are without merit and thus, Sealey's counsel weren't ineffective in failing to raise them on direct appeal and he suffered no actual prejudice as a result. He therefore cannot overcome the default.

1

Sealey argues that the trial court's denial of a one-day continuance denied him due process and a fair trial. Sealey contends that "[n]o reasonable attorney would fail to challenge" the denial of the continuance—which he calls "perhaps the most consequential erroneous ruling by the trial court"—on direct appeal.

On the continuance claim's underlying merits, Sealey argues that, although trial courts have discretion to grant or deny continuances, the trial court's denial of a modest, one-day continuance deprived him of due process, a fair trial, and the effective assistance of trial counsel. Sealey relies primarily on two cases: *Morris v.*

Slappy, 461 U.S. 1, 11–12 (1983) (quotation omitted), for the proposition that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel"; and *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003), for the proposition that in order to succeed on this type of claim, a habeas petitioner must show that the trial court's error in denying him a continuance deprived him of a fundamentally fair trial in violation of due process, which resulted in actual prejudice. In *Morris*, the Supreme Court rejected a habeas petitioner's claim that the trial court abused its discretion and violated the petitioner's right to counsel by denying a continuance that he had requested because his appointed counsel was substituted only six days before trial. 461 U.S. at 3–4. The Supreme Court held that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Id.* at 11–12 (quotation omitted). And again, the Court ultimately found no Sixth Amendment violation. *Id.* at 3.

We conclude that Sealey cannot prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit. The state trial court's decision to deny the continuance in Sealey's case cannot be considered "unreasoning" or "arbitrary" under *Morris* because the court acted

within its discretion to deny the continuance. *See Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1326 (11th Cir. 2002) ("The decision of whether to grant a continuance is reserved to the sound discretion of the trial court."). The court engaged in a colloquy with Sealey's lawyers in an effort to understand why Tutein wasn't available and stressed that they should have been prepared for their witness to testify.

Moreover, Sealey acknowledges that he "must also show that the denial [of the continuance] resulted in actual prejudice." Br. of Petitioner at 104–05 (citing *Powell*, 332 F.3d at 396); *see also Van Poyck*, 290 F.3d at 1326 ("[T]o establish that a denial of a continuance was reversible error, a defendant must show that the denial caused specific substantial prejudice." (quotation omitted)). Had the trial court granted his request for a continuance to allow for Tutein's arrival, Sealey cannot show that Tutein's testimony would have changed the outcome at sentencing, given the weak nature of the testimony compared to the heinous nature of the crimes and other aggravating circumstances. *See supra* at 34–36.

Because Sealey wouldn't have succeeded on his continuance claim had it been raised on direct appeal, he cannot prove that his counsel were ineffective in failing to raise it or that he suffered actual prejudice as a result. *See Brown*, 720 F.3d at 1335. Especially considering that "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, Sealey's

counsel could have strategically decided not to raise this claim in order to focus on others during his direct appeal. Accordingly, Sealey cannot overcome the procedural default of this claim.

2

As for his next defaulted claim, Sealey argues that the death sentence was arbitrary and constitutionally insufficient for essentially two reasons: (a) the aggravating circumstances for the two murders were consolidated, in violation of Georgia's sentencing procedures and *Gregg v. Georgia*, 428 U.S. 153 (1976); and (b) the state trial court found an aggravating circumstance necessary to impose the death penalty, in violation of the Sixth Amendment and *Ring v. Arizona*, 536 U.S. 584 (2002).

The state habeas court determined that Sealey's claim was procedurally defaulted because he didn't raise it in his direct appeal and, alternatively, that it was without merit. The court reasoned that Georgia's capital-sentencing scheme doesn't require the jury to designate for which murder it is imposing the death sentence and, in any event, that at least one aggravating circumstance was found for each murder. Because the state court decided in the alternative to reject the claim on the merits, we give that decision deference under § 2254(d). *See Raulerson*, 928 F.3d at 1001 (holding that "a state court's alternative holding is an

adjudication on the merits" that is reviewed "under the deferential framework set forth in section 2254(d)(1)").

As we will explain, because this claim is without merit, Sealey's counsel's failure to raise it cannot constitute ineffective assistance.

a

First, according to Sealey, "the jury failed to determine the aggravating factors for each count" and instead "improperly consolidated both determinations and submitted to the trial judge one aggravating factor determination and one sentence, as opposed to two separate determinations and two sentences, one for each count." This, Sealey contends, violates the Supreme Court's decision in *Gregg* because it doesn't adhere to the capital-sentencing procedures that the Supreme Court approved in that case—that Georgia juries must "identify at least one statutory aggravating factor" for each crime before imposing the death penalty. 428 U.S. at 206.

This also shows, Sealey argues, that the verdict is arbitrary because "it did not adhere to the unanimity requirement under Georgia's sentencing laws." Because the jury returned a single death sentence without specifying as to which murder it applied, it is possible, Sealey theorizes, that some jurors intended to vote for a death sentence in conjunction with the murder of Mrs. Tubner and others in conjunction with the murder of Mr. Tubner, with no unanimity for either offense.

The state trial court then "compounded the jury's error," Sealey argues, by imposing a single death sentence based on "Counts I and II of the indictment"—*i.e.*, the murder charges.

Contrary to Sealey's assertion, the jury's findings as to aggravating circumstances distinguished between the two murders. Sealey acknowledges that "the trial court charged the jury to deliberate on two sentences for two murder crimes." While the sentencing verdict form only asked the jury to mark whether or not aggravating circumstances existed, and further, which penalty it chose, *another* form given to the jury—titled "Findings of Jury as to Alleged Statutory Aggravating Circumstances"—clearly asked the jury to mark whether it found each aggravating circumstance, as to each murder, beyond a reasonable doubt. After the jury rendered its verdict, the judge read aloud the jury's findings on the statutory aggravating circumstances, specifying to which murder each applied.[17] The jury therefore clearly weighed the aggravating circumstances for each murder separately.

Sealey's death sentence also complied with Georgia's sentencing scheme. The state habeas court acknowledged that, in Georgia, the finding of a single statutory aggravating circumstance renders a defendant eligible for the death penalty; whether to impose death lies with the jury. Ga. Code Ann. § 17-10-30(c).

[17] The court also polled the jurors and confirmed that each chose to impose the death penalty.

The jury found ten statutory aggravating factors—five pertained to Sealey's murder of Mr. Tubner and five pertained to his murder of Mrs. Tubner. Because the jury found more than one aggravating factor for each murder, Sealey's death sentence doesn't contravene § 17-10-30 or *Gregg*.

b

Second, Sealey asserts that the trial court's decision—"that, when all the relevant aggravating and mitigating factors are taken together, a death sentence is the appropriate response to the murder of John Tubner *or* Fannie Tubner"—was an unconstitutional factual finding under the Sixth Amendment, which prohibits a sentencing judge (sitting without a jury) to find an aggravating circumstance necessary to impose the death penalty. *See Ring*, 536 U.S. at 609.

In *Ring*, the Supreme Court invalidated Arizona's sentencing scheme, which allowed a "trial judge, sitting alone, [to] determine[] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." *Id.* at 588. The Court made clear in *Ring* that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Here, Sealey's sentence doesn't run afoul of the Sixth Amendment or *Ring*. It was the jury—not the state trial judge—that found the aggravating circumstances necessary to impose the death penalty. The jurors were given a form on which aggravating circumstances

were found beyond a reasonable doubt, as to each murder. The judge read this form aloud and imposed a death sentence based on the jury's findings, but it was the jurors who determined that the aggravating circumstances existed.

Because Sealey's verdict-based claim would not have succeeded had it been presented, Sealey cannot show that appellate counsel were ineffective in failing to raise it or that he suffered actual prejudice as a result. He therefore cannot overcome the procedural default.

3

In his final procedurally defaulted claim, Sealey argues that he was denied the right to represent himself at trial under *Faretta v. California*, 422 U.S. 806 (1975). Sealey contends that the trial court's repeated admonitions and reluctance to allow him to proceed without counsel, combined with the court's "refusal to appoint stand-by counsel other than Beall and Roberto," caused an "involuntary" waiver of his right to self-representation.

In *Faretta*, the Supreme Court recognized a "right of self-representation" grounded in the Sixth Amendment right to counsel. *Id.* at 818. When a defendant "insists that he wants to conduct his own defense," a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him." *Id.* at 807. Because a defendant choosing to represent himself "relinquishes, as a purely factual matter, many of the traditional benefits associated

with the right to counsel," a defendant "must knowingly and intelligently" choose that course. *Id.* at 835 (quotation omitted). "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

Sealey's *Faretta* claim lacks merit and, accordingly, appellate counsel weren't ineffective in failing to raise it on direct appeal. True, Sealey asserted his right to self-representation when he stated "I want to represent myself," and clarified, "with standby counsel." But Sealey later changed his mind: Following the district court's explanation of the risks of self-representation, and after conferencing with Beall and Roberto, Sealey unambiguously said that "[w]ithout waiving my rights to a conflict, I'd like to proceed with these two attorneys [*i.e.*, Beall and Roberto] as counsel," and he later clarified that he wanted them to represent him "as trial counsel," not standby counsel. The state trial court's warnings were proper, considering that *Faretta* requires that a defendant be "made aware of the dangers and disadvantages of self-representation." And while the trial judge warned Sealey that he would be at a "severe disadvantage" proceeding without a lawyer and "strongly advise[d]" him not to represent himself, he also

acknowledged that "I cannot force lawyers upon you" and "[t]he law says you have the right to represent yourself."[18]

Sealey cannot prove that his appellate counsel were ineffective in failing to raise this claim on direct appeal or that he was actually prejudiced and thus, Sealey cannot overcome the procedural default of this claim.

* * *

In sum, because his procedurally defaulted claims are not meritorious, Sealey cannot prove that his appellate counsel rendered constitutionally ineffective assistance in failing to raise them on direct appeal or that he suffered actual prejudice. He thus cannot overcome the default. Accordingly, we affirm the district court's denial of Sealey's petition as to his procedurally defaulted claims.

VI

We conclude that the district court did not err in denying Sealey's petition for a writ of habeas corpus. The state habeas court's denial of Sealey's ineffective-assistance-of-trial-counsel claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. As to

[18] The trial judge went on to say: "I guess it's sort of like I have the right to operate on my own foot if I want to. You can do it. It might not be the smartest thing you've ever done in your life . . . but you have the right to do that. I don't think you should, but it's your decision." Although the judge might have been forceful in suggesting that Sealey shouldn't represent himself, he plainly gave Sealey a choice. The judge's warnings do not rise to the level of rendering Sealey's waiver "involuntary."

Sealey's procedurally defaulted claims, we conclude that he cannot show cause and prejudice to justify his failure to raise the claims on direct appeal. We therefore affirm the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10565-P

RICHARD L SEALEY,

Petitioner - Appellant,

versus

WARDEN GDCP,

Respondent - Appellee.

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

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

BEFORE: JORDAN, JILL PRYOR, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
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June 09, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-10565-P
Case Style: Richard L Sealey v. Warden GDCP
District Court Docket No: 1:14-cv-00285-WBH

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

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

REHG-1 Ltr Order Petition Rehearing

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

RICHARD L. SEALEY,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	1:14-CV-0285-WBH
v.	:	
	:	DEATH PENALTY
BRUCE CHATMAN,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254

ORDER

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

I. Background and Factual Summary

On August 23, 2002, following a jury trial, Petitioner was convicted of two counts of murder, fourteen counts of felony murder, two counts of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon in Clayton County Superior Court. Following the sentencing phase of Petitioner's trial, on August 27, 2002, the jury recommended a penalty of death which the court imposed.

Petitioner's motion for new trial was denied on May 1, 2003. The Georgia Supreme Court affirmed Petitioner's convictions and sentences on March 1, 2004. Sealey v. State, 593 S.E.2d 335 (2004). Petitioner next filed a state habeas corpus petition in the Superior Court of Butts County, which court entered an order denying relief on July 26, 2012. Petitioner's application for a certificate of probable cause to appeal from the denial of habeas corpus relief was denied by the Georgia Supreme Court on June 17, 2013. This action followed.

On direct appeal, the Georgia Supreme Court summarized the facts of Petitioner's crimes as follows:

> The evidence at the guilt/innocence phase, construed in the light most favorable to the jury's verdict, showed the following. [Petitioner] contacted his friend Gregory Fahie by telephone asking for a ride. Fahie asked his friend, Wajaka Battiste, to drive to [Petitioner]'s motel and then to drive Fahie and Fahie's juvenile girlfriend, Deandrea Carter, to Carter's grandparents' house. Upon arriving at Carter's grandparents' house, [Petitioner], Carter, and Fahie went inside, while Battiste waited in the car listening to music. While he was in a downstairs bathroom, Fahie first heard a loud noise and then heard Carter knocking on the bathroom door and stating that [Petitioner] was "tripping." Fahie exited the bathroom and observed Mr. Tubner lying in a pool of blood and [Petitioner] holding Ms. Tubner down and wielding a handgun he had taken from Mr. Tubner. [Petitioner] dragged Ms. Tubner, who had been bound with duct tape, to an upstairs bedroom. [Petitioner] instructed Fahie to search for money, however, when no money was discovered, [Petitioner] instructed Carter to heat a fireplace poker with which [Petitioner] tortured Ms. Tubner in an effort to force her to reveal where she kept her money. [Petitioner] then instructed Carter to find a hammer so he could kill the victims. Carter returned with an ax. [Petitioner] struck Ms. Tubner multiple times in the head with the ax and then went

> downstairs and did the same to Mr. Tubner, who had crawled a short distance across the living room. Once back in Battiste's automobile, [Petitioner] stated that he "had to do it" because the victims had seen their faces and further stated that the victims deserved to die because they had mistreated Carter's mother in the past. [Petitioner] instructed Battiste never to reveal that he had seen [Petitioner] and then added, "I will out your lights."
>
> The evidence presented in the guilt/innocence phase included the testimony of Fahie and Battiste, Mr. Tubner's handgun and jewelry that had been discovered in [Petitioner]'s motel room, and testimony about the detection of protein residue consistent with blood on the floor and sink of [Petitioner]'s motel bathroom. Upon our review of the entire record, we conclude that the evidence presented in the guilt/innocence phase was sufficient to authorize rational jurors to conclude beyond a reasonable doubt that [Petitioner] was guilty on all counts.

Sealey v. State, 593 S.E.2d 335, 336-37 (2004).

II. Standard of Review

A. Title 28 U.S.C. § 2254

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus in behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This power is limited, however, because a restriction applies to claims that have been "adjudicated on the merits in State court proceedings." § 2254(d). Under § 2254(d), a habeas corpus application "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim":

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential" demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citing Visciotti, 537 U.S. at 25. In Pinholster, the Supreme Court further held,

> that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

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

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court

decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406 (2000). If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 102 (2011) (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

As is mentioned above, after the Butts County Superior Court denied Petitioner's habeas corpus petition, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of the petition without a discussion of the merits of Petitioner's claims. Fairly recently, in Wilson v. Warden, 834 F.3d 1227 (11th Cir. 2016), the Eleventh Circuit addressed how a state appellate court's summary treatment of a claim should be analyzed under § 2254(d):

> [T]he Supreme Court of the United States ruled that, "[w]here a state court's decision is unaccompanied by an explanation," a petitioner's burden under section 2254(d) is to "show[ ] there was no reasonable basis for the state court to deny relief." Richter, 562 U.S. at 98. "[A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." Id. at 102. Under that test, [Petitioner] must establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause.

Wilson v. Warden, 834 F.3d 1227, 1235 (11th Cir. 2016)

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

Respondent contends that some of Petitioner's claims are unexhausted. Section 2254(b)(1) provides:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

B. Impact of *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016)

Upon the motion of the parties, this action was stayed pending the Eleventh Circuit's en banc decision in Wilson v. Warden, Georgia Diagnostic Prison. That case, which has now been decided, concerned the question of how federal habeas corpus courts should interpret – under 28 U.S.C. § 2254(d) – the summary denial of a claim or claims by a state appellate court unaccompanied by an explanation. As mentioned above, after the Butts County Superior Court denied Petitioner's state petition for habeas corpus in a well-reasoned opinion, the Georgia Supreme Court summarily denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief. In that case, according to Wilson, Petitioner's "burden under section 2254(d) is to 'show[ ] there was no reasonable basis for the state court to deny relief.'" Wilson, 834 F.3d at 1235 (quoting Richter, 562 U.S. at 98).

In other words, this Court must determine what arguments or theories supported *or could have supported*, the state court's decision, and "then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the [Supreme] Court." Richter, 562 U.S. at 102; see also Wilson, 834 F.3d at 1235. The Eleventh Circuit noted that a federal habeas court may look to the underlying trial court opinion as an example of a reasonable application of law or determination of fact; however, the federal habeas court is not limited to assessing the reasoning of the lower court. Wilson, 834 F.3d at 1239. The upshot of Wilson is that it matters in this case only if this Court were to determine that the Butts County Court's opinion contained flawed reasoning. In that case, § 2254(d) requires that the federal court give the last state court to adjudicate the prisoner's claim on the merits "the benefit of the doubt," and presume that it "follow[ed] the law." Id. at 1238 (quotations and citations omitted).

However, as is evident from the discussion below, this Court has not found fault with the Butt County Court's conclusions. As such, it will rely on that court's reasoning in analyzing Petitioner's claims.

C. Procedurally Defaulted Claims

Respondent contends that certain of Petitioner's claims are procedurally defaulted. This Court will discuss the procedural default of individual claims in its discussion of those claims below. The legal standard for determining whether a claim is procedurally defaulted, and, if so, whether that claim should nonetheless be reviewed on its merits, is as follows:

> The procedural default doctrine dictates that a state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim. The doctrine is grounded in concerns of comity and federalism and was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures.
>
> Nonetheless, comity does not demand that we give preclusive effect to a state court decision disposing of a claim on state grounds unless: (1) the state court has plainly stated that it is basing its decision on the state rule; (2) the state rule is adequate, i.e., not applied in an arbitrary manner; and (3) the state rule is independent, i.e., the federal constitutional question is not intertwined with the state law ruling. We presume that there is no independent and adequate state ground for a state court decision when the decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.

Frazier v. Bouchard, 661 F.3d 519, 524-25 (11th Cir. 2011) (citations and quotations and footnote omitted).

If a claim is procedurally defaulted, Petitioner can obtain review of that claim by establishing both cause excusing the default and actual prejudice resulting from the procedural bar or, in extraordinary cases, demonstrate that a review of the claim is

necessary to correct a fundamental miscarriage of justice. Hill v. Jones, 81 F.3d 1015, 1022-23 (11th Cir. 1996).

> To show cause, the petitioner must demonstrate "some objective factor external to the defense" that impeded his effort to raise the claim properly in state court. Murray v. Carrier, 477 U.S. 478, 488 (1986). A showing that the legal basis for a claim was not "reasonably available to counsel" could constitute cause. Reed v. Ross, 468 U.S. 1, 16 (1984). We have also determined that an ineffective-assistance-of-counsel claim, if both exhausted and not procedurally defaulted, may constitute cause. See Hill v. Jones, 81 F.3d 1015, 1031 (11th Cir. 1996). As stated by the Supreme Court, "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010).

If a petitioner fails to demonstrate cause, there is no need to consider the issue of prejudice. McCleskey v. Zant, 499 U.S. 467, 502 (1991). Where cause is established, however, the petitioner must also demonstrate actual prejudice. To do so, the petitioner must demonstrate "that there is a reasonable probability that the result of the [proceeding] would have been different [absent the alleged errors]." Strickler v. Green, 527 U.S. 263, 289 (1999).

If a petitioner cannot show both cause and prejudice, a federal court may review a procedurally defaulted habeas claim on the merits only to remedy a fundamental miscarriage of justice. Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001).

Regarding what is necessary in order for a petitioner to succeed on a claim of fundamental miscarriage of justice, the Eleventh Circuit has stated as follows:

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

Hill, 81 F.3d at 1023 (citations omitted). "'This exception is exceedingly narrow in scope,' however, and requires proof of actual innocence, not just legal innocence." Ward, 592 F.3d at 1157 (quoting Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001)).

D. Unexhausted Claims

Respondent further asserts that some of Petitioner's claims are unexhausted. Pursuant to 28 U.S.C. § 2254(b)(1)(A), this Court cannot grant habeas corpus relief unless Petitioner has first exhausted the remedies available in state court. "To satisfy the exhaustion requirement, the petitioner must have fairly presented the substance of his federal claim to the state courts." Picard v. Connor, 404 U.S. 270, 277-78 (1971); Anderson v. Harless, 459 U.S. 4 (1982). To fully exhaust, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking

one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). "A petitioner cannot satisfy the exhaustion requirement if . . . he has failed to avail himself of any available procedure by which he has the right to raise his claim in state court." Gore v. Crews, 720 F.3d 811, 815 (11th Cir. 2013) (quotation and citation omitted). Generally, if a petitioner fails to exhaust his state remedies, a district court must dismiss the petition without prejudice to allow for such exhaustion. See Rose v. Lundy, 455 U.S. 509, 519-20 (1982). However, where, as here, "it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." Snowden v. Singletary, 135 F.3d 732, 736 (11th Cir. 1998). As such, failure to exhaust is proper grounds for dismissal of the petition. Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992).

III. Discussion of Petitioner's Claims for Relief

A. Petitioner's Claim that his Trial Counsel was Ineffective

1. Legal Standard

Petitioner first asserts that his trial counsel's representation of him was so ineffective as to deny him his Sixth Amendment right to an attorney. The standard for

evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984); see also Smith v. Robbins, 528 U.S. 259, 285 (2000) (applying Strickland standard to claims of ineffective assistance of appellate counsel). The analysis is two-pronged, and the court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

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

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for

the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "That requires a substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (quotation and citation omitted).

2. No Ineffectiveness in Guilt/Innocence Phase

As an introductory matter with respect to Petitioner's ineffective assistance claims, this Court notes that, having reviewed the evidence presented at Petitioner's trial and the record of the subsequent challenges to his convictions, this Court finds that it is clear that Petitioner killed John Tubner and Fannie Mae Tubner. It is further clear from the evidence presented at the trial that Petitioner was aware of what he had done and that he attempted, however ineffectively, to hide his guilt or implicate others. Put simply, the record clearly demonstrates Petitioner's criminal culpability and nothing presented in the petition effectively indicates that Petitioner is innocent of the crimes for which he was convicted. Accordingly, the overwhelming evidence of Petitioner's guilt was such that no attorney, however talented, could reasonably have been expected to secure an acquittal during the guilt phase of Petitioner's trial, and this

Court will focus its analysis on whether trial counsel was ineffective during the penalty phase of the trial.

3. Background on Sentencing Phase and Petitioner's Claims

The record reveals that trial counsel presented scant evidence at the sentencing phase of the trial. No witnesses testified on Petitioner's behalf. By stipulation with the prosecution, trial counsel sought to have admitted, and the trial court did admit, two pictures of Petitioner's childhood residence in St. Croix, United States Virgin Islands, two pictures of a baseball field that Petitioner played on in St. Croix, a picture of the street in St. Croix that he lived on, two pictures of a school in St. Croix that Petitioner attended, a letter written by Petitioner while serving a prison term for an earlier crime, a letter back to Petitioner from the supervisor of the treatment unit at the Bureau of Corrections, and a document written by Petitioner. [See Doc. 17-35]. This Court has reviewed the letters and the document, and, at most, they might tend to humanize Petitioner to a slight degree. The pictures are nothing more than pictures of places.

In his closing argument, trial counsel relied on residual doubt, arguing that the jury should not condemn Petitioner to death based on the purportedly dubious

testimony of Petitioner's codefendant, Gregory Fahie, concerning what happened in the Tubner's home.

Petitioner contends that trial counsel should have done more in presenting evidence. According to Petitioner, trial counsel was ineffective for failing to present a mental health expert who could have testified regarding Petitioner's organic brain damage, family members and others who were willing to testify positively about Petitioner, an expert who could testify that Petitioner would not pose a danger while incarcerated, and the results of a polygraph test given to the daughter of one of the victims. Petitioner further contends that trial counsel's investigation was inadequate in a variety of ways. Generally, Petitioner argues that there was confusion regarding which of the two lawyers working on the case was responsible for handling the investigation into mitigation matters, that Jodi Monogue, the paralegal who handled the bulk of the mitigation investigation was an alcoholic,[1] and that, because of Ms. Monogue's lack of experience, trial counsel should have hired a mitigation specialist.

[1] With respect to Petitioner's bald claim that Ms. Monogue (now deceased) was an alcoholic, Petitioner has cited to nothing that even remotely supports this contention, and trial counsel testified that they saw no indication that she had a drinking problem. Finally, there is no constitutional requirement that trial counsel hire a mitigation specialist, and lead trial counsel's experience with and knowledge of death penalty cases and the presentation of a sentencing phase case rendered him more than adequately capable of directing Ms. Monogue's efforts.

4. Discussion of Petitioner's Claims of Ineffective Assistance

This Court readily concedes, at least at first blush, to having had grave concerns regarding the paucity of the case that trial counsel presented in mitigation. After a careful and thorough review of the record and the decisions of the state court's reviewing these claims, however, this Court is satisfied that Petitioner has not demonstrated that his trial counsel was constitutionally ineffective in presenting a case in mitigation at the sentencing phase of the trial.

In evaluating trial counsel's performance during the sentencing phase of a trial, the "principal concern . . . is not whether counsel should have presented a mitigation case, [but] whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the Petitioner]'s background was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 522-23 (2003). Accordingly, this Court first looks to determine whether counsel thoroughly researched and investigated possible avenues of mitigation, consulted with a psychiatrist, interviewed possible witnesses, interviewed Petitioner, reviewed the evidence against Petitioner, and employed an investigator to find and interview potential witnesses. Conklin v. Schofield, 366 F.3d 1191, 1205 (11th Cir. 2004). The record demonstrates that counsel did these things.

a. Claim that Trial Counsel Erred in Failing to Seek Admission of the Results of a Polygraph Examination

According to Petitioner, Sherry Tubner, the daughter of victim John Tubner, was at one time a suspect in the murder. She agreed to take a polygraph test, and that test indicated that she lied when she answered questions about her knowledge of and her participation in the murders. Trial counsel sought to have the test results admitted into evidence during the guilt phase of Petitioner's trial, but the trial judge ruled that the results were inadmissible under Georgia law. Trial counsel did not seek to have the test results admitted during the sentencing phase under the assumption that they would have been inadmissible.

Petitioner argues that, because trial counsel's defense theory during the sentencing phase was residual doubt, they should have sought to have the polygraph results admitted. Petitioner claims that the test results would have been admissible at the penalty phase under Georgia law and that trial counsel's failure to seek admission of the evidence based on an incorrect legal assumption amounts to ineffective assistance.

This Court first notes that, at the time of Petitioner's 2002 trial, Georgia case law indicated that polygraph test results were inadmissible during the sentencing phase of a death penalty trial. In Baxter v. Kemp, 391 S.E.2d 754, 756 n.4 (Ga. 1990), the

Georgia Supreme Court held that "counsel were not ineffective for failing to try to introduce inadmissible polygraph evidence at the sentencing phase." It was not until 2004 that the state court overruled Baxter in Height v. State, 278 Ga. 592, 595 (2004), and concluded "that Georgia's general ban on the admission of polygraph test results absent the parties' stipulation should not be applied automatically in the sentencing phase of a capital case so as to prevent the defendant from presenting a favorable polygraph test result."

Moreover, even under Height, Petitioner has not demonstrated that this claim entitles him to relief. In Height, the Georgia Supreme Court further held that, [w]hen the defendant seeks to introduce unstipulated polygraph test results as mitigation evidence, the trial court must exercise its discretion to determine whether those results are sufficiently reliable to be admitted." Id. In Waldrip v. Head, 620 S.E.2d 829 (Ga. 2005), Tommy Lee Waldrip raised a similar claim in his state habeas corpus petition. In rejecting that claim the Supreme Court held as follows:

> The new law that Waldrip argues is now controlling and that he alleges his appellate counsel should have argued on direct appeal was announced by this Court in Height v. State, 604 S.E.2d 796 (2004) (overruling Baxter v. Kemp, 391 S.E.2d 754 (1990)), where we held that polygraph results may be admissible by the defense in the sentencing phase of a death penalty case, even absent a stipulation by the State, if a sufficient showing of the polygraph's reliability is made. However, even assuming arguendo that this new law could have retroactive effect in this habeas proceeding (see [Head v. Hill, 587 S.E.2d 613, 619 (2003) (discussing the rules governing the retroactive application of new law)]), we find

> Waldrip has failed even to attempt the showing of reliability necessary to conclude that the polygraph results would be admissible under Height. Accordingly, Waldrip has failed to show any prejudice in support of his overall evidence suppression claim or in support of his attempt to overcome the procedural default of that claim. This failure to show prejudice is also fatal to his ineffective assistance of appellate counsel claim.

Id. at 834-35.

Likewise, in his final brief, Petitioner has not pointed to anything that would tend to demonstrate the sufficient reliability of the polygraph test results that might have convinced the trial to admit them during the sentencing phase of Petitioner's trial, and Respondent has presented strong argument that the polygraph test is not reliable. [Doc. 52 at 56, 128-29]. Accordingly, Petitioner has failed to demonstrate that he suffered prejudice as a result of his trial counsel's failure to seek admission of the polygraph test result.

b. Claim that Trial Counsel Failed to Present the Testimony of Ronald Tutein

According to Petitioner, Ronald Tutein, who is Petitioner's nephew, was willing to testify and present favorable testimony on Petitioner's behalf during the sentencing phase of the trial, but trial counsel failed to present that testimony. It appears from the record that the prosecution did not take as long to present its case in aggravation as was

expected, and when the state rested, trial counsel sought to continue the trial so that he would have enough time to fly Mr. Tutein up from St. Croix. The trial court refused the request and required trial counsel to proceed.

In concluding that Petitioner had failed to establish that trial counsel was ineffective in failing to present this witness, the state habeas corpus court discussed the matter and held as follows:

> Petitioner alleges trial counsel were ineffective for failing to present the testimony of Petitioner's nephew, Ronald Tutein, during the sentencing phase of Petitioner's trial. Based upon trial counsel's testimony before this Court, and the fact that trial counsel had purchased Mr. Tutein [sic] plane fare so that he may attend Petitioner's trial, this Court concludes trial counsel clearly intended to present Mr. Tutein during the sentencing phase of trial. Conflicting testimony was presented to this Court regarding Mr. Tutien's availability during Petitioner's trial. Trial counsel testified that Mr. Tutein was unavailable on the day in which he was needed to testify and Mr. Tutein testified that he was available to testify. However, this Court finds it need not decide whether trial counsel was deficient for not presenting Mr. Tutein as Mr. Tutein's testimony before this Court was neither compelling nor mitigating for the crimes for which Petitioner had committed and there is no reasonable probability that this testimony would have changed the outcome of Petitioner's trial. The majority of Mr. Tutein's testimony was about Petitioner's father, Gerald Sealey, and how he would take the children in the family to the park and McDonald's. The only testimony Mr. Tutein gave pertaining to Petitioner was that he was loud and always laughing and once discouraged him from fighting.
>
> Trial counsel also admitted that Mr. Tutein's testimony was not going to mitigate to brutal torture and murder of Mr. and Mrs. Tubner. Mr. Roberto testified that Petitioner's nephew Ronald Tutein was going to testify on Petitioner's behalf and state that Petitioner was a "good uncle" and was "always nice to him." However, Mr. Tutein had not spent a lot

> of time with Petitioner, therefore, there was not going to be "alot of depth" to his testimony. . . . Therefore, this Court finds there is no reasonable probability that Mr. Tutein's testimony would have changed the outcome of the sentencing portion of Petitioner's trial.

[Doc. 27-14 at 21-22].

In arguing that the state court's conclusion is not entitled to deference under § 2254(d), Petitioner asserts that "there is a reasonable probability that the mind of at least one juror would have been swayed" by Mr. Tutein's testimony. [Doc. 47 at 51]. According to Petitioner, the state court erred by failing to recognize that mitigating evidence need not "outweigh" the aggravating evidence in order to be effective and that regardless of the brutality of the crime, "jurors would have considered the evidence and weighed it in favor of a life sentence." [Id. at 52]. Petitioner further claims that, given the fact that trial counsel presented so little evidence in mitigation, Mr. Tutein's testimony would have had a larger impact.

However, Petitioner merely quibbles with the state court's conclusion, and fails to meet the required standard of showing that no reasonable jurist could agree with the state court. Having reviewed Mr. Tutein's testimony from the state habeas corpus proceeding, this Court agrees with the state court that the testimony was, at best, mitigating to a very slight degree, and, in view of the nature of Petitioner's crimes and the other evidence presented by the state during the sentencing phase, this Court concludes that reasonable jurists could readily agree with the state court's conclusion.

As noted above, the prejudice prong of the Strickland analysis requires Petitioner to demonstrate "a substantial, not just conceivable, likelihood of a different result," Pinholster, 563 U.S. at 190 (quotation and citation omitted), and Mr. Tutein's potential testimony does not provide that substantial likelihood. Accordingly, Petitioner is not entitled to relief with respect to this claim, and it follows that Petitioner cannot establish that he was prejudiced based on his separate claim that trial counsel failed to properly argue for a continuance during the sentencing trial to allow time for Mr. Tutein to arrive in Atlanta. [See Doc. 47 at 107].

c. Claim that Trial Counsel was Ineffective in Failing to Discover and Present Evidence of Petitioner's Neurological Dysfuntion

Petitioner further claims that trial counsel's investigation of Petitioner's mental health was inadequate because they did not pursue a full battery of psychological testing. Petitioner notes that, before the trial, trial counsel secured the services of a psychiatrist, Dr. Jack Farrar, who performed a preliminary assessment on Petitioner and determined that Petitioner suffered from a delusional, paranoid disorder that could be a psychosis and that he also likely had an organic brain disorder. Dr. Farrar suggested further evaluation, but trial counsel never followed up on this suggestion despite the fact that trial counsel had obtained funds from the trial court to do so. A

more thorough examination by a neuropsychologist performed in preparation for Petitioner's state habeas corpus proceedings resulted in a diagnosis that Petitioner suffers from "organic brain syndrome and borderline mental retardation of intellectual functions." [Doc. 47 at 60]. Petitioner contends that trial counsel's failure to obtain a full mental health examination amounted to ineffective assistance because it would have led to mitigating evidence that trial counsel could have presented, rendering a life sentence reasonably likely.

In denying relief on this claim, the state habeas corpus court noted that trial counsel saw no basis to investigate Petitioner's mental health further because, in their interactions with Petitioner and in their investigation, they saw no indication that Petitioner suffered from a serious mental condition. [Doc. 27-14 at 27-29]; see Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000) (counsel not required to seek mental health evaluation when the defendant does not display strong evidence of mental problems). The state court also provided a detailed discussion of the testimony of Dr. Glen King, the Respondent's mental health expert who refuted the diagnosis made by Petitioner's expert before the state habeas corpus court. [Id. at 59-67]. The state habeas corpus court found that Dr. King's testimony was more credible and concluded that Petitioner could not, therefore, establish that he was prejudiced by the

failure of trial counsel to present mental health evidence during the sentencing phase of Petitioner's trial.

Petitioner criticizes the state court's conclusions, contending that, as a layman with respect to mental health issues, trial counsel was not qualified to make the judgment that Petitioner did not exhibit any mental health deficiencies, but see Holladay, 209 F.3d at 1250 (11th Cir. 2000) (cited above), and, in any event, Petitioner claims that trial counsel had ample reason to suspect that Petitioner had mental problems. This Court agrees, however, with the state court's further conclusion that "even if many reasonable lawyers would not have done as trial counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so," [id. at 28], and Petitioner failed to meet the burden of proving that fact.

Petitioner further criticizes the state court's finding that Respondent's mental health expert's testimony was more credible than Petitioner's expert's, arguing that the state court ignored much of Petitioner's expert's testimony.

In its own analysis, this Court finds that the record reveals that trial counsel had a reasonable strategic basis for not presenting a mental health defense during the sentencing phase even if trial counsel had reason to suspect that Petitioner suffered from some mental deficiency. Trial counsel testified that his strategy was generally

not to present evidence of mental health issues unless they are substantial and they comport with his theory of defense. [Doc. 19-22 at 9, 11]. Trial counsel's strategy was to approach the case as a whole and not treat the guilt and sentencing phases separately – if he planned to present a strong defense during the guilt phase, he wanted to rely on residual doubt in the sentencing phase rather than change tactics. [Id. at 25-26]. Trial counsel testified that Petitioner told him that he did not commit the crimes, and trial counsel believed him. [Id. at 28]. As a result, trial counsel decided to cast doubt on the state's case during the guilt phase and then rely on residual doubt at sentencing, and it is perfectly reasonable for counsel to have avoided using mental issues to excuse Petitioner's conduct when he was trying to convince the jurors that they could not be sure that Petitioner engaged in the conduct in the first instance. Moreover, trial counsel specifically testified that he did not want to present mental health evidence because such evidence would be more aggravating than mitigating:

> This was a homicide by axe. Juries come to the court with a lot of background. This is the type of thing that is feared heuristically. You would consider that if they make horror movies out of a situation like this that the jury may come with preconceived notions. One of the things I remember vividly about this is that I did not want the jury to have the opportunity to think that this was a crazed man with an axe and that they were then going to let him out with life with parole, or life without. I was hoping for life without parole, obviously. But I did not think the mental health issue was viable in this case. I don't, as I sit here today.

[Id. at 62].

Trial counsel also did not want to have to contend with the fact that if he presented mental health evidence, the state would seek to perform their own psychological evaluation as well as possibly gaining access to the report from Petitioner's expert mental health expert. [Id. at 65]. Trial counsel considered that problematic because the state expert performing the evaluation would want Petitioner to discuss the case, and trial counsel did not want Petitioner either discussing the case or having the state putting into evidence the fact that Petitioner had refused to cooperate with the state's expert. [Id].

In summary, this Court concludes that trial counsel's strategic basis for choosing not to present mental health evidence was reasonable.

This Court also briefly notes that the Eleventh Circuit has instructed that "analysis of the prejudice prong . . . must also take into account the aggravating circumstances associated with [Petitioner]'s case . . . ." Dobbs v. Turpin, 142 F.3d 1383, 1390 (11th Cir. 1998). "At the end of the day, we are required to 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" Boyd v. Allen, 592 F.3d 1274, 1301 (11th Cir. 2010) (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)). In Boyd, for example, the Eleventh Circuit explained that although trial counsel many have overlooked mitigating evidence of childhood abuse that "undeniably would have been relevant to Boyd's mitigation case," the court

determined "that the evidence of abuse would not ultimately have affected weighing the aggravators and the mitigators." Id. at 1299. The petitioner in Boyd had participated in a gruesome double murder that culminated in Boyd and his accomplice beating and shooting their victims. Id. at 1279-81. In light of these circumstances, the Eleventh Circuit "conclude[d] that the totality of mitigating evidence . . . pales when compared to the brutal nature and extent of the aggravating evidence." Id. at 1302. As in Boyd, the evidence of aggravating factors of Petitioner's crimes are substantial – using a hot poker to torture his female victim before killing her and her husband with an ax – while the evidence of mild mental impairment presented at the state habeas corpus proceeding is not particularly compelling. Petitioner's mental health expert testified that Petitioner has borderline intelligence and "organic brain syndrome," that Petitioner had an impairment in higher order brain function, that he is "emotionally impeded," suffers from a learning disability, and that "the chaos and destabilization that occurred when [Petitioner] was uprooted from his childhood home in St. Croix and moved to the Bronx as a pre-teen interrupted [his] cognitive and emotional development at a vital stage." [Doc. 19-19 at 65-76]. Nothing in this testimony undermines this Court's confidence in the outcome of the sentencing phase of Petitioner's trial when compared to the circumstances of Petitioner's crime. Indeed, this evidence is just as likely to be aggravating as mitigating. C.f. Rhode v. Hall, 582

F.3d 1273, 1285-86 (11th Cir. 2009) ("Counsel reasonably believed that the jury would see Rhode's impulsive behavior, which more than one expert believed was triggered by his organic brain damage, as aggravating.").

Accordingly, this Court further concludes that, even if trial counsel had acted unreasonably, Petitioner has failed to establish that he was prejudiced by his trial counsel's failure to present mental health evidence during the sentencing phase of his trial.

d. Claim that Trial Counsel was Ineffective in Failing to Discover and Present Evidence Concerning Petitioner's Background and Life History

Petitioner also claims that trial counsel's investigation into his background and life history was inadequate. The state habeas corpus found the opposite, detailing in a lengthy discussion the many avenues that trial counsel pursued in attempting to discover evidence for use during a sentencing trial. [Doc. 27-14 at 9-22]. This Court will not repeat that discussion here, but it is clear that trial counsel thoroughly investigated Petitioner's background, including his early life, his family, his criminal history, his periods of incarceration in St. Croix and in Federal Prison in Kentucky, his school records, his speech impediment and the therapy he received for it, his transition

from St. Croix to New York and then back to St. Croix, his life in Atlanta, his employment history, his involvement in a gang around the Little Five Points area of Atlanta, and his medical history. Trial counsel traveled to St. Croix and talked to Petitioner's brothers and sisters as well as others who knew Petitioner when he was growing up. Trial counsel tried to locate Petitioner's speech therapist and little league baseball coach but was unable to do so.

Petitioner has presented a description of the type of background and life history evidence that trial counsel could have presented. [Doc. 47 at 76-79]. The majority of it is information that trial counsel knew about and chose not to present. See Wiggins, 539 U.S. at 522-23.

In response to Petitioner's assertion that habeas counsel found certain witnesses who had positive things to say about Petitioner and who would have testified, this Court notes that trial counsel testified that they had difficulty finding people willing to testify and that they would have put such witnesses up if their testimony fit with trial strategy. [Doc. 19-22 at 30-31].

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions . . . . But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance . . . . That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to

> focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.
>
> The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight-except perhaps the rule that we will not judge trial counsel's performance through hindsight. We reiterate: The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Grossman v. McDonough, 466 F.3d 1325, 1347 (11th Cir. 2006) (quoting Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995) (citations, internal quotation marks, and alterations omitted)).

More important to this Court's analysis, having reviewed the evidence regarding Petitioner's background that Petitioner presented during the state habeas corpus proceedings, this Court finds that the evidence is not so significant that it undermines this Court's confidence in the outcome of Petitioner's sentencing trial. According to Petitioner, his mother suffered from mental illness and was distant. She was arrested twice and lost a job for assaulting people, but these assaults appear to have been minor. Petitioner's father was not emotional but had "loud outbursts." Petitioner's father occasionally "whooped" Petitioner, but, overall, he received little supervision or discipline from his parents. Petitioner suffered from a stutter that made him feel like an outcast, and he did not do well in school. Petitioner's family moved him to New

York, and he associated with some rough characters there, a trend that continued upon his return to St. Croix. The prison in St. Croix where Petitioner was incarcerated had very low standards of prison care.

In both Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court concluded, *inter alia*, that trial counsel had been ineffective in failing to present evidence of the death penalty defendants' troubled childhood during the penalty phase of the trial. However, the facts presented in both cases were much more extreme than that here presented by Petitioner. In Wiggins, there was evidence that

> [Wiggins'] mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner – an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to [a licensed social worker], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Wiggins, 539 U.S. at 516-17.

In Williams v. Taylor, Terry Williams' childhood was equally distressing. Williams' parents were severe alcoholics who were often so drunk that they were incapable of caring for the children. When social workers arrived at the Williams home on one occasion, conditions were not habitable, including human feces in several places on the floor. The social workers had to remove the children because, among other reasons, the children were drunk from consuming moonshine. Williams' parents were each charged with five counts of criminal neglect. Acquaintances of the family testified that Williams' father would strip Williams naked, tie him to a bed post and whip him about the back and face with a belt, and that Williams' parents engaged in repeated fist fights that terrorized the children. Williams' trial attorneys also ignored or failed to discover evidence of Williams' borderline retardation, organic brain damage caused by head injury, and Fetal Alcohol Syndrome. See generally, Williams v. Taylor, 1999 WL 459574 (Brief for Petitioner).

The evidence presented by Petitioner in the state habeas corpus action is, when compared to the facts of Williams and Wiggins, fairly mundane. There is no evidence of physical abuse or significant substance abuse by any of Petitioner's family. There is further no evidence that Petitioner was deprived of food or minimally habitable living conditions. Neither Petitioner nor his siblings were removed from their home by the state because of neglect, and, other than the uncorroborated, speculative

comment of a mental health expert, there is no evidence that Petitioner was a victim of sexual abuse.

As discussed above in relation to Petitioner's claim that trial counsel should have presented mental health evidence in mitigation, this Court must weigh Petitioner's proposed life history evidence against the aggravating circumstances associated with Petitioner's crimes. Making that comparison, this Court again finds that there is no reasonable probability that the mitigating evidence would have changed the outcome of the sentencing trial.

e. Claim that Trial Counsel was Ineffective in Failing to Rebut the State's Case in Aggravation

Petitioner claims that trial counsel failed to rebut the state's presentation of aggravating evidence during the sentencing phase in several ways. Petitioner first complains that trial counsel should have objected to the state's introduction of evidence and testimony indicating that Petitioner had committed a prior murder and a rape for which Petitioner was not charged or convicted. Petitioner argues that the State failed to demonstrate any threshold indicia of reliability prior to the introduction of this evidence. Ignoring the question of whether this claim is unexhausted, this Court concludes below, see infra discussion at § III.O.2, that the trial court did not err in

admitting evidence of these crimes, and as a result, Petitioner cannot demonstrate that he was prejudiced by this trial counsel's failure to object to the testimony and evidence.

Petitioner also claims that his trial counsel was ineffective during the guilt phase of the trial for failing to object to (1) evidence presented by the prosecution that Petitioner had been in jail in July, 2002, and had passed contraband notes to other inmates, (2) the prosecution reading a note passed by Petitioner to another inmate, and (3) the evidence that Petitioner had been convicted for assault with the intent to take money from another.

Petitioner cannot establish that his trial counsel was ineffective for failing to object to this evidence because it was clearly admissible. Regarding the note[2] at the jail, Petitioner addressed the note to an individual with the nickname "Oompman." In the note, Petitioner asks Oompman to secure three women to testify falsely that Petitioner's codefendant, Gregory Fahie, and victim John Tubner's daughter, Sherry Tubner, bought drugs together and talked about how they intended to rob and kill John and Fannie Mae Tubner. Meeker v. State, 294 S.E.2d 479, 482 (Ga. 1982) (inculpatory note written in jail by defendant admissible).

[2] In his final brief, Petitioner refers to "notes." From this Court's review of the record, it appears that there was but one note.

Evidence regarding Petitioner's conviction for assault with the intent to take money from another was admissible under the exception that prior bad acts and crimes are admissible to show motive, intent, or state of mind. Humphries v. State, 269 S.E.2d 90, 92 (Ga. Ct. App. 1980); see United States v. LeCroy, 441 F.3d 914, 926 (11th Cir. 2006). This crime demonstrated that Petitioner had previously assaulted someone in an effort to obtain money just as he had with the Tubners.

f. Claim that Trial Counsel was Ineffective in Failing to Rebut the State's Evidence of Petitioner's Future Dangerousness

At Petitioner's trial, prosecutors presented evidence of his criminal history and of his disciplinary history while in prison in an effort to demonstrate that it would be difficult and dangerous to house Petitioner in a prison. Petitioner claims that trial counsel should have rebutted this evidence by pointing out the abysmal prison conditions at the two prisons in St. Croix where Petitioner was housed and by hiring an expert to testify about Petitioner's future dangerousness. At the state habeas corpus hearing, Petitioner presented the testimony of James Aiken, an expert witness on future dangerousness. According to Aiken, Petitioner could be "adequately managed" in prison without posing undue risk to prison staff and other inmates. Petitioner further

contends that corrections officers could have testified that Petitioner was not particularly unmanageable or disruptive.

In denying relief on this claim, the state habeas corpus court found that Petitioner had failed to present any evidence that Petitioner suffered from abuse in the St. Croix prisons, that his prison disciplinary record strongly contradicts the expert testimony that Petitioner was not dangerous, [Doc. 27-14 at 30-32 (listing two pages of incident reports that detail Petitioner's infractions while he was in a federal prison and two county jails)], and that, owing to the dubious value of the testimony, trial counsel had a reasonable strategic basis for not calling the future dangerousness expert witness to testify. [Id.].

Petitioner contends that the state court's decision is not entitled to § 2254(d) deference because trial counsel's decision not to have an expert on future dangerousness testify could not have been a strategic decision because trial counsel did not know what such an expert would have said as he never talked to one. Petitioner further criticizes the state court's finding that Petitioner's prison disciplinary history demonstrates that the future dangerousness expert's testimony was not believable. In response, this Court first points out that a lawyer's decisions need not be based on omniscience in order to avoid running afoul of Strickland. Rather, the decision need only be reasonable. In this instance, this Court concludes that, without talking to an

expert on future dangerousness, trial counsel could have reasonably determined that, given Petitioner's extensive prison disciplinary history, it would be a waste of limited resources – time as well as money – in order to secure the services of such an expert. This Court further credits the state court's determination that trial counsel was reasonable in believing that testimony of a future dangerousness expert likely would have done more harm than good.

Petitioner attempts to minimize his prison disciplinary record, but it appears relatively substantial, certainly substantial enough that a lawyer would be objectively reasonable in wanting to avoid looking foolish by arguing that Petitioner was not a threat, and as noted by Respondent, trial counsel testified that, in his opinion, presenting future dangerousness testimony would not have been helpful and that it did not fit with his strategy in the sentencing phase. [Doc. 19-22 at 68]. As a result, this Court concludes that the state court's conclusion that trial counsel was not ineffective in relation to his failure to consult an expert on future dangerousness is not unreasonable under the facts, and this Court must defer to it.

g. Claim that Trial Counsel was Ineffective in Failing to Request Jury Instructions Regarding Unadjudicated Crimes and Bad Conduct and Failing to Object to Improper Jury Instructions

With respect to the trial court's instructions at the penalty phase of Petitioner's trial, Petitioner argues that trial counsel should have sought a jury instruction that, before the jury could consider prior bad acts or unadjudicated crimes in aggravation, they must first unanimously find that Petitioner was guilty of the bad acts or crimes. Petitioner further asserts that trial counsel was ineffective in failing to object to the (1) trial court's jury instructions regarding whether the jury must be unanimous in determining whether a statutory aggravating circumstance exists, (2) the failure of the trial court to properly define the elements of murder and armed robbery despite the fact that those crimes were alleged as part of the statutory aggravating factors, (3) the failure of the trial court to instruct jurors that mitigating circumstances need not be found unanimously, and (4) the fact that the verdict form did not require the jurors to find aggravating circumstance unanimously.

Ignoring the question of whether this claim is properly exhausted, this Court concludes that Petitioner cannot show prejudice under Strickland because he has failed to demonstrate how his rights were violated by the challenged instructions and failures to instruct. Other than providing a string of citations to cases that discuss the

requirements of jury instructions in criminal cases, the permitted use of prior crimes in criminal cases, and the constitutional requirements in imposing a penalty of death, Petitioner makes no argument that demonstrates how the trial court's charge to the jury was constitutionally infirm. In order to have a claim considered, habeas corpus petitioners must do more than merely raise that claim – they must also provide argument that demonstrates how their rights were violated. Fils v. City of Aventura, 647 F.3d 1272, 1284, 1285 (11th Cir. 2011) ("district courts cannot concoct or resurrect arguments neither made nor advanced by parties," and a district court "may not . . . act as a plaintiff's lawyer and construct the party's theory of liability").

In performing its own research on Petitioner's claims, this Court has found no case law that supports the proposition that a court in a death penalty case must instruct the jury that they must find that the defendant committed prior bad acts or unadjudicated crimes unanimously before they can consider them. See Michaels v. Chappell, 2014 WL 7047544, at *85 (S.D. Cal. 2014) (rejecting a similar argument).

With respect to his claim that Petitioner failed to object to the trial court's failure to instruct the jurors that they could impose a death penalty only if they first unanimously found beyond a reasonable doubt that an aggravating circumstance existed, this Court first notes that the trial court repeatedly instructed the jury that prior to imposing a death sentence, they must find that statutory aggravating factors exist

beyond a reasonable doubt, [e.g., Doc. 17-23 at 64, 65, 67], and the verdict form carried the same requirement, [Doc. 13-13 at 63-65]. The jury was instructed that their verdict as to penalty must be unanimous and the sentencing verdict form required the jury to expressly find whether statutory aggravating circumstances existed and to show which statutory aggravating circumstances had been proven beyond a reasonable doubt. [Doc. 13-13 at 64-65]. The trial court's instructions, coupled with the verdict form, informed the jury that unanimity was required as to aggravating circumstances. See Lucas v. Upton, 2013 WL 1221928, at *39 (M.D. Ga. 2013) (noting that jury instructions and the verdict form in a death penalty case materially identical to those used in this case adequately informed the jury that unanimity was required for statutory aggravating circumstances).

Finally, while there is case law to the effect that a statute which requires jurors unanimously to agree on mitigating circumstances is unconstitutional, Mills v. Maryland, 486 U.S. 367, 376 (1988), this Court could not find a case that mandated an instruction that a determination of mitigating circumstances need not be unanimous. See also Lucas v. State, 555 S.E.2d 440, 450 (Ga. 2001) (noting that "[t]he trial court was not required to charge the jury that mitigating circumstances need not be found unanimously, because it charged the jury that it could impose a life sentence for any reason or no reason").

As Petitioner has failed to demonstrate that the trial court's charge to the jury violated his rights, he cannot have been prejudiced by his trial counsel's failure to raise objection to that charge.

h. Claim that Trial Counsel was Ineffective in Failing to Object to the Admission of Prejudicial Evidence

Petitioner next faults trial counsel for failing to object to numerous pictures of the victims' bodies and of the crime scene. However, as this Court determines below, see infra discussion at § III.O.1, the photographs were admissible, and trial counsel could not have been ineffective for failing to object to them.

i. Claim that Trial Counsel was Ineffective in Failing to Object to Improper Argument by the State

In relation to his claim that trial counsel was ineffective for failing to object to certain arguments made by the prosecution, Petitioner first asserts that, during closing argument in the guilt/innocence phase of the trial, the prosecutor referred to matters and facts not in evidence. Petitioner cites to four pages from the trial transcript, [Doc. 17-19 at 24-25, 29-30], but he fails to identify what matters and facts the prosecutor discussed in those four pages that were purportedly not in evidence. As it is not this

Court's job "to mine the record, prospecting for facts that the habeas petitioner overlooked and could have, but did not, bring to the surface in his petition," Chavez v. Sec. Florida Dept. of Corrections, 647 F.3d 1057, 1061 (11th Cir. 2011), this Court finds that Petitioner has failed to demonstrate that the prosecutor made improper arguments.

Petitioner next contends that the prosecutor made improper argument regarding the fact that Petitioner did not testify in his defense in violation of the rule of Griffin v. California, 380 U.S. 609 (1965). During closing argument in the guilt/innocence phase of the case, while the prosecutor was discussing what the defense had failed to show, he asked: "Did anybody in this case say that Richard Sealy is not an ax murderer? Did anybody say that he didn't pick up the ax and chop those poor people to death? They didn't did they?"[3] [Doc. 17-19 at 14].

As an initial matter, this Court notes that these statements are, at most, oblique references to the fact that Petitioner did not testify. Such a statement constitutes an impermissible comment on Petitioner's right to remain silent "only if: (1) the prosecutor's manifest intention was to comment upon the defendant's failure to testify;

[3] Petitioner also contends that this statement had the effect of improperly shifting the burden of proof to the defense. When read in proper context, it does no such thing, and, in any event, the jury instructions in the guilt/innocence phase were quite clear that the state carried the burden of proof so that the jury would not have been confused on this point.

or (2) the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982). In this case, there is no indication that the prosecutor made the remark intending to comment on Petitioner's failure to testify, and, as the statements related to the case the defense team put up, this Court finds that the jury would not have naturally considered it a comment on Petitioner's failure to testify. See United States v. Norton, 867 F.2d 1354 (11th Cir. 1989) ("[A] defendant's fifth amendment privilege is not infringed by a comment on the failure of the defense, as opposed to the defendant, to counter or explain the testimony presented or evidence introduced.").

In any event, in the jury charge at the close of the guilt/innocence phase of the trial, the trial court instructed correctly and adequately the jury as follows:

> The defendant in a criminal case is under no duty to present any evidence tending to prove innocence and is not required to take the stand and testify in the case. If the defendant elects not to testify, no inference hurtful, harmful, or adverse to the defendant shall be drawn by the jury, nor shall such fact be held against the defendant in any way.

[Doc. 17-19 at 41].

Petitioner next contends that the prosecutor improperly vouched for the witness Gregory Fahie who implicated Petitioner. However, the entire theory of the defense at the trial was that while Petitioner was in the victims' house when the murders

occurred, he did not commit the murders. The only other person in the house who was likely to have committed the murders was Fahie, and as such, it was perfectly acceptable for the prosecutor to point out the many reasons that it was unlikely that Fahie was the murderer, which is all the prosecutor did. This Court thus concludes that the prosecutor did not improperly vouch for Fahie's credibility.

Next, Petitioner contends that the prosecutor improperly injected his own view of the evidence and vouched for the strength of the state's case. However, as with his claim regarding the prosecutor purportedly referring to facts not in evidence, Petitioner makes no effort to point out which statements in the four pages of transcript that he cites supposedly contained the prosecutor's own views.

In his final assertion of improper argument by the prosecution, Petitioner contends that, during closing argument in the penalty phase of the trial, the prosecutor encouraged "the jury to punish the Petitioner for three murders, including a murder for which Petitioner had never been convicted." [Doc. 47 at 103]. However, in the discussion below, see infra discussion at § III.O.2, this Court determines that the connection between Petitioner and William Kerry's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury. If the evidence is admissible, it is axiomatic that the prosecution can discuss that evidence in closing argument.

Having determined that none of the instances of prosecution closing argument about which Petitioner complains was improper, trial counsel cannot be faulted for failing to object to that argument.

j. Claim that Trial Counsel was Ineffective in Failing to Give Adequate Closing Arguments

Petitioner argues that trial counsel was ineffective for failing to give a proper closing argument during the sentencing phase because counsel argued only residual doubt and failed to humanize Petitioner. This Court agrees with Respondent that this claim is unexhausted. It is undisputed that Petitioner did not raise this claim in his state habeas corpus petition, and his argument in his post hearing brief that trial counsel's closing argument demonstrated that trial counsel had not properly prepared for the penalty phase was not sufficient to give the state court a full opportunity to resolve the issue raised here. Accordingly, this Court concludes that the claim is unexhausted, and, as Petitioner would be barred from attempting to raise the claim again, the claim presents no basis for federal habeas relief.

This Court further agrees with Respondent that Petitioner has failed to demonstrate how the closing argument was constitutionally ineffective. This Court has already explained that trial counsel made a reasonable strategic decision to rely on

residual doubt during the penalty phase by pointing out the weaknesses in the state's case. As such, it cannot have been ineffective for trial counsel to continue that strategy during his closing argument. For these reasons, this Court concludes that Petitioner is not entitled to relief on this claim.

k. Claim that Trial Counsel was Ineffective in Failing to Properly Convey the Terms of a Plea Offer

Petitioner also claims that his trial counsel was ineffective for failing to communicate the state's plea offer of life without parole in exchange for Petitioner's guilty plea in a manner that Petitioner could understand. Petitioner argues that because of Petitioner's mental deficiencies and because of hostility between trial counsel and Petitioner, trial counsel was not able to functionally communicate with Petitioner. As a result, Petitioner claims he did not understand the plea offer and further claims that if he understood it, he would have taken the plea.

According to the state habeas corpus court,

> trial counsel communicated the district attorney's plea offer of life without parole but Petitioner refused to accept such offer. Petitioner has not presented any evidence to this Court that he would have at any time been willing to accept the State's plea offer. Once a plea deal has been properly communicated to a defendant, as it was in this case, the decision to whether to accept or refuse an offer rest entirely on the defendant. See Baskin v. State, 267 Ga. App. 711 (2004).

[Doc. 27-14 at 39].

Trial counsel testified that he worked "hard" to convince Petitioner to accept the state's plea offer. [Doc. 19-22 at 354-355]. It is further clear that trial counsel took a measured and careful approach in considering how to convey the plea offer to Petitioner and how to convince Petitioner to accept that offer:

> I had a long discussion with other professionals, and not just the legal profession but in the medical profession, about whether or not to take a position like this where I say it's my professional opinion that you should accept this plea. There was a lot of discussion back and forth and [Petitioner]'s life was on the line, and based on my education, training and experience, my experience with Clayton County juries, I wanted [Petitioner] to take this plea. I wanted him to take the plea in the worst way, not because I didn't think he was innocent, but because I didn't think he'd be found not guilty.

[Id. at 355].

In addition, the proffered plea agreement was discussed in at least two separate hearings, [see Docs. 16-30, 16-31], and it is clear that Defendant was an active participant in negotiating a plea deal, [Doc. 16-31 at 25-29], and that he understood the prosecution's offer.

Given the record, it is abundantly clear that the state court's findings were reasonable and supported by the evidence presented and its conclusion was not an unreasonable application of the Strickland standard. Accordingly, this Court concludes that Petitioner is not entitled to relief on this claim.

l. Petitioner's Claim that his Counsel was Ineffective on Appeal

Petitioner's discussion of his claim of ineffective assistance of appellate counsel is a single paragraph in which he claims, in decidedly conclusory form, that counsel failed to raise "the numerous errors of constitutional magnitude which infected Petitioner's trial." [Doc. 47 at 110]. Petitioner briefly mentions two issues – a "patently improper" jury verdict and the purported violation of Petitioner's right to self-representation – which this Court determines elsewhere do not entitle Petitioner to relief. Put simply, Petitioner entirely fails to demonstrate why counsel should have raised those or any other claims in his appeal, and he has not presented argument that might tend to overcome the presumption that trial counsel actions were reasonable.

m. Cumulative Trial Counsel Error

In his final assertion of ineffectiveness, Petitioner raises a claim of "cumulative prejudice," arguing that the cumulative effect of the alleged errors of his trial counsel resulted in a fundamentally unfair trial. In particular, Petitioner argues that trial counsel's failure to present any evidence during the sentencing trial aside from a few stipulated photographs and documents when the testimony of character witnesses and experts could have been presented was prejudicial.

As is discussed more fully below, typical "cumulative error analysis" addresses the possibility that the cumulative effect of two or more individually harmless errors has the potential to prejudice a criminal defendant to the same extent as a single reversible error. See infra discussion at § III.U.

> The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim. However, the Supreme Court has held, in the context of an ineffective assistance claim, that "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."

Forrest v. Florida Dep't of Corr., 342 Fed. Appx. 560, 564-65 (11th Cir. 2009) (quoting United States v. Cronic, 466 U.S. 648, 659 n.26 (1984)). The Eleventh Circuit has also not addressed the issue.

As discussed above, this Court has determined that Petitioner has failed to show that trial counsel's representation was constitutionally ineffective under Strickland. This Court now further concludes that in again "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence . . . the totality of mitigating evidence . . . pales when compared to the brutal nature and extent of the aggravating evidence." Boyd, 592 F.3d at 1301 (quotation and citation omitted). As a result, this Court concludes that even when his allegations of ineffective assistance

are viewed cumulatively, Petitioner has failed to establish the prejudice prong of the Strickland test, and he is not entitled to relief.

B. Claim that the Trial Court Denied Petitioner's Right to Represent Himself

Petitioner alleges that he was denied the right to represent himself at trial in violation of Faretta v. California, 422 U.S. 806 (1975). The state habeas corpus concluded that this claim was procedurally defaulted because Petitioner failed to raise this claim in his appeal. [Doc. 27-14 at 56].

In a hearing held ten days before the trial, counsel for Petitioner informed the trial court that Petitioner wished to address the court regarding the fact that he no longer wanted to be represented by trial counsel. [Doc. 16-30 at 4]. The prosecution left the courtroom, and the trial court commenced with an ex parte hearing. During the ex parte hearing, Petitioner complained to the judge that trial counsel had not investigated a matter that Petitioner wanted them to investigate. Petitioner further complained that he had a conflict with trial counsel because of the advice that he should accept the state's offer of a plea in exchange for a sentence of life without parole. Petitioner felt that, because trial counsel wanted him to accept the plea deal, that trial counsel had given up on his case. [Id. at 8-9].

Trial counsel responded that he had investigated the matter that Petitioner had inquired about. Specifically, Petitioner had told trial counsel that a codefendant had hidden a shoe on the roof of a store, and the investigator had gone to that roof and could not locate the shoe. [Id. at 10]. After hearing Petitioner's arguments and trial counsel's response, the trial court ruled that the grounds Petitioner raised for removing trial counsel were not sufficient. [Id. at 15]. Petitioner then indicated that he wanted to represent himself with standby counsel, and at that point, the trial court ended the ex parte hearing and invited the prosecutors back into the courtroom. [Id. at 19].

Petitioner did not want his then trial counsel to serve as standby counsel, and after a discussion of who might be Petitioner's standby counsel, the trial court continued the hearing for a few days so that Petitioner could think about what he wanted to do and see if he could obtain someone to serve as his standby counsel. [Id. at 31].

When the hearing recommenced, six days before the trial, Petitioner at first stated that he wanted to represent himself with standby counsel. [Doc. 16-31 at 2]. He had talked to three lawyers, but none of them were available. [Id. at 3]. The trial court reiterated that Petitioner had failed to establish a legal ground for the removal of his current trial counsel and that if he wanted standby counsel, he was stuck with his current trial counsel. [Id. at 11]. The trial court began a colloquy with Petitioner to

determine his education, his understanding of the charges against him and his understanding of the law and of court procedures to see if he was capable of representing himself. One of the matters that the judge discussed with Petitioner was the fact that, proceeding to trial with his current trial counsel would not waive his claim of a conflict with the attorneys – he could later appeal the trial court's ruling that Petitioner had not demonstrated a sufficient basis to remove counsel from the case. The judge further pointed out that, just because trial counsel had recommended to Petitioner that he take the plea deal, that did not mean that counsel would not be zealous in attempting to obtain an acquittal. [Id. at 15-16]. The judge also strongly advised Petitioner that he should not represent himself. After these discussions, Petitioner changed his mind and said, in open court and on the record, "Without waiving my rights to a conflict, I'd like to proceed with these two attorneys as counsel." [Id. at 19]. The trial court queried Petitioner to make sure that Petitioner meant to keep his current counsel acting as his trial counsel rather than standby counsel, and Petitioner assured the judge that he meant to keep his current lawyers as trial counsel.

Nothing the record indicates that Petitioner was coerced or improperly influenced, and indeed, Petitioner makes no such claim. Rather, Petitioner claims that the trial court's refusal to find someone to serve as Petitioner's standby counsel put

undue pressure on Petitioner, rendering him unable to invoke his right to represent himself under Faretta.

Clearly this claim is procedurally defaulted. Even more clearly, if the claim were not procedurally defaulted, it would not entitle Petitioner to relief. Trial counsel had no conflict in representing Petitioner, and there was no reason for the trial court to remove trial counsel from the case, and it is patently ridiculous for Petitioner to suggest that the trial court had an obligation to go out and find Petitioner a new lawyer six days before the trial was to commence when every indication was that Petitioner's trial counsel had ably prepared and was ready to try the case.

Accordingly, this Court concludes that Petitioner is not entitled to relief on his claim that the trial court violated his right to represent himself.

C. Claim that Trial Counsel had a Conflict of Interest

This Court has reviewed the record in relation to Petitioner's claim of a conflict between Petitioner and trial counsel and concludes that the claim lacks substance. Petitioner's purported conflict is that trial counsel was not friendly to Petitioner. However, heated discussions, arguments regarding strategy, and a strained relationship do not create a conflict of interest in the legal sense, and Petitioner has not

demonstrated that the trial court had any reason to remove trial counsel from the representation of Petitioner.

D. Claim that Trial Court Unconstitutionally Denied Motion for a Continuance During the Penalty Phase

As discussed above, the state finished its presentation of evidence earlier than anticipated during the penalty phase of the trial, and, in an attempt to get enough time to bring Ronald Tutein to Atlanta to testify, trial counsel sought a continuance. Petitioner claims that the trial court's denial of that motion violated his constitutional rights.

Respondent correctly points out that the state habeas corpus court plainly stated that this claim is procedurally defaulted under state rules, [Doc. 27-14 at 56], and there is no dispute that the state rule is adequate as discussed in Frazier, 661 F.3d at 524-25. As a result, the claim is procedurally barred before this Court.

In an attempt to establish cause and prejudice to overcome the procedural bar to his claim in this Court, Petitioner contends that appellate counsel was ineffective in failing to raise this issue in his appeal. However, this Court has already determined that Petitioner has failed to demonstrate that he was prejudiced by his trial counsel's failure to secure the testimony of Ronald Tutein. Because of the "'striking linguistic

parallel'" between the standard for establishing prejudice sufficient to excuse procedural default under Strickler and the standard for proving the prejudice prong of an ineffective assistance of counsel claim under Strickland, the Eleventh Circuit treats them as "'one and the same.'" Mincey v. Head, 206 F.3d 1106, 1147 n.86 (11th Cir. 2000) (quoting Prou v. United States, 199 F.3d 37, 49 (1st Cir. 1999)). Accordingly, Petitioner cannot establish prejudice to overcome the procedural bar, and he is not entitled to relief with respect to this claim.

E. Claim that the Sentencing Verdict Is Unconstitutionally Arbitrary

Georgia's death penalty statue requires, *inter alia*, that before a jury can impose a death sentence, the jury must find, beyond a reasonable doubt, the presence of one or more statutory aggravating circumstances. O.C.G.A. § 17-10-30. In their penalty phase deliberations, the jury found, beyond a reasonable doubt, the presence of ten aggravating circumstances, five in connection with the murder of John Tubner and five in connection with the murder of Fannie Mae Tubner. [Doc. 13-13 at ecf pp. 64-65]. After so finding, the jury fixed the sentence as death, but the verdict form did not permit them to specify whether the death sentence was imposed for the murder of John Tubner or Fannie Mae Tubner or both.

In arguing that the death sentence imposed upon him was arbitrary, Petitioner first asserts that the failure of the jury to specify which murder the death penalty applied to violated O.C.G.A. §§ 17-10-30 and 17-10-31. This Court has reviewed those code sections, and agrees with the state habeas corpus court, [Doc. 27-14 at 48], that, in the case of a multiple murder, the laws do not require the jury to differentiate between the various murders in imposing a death sentence, and Petitioner has failed to point to case law that holds that such a requirement exists.

Petitioner further argues that his death sentence was arbitrarily imposed in violation of Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153, 206 (1976). In Furman, the Supreme Court struck down Georgia's old system of imposing the death penalty in part because it permitted juries to impose a sentence of death in a random and arbitrary manner.

> The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant.
>
> Left unguided, juries imposed the death sentence in a way that could only be called freakish.

Gregg, 428 U.S. at 206.

The main focus of Furman was the fact that the decisionmakers – juries or judges – in various state statutory death penalty schemes were not given adequate

guidelines under which to impose death. See Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

The Georgia legislature then passed a new death penalty statute that the Supreme Court evaluated and approved in Gregg. The Supreme Court found that the new statutory scheme narrowed "the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed" and that the jury could also consider "any other appropriate aggravating or mitigating circumstances." Id. at 196-97. The Court concluded that "[t]hese procedures require the jury to consider the circumstances of the crime and the criminal" as well as "the characteristics of the person who committed the crime." Id. at 197.

Having reviewed the verdict form and the trial court's instructions from the penalty phase of Petitioner's trial, this Court concludes that the sentence imposed does not violate Furman or Gregg. The instructions clearly required the jury to consider the circumstances of the murders committed by Petitioner as well as Petitioner's personal characteristics. That the jury did not specify for which murder it imposed the death

sentence is of no particular moment because Petitioner was convicted of both murders and the jury found the presence of aggravating circumstances in connection with both murders, rendering either murder as sufficient to support the imposition of a death sentence. C.f. Griffin v. United States, 502 U.S. 46, 49 (1991) (general jury verdict is valid "so long as it was legally supportable on one of the submitted grounds").

This Court further agrees with Respondent that the state habeas corpus court concluded that this claim was procedurally defaulted, [Doc. 27-14 at 50], and it is thus barred before this Court. Petitioner cannot demonstrate prejudice as it is not reasonably probable that a verdict form that permitted the jury to designate that the death sentence be imposed for one of or both of the murders would have resulted in a different sentence. For these reasons, this Court concludes that Petitioner is not entitled to relief for this claim.

F. Claim that Trial Court Allowed the Invalid Verdict to Stand

As this Court has concluded that the jury's death verdict was not invalid, it necessarily follows that the trial court did not err in accepting that verdict and sentencing Petitioner to death. This Court further disagrees with Petitioner's contention that "the trial court found factors in imposing a death sentence that were not necessarily found by the jury." [Doc. 47 at 143]. As noted above, the jury found,

beyond a reasonable doubt, the presence of ten aggravating circumstances that were each specifically linked to a murder victim. There was clearly a consensus among the jurors, and the trial court did not find statutory aggravating circumstances that were not found by the jury.

G. Claim of Juror Misconduct, Bias, and External Influence

1. Juror's Purported Reference to the Bible During Deliberations

In relation to the jury, Petitioner first claims that the jurors violated his constitutional rights when they consulted and relied on the Christian Bible during penalty phase deliberations. Petitioner raised this claim before the state habeas corpus court, and that court found as follows:

> Petitioner alleges his constitutional right to a fair trial was violated by the jurors during the sentencing phase when they allegedly relied on the Bible as an extrajudicial source of information when determining Petitioner's death sentence.
>
> Petitioner proffered affidavits from six jurors, James Alford, Charlene Johnson-Booker, David Peek, Mildred Jones, Monique Sheffield and Bob Eugene Reynolds, and called two jurors, Charlene Johnson-Booker and Janice Riley, as witnesses during the evidentiary hearing before this Court. Respondent proffered counter affidavits from three of the jurors from whom Petitioner had obtained affidavits, Monique Sheffield, James Alford and Charlene Johnson-Booker. After review of this testimony this Court finds that the jurors that determined Petitioner's sentence did not rely upon biblical scripture in deciding Petitioner's sentence of death.

Mr. Alford stated that the jury was led in prayer prior to deliberation, however, he also testified that "there were no discussions about Biblical scriptures" and he did "not recall seeing a Bible in the jury room." Ms. Sheffield stated in her affidavit that "we began each session with prayer for guidance in our decision making," but clarified that statement by subsequently testifying, "I did not base my verdict or sentence on the prayers. I relied only upon the evidence presented at trial and the judge's instructions." In the affidavits submitted by Petitioner from Mr. Peek, Ms. Jones and Mr. Reynolds, the affiants do not mention prayer or the Bible.

In the affidavit submitted by Petitioner from Ms. Johnson-Booker, she does state that she and other jurors discussed scripture and "how it applied to guide our decisionmaking." However, when called by Petitioner during the evidentiary hearing before this Court, Ms. Johnson-Booker fully explained this statement. Ms. Johnson-Booker testified that she did have discussions of biblical scripture but went on to state the following:

> We had discussions, but it was not to determine how we should sentence him. It was basically just comfort for us because it was a very difficult decision for us to make. So, we were not trying to say, you know, we'll take this Bible and this Bible says that we should do this. That was not how it was used.

Ms. Johnson-Booker went on to state that the Bible was used "just as comfort" and was "not used to say, you know, God says we should do such-and-such." Moreover, she testified:

> None of us were Bible scholars, so we didn't even get that deep into it. We didn't have Biblical discussions at all. We did what we were supposed to do. So, it didn't turn into your beliefs versus my beliefs, and any of that. That was not what happened.

Further, Ms. Johnson-Booker only recalled opening the Bible after the "final decision" but only for "comfort" to "endure" what she was having

to go through. Again, Ms. Johnson-Booker, stated that the Bible was "never used to determine how we should sentence Mr. Sealey, never, ever used in that way" and that the jurors knew they "could not mix faith and the system." Moreover, she testified that she did not believe the Bible passage that was viewed after the decision referenced punishment for certain acts. Finally, Ms. Johnson-Booker testified that her decision to convict and sentence Petitioner to death was based "[s]olely upon the evidence" that was presented at trial.

Petitioner's argument that the jury relied "heavily" on the Bible during deliberations is not borne out by the evidence before this Court. In fact, Petitioner misquotes one of own his witnesses, Mildred Jones, by stating that she testified in her affidavit that the jurors "relied upon prayer to reach the verdict of death after the jury was initially 'divided roughly down the middle.'" (Petitioner's Brief, pp. 94-95). Ms. Jones actually stated the following:

> When the sentencing phase concluded and we began our deliberations, our initial vote was divided roughly down the middle, half voting for a life without parole sentence and half voting for a death sentence. We talked long and hard about the sentencing because this was not an easy decision. Several members of the jury were having a difficult time with the death sentence. When this happened, one of the things we would do was revisit the crime scene photos as a way to get us all on the same page. What prompted me personally to vote for a guilty verdict and ultimately death were the crime scene photos. They were horrible. We also had group prayer during this time to help us with our decision-making.

[Doc. 27-14 at 40-42 (citations to the state court record omitted)].

Based on the foregoing, the state habeas corpus court further found that biblical scripture did not influence the jury's sentencing decision and concluded that Petitioner

had failed to demonstrate that the jurors used the Bible as an improper source of information in fixing Petitioner's death sentence. [Id. at 42-43].

In arguing that the state court's decision is not entitled to deference under § 2254(d), Petitioner (1) relies heavily on the affidavit of a juror and wholly ignores that juror's testimony at the state habeas corpus hearing where she fully clarified her affidavit statements and (2) and misquotes another juror's affidavit.

This Court has reviewed the testimony and affidavits of the various jurors that testified before the state habeas corpus court and finds that the state court's findings of fact are reasonable in light of the evidence presented. Based on those facts, this Court concludes that the state court's decision was not contrary to, and did not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court. As such, this Court is constrained by § 2254(d) from granting Petitioner relief as to this claim.

2. Other Allegations of Juror Misconduct

Petitioner further alleges that the jurors prematurely discussed evidence presented at trial prior to deliberation, discussed media coverage and jury members slept through portions of the trial. The state habeas corpus court concluded that these claims were procedurally defaulted and that Petitioner had failed to establish cause and

prejudice to overcome the procedural bar. [Doc. 27-14 at 44]. The state court alternatively held that Petitioner had failed to establish this claim of juror misconduct because the evidence he sought to use to establish this claim – juror affidavits – are inadmissible to impeach a verdict under Georgia law. [Id.].

Even if Petitioner were to establish that these claims of juror misconduct were not procedurally barred before this Court and, further, that this Court should not defer to the state court's holding under § 2254(d), this Court would nonetheless deny relief because it is likewise prevented from considering the juror affidavits under Fed. R. Evid. 606(b). That rule provides that in a challenge to the validity of a verdict, jurors may not testify to most matters pertaining to the jury's deliberations or to the mental processes of any juror. Jurors may testify only "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b) clearly applies to § 2254 proceedings. Fed. R. Evid. 1101(e); e.g., Fields v. Brown, 431 F.3d 1186, 1207 (9th Cir. 2005); Williams v. Price, 343 F.3d 223, 230 n.3 (3d Cir. 2003); Gosier v. Welborn, 175 F.3d 504, 511 (7th Cir. 1999).

The only such testimony that might fall outside of the Rule 606(b) restriction is that which relates to Petitioner's claim that members of the jury engaged in conversations with a bailiff. However, Petitioner has provided no evidence that the

conversations between the bailiff and any juror were inappropriate such that the bailiff provided extraneous prejudicial information to or otherwise improperly influenced a juror. See Fullwood v. Lee, 290 F.3d 663, 680 (4th Cir. 2002).

Plaintiff cites Turner v. Louisiana, 379 U.S. 466, 472 (1965), for the proposition that "private communications with the bailiff – even if they concern matters outside the trial – are presumptively prejudicial because they bias the jury against the defendant and in favor of the State." [Doc. 47 at 153]. This is an incorrect statement of the law. The Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 455 U.S. 209, 217 (1982). In Turner, the case cited by Petitioner, the two bailiffs that were in charge of transporting and arranging meals for the sequestered jurors of a murder trial were also the star witnesses for the prosecution of the defendant Turner's murder trial who arrested Turner and testified as to his confession. The facts of that case differ markedly from Petitioner's allegations of interactions between the jury and the bailiff at his trial where the jurors merely talked to the bailiff regularly and "became friendly enough with him to learn that he was set to retire not long after the trial." [Doc. 47 at 153 (quotation omitted)].

Accordingly, this Court concludes that Petitioner has failed to establish that he is entitled to relief with regard to his claims of jury irregularities.

H. Claim that Trial Court Erred in Refusing to Admit Results of Polygraph

Turning again to the polygraph test that Sherry Tubner failed, discussed above in relation to Petitioner's claims of ineffective assistance of counsel, see supra § III.A.4.a, Petitioner claims that the trial court violated his due process rights in refusing to permit the defense to present testimony regarding the test because of the exculpatory and mitigating nature of the evidence. This Court points out that the defense sought to present the results of the polygraph test during the guilt phase of the trial, not the penalty phase, and as noted above, trial counsel was not ineffective in failing to present the evidence during the penalty phase. Longstanding precedent has held that polygraph results are inadmissible during the guilt phase of a trial, and neither the Supreme Court nor the Eleventh Circuit has held that the Constitution mandates admission of such evidence.

Moreover, Polygraph tests are notoriously unreliable, see United States v. Scheffer, 523 U.S. 303, 310 (1998) (citing one study which found polygraph assessments of truthfulness to be "little better than could be obtained by the toss of a coin."), and courts have held that polygraph test results can be excluded from a death

penalty sentencing trial on that basis. United States v. Catalan-Roman, 368 F. Supp. 2d 119, 122 (D.P.R. 2005); Goins v. Angelone, 52 F. Supp. 2d 638, 675 (E.D. Va., 1999). Some courts have held that polygraph results can be admitted during the sentencing phase of a death penalty trial, but there is no constitutional mandate requiring courts to allow such evidence. Goins v. Angelone, 226 F.3d 312, 326 (4th Cir. 2000) ("[T]he Constitution does not mandate admission of polygraph results in capital sentencing proceedings.") abrogated on other grounds Bell v. Jarvis, 236 F.3d 149, 182 (4th Cir. 2000). In short, this Court concludes that Petitioner has failed to state a claim under § 2254 regarding the failure of the trial court to admit the results of the polygraph test.

I. Claim Regarding the Grand and Traverse Jury Venires

Petitioner next brings claims regarding the venires used to make up the grand jury that indicted him and the traverse jury that convicted him and sentenced him to death. He claims that the venires underrepresented African Americans, Hispanics, young persons and poor persons. Petitioner further asserts that the Clayton County jury commission excluded persons below a predetermined level of intelligence from service on the grand jury.

With respect to his contention that distinctive groups are underrepresented,

> [d]iscriminatory selection of a jury venire may be challenged under the Sixth Amendment's requirement that the venire reflect a fair cross-section of the community. Duren v. Missouri, 439 U.S. 357 (1979). To establish a prima facie violation of the fair cross-section requirement, a petitioner must show (1) that the group underrepresented is a distinctive group in the community, (2) that the underrepresentation in the venire is not fair and reasonable in relation to the group's number in the community, and (3) that this underrepresentation is due to systematic exclusion of the group from the selection process. Duren, 439 U.S. at 364.

Cunningham v. Zant, 928 F.2d 1006, 1013 (11th Cir. 1991) (footnote omitted). If a defendant fails to establish any of these elements he has failed to establish a prima facie violation of the sixth amendment. United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984).

In affirming Petitioner's conviction and sentence, the Georgia Supreme Court held as follows:

> [Petitioner] further contends that the source lists from which his grand and traverse juries were drawn unlawfully under-represented Hispanic persons. This claim must fail on appeal, as [Petitioner] failed to present evidence showing Hispanic persons constituted a cognizable group in the county or any evidence establishing either the existence of actual under-representation or the degree thereof.

Sealey v. State, 593 S.E.2d at 338.

Ignoring the question of whether this claim (or part of it) is unexhausted and/or procedurally barred from this Court's review, it is clear that Petitioner has failed to establish a claim under Duren as he has not presented evidence to establish that the

underrepresentation in the venire is not fair and reasonable in relation to the group's number in the community.

> To determine whether the representation was fair and reasonable, we are only concerned with the "absolute disparity" produced by the selection process. United States v. Maskeny, 609 F.2d 183, 190 (5th Cir. 1980) (rejecting comparative disparity and standard deviation analysis); United States v. Butler, 611 F.2d 1066, 1069-70 (5th Cir.), reh'g denied, 615 F.2d 685, 686 (1980) (other statistical methods not necessary when small absolute disparity shown and minority more than ten percent of population). The relevant comparison for sixth amendment fair cross-section purposes is the comparison between the percentage of the "distinctive group" on the qualified wheel and the percentage of the "distinctive group" among the population eligible for jury service. See United States v. Esle, 743 F.2d 1465, 1478 (11th Cir. 1984) (Tjoflat, J., concurring).

Pepe, 747 F.2d at 649.

Petitioner has not pointed to anything in the record from which this Court can determine any disparity between the percentage of Hispanics or African Americans (or any other distinctive group) in the community and the percentage of those groups in the grand and traverse jury venires.

As to his claim that the jury commission excluded individuals from the grand jury pool below a predetermined education level, the Georgia Supreme Court reviewed this claim and held as follows:

> [Petitioner] contends that his indictment was invalid under Georgia statutory law because the jury commissioners excluded some persons from grand jury service based on their levels of education in an attempt to comply with the statutory directive that grand jurors be selected from "the most experienced, intelligent, and upright citizens of the county."

> O.C.G.A. § 15-12-40(a)(1). Contrary to [Petitioner]'s statement in his oral argument that the jury commissioners required a high school education for grand jury service, our review of the record reveals that [Petitioner] failed to present evidence clearly showing what educational requirement was applied. In fact, the testimony actually elicited indicated nothing more specific than that the commissioners had required prospective grand jurors to "have a third-grade education or something." The testimony also indicated that each prospective grand juror removed as a candidate for the grand jury source list was replaced with a candidate from the same race and sex categories. Under the facts in evidence in this case, we decline to depart from our previous position that, unlike constitutional requirements, the statutory procedures for creating the [grand jury] list are merely directory, and do not create a basis for sustaining challenges to the array.

Sealey, 593 S.E.2d at 337-38 (Ga. 2004) (case citations and quotations omitted).

As Respondent points out, Petitioner brought this claim only under state law before the state court, and a constitutional claim is thus unexhausted and procedurally barred before this Court. Moreover, this Court has reviewed the record in relation to this claim, and concludes that the state court is correct: there simply is no evidence that the jury commission in Clayton County excluded any potential grand jurors based on their education or intelligence. Accordingly, this Court concludes that Petitioner has failed to establish this claim as well.

J. Claims Regarding Voir Dire Restrictions

Petitioner claims that the "the trial court unconstitutionally forbid trial counsel from pursuing numerous lines of questioning designed to uncover hidden bias and ascertain prospective jurors' suitability to serve on a capital jury." [Doc. 47 at 174]. According to Petitioner, the trial court would not permit trial counsel to ask a prospective juror what the term "murder" meant, whether "a prospective juror understood that a murder conviction requires the State to prove guilt beyond a reasonable doubt," and whether a panel member "would be able to serve as foreman and sign a jury verdict form if the other members of the juror voted for the death penalty." [Doc. 47 at 176]. Meanwhile, the trial court permitted the prosecutor to ask panel members whether they would "require the state to show you a hundred percent proof of guilt before you would consider the death penalty." [Id.]. The record shows that the trial court would not permit trial counsel to ask these questions based upon the court's opinion that it is improper to inquire about a panel member's understanding of legal concepts or to pose questions that ask the juror to prejudge the case using hypotheticals.

"The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." Morgan v. Illinois, 504 U.S. 719, 731 (1992). "A judge has substantial discretion in conducting the voir dire examination of

jurors." United States v. Salazar, 480 F.2d 144, 145 (5th Cir. 1973). "Where the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present, no abuse of discretion may be found." United States v. Holman, 680 F.2d 1340, 1344 (11th Cir. 1982). While the Supreme Court has reversed cases for what it saw as an insufficient voir dire, those reversals happen when the Court has determined that the voir dire process was deemed unfair based on the fact that the judge would not permit a defense counsel to make a particular inquiry. E.g., Morgan, 504 U.S. at 731 (holding that prospective jurors in death penalty cases must be asked whether they would impose a death penalty for a murderer in every instance).

Petitioner raised these claims in his appeal, and in affirming, the Georgia Supreme Court reviewed the voir dire colloquies of the specific jurors being questioned by trial counsel when the trial court sustained the prosecution's objections and held that "[t]he juror's responses sufficiently indicate the juror's willingness to consider all three possible sentences upon a conviction for murder when those responses are read in the light of the trial court's initial instructions and of the entirety of the questioning of the juror by the trial court and the parties." Sealey, 593 S.E.2d at 338 (citations and quotations omitted). Having read the colloquies of the jurors in

question, this Court agrees with the state court and thus defers to the court's decision under § 2254(d).

Moreover, in a broader sense, this Court has reviewed the entire voir dire and finds that the questions posed by the court, by the prosecutors and by trial counsel provided reasonable assurance that bias would be discovered if present. The trial court asked each of the jurors whether they were conscientiously opposed to the death penalty; whether they believed that the death penalty is the only appropriate punishment for murder; and whether, in the event of a conviction, they would be willing to consider a life sentence, a life sentence without parole, and the death penalty after hearing the evidence and argument of the prosecution and the defense. The prosecution and the defense were then permitted to ask questions.

With respect to the specific claims that Petitioner raises, the trial court's instructions to the jury clearly defined the concept of malice murder and what the state was required to prove in order for the jury to convict Petitioner, and Petitioner has not overcome the presumption that the jury understood and properly applied those instructions. As such, there is no basis for this Court to find, as Petitioner claims, that the jury imposed Petitioner's death sentence after convicting him of manslaughter or negligent homicide. Likewise, the trial court clearly and repeatedly informed the jury of the state's burden to prove Petitioner's guilt beyond a reasonable doubt, and

Petitioner has failed to establish that asking prospective jurors about their understanding of the state's burden would uncover some hidden bias. For these reasons, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief with respect to his claims regarding voir dire.

K. Claim that the Trial Court Failed to Remove Jurors that Were Predisposed in Favor of the Death Penalty

According to Petitioner, the trial court erred in failing to remove for cause two jurors – Leon Williams and William George McKiever – who Petitioner claims "were incapable of giving proper consideration to mitigating evidence or a sentence less than death."

Neither of those two individuals, however, served on Petitioner's jury. Under Georgia law, death penalty defendants are entitled to 42 qualified jurors, and the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal. Lively v. State, 421 S.E.2d 528 (Ga. 1992). Conversely, under federal constitutional law, if a biased panel member does not serve on the jury, Petitioner cannot have been prejudiced by the trial court's refusal to strike that individual for cause even though Petitioner was required to use a peremptory strike to avoid having that panel member serve. "[I]f [a] defendant elects to cure [a trial judge's

erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," the Supreme Court has held that the criminal defendant "has not been deprived of any . . . constitutional right." United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" demonstrates "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." Id. at 316; see also Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (rejecting "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury"). Because neither Mr. Williams nor Mr. McKiever served on Petitioner's jury, he cannot establish a claim under § 2254 based on the trial court's failure to remove those panel members for cause.

Moreover, as pointed out by Respondent, the Georgia Supreme Court ruled that Petitioner had abandoned this claim. Sealey, 593 S.E.2d at 338. A state court determination that a claim was abandoned bars review of that claim under § 2254, Brownlee v. Haley, 306 F.3d 1043, 1066–67 (11th Cir. 2002). Mr. McKeiver was removed for cause – albeit for having a felony conviction rather than for any bias indicated in his voir dire responses – and Petitioner cannot, therefore, demonstrate cause to overcome the procedural default as to that panel member. With respect to Mr. Williams, this Court agrees with Respondent's discussion, [Doc. 52 at 294-99], that

a review of Mr. Williams' entire voir dire testimony, rather than merely the cherry-picked statements cited by Petitioner, reveals that Mr. Williams intended to follow the law and consider all sentencing options in light of the evidence presented during the trial. As a result this Court concludes that the trial court did not abuse its discretion in finding him qualified. For these reasons, this Court concludes that Petitioner is not entitled to relief on his claim that the trial court erred in failing to strike certain jurors for cause.

L. Claim That the Trial Court Erred in Denying Petitioner's Motion for a Change of Venue

Citing various press reports regarding the murders of the Tubners and arguing that this media coverage influenced members of his jury, Petitioner claims that the trial court violated his rights to a fair trial by denying his motion for a change of venue. As Respondent points out and Petitioner admits, this claim is procedurally defaulted. Petitioner did not raise the claim on appeal, and when Petitioner raised it before the state habeas court, that court ruled that the claim was procedurally defaulted and that Petitioner had failed to demonstrate cause and prejudice to overcome the default. [Doc. 27-14 at 54-55]. It thus follows that the claim is procedurally barred before this Court.

Petitioner attempts to argue cause and prejudice by asserting that trial/appellate counsel was ineffective for failing to pursue the motion and failing to raise the claim in Petitioner's appeal. However, the Eleventh Circuit has recognized a strong presumption that counsel's decisions at trial constitute sound trial strategy, Jennings v. McDonough, 490 F.3d 1230, 1234 (11th Cir. 2007), and Petitioner has presented no evidence or argument to overcome that presumption and that might tend to show that trial counsel did not have a sound strategic reason for wanting to keep the case in Clayton County. Accordingly, Petitioner has failed to demonstrate cause to overcome the procedural bar, and he is not entitled to relief on his claim that the trial court erred in failing to grant his motion to change venue.

M. Claim that Petitioner was Incompetent During his Trial

In his Claim XV, Petitioner asserts two related claims (1) that he was not mentally competent to stand trial, and (2) that the trial court violated Petitioner's due process rights by failing to hold a competency hearing. The state habeas corpus court held that both of these claims were procedurally defaulted. [Doc. 27-14 at 56]. The first claim – that Petitioner was tried while incompetent – is not subject to procedural default under § 2254 review, Adams v. Wainwright, 764 F.2d 1356, 1359 (11th Cir. 1985), and is thus entitled to *de novo* review. The second claim, regarding the trial

court's failure to hold a competency hearing, is subject to procedural default. Because, as this Court determines below, Petitioner has failed to establish his incompetence at the time of his trial, Petitioner cannot establish prejudice to overcome procedural bar to the second claim.

The trial of an incompetent defendant violates his substantive due process rights under the Sixth and Fourteenth Amendments. Dusky v. United States, 362 U.S. 402, 402 (1960). "Competence to proceed to trial . . . requires the defendant to possess the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. Every defendant has a substantive fundamental right under the Due Process Clause not to be tried or convicted while incompetent." United States v. Wingo, 789 F.3d 1226, 1234–35 (11th Cir. 2015). However, "not every manifestation of mental illness demonstrates incompetence to stand trial." Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir. 1995) ("[N]either low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial.").

In Lawrence v. Sec., Florida Dept. of Corrections, 700 F.3d 464, 481 (11th Cir. 2012), the Eleventh Circuit evaluated a claim that a § 2254 petitioner, Lawrence, was incompetent to stand trial and sought an evidentiary hearing to prove it. According to the Eleventh Circuit:

> In advancing his substantive competency claim, Lawrence "is entitled to no presumption of incompetency and must demonstrate his . . . incompetency by a preponderance of the evidence." James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992). Relatedly, we have said that in order to be entitled to an evidentiary hearing on a substantive competency claim, which Lawrence seeks here, a petitioner must present "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his competence. Id. at 1573; accord Medina, 59 F.3d at 1106; Card v. Singletary, 981 F.2d 481, 484 (11th Cir. 1992) ("The standard of proof is high. The facts must positively, unequivocally and clearly generate the legitimate doubt." (alterations and quotation marks omitted)).

Lawrence v. Sec., Florida Dept. of Corrections, 700 F.3d 464, 481 (11th Cir. 2012).

According to Petitioner, the psychiatrist who interviewed Petitioner prior to his trial stated that "there was 'something very wrong' with Petitioner, that he was 'extremely paranoid,' unable to focus, and possibly decompensating." [Doc. 47 at 192]. The psychiatrist noted that Petitioner "likely suffered from an organic brain problem that originated sometime in his early childhood." [Id.]. A neuropsychologist examined Petitioner prior to the state habeas corpus proceedings and "concluded that Petitioner suffered from 'organic brain syndrome and borderline mental retardation of intellectual functions.'" [Id.]. Experts testified that Petitioner's IQ was in the mid-70s to low 80s and that he was impaired. [Id. at 192-93].

This evidence falls short of meeting the standard discussed in Lawrence for obtaining a hearing or establishing incompetence. In Wright v. Secretary for Department of Corrections, 278 F.3d 1245 (11th Cir. 2002), cited in Lawrence, the

Eleventh Circuit held that the petitioner's chronic schizophrenia was "not enough to create a real, substantial, and legitimate doubt as to whether he was competent to stand trial," even though the petitioner had been deemed incompetent to stand trial seven and eight months after his trial, as well as seventeen years prior to his trial. Id. at 1259. These facts did not counter the best evidence of what his mental condition was at the time of trial: his behavior during that time and how he related to and communicated with others then. Id. Based on evidence that the petitioner behaved in a "perfectly normal fashion" leading up to trial and during trial, the court held that his substantive competency claim failed on the merits. Id.

In Petitioner's case, a review of the transcript of the two hearings held a week before the trial demonstrate Petitioner's competence. Those hearings are described more fully above in relation to Petitioner's claim that the trial court violated his right to represent himself. See supra discussion at § 4.B. From a review of the transcripts of those hearings, [see Docs. 16-30 at 4-31; 16-31 at 2-19], it is abundantly clear that Petitioner fully understood the nature of the proceedings against him and that he was capable of assisting his trial counsel in his defense.[4] At those hearings Petitioner

[4] Petitioner points to his attempt to dismiss trial counsel and represent himself just a week before trial as evidence of his "increasingly paranoid and irrational behavior." [Doc. 47 at 193]. However, paranoia and irrationality are not the standard. It does not matter that Petitioner might have made bad choices or that he did not agree with trial counsel about how to defend the case.

conversed cogently with the trial judge; he indicated that he had called several attorneys in an attempt to find someone to act as standby counsel; he obviously understood the proceedings; and he demonstrated his ability to assist in his defense by virtue of the fact that he discussed his dissatisfaction with trial counsel for failing to properly investigate purported exculpatory evidence that he had told trial counsel about. Put simply, Petitioner has failed to meet his burden to demonstrate that he was incompetent at the time of his trial.

N. Claims Regarding the Trial Courts Instructions to the Jury

Petitioner claims that the trial court's instructions to the jury at the close of both phases of the trial violated his constitutional rights. Petitioner's arguments, however, are decidedly conclusory in nature. He does little more than point to seven instructions and provide a brief argument that the instructions "failed to ensure that the death sentence was imposed consistent with the statutory sentencing scheme upon which the constitutionality of the Georgia death penalty is premised." [Doc. 47 at 197]. He then provides a string of citations to cases that tangentially relate to a few the instructions that he challenges. Otherwise, Petitioner neglects to provide sufficient substantive argument to explain why a particular instruction failed to meet constitutional

requirements as set by the Supreme Court (or any other court). As noted above, this Court may not provide Petitioner's theory of liability for him. Fils, 647 F.3d at 1284.

This Court has reviewed the jury instructions from both phases of the trial and concludes that, when each is read in its entirety, the instructions fully satisfy the requirements of the Constitution. This Court further credits the discussion of Respondent regarding the specific instructions that Petitioner challenges. [Doc. 52 at 330-39]. In summary, this Court concludes that Petitioner has failed to establish that he is entitled to relief with respect to his claim that the trial court erred in instructing the jury.

O. Claims Regarding Prosecutorial Misconduct

Petitioner raises various instances of what he refers to as prosecutorial misconduct. He contends that prosecutors (1) improperly introduced inflammatory testimony and photographs, (2) raised improper arguments during his closing argument at the penalty phase of the trial, (3) introduced evidence of prior crimes in an attempt to show that Petitioner had committed those crimes even though he was not convicted of them, and (4) that a prosecutor had a conflict of interest.[5]

[5] In the section of his brief raising these claims, Petitioner also complains that the prosecution improperly introduced prejudicial victim impact testimony. However, he does not discuss or cite to any victim impact testimony that purportedly violated his

The claims numbered 1 and 3 above raise evidentiary issues rather than issues of prosecutorial misconduct. Evidentiary rulings in state court are generally a matter of state, not constitutional, law, Cronnon v. State of Ala., 587 F.2d 246, 250 (5th Cir. 1979) ("The mere violation of evidentiary rules by the state trial court does not in itself invoke habeas corpus relief, but only where the violation of the state's evidentiary rules results in a denial of fundamental fairness should habeas be granted.") (quotation and citation omitted), and this Court reviews state court evidentiary rulings in a § 2254 habeas corpus proceeding to determine only "'whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial.'" Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (quoting Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983)). Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a "'crucial, critical, highly significant factor'" in the outcome of the proceeding. Williams v. Kemp, 846 F.2d 1276, 1281 (11th Cir. 1988) (quoting Jameson v. Wainwright, 719 F.2d 1125, 1126-27 (11th Cir. 1983)). In order to demonstrate that he is entitled to relief, Petitioner must show that the evidence was inflammatory or gruesome and so critical that its introduction denied petitioner a fundamentally fair trial. Futch v. Dugger, 874 F.2d at 1487; see also Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) ("An evidentiary error does not justify

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rights.

habeas relief unless the violation results in a denial of fundamental fairness."). Moreover, the limits placed on the admission of evidence during the guilt phase of a criminal trial are significantly relaxed during sentencing. United States v. Watts, 519 U.S. 148, 151 (1997).

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. People of State of N.Y., 337 U.S. 241, 246 (1949) (footnotes omitted).

> Highly relevant – if not essential – to [a sentencer's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a [sentencer] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id. at 247.

The Supreme Court has made it clear that in order to achieve required "heightened reliability[ ]" during the penalty phase of a capital case, more evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors." Gregg v. Georgia, 428 U.S. 153, 203-04 (1976). The Supreme Court has further stated that "consideration of a defendant's past conduct as indicative of his

probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a person's probable future conduct when it engages in the process of determining what punishment to impose.' " Skipper v. South Carolina, 476 U.S. 1, 5 (1986) quoting Jurek v. Texas, 428 U.S. 262, 275 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

1. Victim Photograph Evidence

With respect to the victim photographs that the prosecution put into evidence, Petitioner complains that the nearly fifty photographs of the victims were too graphic and too many. The state habeas corpus court concluded that this claim was procedurally defaulted before that court. [Doc. 27-14 at 57]. In attempting to establish cause and prejudice to raise the procedural bar in this Court, Petitioner asserts a claim of ineffective assistance of counsel for failing to object to the introduction of the photographs. However, Petitioner cannot demonstrate that his trial counsel was ineffective as he cannot demonstrate prejudice. It is clear that any objection by trial counsel would have been properly overruled as such photographs are routinely shown to the jury in homicide cases.

The relevance of such photographs is without question. Photographs of homicide victims are relevant in showing the identity of the victim, the manner of death, the

murder weapon, or any other element of the crime. United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986), overruled on other grounds, United States v. De Parias, 805 F.2d 1447 (11th Cir. 1986). To the degree that Petitioner complains that the number and graphic nature of the photographs rendered the guilt/innocence phase of his trial unfair, this Court responds that the evidence of Petitioner's guilt was so overwhelming that the photographs could not have been a critical or significant factor in his conviction. Williams v. Kemp, 846 F.2d at 1281.

As to Petitioner's complaint that the photographs improperly influenced the jury's sentencing decision, as noted, the range of evidence permitted for penalty purposes is much broader. In the case of these photographs, this Court agrees that the jury should be permitted to see, in graphic form, the horrific nature of Petitioner's crimes. See Ramey v. State, 298 S.E.2d 503, 505 (Ga. 1983) (Weltner, J., dissenting) ("It is true that photographs of such an undertaking will be gory because the truth itself is gory. Nor may the author of carnage rightfully complain when the jury is exposed properly to an accurate depiction of his work.").

2. Prior Crime Evidence

Turning to the evidence of prior, unadjudicated crimes, during the penalty phase of the trial, the prosecution presented the testimony of a witness who had owned a

jewelry store in Atlanta. The upshot of this testimony was that Petitioner had used a stolen credit card to purchase some jewelry. Further witness testimony established that the man to whom the credit card had belonged, William Kerry, had been attacked and murdered in a fairly brutal fashion in his apartment and that his credit cards and other property had been stolen. Petitioner had used the stolen credit card at the jewelry store on the same day that Mr. Kerry was murdered, the implication being that Petitioner murdered Mr. Kerry and stole his credit cards. Testimony included the medical examiner who testified in fairly graphic fashion regarding Mr. Kerry's injuries and the cause of his death, and pictures of Mr. Kerry's body were shown to the jury. [See generally Docs. 17-21, 17-22]. It appears that Petitioner was not charged with or convicted of any crime in relation to the murder or the theft or use of the credit cards.

The prosecution also presented the testimony of a woman who said that Petitioner had invited her to his apartment where he had held a gun to her head and raped her. A police officer testified that Petitioner was arrested for the rape, and that a preliminary hearing was scheduled, but it is not clear what happened at that hearing. [Id.]. Petitioner likewise was not convicted of any charges in relation to the alleged rape. Additionally, the prosecution also called several witnesses to the stand to testify regarding Petitioner's misconduct while in prision.

With respect to the murder of William Kerry, the Georgia Supreme Court addressed the issue in affirming Petitioner's conviction and sentence:

> The trial court did not err in admitting evidence in the sentencing phase showing that [Petitioner] had illegally used a man's credit card shortly after the man's murder. Reliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial. The evidence of [Petitioner]'s illegal use of the man's credit card was clearly reliable, and we conclude from our review of the record that the connection between [Petitioner] and the man's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury. Furthermore, although the charge was erroneous, we also note that the jury was charged that it was not permitted to consider non-statutory aggravating circumstances unless they were first proven beyond a reasonable doubt.

Sealey, 593 S.E.2d at 339 (quotations, alterations, and citations omitted).

With respect to the state court's finding that the connection between Petitioner and Mr. Kerry's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury, Petitioner has not even attempted to present clear and convincing evidence to overcome the § 2254(e)(1) presumption of correctness of that finding. Accordingly, this Court must defer to that finding and the conclusion that necessarily follows therefrom that the evidence of the murder was relevant and properly introduced.

With regard to the rape allegation, Petitioner did not raise this claim on appeal, and as such, the claim was procedurally defaulted before the state habeas corpus court[6] and is barred before this Court, and Petitioner cannot demonstrate prejudice to overcome the default. As noted by Respondent, Petitioner's argument is premised upon his assertion that prior crimes cannot be presented absent a conviction, and there simply is no Supreme Court or Eleventh Circuit precedent supporting that argument. The rape allegation was made by the purported victim who obviously would have had first-hand knowledge. The witness was subject to cross examination, and trial counsel had ample opportunity to cast doubt on her testimony during closing argument. In short, there is no basis for this Court to determine that the evidence was presented in violation of Petitioner's constitutional rights.

Finally, with respect to the prison discipline testimony, that type of testimony is clearly relevant to Petitioner's future dangerousness and his ability to adapt to prison life, and this Court finds no error in the trial court permitting the testimony.

3. Improper Prosecutorial Argument

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[6] Petitioner did not brief the portion of the claim relating to the rape accusation in his state habeas corpus brief, and the state court did not fully address it other than stating that, to the degree that a portion of the claim was not raised on appeal, it would be procedurally defaulted. [Doc. 27-14 at 26 n.2].

Under a heading that refers to victim impact evidence, Petitioner asserts that, during closing argument, the prosecutor made a variety of improper and prejudicial arguments that deprived Petitioner of his constitutional rights. It is undisputed that Petitioner never raised this claim before the state courts, and the claim is unexhausted and barred from consideration before this Court. Snowden, 135 F.3d at 736. Petitioner makes no argument that cause and prejudice should excuse the default.

Moreover, this Court has reviewed the prosecution's closing argument from both phases of the trial and concludes that nothing therein violated Petitioner's constitutional rights.

4. Conflict of Interest

According to Petitioner, one of the attorneys on the staff of the Clayton County District Attorney, Jack Jennings, might have represented Petitioner in a prior criminal matter.[7] The trial court held a hearing on Petitioner's motion to recuse the Clayton County District Attorney. [See Doc. 13-21]. At the hearing Mr. Jennings testified that

[7] Petitioner claims that Mr. Jennings represented Petitioner in two prior matters. However, Petitioner has not provided citation to anything in the record to show that there actually were two matters. As stated in the text, Mr. Jennings only testified to discussing one case with Petitioner, and he had no recollection of actually working on Petitioner's behalf on the case. The Georgia Supreme Court indicated that there were two matters, but, again there is no evidence to support that supposition, and the state court might have been simply parroting what Petitioner had claimed in his appeal.

he vaguely remembered working with Petitioner on a prior murder charge, but the representation (if it could be called a representation) was limited, and Mr. Jennings did not remember anything other than briefly discussing the case with Petitioner. He did not recall representing Petitioner in court or filing a notice of appearance on Petitioner's behalf. [Id. at 6, 10]. After hearing argument and reviewing case law, the trial court denied the motion to recuse in a ruling grounded in state law. Petitioner raised this claim in his appeal under state law and the guidelines of the American Bar Association. In affirming, the Georgia Supreme Court held:

> [Petitioner] argues that the entire office of the district attorney should have been disqualified because one assistant district attorney, while previously in private practice, had represented [Petitioner] in two unrelated criminal cases. Because the record confirms that the assistant district attorney was properly "screened from any direct or indirect participation" in [Petitioner]'s prosecution in this case, the trial court did not err in allowing other members of the district attorney's office to continue in the case.

Sealey, 593 S.E.2d at 338 (citation omitted).

Petitioner did not raise a claim relating to the prosecution's purported conflict in his state habeas corpus petition.

Respondent is correct that this claim is unexhausted and therefore procedurally barred before this Court because Petitioner raised this claim only on state law grounds before the Georgia Supreme Court and did not rely on federal constitutional law. Baldwin v. Reese, 541 U.S. 27, 32 (2004) (§ 2254 petitioner must alert state court of

"presence of a federal claim" in order to exhaust). Moreover, based on the facts in the record, there is no basis to conclude that the trial court's denial of Petitioner's motion to recuse rendered his trial fundamentally unfair or otherwise impinged on Petitioner's federal rights. Mr. Jennings barely remembered Petitioner knew nothing incriminating about Petitioner that was not in the public record, and the trial court prohibited Mr. Jennings from participating in Petitioner's case in any manner.

P. Claim that Statutory Aggravating Circumstances Under O.C.G.A. §§ 17-10-30(b)(2) and (b)(7), Are Unconstitutionally Vague and Arbitrary

Petitioner very briefly argues that the statutory aggravating circumstances found by the jury do not narrow the class of persons eligible for the death penalty or reasonably justify the imposition of a death sentence on Petitioner when compared to others found guilty of murder because the aggravating circumstances as written in the statute are vague and overbroad. The two aggravating circumstances found by the jury are found in O.C.G.A. §§ 17-10-30(b)(2) and (b)(7). They state that the death penalty may be imposed if the jury finds that:

> The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary in any degree or arson in the first degree;

O.C.G.A. § 17-10-30(b)(2).

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

O.C.G.A. § 17-10-30(b)(7).

Petitioner first faults the aggravating factor in § 17-10-30(b)(2) because it is "ostensibly applicable to all felony murders." [Doc. 47 at 218]. However, this assertion is simply incorrect. Felony murder under Georgia law occurs when, in the commission of *any* felony the defendant causes the death of another human being. O.C.G.A. § 16-5-1. The § 17-10-30(b)(2) aggravating circumstance arises only when a limited set of enumerated felonies are committed along with the death. This Court thus concludes that the § 17-10-30(b)(2) aggravated circumstance as written meets the requirements of Zant v. Stephens, 462 U.S. 862, 877 (1983).

Petitioner's argument about the § 17-10-30(b)(7) aggravating circumstance is that it "could potentially be used to sentence any person who commits murder to death [because it] is hard to imagine a murder that is not 'horrible' or 'inhuman.'" [Doc. 47 at 218]. In this instance, Petitioner misreads (or ignores part of) the statutory language. This aggravated circumstance requires more than a finding that the murder was inhuman. It further requires a finding that the murder involved torture, depravity of mind, or an aggravated battery to the victim. Again, this Court concludes that the

§ 17-10-30(b)(7) aggravated circumstance as written meets the requirements of Zant. As a result, Petitioner is not entitled to relief as to this claim.

Q. Claim that Death Penalty as Applied in Georgia Violates Equal Protection

Petitioner asserts that Georgia's application of the death penalty violates Bush v. Gore, 531 U.S. 98 (2000), which, according to Petitioner, held that when a fundamental right is at stake, due process requires states to have uniform and specific standards to prevent the arbitrary and disparate treatment of similarly-situated citizens. [Doc. 47 at 219]. According to Petitioner, the unfettered discretion of prosecutors in determining whether to pursue a death sentence results in arbitrary and unequal treatment. Petitioner further points to cases which he claims were at least as aggravated as his case where the defendants did not receive the death penalty. This claim is materially identical to the petitioner's claim in Crowe v. Terry, 426 F. Supp. 2d 1310, 1354 (N.D. Ga. 2005). In that case, the Honorable Orinda D. Evans, District Judge of this Court, provided an extensive discussion in denying relief on that claim in which she pointed out that the system that the Supreme Court criticized in Bush applied a system for recounting ballots where the rules for determining voter intent "varied from county to county and 'within a single county from one recount team to another.'" Id. (quoting Bush, 531 U.S. at 106). Judge Evans then noted that, in the

case of prosecutorial discretion in determining whether to pursue the death penalty, "no similar risk of unequal treatment is involved." Id. at 1354-55.

> It is true that Georgia prosecutors have discretion to seek the death penalty; however, "[d]iscretion is essential to the criminal justice process [and thus] we would demand exceptionally clear proof before we would infer that the discretion has been abused." McCleskey v. Kemp, 481 U.S. 279, 297 (1987):
>
> > [T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.' . . . Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States and Georgia laws permit imposition of the death penalty.
>
> Id. at 296-97.

Crowe, 426 F. Supp. 2d at 1355.

Here, the jury found Petitioner guilty of murder and further concluded the existence of several statutory aggravating circumstances. Accordingly, the prosecutor's decision to seek the death penalty was consistent with Georgia law and was not arbitrary.

As also pointed out by Judge Evans, the Supreme Court in Gregg expressly upheld Georgia's death penalty system, rejecting a claim that the system was unconstitutional because of a prosecutor's "unfettered authority to select those persons

whom he wishes to prosecute for a capital offense." Gregg, 428 U.S. at 199. In Gregg, the Court upheld Georgia's death penalty scheme because Georgia limits the risk of arbitrary and capricious action by bifurcating the sentencing proceeding, requiring a finding of at least one aggravating circumstance, allowing the defendant to introduce mitigating evidence, requiring an inquiry into the circumstances of the offense and the propensities of the offender, and providing for automatic, mandatory appeal. The Supreme Court further explained:

> [T]he existence of [ ] discretionary stages is not determinative of the issue . . . At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty . . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution . . . . In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant . . . . Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today.

Id. at 199-200 n. 50; See also Proffitt v. Florida, 428 U.S. 242, 253 (1976) (rejecting a petitioner's contention that the Florida death penalty system is arbitrary because the prosecutor decides whether to charge a capital offense and accept or reject a plea to a lesser offense).

In response to Petitioner's contention that murders committed by other defendants which were at least as aggravated as his crimes did not result in the death penalty, this Court notes that the Georgia Supreme Court held that

> Considering both the defendant and the clearly egregious facts of this torture and double murder case, we conclude that [Petitioner]'s death sentences are not excessive or disproportionate punishment as compared to the penalty imposed in similar cases.

Sealey, 593 S.E.2d at 339 (citing O.C.G.A. § 17-10-35(c)(3)). This Court must defer to this factual determination because Petitioner has not put forth clear and convincing evidence to demonstrate that the state court was incorrect. 28 U.S.C. § 2254(e)(1); see Crowe, 426 F. Supp. 2d at 1355.

R. Claim that Execution in this Case Would Violate the Eighth Amendment Because of Petitioner's History in Prison and His Mental Status

According to Petitioner, his incarceration from the ages of 17 to 30, had a "profound effect on his cognitive growth and mental capacity." [Doc. 47 at 225]. While in prison, he claims that he was subjected to "physical and emotional violence, staff corruption, and casual brutality," and prison officials did nothing to ameliorate these conditions. [Id.]. Petitioner also faults prison officials for failing to rehabilitate him. [Id.]. Thus, according to Petitioner, "[t]he State's execution of Petitioner in light

of the partial responsibility of other State actors at the United States Bureau of Prisons for the mental defects and maladaptive behaviors that led to his crime would be cruel, unusual, and disproportionate" in violation of the Eighth Amendment and Petitioner's due process rights. [Id. at 226].

> The state habeas corpus court concluded that this claim was not cognizable.
>
> > As there is no constitutional protection from the death penalty for career criminals, this claim fails to raise a constitutional issue for this Court's review.
> >
> > To the extent Petitioner is alleging he suffers from a mental illness due to this incarceration, there is also no constitutional protection from the death penalty for mentally ill offenders. While Georgia and federal law provide that a person who is mentally retarded may not be executed, see O.C.G.A. § 17-7-131(j); Fleming v. State, 259 Ga. 687 (1989); Atkins v. Virginia, 536 U.S. 304 (2002), Georgia law expressly does not preclude a death sentence for someone with a mental illness. See O.C.G.A. § 17-7-131. The Georgia Supreme Court held in Lewis v. State that "unlike a verdict of guilty but mentally retarded, the statute that provides for a verdict of guilty but mentally ill does not preclude a death sentence as a result of such verdict." 279 Ga. 756, 764 (2005), cert. denied, 126 S. Ct. 1917 (2006).
> >
> > Therefore, because Petitioner's sentence does not violate the Eighth Amendment or state a claim challenging a constitutional right violate [sic] at trial, it is non-cognizable.

[Doc. 27-14 at 51-52].

Other than stating without citation or further argument that the claim is "plainly cognizable," [Doc. 47 at 226], Petitioner has said nothing that would overcome the deference that the state court's conclusion enjoys under § 2254(d), and, in any event,

this Court wholly agrees with the state court. Accordingly, Petitioner is not entitled to relief on this claim, and his request for discovery with respect to this claim is denied.

S. Claim that Petitioner's Execution Would Violate the Eighth Amendment Because he is the Equivalent of a Juvenile or Mentally Retarded Offender

In a claim similar to the one just discussed, Petitioner asserts that his execution would violate the Eighth Amendment because he has a "below average" IQ and "his cognitive growth and mental capacity were severely impacted by his incarceration." Petitioner claims he "never really progressed beyond the mental capacity he possessed at the time of his incarceration at seventeen. As such, while his chronological age is that of a mature man, his mental capacity is that of a teenager." [Doc. 47 at 230].

The Supreme Court has prohibited the execution of the mentally retarded, Atkins v. Virginia, 536 U.S. 304 (2002), and those who were under the age of eighteen at the time that they committed their crimes, Roper v. Simmons, 543 U.S. 551(2005). However, Petitioner is not mentally retarded, and he was 36 years of age when he committed the murders for which he received his death sentence, and no court has concluded that one who has the demeanor of a minor and/or a mentally retarded individual, but is in fact neither, is not eligible for the death penalty, and this Court is not convinced by Petitioner's arguments to arrive at such a holding.

More devastating to Petitioner's claim is the fact that the state habeas corpus court found that the IQ test results produced by Petitioner's expert witness were unreliable, [Doc. 27-14 at 61], and Petitioner has not presented clear and convincing evidence to refute this finding. The state court further credited Respondent's expert's testimony that Petitioner's intelligence was well above borderline. [Id. at 62-63]. As a result, even if this Court were to agree that this claim is cognizable, Petitioner has no evidentiary basis to establish that he suffers from significantly diminished intelligence. This Court thus concludes that Petitioner is not entitled to relief on this claim.

T. Claim that Georgia's Lethal Injection Protocol Subjects Petitioner to a High Risk of an Eighth Amendment Violation

In his Claim V, Petitioner asserts that Georgia's lethal injection protocols put him at serious risk of being subjected to cruel and unusual punishment in violation of the Eighth Amendment. However, claims raising challenges to lethal injection procedures should be brought under 42 U.S.C. § 1983 rather than in a habeas corpus proceeding. Tompkins v. Secretary, Dept. of Corrections, 557 F.3d 1257, 1261 (11th Cir. 2009) ("A § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures."). This is especially relevant in light of the well-documented problems that states, including Georgia, have encountered obtaining the

drugs necessary for lethal injections and the changes that Georgia has made in its lethal injection protocol. See generally, Bill Rankin, et al., Death Penalty, Atl. J. Const., Feb. 17, 2014 at A1 (discussing the increasing reluctance of drug manufacturers and compounding pharmacies to supply drugs for executions); DeYoung v. Owens, 646 F.3d 1319, 1323 (11th Cir. 2011). It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court. This Court also points out that bringing this claim under § 1983 would likely work to Petitioner's substantial advantage because he will be able to conduct discovery without leave of court, and he will be more likely to have a hearing. Accordingly, Petitioner's challenge to Georgia's lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

U. Cumulative Error Analysis

Finally, Petitioner asserts that the cumulative effect of the unconstitutional incidents at Petitioner's capital trial served to deprive him of his right to a fair trial. Cumulative error analysis addresses the possibility that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." United States v. Rosario Fuentez, 231 F.3d 700, 709 (10th Cir. 2000). However, in order for a court to perform a cumulative error

analysis, there first must be multiple errors to analyze, and this Court has not identified such error. Accordingly, Petitioner is not entitled to relief with respect to this claim.

Conclusion

Having considered all of Petitioner's claims, this Court concludes that Petitioner has failed to establish any entitlement to relief under 28 U.S.C. § 2254. As such, his petition for a writ of habeas corpus is **DENIED** (except that Petitioner's claim regarding Georgia's lethal injection protocol is **DENIED** without prejudice to his raising the claim in a proceeding under 42 U.S.C. § 1983). This matter is hereby **DISMISSED**, and the Clerk is **DIRECTED** to **CLOSE** this action.

IT IS SO ORDERED, this 9th day of November, 2017.

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

SUPREME COURT OF GEORGIA
Case No. S13E0141

Atlanta, June 17, 2013

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

RICHARD L. SEALEY v. STEPHEN UPTON, WARDEN

From the Superior Court of Butts County.

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

Trial Court Case No. 2004V898

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Pamela M. Fishbourne, Deputy Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RICHARD SEALEY,	)	
	)	
PETITIONER,	)	CIVIL ACTION
	)	
VS.	)	FILE NO. 2004-V-898
	)	
STEPHEN UPTON, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,	)	HABEAS CORPUS
	)	
RESPONDENT.	)	

Filed 7/30 2012 at 10:30 A.M.
Rhonda Smith
Clerk, Butts Superior Court

ORDER

The within matter came before the Court on Petitioner's petition and amended petition for Writ Of Habeas Corpus as to his conviction and sentence in the Superior Court of Clayton County, Georgia. The parties being present and represented by counsel and the Court having reviewed all pleadings, relevant portions of the appellate record, evidence admitted at the hearing and the argument of counsel and briefs thereon the Court makes the following findings of fact and conclusions of law.

PROCEDURAL HISTORY

Trial Proceedings In Clayton County Superior Court

Petitioner, Richard Lester Sealey, was convicted by a jury of two counts of malice murder, fourteen counts of felony murder, two counts of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon. The felony murder convictions were vacated by operation of law. On August 27, 2002, Petitioner was sentenced to death for each of the two counts of malice murder and finding beyond a reasonable doubt that the murders of Fannie Mae and John Tubner was

outrageously or wantonly vile, horrible or inhuman in that it involved the torture of the victims, depravity of mind and an aggravated battery to the victims, that the murders were both committed for the purpose of receiving money or any other thing of monetary value, that the murder of Mr. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery and aggravated battery, and that the murder of Ms. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery, aggravated battery, and kidnapping with bodily injury. Petitioner also received three five-year prison terms to run consecutively to the death sentences and concurrently with each other for the two counts of possession of a firearm during the commission of a crime and the one count of possession of a firearm by a convicted felon.

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> Sealey contacted his friend Gregory Fahie by telephone asking for a ride. Fahie asked his friend, Wajaka Battiste, to drive to Sealey's motel and then to drive Fahie and Fahie's juvenile girlfriend, Deandrea Carter, to Carter's grandparents' house. Upon arriving at Carter's grandparents' house, Sealey, Carter, and Fahie went inside, while Battiste waited in the car listening to music. While he was in a downstairs bathroom, Fahie first heard a loud noise and then heard Carter knocking on the bathroom door and stating that Sealey was "tripping." Fahie exited the bathroom and observed Mr. Tubner lying in a pool of blood and Sealey holding Ms. Tubner down and wielding a handgun he had taken from Mr. Tubner. Sealey dragged Ms.Tubner, who had been bound with duct tape, to an upstairs bedroom. Sealey instructed Fahie to search for money, however, when no money was discovered, Sealey instructed Carter to heat a fireplace poker with which Sealey tortured Ms. Tubner in an effort to force her to reveal where she kept her money. Sealey then instructed Carter to find a hammer so he could kill the victims. Carter returned with an ax. Sealey struck Ms. Tubner multiple times in the head with the ax and then went downstairs and did the same to Mr.Tubner, who had crawled a short distance across the living room. Once back in Battiste's automobile, Sealey stated that he "had to do it" because the victims had seen their faces and further stated that the victims deserved to die because they had mistreated Carter's mother in the past. Sealey instructed Battiste never to reveal that he had seen Sealey and then added, "I will out your lights."

> The evidence presented in the guilt/innocence phase included the testimony of Fahie and Battiste, Mr. Tubner's handgun and jewelry that had been discovered in Sealey's motel room, and testimony about the detection of protein residue consistent with blood on the floor and sink of Sealey's motel bathroom.

Sealey v. State, 277 Ga. 617, 617-618, 593 S.E.2d 335 (2004).

Petitioner's motion for new trial, as admitted, was denied by the Court. The Georgia Supreme Court affirmed the convictions and sentence of death. No further actions were pursued in the Georgia Supreme Court nor was petition made to the United States Supreme Court.

Petitioner filed the present petition as amended and hearing was held on the case.

Petitioner contends that in nine areas of the trial proceedings trial counsel was ineffective and constitutional violations occurred in the trial. Petitioner contends as follows: (1) Ineffective assistance of counsel at the guilt/innocence phase. (2) Ineffective assistance of counsel for the sentencing phase. (3) Ineffective assistance of counsel on the direct appeal. (4) Trial counsel labored under an actual conflict of interest. (5) Alleged juror misconduct. (6) The sentence and verdict and court's instructions on sentence were constitutionaly deficient. (7) The State failed in its duty to rehabilitate the Petitioner. (8) Certain specific constitutional violations. (9) The presence of new evidence.

The standard for review of ineffective assistance of counsel claims were enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668.

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

> whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687.

Under the first prong, Petitioner must demonstrate that counsel's performance falls below an objective standard of reasonableness under the prevailing professional norms. Under the second prong the test is whether there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different.

The Georgia Supreme Court adopted the framework set forth in Strickland and its progeny in considering ineffective assistance of counsel claims and stated that such claims must "address not what is prudent or appropriate, but only what is constitutionally compelled." Zant v. Moon, 264 Ga. at 95-96 (quoting Burger v. Kemp, 483 U.S. 776, 780 (1987)).

Additionally, "when reviewing whether an attorney is ineffective, courts 'should always presume strongly that counsel's performance was reasonable and adequate.' Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992). Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. In Jefferson v. Zant, the Georgia Supreme Court stated:

> The test for reasonable attorney performance has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial....

Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993)(citation omitted).

Also, it is important to note, that the United States Supreme Court has not held that noncompliance with the provisions of the ABA's suggested guidelines for attorney performance in capital cases mandates a finding of deficient performance. Rather, the Court has simply held, consistent with its prior holding in Strickland v. Washington, that such standards are only to be used as guides in determining whether an attorney's performance in a particular case was objectively reasonable, but that the ultimate determination regarding the reasonableness of an attorney's performance "must be directly assessed for reasonableness" considering "*all the circumstances*" of counsel's representation. Wiggins v. Smith, 538 U.S. at 533, citing Strickland, 466 U.S. at 691). (Emphasis added). "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland, 466 U.S. at 688-689.

1. Petitioner claims that trial counsel was ineffective during the guilt/innocence phase of the trial.

Petitioner first claims that trial counsel was ineffective in their initial qualifications, their failure to request a change of venue, their failure to obtain a trial instruction as to the defendant's right not to testify and their failure not to request sequestration of the jury.

1(a) Trial Counsel's Qualifications

John Beall was lead counsel and Joseph Lee Roberto sat second chair.

Mr. Beall was admitted to the bar in 1984 and has tried nearly 20 murder cases. He has been involved in approximately 33 death penalty cases of which he was first or

second chair on six to eight cases. He has attended and lectured at various death penalty seminars. He has tried four death penalty cases before the present case and has had at least two cases where the death penalty was not given.

Mr. Roberto was admitted to the bar in 1992. He has had approximately 10 murder cases that did not go to trial and was lead counsel on five cases that were tried. He was second chair on two death penalty cases prior to the current case.

In addition to trial counsel, Petitioner was also assisted by Jodi Monogue, a paralegal in Mr. Roberto's firm, Mr. Beall's entire office staff, including Jeremy Salter, a paralegal who is now an attorney in Mr. Beall's office, and Rebecca Raymer, another paralegal from Mr. Beall's office. (HT 3:333-335, 342, 367, 469-471; RX 214, 3:17,877; RX 215, 63:17,971-973). Trial counsel also hired a local investigator, Andrew Pennington, and an investigator in St. Criox, Petitioner's homeland, Dennis Sheraw. (HT 3:358; RX 215, 63:17,977; RX 31, 37:11,244-249). Additionally, trial counsel hired a mental health expert, Dr. Jack Farrar to evaluate Petitioner prior to trial. (HT 3:382-384; RX 214, 63:17,882-883; RX 40-45, 37:11,277-301). Also, Dr. Barbara Wolf, a forensic pathologist, was hired to assist with forensic evidence; a jury consultant was hired to assist with voir dire; Walter Maddox, a polygraph expert, and possibly some assistance from John Ellis, a client liaison, from the Multi-County Public Defender's Office. (HT 3:366-367, 338, 339-340, 365-366; RX 214, 63:17,875, 17,892-893; RX 215, 63:17,977; RX 36, 37:11,264; RX 33, 37:11,251-253; RX 47-49, 37:11,305-314).

Further, Mr. Beall testified that he consulted with the Georgia Resource Center, the Southern Center for Human Rights and Mr. Beall's files also show he consulted with

Michael Mears of the Multi-County Public Defender's Office. (HT 3:335-336, RX 214, 63:17,874-875; RX 15, 37:11,098).

The evidence presented is that trial counsel and the defense team were qualified to handled the issues in this case.

1(b) *Motion For Change Of Venue*

Petitioner alleges that trial counsel were ineffective for not pursuing their change of venue motion, however, Petitioner has failed to prove that a change of venue was required. "To justify a change of venue, a defendant must show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of individual jurors. Cromartie v. State, 270 Ga. 780, 782, 514 S.E.2d 205 (1999) (quoting Barnes); See, e.g., Jones v. State, 261 Ga. 666, 409 S.E.2d 642 (1991). (defendant in a death penalty case must make "a substantial showing of the likelihood of prejudice by reason of extensive publicity" in order to secure a change of venue); Barnes v. State, 269 Ga. 345(2), 496 S.E.2d 674 (1998) (revsd. on other grounds).

In considering whether the trial setting was inherently prejudicial as a result of pretrial publicity, factors to be considered include the size of the community, whether the media coverage was extensive, the proximity of the coverage to the time of trial, and the nature of the coverage, especially whether the coverage was inaccurate, inflammatory or reflective of an atmosphere of hostility. See, e.g., Cromartie, 270 Ga. at 782; Barnes, 269 Ga. at 347-348 (citing Chancey v. State, 256 Ga. 415(5), 349 S.E.2d 717 (1986)). Further, in order to show actual juror bias, the defendant "must demonstrate that a high percentage of jurors had actual knowledge or had formed opinions about the case based on what they had seen or heard, or that there was a relatively high excusal rate." Barnes,

269 Ga. at 348 (citing Jones, 267 Ga. at (1)(a)). Petitioner's only argument in support of this claim is a cite to a few newspaper articles reporting on Petitioner's crimes. This does not meet the standard set forth above by the Georgia Supreme Court.

Therefore, as Petitioner has failed to prove that a change of venue was required by law, he has also failed to show that trial counsel were ineffective for not securing a change of venue and this portion of Petitioner's ineffective assistance claim is DENIED.

1(c) Trial Court's Instruction On Petitioner's Decision Not To Testify

Petitioner alleges that trial counsel "failed to request an instruction regarding the lack of testimony from Mr. Sealy" during the "trial and sentencing phases". (Petitioner's Brief, p. 82). After a review of the record, this Court finds this is a misrepresentation of the record as the trial court instructed the jury at the close of the guilt/innocence phase that Petitioner had no duty to take the stand and the jury could not draw harmful inferences from that decision.

Accordingly, as the proper instruction was given by the trial court, Petitioner has failed to prove trial counsel were ineffective for failing to request a charge that was properly given and this portion of Petitioner's ineffective assistance claim is DENIED.

1(d) Sequestration of Jurors

Petitioner alleges trial counsel were ineffective for convincing him to waive his right to have the jury sequestered. However, as Petitioner has failed to show that the jury participated in any type of misconduct, [See part (5) below] he has failed to prove that trial counsel were ineffective for allowing him to waive this right. Accordingly, this portion of Petitioner's ineffective assistance claim is DENIED.

(2) Petitioner Alleges Ineffective Assistance of Counsel At the Sentencing Phase Of The Trial.

2(a) Petitioner Alleges Ineffective Assistance of Counsel For Failure To Investigate Evidence Including Mitigation Evidence.

Trial counsel began the sentencing phase investigation by interviewing Petitioner. During Mr. Roberto's first meeting on April 21, 2001 with Petitioner, Mr. Roberto explained to Petitioner that he needed to obtain Petitioner's "entire life history" in order to compile a "sociological profile" and requested that Petitioner think "about his family and his life history" and that trial counsel would also have to gather "ALL his school, medical, [and] jail records." (RX 60, 37:11,343). Shortly following this meeting on May 3, 2001, Mr. Roberto met with Petitioner and obtained a short history of Petitioner's background. (RX 59, 37:11,333-340). Mr. Roberto discovered Petitioner was born in St. Croix at the "Charles Harwood Memorial Hospital", his mother and father's background, that Petitioner had a speech impediment, "took speech therapy with Ms. 'Speech'", the name of his elementary school and high school in St. Croix, the names, locations, and occupations of his siblings and the type of relationship he had with them, and told counsel that his father never disciplined him and that once when he got in trouble for robbing a post office but was never prosecuted because his father paid someone off. Id. at 11,333-335.

Petitioner also provided Mr. Roberto with his criminal history beginning at the age of 17 when he was incarcerated in the Federal "Bureau of Prisons" for committing a robbery and shooting, but also admitted that prior to this crime "he sold pot" and that this was not his "first robbery". Id. at 11,335-336. Mr. Roberto also learned about Petitioner's

prison history and Petitioner complained about the prison conditions, "bad management" and "[n]o parole hearings", however, Petitioner also explained that he took a course in mechanics, played basketball "for the jail team and was considered 'best in system'", received a "certificate for heating, ventilation, and air conditioning (HVAC)", took college courses in "Organizational Behavior, Spanish 1 and Music Theory 1 and 5, and courses in "Pest Control Management" Business Aspects of Pest Control Management. Id. at 11,337-338.

Petitioner also told Mr. Roberto about his life in Atlanta after his incarceration. Id. at 11,339. He stated that he: worked at "Phipps plaza as a maintenance man/housekeeping" but was fired for "sleeping on the job"; obtained "credit card receipts from a girl who worked at Phipps-Nioki Bailey" and would use the "receipt numbers" to "book tickets to Miami, and stay at a South Beach condo with a friend named Maya"; after Phipps Plaza, he worked at a local Flea Market with an individual he knew from the Virgin Islands that sold pot; and finally told counsel about his arrests for the deaths of two men who were killed in Fulton County. Id. at 11,339-340.

Mr. Roberto questioned Petitioner about his time in federal prison. (HT 3:495). Mr. Roberto recalled asking Petitioner whether he had "been beaten" or "locked in closets", however, Petitioner did not inform trial counsel that he was abused in prison. Id. at 496.

Mr. Beall testified that it was important to get Petitioner's "history" and recalled questioning Petitioner about the following: his childhood; his "transition from St. Croix

custody to federal custody and ultimately to his release"; "the Bubble Gum gang and Little Five points area"; and, Petitioner's transition from St. Croix to New York and then back to St.Croix. (HT 3:348-349).

Trial counsel requested Petitioner's records from the following sources: 1) St. Croix Police Department (these also contain the records of Petitioner's co-defendant Troy Joseph); 2) Leavenworth U.S. Penitentiary; 3) DeWitt Clinton High School; 4) William Niles School; 5) St. Croix Central High School; 6) District Court of the Virgin Islands; 7) Federal Bureau of Prisons; 8) Fulton County District Attorney's Office; 9) Fulton County Jail; 9) Atlanta Police Department; and 10) Clayton County Sheriff's Office, Jail Operations Division. (RX 133, 38:11,599; RX 138, 38:11,625; RX 139, 38:11,628; RX 140, 38:11,631; RX 141, 38:11,656; RX 143, 39:12,173; RX 144, 42:12,364; RX 152, 45:12,795; RX 156, 47:13,409; RX 158, 52:14,665; RX 159, 52:14,674). From those requests trial counsel was able to obtain records from every source, (RX 134, 38:11,600; RX 140, 38:11,631; RX 143, 39:12,173; RX 150-151, 42-44:12,401-794; RX 155-157, 45-51:12,802-14,644; RX 158, 52:14,665; RX 159, 52:14,674), except the St. Croix Central High School, who reported to Petitioner's counsel that there were no records due to the fact that Petitioner did not attend "for a period long enough to earn any grades." (RX 141, 38:11,656). There were no records within the trial attorney's file regarding the DeWitt Clinton High School, other than the request for records, however, this Court cannot assume that the records were not obtained by trial counsel without further proof of such. See Williams v. Head, 185 F.3d 1223, 1227 (11th Cir. 1999) ("Recognizing the strength and applicability of the presumption that counsel rendered effective assistance, the district court correctly refused to 'turn that presumption on

its head by giving Williams the benefit of the doubt where it is unclear what' [trial counsel] did or did not do because [counsel] turned his file over to someone on Williams' legal team").

Mr. Roberto testified that he recalled information about Petitioner's mother having a difficult birth with him, however, the medical facility in which Petitioner was born no longer existed and they were unable to obtain any medical records to substantiate this information. (HT 3:492).

Accordingly, this Court finds trial counsel's performance in gathering the necessary historical and background records regarding Petitioner was not deficient nor did trial counsel unnecessarily focus upon this aspect of their mitigation investigation.

Trial Counsel's Investigation Of The Bubble Gum Gang

Petitioner alleges trial counsel were ineffective for failing to properly interview and present testimony from members of the Little Five Points Bubble Gum Gang. They were a group of young adults that trial counsel testified Petitioner "heralded over" in Little Five Points that were called the Bubble Gum gang. (HT 3:348; RX 214, 63:17,885; RX 215, 63:19,978). Mr. Roberto testified that Petitioner's defense team went to the local police precinct in Little Five Points and the police provided them with the names and location of the memebers. (RX 215, 63:18,003). Mr. Beall testified that the defense team interviewed members of the Bubble Gum gang. (RX214, 63:17,886). Trial counsel interviewed a young lady who was a member of the Bubble Gum Gang, but testified that she was "fairly noncommunicative and did not want to get involved." Id. at 458-459. Mr. Beall went on to explain that this individual "seemed extremely nervous, as if she were afraid." (HT 3:458,459, 486; RX 215, 63:18,003). Additionally, notes provided to

counsel by Ms. Monogue revealed that she had also visited the home of a young lady named Tori who lived in the Little Five Points area and spoke with Tori's grandmother. (RX 83, 38:11,423). However, Tori's grandmother stated that Tori had had a "nervous breakdown" after being served with a subpoena in the case and had received "threats" from "the gang of kids" and they intended to "move as quickly as possible in order to keep Tori safe." Id.

Mr. Beall testified that after interviewing members of the Bubble Gum gang, the defense team discussed their possible testimony and chose not call them as witnesses. (RX 214,63:17,885-886). When questioned as to why trial counsel chose not call members of this gang, Mr. Roberto explained the following:

> Here are my associates and nefarious activities and put him -- in my perception was in a quasi leadership role of a bunch of Little Five Point misfits. What kind of mitigation is that? That's not going to help you. These are the crimes and activities that they are suspected of and this is what they did, and it puts him physically older, over -- somehow having some influence over these younger people. I didn't think that helped at all.

(RX 215, 63:18, 004).

This Court finds trial counsel's investigation of the Bubble Gum Gang was reasonable and there is no reasonable probability that the outcome of Petitioner's trial would have been different had this testimony been utilized by trial counsel or presented at trial. Accordingly, this protion of Petitioner's ineffective assistance of counsel claim is DENIED.

Trial Counsel's Investigation Of Petitioner's Time in New York

Petitioner alleges trial counsel were ineffective for failing to properly investigate and present evidence of the impact his move had upon his mental well-being. Mr. Beall

testified that as part of their sentencing phase strategy the defense team investigated the effect that moving to Brooklyn, New York, had on Petitioner when he was a teenager. (HT 3:349; RX 215, 63:17,998). Mr. Beall testified that the defense team looked for evidence of psychological problems while Petitioner lived in New York but were unable to find any information other than Petitioner got in trouble with the law in New York and then came back to St. Croix and "got in trouble again and went into prison there in St. Croix" and were ultimately unable to find anything of mitigation value. (RX 215, 63:17,998-999; RX 214, 63: 17,878, 17,903). In fact, Mr. Beall recalled that his parents were "disappointed in him" and had moved him back and forth from St. Croix to New York and back to St. Croix to "give him a better opportunity." (RX 214, 63:17,932). As Petitioner has failed to present any evidence proving his time in New York was debilitating to his mental health other than vague conjecture, this Court finds this portion of his ineffective assistance of counsel claim is DENIED as trial counsel's investigation was reasonable and there is no reasonable probability that the outcome of Petitioner's trial would have been different if this evidence had been presented.

Trial Counsel's Preparation And Investigation Of Mitigating Evidence In St. Croix

Petitioner alleges trial counsel failed to prepare for their trip to St. Croix and their subsequent investigation in St. Croix was deficient. As shown above, Petitioner's defense team questioned Petitioner about his background in St. Croix. The defense team questioned Petitioner about where he lived in St. Croix; relatives' names and addresses in St. Croix; friends names and addresses in St. Croix; schools he attended in St. Croix; the names of lawyers in St. Croix; the prison where he was incarcerated; and, co-defendant Fahie's reputation in the Virgin Islands. (RX 59, 37:11,333-340; RX 62, 37:11,358; RX

65, 37:11,363). In addition to interviewing Petitioner, Ms. Monogue also interviewed Petitioner's closest sister, Geraldine Warrington, and his sisters Pauline Corbitt and Murine Allen. (RX 75, 37:11,408; RX 78-79, 38:11,415-417; RX 85, 38:11,427; RX 87, 38:11,430; RX 88, 38:11,432; RX 89, 38:11,434).

Petitioner's defense team met prior to their trip to the Virgin Islands and prepared an "Itinerary for St. Croix/Christiansted". (RX 111, 38:11,527; see also RX 1, 36:10,899 (Beall's billing records). This Itinerary listed materials needed for the trip, places to gather records, including but not limited to, Petitioner's schools and penal institutions in which Petitioner was incarcerated, and individuals to be interviewed, including family, friends, teachers and neighbors. See (RX 111, 38:11,527-529). Trial counsel's billing records also reveal that they held lengthy strategy meetings while in St. Croix to discuss "trial strategy" and "mitigation". (RX 7, 36:10,982).

Mr. Beall explained that when they met with Petitioner's family in St. Croix, it was a meeting organized by a member of Petitioner's family, and trial counsel explained to the family what type of information was needed to assist in the mitigation phase of trial. (HT 3:380). Trial counsel asked them about "family background, trouble he (Petitioner) might have gotten into, things he might have done to help other people, good things, what the best thing that you can remember about him, things like that." Id. at 389. Mr. Beall wanted that information to "humanize" Petitioner with "references to family and background." Id. Additionally, Mr. Beall stated that he would have discussed Petitioner's mental health and the mental health of the family. Id. at 380.

Mr. Beall also testified that they looked for more relatives by visiting the house in which Petitioner had grown up. (RX 214, 63:17,901). Mr. Roberto described the house to

be of "good construction" and for St. Croix island he thought it was a "somewhat monied (sic) neighborhood" but it was not "extravagant, but it was something that wasn't going to blow away in a hurricane" it was "upper middle class." (RX 215,63:17,997-998). Mr. Roberto testified that Petitioner had a "dearth of friends in St. Croix" as he had left at an early age to serve his 12 year sentence in federal prison on the mainland, which became 14 years due to his misconduct. (RX 215, 63:18,002).

Trial counsel attempted to find Petitioner's speech therapist, "Mrs. Speech", while in St. Croix. (HT 3:379). Trial counsel visited Petitioner's school and requested Petitioner's school records but the principal did not want to provide trial counsel with records despite having a release from Petitioner. (HT 3:361). Trial counsel continued to press the issue with the principal, and she finally stated that the "hurricane blew them all away." Id. Mr. Beall was particularly interested in school records as they were relevant to mental health. Id. Trial counsel also visited Petitioner's high school, the Department of Health and the local hospital and requested records from all three locations. (RX 7, 36:10,981).

Trial counsel visited Anna's Hope Prison in St. Croix where Petitioner was incarcerated, and spoke with the warden who vaguely remembered Petitioner. (HT 3:394-395). Mr. Beall recalled that the entrance to the prison reminded him of the entrance to the Georgia Diagnostic and Classification Prison where Petitioner is currently housed but he did not recall seeing the cells. (HT 3:395). Trial counsel also visited the St. Croix police headquarters and were successful in obtaining Petitioner's police files. (HT 3:361; RX 7, 36:10,982). Additionally, trial counsel visited the "Territorial Court" and the "District Court" and reviewed files and requested copies of files. (RX 7, 36:10,982).

Mr. Beall recalled that Petitioner played baseball and was an "all star" player. (HT 3:431). He also recalled trying to find his baseball coach by asking his family about him and visiting the "ballfield" to question any players that might be there. Id.

Petitioner complains that trial counsel spent time gathering background records, however, these are a vital and necessary part of a mitigation investigation. Moreover, trial counsel did not have the benefit of a made record that his current state habeas counsel has been provided. Further, this Court finds Petitioner's defense team accomplished a great deal while in St. Croix as demonstrated by their exit memo. See (RX 113, 38:11,533).

Contrary to Petitioner's assertions, "Strickland does not require counsel to investigate every conceivable line of mitigation evidence no matter how unlikely the effort would be to assist the defendant at sentencing." Wiggins, 539 U.S. 510, 533, 123 S.Ct. 2527, 2541 (2003). Moreover, "Given the finite resources of time and money that face a defense attorney, it simply is not realistic to expect counsel to investigate substantially all plausible lines of defense." Williams v. Head, 185 F. 3d 1223, 1236 (1999).

This Court finds trial counsel's preparation and investigation of evidence in St. Croix was not deficient and this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

2(b) Petitioner Challenges Trial Counsel's Decision Not To Interview His Mother

Petitioner alleges trial counsel were ineffective for failing to interview Petitioner's mother, Muriel Sealey. However, Petitioner has failed to present this Court with direct testimony from his mother.

Counsel notified Petitioner that they would not be calling or writing to his mother because her health situation "as instructed."

"One of the circumstances that bears upon the reasonableness of an investigation is the information supplied by counsel's own client. Just as information supplied by the defendant may point to the need for further investigation, the lack of information supplied may also indicate that further investigation would be unnecessary or fruitless. Similarly, a client's demand that counsel undertake or, even, refrain from a particular investigation bears upon the reasonableness of the investigation." Waldrop v. Thigpen, 857 F.Supp. 872, 915-916 (1994) citing Mulligan v. Kemp, 771 F.2d 1436 (11th Cir. 1985). "A client's failure to disclose information to his attorney, as well as his refusal to assist the attorney, necessarily must be considered in assessing the reasonableness of the investigation performed by counsel." Id. at 915.

Further, the Georgia Supreme Court stated in Morrison v. State, 258 Ga. 683, 373 S.E.2d 506 (1988), that "even if [a defendant] is represented by an attorney, the attorney 'is still only an assistant to the defendant and not the master of the defense.'" Morrison v. State, 258 Ga. at 686; citing Mulligan v. Kemp, 771 F.2d 1436, 1441 (11th Cir. 1985).

In Mitchell v. Kemp, 762 F.2d 886, (11th Cir. 1985), the defendant, who had pled guilty to murder, instructed his attorney, to leave his father and his family out of the case. The attorney felt that the father was the only avenue into the defendant's family situation. The Eleventh Circuit Court of Appeals held that "when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made. Mitchell, 762 F.2d at 889, citing Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983), cert. denied, 466 U.S. 993, 104 S. Ct. 2375, 80 L.Ed.

2d 847 (1984). Accordingly, trial counsel cannot be found to be ineffective for choosing not to interview Petitioner's mother after Petitioner and his family specifically instructed counsel not to contact her.

2(c) Petitioner's Family, Friend and Acquaintance Testimony

Petitioner alleges trial counsel were ineffective for failing to present testimony during the sentencing phase of trial from various family members, friends and acquaintances. The record before this Court shows that trial counsel diligently endeavored to find and convince witnesses to testify on Petitioner's behalf during the sentencing phase of Petitioner's trial, however, despite their efforts the witnesses contacted by trial counsel could not be persuaded to testify on Petitioner's behalf. (RX 214, 63, 17,902). For example, Petitioner's favorite sister, Geraldine, told trial counsel, "As far as she is concerned, they can lock him up and throw away the key." (RX 75, 37:11,409). Furthermore, other members of Petitioner's family were also uncooperative and as they had spent very little time with Petitioner due to his incarceration at a young age, they had little information to provide. (HT 3:478).

In the memorandums detailing some of the witness interviews by Petitioner's defense team, Petitioner's family members had very little to report regarding Petitioner and only a miniscule portion was favorable. For example, Petitioner's sister Geraldine reported that they "grew up in a nice 3 bedroom house", that Petitioner was called "Our promise" by their parents but was "spoiled and lazy", that their family went on vacation every year, including Europe and Disneyworld, and that although she did not want Petitioner to die, she thought "he should stay in jail". (RX 78, 38:11,415). Another of Petitioner's sisters, Pauline Corbitt, stated that Petitioner was a "very difficult child-very

short tempered" had a "mean streak" was "spoiled" and "never wanted to work for what he got". (RX 81, 38:11,420). Pauline also stated that after Petitioner was released from federal prison she did not want him to come to her home because she thought he would be a bad influence on her son and stated she would only be willing to come and testify for him if school was "not in session at that time" as she was a third grade teacher. Id. at 11,421. Petitioner's half-sister, Murine Allen, could provide little information as she had not lived on the same island as Petitioner growing up and only "vaguely" remembered meeting him. (RX 79, 38:11,417). Murine stated that there was "nothing" she could do to help. Id. The only individuals that had anything positive to say about Petitioner were his nephews, Kareem Dennis and Ronald Tutein, who did not know him very well and whose positive statements were mainly based upon Petitioner being a cool uncle who drove a BMW and was good at sports. (RX 80, 38:11,418).

Mr. Roberto explained that while interviewing Petitioner's family members, trial counsel learned his family were not going to be able to provide substantial mitigating evidence for Petitioner:

> It wasn't like they were going to hop on a plane, come down and say good things about Richard or, you know, that they had not had a lot of time together with Richard because of, you know, Richard going to prison at an early age. So, they weren't going to cooperate; they didn't have anything to give, more or less, and they weren't, there wasn't much to get from them, there wasn't much to give, and they weren't Richard was not a priority.

(HT 3:478).

Trial counsel explained to Petitioner's family the importance of their testimony in the sentencing phase:

> I'm sure that anyone that we solicited as a witness that we made it clear, you know, it's really important, it could make a big difference, it's not

> going to cost you anything other than your time. The pitch was basically, you know, that this would be real important, you know, maybe someday somebody will need somebody to come and speak up for you.

(HT 3:482). Despite trial counsel's efforts however, the family members would not come and none expressed a desire to plead for his life. Id.

Mr. Roberto recalled that Geraldine stated, "I don't want them to kill Richard. I love Richard, but I'm not going to go in there and say anything good about him." (HT 3:481). Additionally, Mr. Roberto recalled asking Petitioner's sister Pauline to testify but she was reluctant to come and gave excuses like: "I've got kids. I haven't seen Richard in a long time. This really isn't good for me." (HT 3:482).

2(d) Ronald Tutein

Petitioner alleges trial counsel were ineffective for failing to present the testimony of Petitioner's nephew, Ronald Tutein, during the sentencing phase of Petitioner's trial. Based upon trial counsel's testimony before this Court, and the fact that trial counsel had purchased Mr. Tutein plane fare so that he may attend Petitioner's trial, this Court concludes trial counsel clearly intended to present Mr. Tutein during the sentencing phase of trial. (HT 3:478-479). Conflicting testimony was presented to this Court regarding Mr. Tutien's availability during Petitioner's trial. Trial counsel testified that Mr. Tutein was unavailable on the day in which he was needed to testify and Mr. Tutein testified that he was available to testify. Id. However, this Court finds it need not decide whether trial counsel was deficient for not presenting Mr. Tutein as Mr. Tutein's testimony before this Court was neither compelling nor mitigating for the crimes for which Petitioner had committed and there is no reasonable probability that this testimony would have changed the outcome of Petitioner's trial. The majority of Mr. Tutein's testimony was about

Petitioner's father, Gerald Sealey, and how he would take the children in the family to the park and McDonald's. (HT 1:173-174). The only testimony Mr. Tutein gave pertaining to Petitioner was that he was loud and always laughing and once discouraged him from fighting. Id. at 171-173, 175-176.

Trial counsel also admitted that Mr. Tutein's testimony was not going to mitigate to brutal torture and murder of Mr. and Mrs. Tubner. Mr. Roberto testified that Petitioner's nephew Ronald Tutein was going to testify on Petitioner's behalf and state that Petitioner was a "good uncle" and was "always nice to him." (HT 3:482-483). However, Mr. Tutein had not spent a lot of time with Petitioner, therefore, there was not going to be "alot of depth" to his testimony. Id. at 483.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. 699. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. Therefore, this Court finds there is no reasonable probability that Mr. Tutein's testimony would have changed the outcome of the sentencing portion of Petitioner's trial and DENIES this portion of Petitioner's ineffective assistance of counsel claim.

2(e) Sherry Tubner's Polygraph

Petitioner alleges trial counsel were ineffective for failing to introduce during the sentencing portion of Petitioner's trial a polygraph test taken by Sherry Tubner. At the time of Petitioner's trial, polygraph results were inadmissible during the guilt/innocence phase and there was no precedent that allowed for their admission during

the sentencing phase. See Height v. State, 278 Ga. 592, 595, 604 S.E.2d 796 (2004). In fact, the Georgia Supreme Court in Baxter v. Kemp, 260 Ga. 184, 391 S.E.2d 754 (1990), held trial counsel were not ineffective for failing to request admission of a polygraph test during the sentencing phase. Baxter v. Kemp, 260 Ga. at 187(8), n. 4. However, since Petitioner's direct appeal decision in 2002, the Georgia Supreme Court has held, "Georgia's general ban on the admission of polygraph test results absent the parties' stipulation should not be applied automatically in the sentencing phase of a capital case so as to prevent the defendant from presenting a favorable polygraph test result." Height v. State, 278 Ga. at 595. [1] However, as trial counsel assiduously attempted to present the results of Ms. Tubner's polygraph results during the guilt/innocence phase of trial it was reasonable for trial counsel to assume these results would not be admissible during the sentencing phase as there was not precedent allowing such admission. Therefore, trial counsel cannot be found to be ineffective for not seeking admission of evidence that the trial court would have found inadmissible.

Further, the record before this Court shows that Petitioner has failed to prove that Ms. Tubner's polygraph results were reliable. The report from Mr. Maddox to trial counsel revealed that Sherry Tubner may not have been lying during the polygraph test. Mr. Maddox reported the following to trial counsel:

> A thorough review of the video tape of the Sherrie Tubner, "Cookie", Computer Lie detector Examination **reveals many indications that she is answering the relevant questions truthfully.** There is no indications

[1] Furthermore, the Eleventh Circuit Court of Appeals has repeatedly held that "'reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.'" Marquard v. Sec'y for the Dep't of Corr., 429 F.3d 1278, 1313 (11th Cir. 2005) quoting Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994)

> noted which suggest that she is lying to the relevant questions. The Computer Operator and the examinee both smoke during the interviews and each cough several times during the instrumentation portion of the examination. One of the relevant questions is improper and invalid as it is compound causing it to be actually two questions in one. A relevant question is singular in action having to do with one element of the accusation against the interest of the accused.
>
> No evaluation of the charts can be made without the opportunity to review them and administer a numerical analysis of them. It is very important that they be evaluated as either the computer device utilized is inaccurate or it has been programmed to report each person to be "deceptive" irregardless [sic] if they are answering the relevant questions truthfully. The operator reported the charts to be .99 deceptive.

(RX 48, 37:11,311). (Emphasis added). Clearly, the testers and the polygraph instruments were fraught with problems thereby calling into question the reliability of the polygraph results.

In addition this claim was addressed and adversely decided to Petitioner on direct appeal. Scaley v. State, 277 Ga. 620.

Accordingly, as trial counsel cannot be shown to be ineffective for not presenting evidence that would have, at the least been unreliable, and at the worst could have further inculpated him as the person wielding the axe and destroyed any reasonable doubt that may have existed from the guilt/innocence phase, this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

2(f) State's Introduction Of Prior Unajudicated Crimes And Bad Conduct

Petitioner alleges the prosecution's introduction of evidence of prior unajudicated crimes and bad conduct at the sentencing phase deprived him of a fair trial, due process, and the right to a reliable determination of sentence.

This Court finds that Petitioner has failed to prove his claim on the merits. The Georgia Supreme Court in Sears v. State, 270 Ga. 834, 842, 514 S.E.2d 426 (1999)

(citing Fair v. State, 245 Ga. 868, 873, 268 S.E.2d 316 (1980)), stated that "during the penalty phase, '[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation subject to the notice provisions of [O.C.G.A. § 17-10-2].'" Furthermore, in the sentencing phase, the State may introduce evidence of Appellant's commission of another crime as evidence in non-statutory aggravation "despite the lack of a conviction, so long as there has not been a previous acquittal." Jefferson v. State, 256 Ga. 821, 827, 353 S.E.2d 468 (1987). See also, Pace v. State, 271 Ga. 829, 842, 524 S.E.2d 490 (1999), and Bishop v. State, 268 Ga. 286, 295, 486 S.E.2d 887 (1997); Potts v. State, 261 Ga. 716(21), 410 S.E.2d 89 (1991).

Guilt-innocence phase concerns regarding the admission of bad character evidence are no longer present at the sentencing phase of trial. In the sentencing phase of trial, a defendant's character is a relevant and proper issue for consideration by the jury. In Hicks v. State, 256 Ga. 715, 352 S.E.2d 762 (1987), the Court held that "evidence of the defendant's escape was properly admitted in aggravation" and stated "a defendant's character in general, and his conduct while in prison, are relevant to the question of sentence." Hicks v. State, 256 Ga. at 727-728 quoting Fugitt v. State, 256 Ga. 292, 296, 348 S.E.2d 451 (1986). See also Lockett v. Ohio, 438 U.S. 586 (1978)(any aspect of defendant's character or record or the circumstances of the offense are relevant to sentencing).

In the sentencing phase the State presented evidence that Petitioner had a stolen credit card and used it to buy jewelry on the same day that the owner was murdered. Petitioner then objected to the presentation of further testimony alleging it was being

improperly introduced to show that he had murdered the owner. His objection was overruled.

As this evidence was sufficiently reliable to warrant its admission in that it tended to prove Petitioner's bad moral character which was clearly relevant to the jury's sentencing determination in this case, this Court finds that the trial court did not abuse its discretion in admitting this evidence, and this claim also fails on the merits.

In addition this claim was addressed and decided adversely to Petitioner on direct appeal. The Georgia Supreme Court held:

> The trial court did not err in admitting evidence in the sentencing phase showing that Sealey had illegally used a man's credit card shortly after the man's murder. "[R]eliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial." Braley v. State, 276 Ga. 47, 54 (34) (572 S.E.2d 583) (2002); Wilson v. State, 271 Ga. 811, 822-823 (20) (525 S.E.2d 339) (1999). The evidence of Sealey's illegal use of the man's credit card was clearly reliable, and we conclude from our review of the record that the connection between Sealey and the man's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury. Furthermore, although the charge was erroneous, we also note that the jury was charged that it was not permitted to consider non-statutory aggravating circumstances unless they were first proven beyond a reasonable doubt. See Wilson, 271 Ga. at 822 (20).

Sealey v. State, 277 Ga. at 621 (12). Because this claim has already been adjudicated by the Georgia Supreme Court, this Court finds this claim is barred under the doctrine of *res judicata*. See Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996).[2]

Accordingly, this claim is DENIED.

[2] To the extent that any portion of this claim was not raised on direct appeal, it is now procedurally defaulted and this Court finds Petitioner has failed to show cause and prejudice to overcome this procedural default.

2(g) Investigation Of Mental Health Evidence

Petitioner claims that trial counsel's investigation of Petitioner's mental health was inadequate in that a mental health evaluation should have been done.

Trial counsel testified that they questioned Petitioner's family about any mental health problems within the family but no information was reported to support such a conclusion. Trial counsel further found Petitioner to be a smart and clever person who was able to lead and manipulate others to get what he wanted.

Petitioner's prior attorney, Mr. Collins, did not indicate any mental health problems for Petitioner.

Mr. Beall summarized his decision not to pursue further mental health evaluations in the following testimony:

> [M]y conversations with Mr. Sealey, his conversations with other member of my team, their reports back to us, how he was adapting there in Clayton County Jail, his ability to be consistent in his testimony or in his discussions with us, things along that nature...In addition to that, I think over some period of time we were looking for some actual basis for, for example, an organic injury or some indications in his school records. We knew, of course, about Mrs. Speech and his stuttering, and that was the, I think the only thing that I can recall that gave me some pause.

The Eleventh Circuit in Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998), stated:

> "Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel. See Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994)("The more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.") (quoting Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989)). At the time of Provenzano's trial, one of his two counsel had tried eighty-seven criminal cases and had been lead counsel in nine capital cases. The other attorney had tried even more criminal cases in general

> and capital cases in particular, had been practicing twenty years, and had earned the reputation in the Bar and community as a leading criminal defense attorney. Clearly, these two experienced criminal defense attorneys knew what they were doing; their decisions were informed by years of experience with juries in capital and noncapital cases. We will not second guess their considered decision about whether Provenzano stood a better chance, however slim it may have been, with a jury in Orlando than with a jury in St. Augustine. As we said in cases in which habeas Petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between, and cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. This is not one of those rare cases.

Provenzano, 148 F.3d at 1331.

Further, trial counsel is not required to seek a mental health evaluation if Petitioner does not present symptoms of mental health problems. The Eleventh Circuit Court of Appeals stated in Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000), that, "In Bertolotti v. Dugger, 883 F.2d 1503, 1511 (11th Cir.1989), we held that counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems." Additionally, in Baldwin v. Johnson, 152 F.3d 1304, 1314 (11th Cir. 1998), the Court found trial counsel's decision not to pursue psychological testing as Petitioner appeared normal to counsel.

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

counsel does not require a finding that [Appellant] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847, 440 S.E.2d 452 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5, 426 S.E.2d 360 (1993)). See also Griffin v. Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384.

Accordingly, this Court finds trial counsel's investigation of Petitioner's mental health was reasonable.

2(h) Petitioner Contends Trial Counsel Should Have Obtained A Mitigation Expert

Petitioner contends that trial counsel should have hired a mitigation expert. Petitioner claims that rather than hire a mitigation expert trial counsel delegated the mitigation investigation to a paralegal with no capital case experience.

Trial counsel obtained Petitioner's entire life history and complied a sociological profile from the information gathered from school, medical, jail and other records. An investigation was conducted in St. Croix where Petitioner was born and where he went to school.

In addition trial counsel's paralegal did extensive investigation into mitigation. The paralegal was prepared by trial counsel for assisting in the investigation of Petitioner's background. Her reports were meticulous and well prepared.[3]

The Georgia Supreme Court held in McMichen V. State, 265 Ga. 598 (1995) that the trial court did not err in denying funds for a mitigation specialist to be hired in a death penalty proceeding. It is not inappropriate for trial counsel to have others in the defense

[3] Petitioner claimed that the paralegal suffered from alcoholism. Petitioner failed to illicit any testimony to this fact and therefore failed in his burden of proof.

team to perform certain task such as investigations. See Whatley v. Terry, 284 Ga. 555 (2008).

Therefore, as trial counsel properly relied upon the assistance of Ms. Monogue and as Petitioner has failed to show that a mitigation specialist is constitutionally mandated or that a mitigation specialist could have accomplished more than Ms. Monogue, this Court finds this portion of Petitioner's ineffective assistance counsel claim to be without merit.

2(i) Future Dangerousness Expert

Petitioner alleges trial counsel were ineffective for failing to present evidence of the prison conditions in which he was incarcerated and expert testimony that he could be "adequately managed" in prison. (Petitioner's Brief, p. 39). However, Petitioner has failed to present any evidence to this Court that he was ever abused or mistreated while in prison in St. Croix or in federal prison and his voluminous prison records show that he was anything but a model prisoner. This Court finds trial counsel conducted a reasonable investigation into Petitioner's incarceration in St. Croix and the federal prison, and made the reasonably strategic decision not to present evidence regarding Petitioner's conduct while previously incarcerated.

Petitioner presented the testimony of James Aiken, an expert in the field of future dangerousness of prison inmates. (HT 2:265). Mr. Aiken testified that he reviewed Petitioner's prison records and concluded that he "could be adequately managed" while in prison. Id. at 276. However, this Court's review of Petitioner's prison records does not support Mr. Aiken's testimony. The following are Petitioner's incident reports from the various prisons in which Petitioner has been incarcerated:

Federal Bureau of Prisons

• 10/16/81 – Petitioner was charged with assaulting another person, fighting with another person and conduct which disrupts or interferes with the security or orderly running of the institution. (RX 151, 44:12686-12687).

• 10/27/81 – Petitioner was charged with threats, encouraging others to riot and conducts which disrupts or interferes with the security or orderly running of the institution. Id. at 12684-12685.

• 12/4/81 – Petitioner was charged with refusing to obey any properly authorized order of any staff member. Id at 12682-12683.

• 2/13/82 – Petitioner was charged with escape from custody. Id. at 12681.

• 7/7/82 – Petitioner was charged with throwing trash on the floor in A-Dorm and refusing to obey a properly authorized order. Id. at 12679-12680.

• 3/9/83 – Petitioner was charged with possession of anything not authorized. Specifically, Petitioner had a Timex watch that did not belong to him. (RX 151, 43:12468-12471.

• 5/24/83 – Petitioner was charged with assaulting any person. Specifically, Petitioner assaulted another inmate by stabbing him with a homemade weapon. Id. at 12472-12476.

• 7/10/83 – Petitioner was charged with assaulting any person (staff member). Specifically, Petitioner shoved a correctional officer while attempting to get into a supply box. Id. at 12477-12481.

• 9/30/83 – Petitioner was charged with possession of a sharpened instrument (shank). Id. at 12482-12486.

• 11/18/83 – Petitioner was charged with possession of a weapon (copper pipe). Id. at 12487-12490.

• 11/18/83 – Petitioner was charged with interfering with the taking of count and refusing to obey an order. Id. at 12491-12494.

• 11/25/83 – Petitioner was charged with assault. Specifically, Petitioner assaulted a correctional officer with a ball point pen. Id. at 12495-12503.

Fulton County Jail

• 11/22/96 – Petitioner was charged with fighting. (RX 157, 47:13686-13691).

• 12/3/96 – Petitioner was charged with derogatory remarks/gestures to staff, failure to comply, disrupting headcount, attempted escape, red zone violation and attempting to control staff. Id. at 13677-13685.

• 7/29/97 – Petitioner was charged with controlling other inmates. Id. at 13644-13646.

• 8/9/97 – Petitioner was charged with fighting. Id. at 13627-13632.

• 2/10/98 – Petitioner was charged with fighting and disrupting food service. Id. at 13639-13643.

• 3/15/98 – Petitioner was charged with burning paper, repeated major violation and possession of unauthorized items (tobacco). Id. at 13633-13638.

• 11/18/99 – Petitioner was charged with fighting. Id. at 13697-13700.

Clayton County Jail

• 4/7/01 – Petitioner was charged with disrupting religious, medical or food services or other facility activity, fighting or molesting any member of the staff, visitors or fellow inmates, and interfering with security operations of the facility. (RX 159, 52:14674-14676).

• 10/26/01 – Petitioner was charged with failure to comply with an officer's order, fighting or molesting any member of the staff, visitors or fellow inmates, and assault on any person(s). Id. at 14677-14680.

• 12/16/01 – Petitioner was charged with lying to an officer, being in the wrong cell, interfering with security operations of the facility and assault on any person(s). Id. at 14681-14635.

• 4/21/02 – Petitioner was charged with possession of a weapon, or any object which has been modified so that it may be used as a weapon (spork) and possession of contraband. Id. at 14686-14687.

• 6/21/02 – Petitioner was charged with failure to comply with an officer's order and the use of profanity, derogatory remarks/gestures toward any member of the staff, visitors or other inmates. Id. at 14688-14689.

• 7/7/02 – Petitioner was charged with malicious destruction, altercation or misuse of county property. Id. at 14690- 14691.

• 8/8/02 – A correctional officer searched Petitioner and found a black writing ink pen in his underwear. Id. at 14692-14693.

Moreover, since being incarcerated on death row Petitioner has received the following incident reports, most notably, he threw a mixture of bleach and water in the face of a mental health official attempting to help him:

Georgia Department of Corrections

• 3/28/03 – Petitioner was charged with failure to follow instructions. (RX 209, 60:17175).

• 5/6/03 – Petitioner was charged with failure to follow instructions. Id. at 17166-17172.

• 12/5/03 – Petitioner was charged with failure to follow instructions. Id. at 17160-17163.

• 5/27/04 – Petitioner was charged with insubordination. Id. at 17129-17138.

• 6/5/04 – Petitioner was charged with causing injury to another prisoner. Id. at 17102-17127.

• 9/15/04 – Petitioner was charged with failure to follow instructions. (RX 209, 61:17431-17432).

• 10/19/06 – Petitioner was charged with projecting nuisance items (mental health official was sprayed in the face with a water and bleach mixture). Id. at 17429-17430.

• 3/27/07 – Petitioner was charged with disrupting count and failure to follow instructions. Id. at 17428.
• 12/26/07 – Petitioner was charged with assaulting an inmate (with injury). (RX 208, 59:16773-16784).

Miscellaneous Notes From Georgia DOC File

• 9/23/02 – Petitioner was placed in administrative segregation as he was a new death row inmate, and the prison was concerned that he may be assaultive. (RX 209, 61:17235).

• 8/26/03 – Petitioner was placed in administrative segregation due to the possibility that he threatened inmate Melbert Ford's family. (RX 209, 60:16991).

Presentation of evidence to attempt to establish that Petitioner would not have been dangerous in the future would not, with reasonable probability, have changed the outcome of Petitioner's sentencing. The American Psychiatric Association has stated,

psychological testimony about future dangerousness is speculative and usually wrong. Am. Psychiatric Ass. Task Force on Clinical Aspects of the Violent Individual. "No one has the ability to predict" and any predictions are "extremely poor." Am. Psychological Ass. Task Force on the Role of Psychology in the Cr. Justice System. The Chief Judge of the Seventh Circuit, for instance, complained that there is "hardly anything, not palpably absurd on its face, that cannot be proved by some so-called 'experts.'" Caulk v. Volkswagen of Am., Inc., 808 F.2d 639, 644 (7th Cir. 1986).

Petitioner also alleges trial counsel's decision not to investigate his attack on the federal prison guard that caused him to have two additional years added to his federal prison term was ineffective. Petitioner accuses trial counsel of concluding that he attempted to kill the federal prison guard which he now alleges he did not intend to kill. However, Mr. Beall testified that Petitioner either "attempted to kill" or had "some very serious altercation with a prison guard" and Mr. Roberto referred to it as "aggravated assault". (RX 214,63:17, 880; HT 3:500).[4]

Regardless of whether trial counsel thought he tried to kill or just attack the guard, the report reads as follows:

Description of Incident

> While in process of transferring named inmate from Wood House Dentition to Regular Segregation, inmate refused to leave his cell. Inmate stated to Lt. L.LaRue; "If you mother fuckers want me out then come in and get me." I entered cell, at which time inmate jumped forward toward me. Inmate struck me in center of chest with a clenched left fist. At the same time Inmate raised a clenched right fist, holding a black ballpoint pen. Inmate attempted striking downward with pen at which point inmate was restrained by this officer, Officer L. Steward and Lt. L. LaRue. Wrist

[4] Further, Petitioner reported to Mr. Roberto that the assault that increased his federal prison sentence was an assault by his roommate (cellmate) on the guard after the guard found their pornographic magazines.(RX59,37:11,337).

> restraints were applied by Lt. L. LaRue. Inmate continued a violent struggle until removed from cell.

(RX 151, 43:12,495-496).

Other facts about the incident were also reported:

> Inmate Sealey had been very disruptive in Wood Detention prior to him being moved to Regular Detention, by kicking on his cell door and hollering to other inmates on the range, therefore creating a management problem with the other inmates in the Unit.
>
> ...
>
> Sealey is an assaltive (sic) type of individual as his record indicates. The incident report and the supporting memos from the staff members invo[l]ved support the charge Assault on Staff, and I feel that the incident occurred as written.

Id. at 12,497. Petitioner was not charged with attempted murder, he was charged with assault and whether or not he intended to kill the prison guard, does not change the fact the jury would have heard he attacked a prison guard with his fists and a weapon, was considered "a management problem" and an individual prone to assaulting others.

Based upon Petitioner's behavior while incarcerated in federal prison and the Clayton County jail, this Court finds trial counsel reasonably decided not to present evidence that Petitioner would not be a future danger in prison. Mr. Beall testified that he thought presenting an expert on Petitioner's ability to adapt well in prison would be a "complete waste of time", "ludicrous" and would have been a "wrong-headed strategy." (HT 3:441, 446; RX 214, 63:17,880, 17,972.

Mr. Beall further made a trial strategy decision that an expert testimony on future dangerousness would be more harm than help to Petitioner's case.

"Another factor requiring deference to counsel's judgment call in this case is that it was a decision based upon his perception of how the jury would react to the evidence ...

We have held that a defense attorney's sense of the jury's reaction to testimony or evidence is a sound basis on which to make strategic decisions. See Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990); Foster v. Strickland, 707 F.2d 1339, 1344 (11th Cir. 1983), cert. denied, 466 U.S. 993, 104 S. Ct. 2375, 80 L. Ed. 2d 847 (1984); Gates, 863 F.2d at 1499." Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994). The Eleventh Circuit stated in Waters v. Thomas, 46 F.3d 1506, 1521-1522 (11th Cir. 1995) (en banc):

> Writing for this Court more than a decade ago, Judge Vance observed that in regard to strategy decisions, trial counsel's 'position in reaching these conclusions is strikingly more advantageous than that of a federal habeas court in speculating post hoc about his conclusions.' Stanley v. Zant, 697 F.2d 955, 970 (11th Cir. 1983), *cert. denied*, 467 U.S. 1219, 104 S. Ct. 2667, 81 L. Ed. 2d 372 (1984). He explained that counsel's knowledge of local attitudes, and 'evaluation of the particular jury, his sense of the chemistry of the courtroom are just a few of the elusive, intangible factors that are not apparent to a reviewing court, but are considered by most effective counsel in making a variety of trial and pretrial decisions.'

Id. Waters v. Thomas, 46 F.3d at 1521-1522. "The fact that [Appellant] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Appellant] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847, 440 S.E.2d 452 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5, 426 S.E.2d 360 (1993)). See also Griffin v. Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384.

Therefore, as trial counsel's investigation was reasonable and as there is no reasonable probability that Petitioner's expert's testimony would have changed the outcome of the sentencing phase of Petitioner's trial given the overwhelming evidence to

the contrary, this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

2(j) Sentencing Phase Instructions

In a portion of Claim XXI, Petitioner alleges the sentencing decision was based upon erroneous and inadequate instructions. Petitioner failed to present any evidence at the evidentiary hearing or argument in his post-hearing brief in support of this claim. Petitioner has also failed to provide any legal support for his claim. As such, Petitioner has failed to meet his burden of proving that he is entitled to habeas relief and this claim is DENIED.

3. TRAIL COUNSEL'S EFFECTIVENESS DURING HIS DIRECT APPEAL

Petitioner alleges trial counsel were ineffective during his direct appeal. In preparation for Petitioner's direct appeal, Mr. Beall "[r]ead the transcript, looked for objections, decided how many issues to raise, whether to be a shotgun approach or to be a more targeted approach." (HT 3:398). Mr. Beall specifically recalled that he "wanted an answer with respect to the use of the stipulated polygraph." Id. Mr. Beall's billing records reveal that he spent a considerable amount of time, 207 hours, preparing for Petitioner's Motion for New Trial and Direct Appeal. (RX 4, 36:10,928-934). Petitioner failed to present any evidence during his habeas evidentiary hearing to support his allegation the trial counsel were ineffective during his direct appeal. As Petitioner has failed to prove that trial counsel were ineffective during trial, or that Petitioner suffered a violation of his constitutional rights during trial, he has failed to show trial counsel were ineffective

during his direct appeal. Accordingly, Petitioner's claim of ineffective assistance of appellate counsel is DENIED.

4. TRAIL COUNSEL LABORED UNDER AN ACTUAL CONFLICT OF INTEREST

4(a) Trial Counsel Did Not Represent Petitioner While Under A Conflict Of Interest.

In Claim XIII of Petitioner's Amended Petition, section VII of Petitioner's post-hearing, Petitioner alleges trial counsel, Mr. Beall and Mr. Roberto, represented him while under a conflict of interest after he petitioned the trial court to have trial counsel removed and the trial court denied his request. As evidenced by the trial record and the extensive habeas record currently before this Court, trial counsel diligently endeavored to represent Petitioner through all phases of his death penalty proceeding and, as Petitioner failed to show the trial court, Petitioner has also failed to prove to this Court that trial counsel did not effectively represent him. Accordingly, this Court DENIES Petitioner's claim as it is without merit.

4(b) Petitioner Has Failed To Show An Actual Conflict Of Interest.

In the seminal case of Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980), the United States Supreme Court established the criteria for analyzing a claim of "conflict of interest." First, in order to demonstrate an ineffective assistance of counsel claim arising from alleged conflict of interest, the [Petitioner] must establish an "actual conflict of interest." Cuyler v. Sullivan, 446 U.S. at 348. The Georgia Supreme Court has further held that an actual conflict "must be palpable and have a substantial basis in fact." Lamb v. State, 40 267 Ga. 41, 42, 472 S.E.2d 693 (1996). An actual conflict of interest is not

established by the mere "possibility that a conflict might have developed." Hudson v. State, 250 Ga. 479, 482, 299 S.E.2d 531 (1983).

Petitioner alleges "personality disputes" prevented effective communication with trial counsel. There is no evidence that any such conflicts affected the work done by trial counsels. The evidence presented shows that Petitioner was actively involved in his case,

In addition, trial counsel communicated the district attorney's plea offer of life without parole but Petitioner refused to accept such offer. Petitioner has not presented any evidence to this Court that he would have at any time been willing to accept the State's plea offer. Once a plea deal has been properly communicated to a defendant, as it was in this case, the decision to whether to accept or refuse an offer rest entirely on the defendant. See Baskin v. State, 267 Ga. App. 711 (2004).

In addition Petitioner complained to the trial court about trial counsel's representation and after hearing from trial counsel denied Petitioner's request for removal of trial counsel.

Therefore, as Petitioner has failed to prove an "actual conflict of interest," this Court denies Petitioner's conflict of interest claim.

5. Petitioner Alleges Juror Misconduct

5(a) Petitioner's Jurors Did Not Rely Upon The Bible In Determining Petitioner's Death Sentence.

Petitioner argues that this Court improperly excluded evidence regarding the jury's alleged "reliance" on the Bible, however, in the Court's *Order on Respondent's Motion in Limine to Preclude Evidence Impeaching Jury Verdict* dated July 8, 2008, this Court specifically stated that Petitioner could proffer evidence from the jury regarding

"'extrajudicial and prejudicial information [that was] brought to the jury's attention improperly'". Order, 7/8/08, *quoting* Gardiner v. State, 264 Ga. 329, 332(2), 444 S.E.2d 300 (1994). Furthermore, this Court stated, after listening to oral argument on this issue, that Petitioner could present evidence regarding whether or not the jurors relied upon the Bible during their deliberations. (HT 1:152). Consequently, this Court finds Petitioner's argument that this Court improperly excluded this evidence to be without merit.

Petitioner alleges his constitutional right to a fair trial was violated by the jurors during the sentencing phase when they allegedly relied on the Bible as an extrajudicial source of information when determining Petitioner's death sentence.

Petitioner proffered affidavits from six jurors, James Alford, Charlene Johnson-Booker, David Peek, Mildred Jones, Monique Sheffield and Bob Eugene Reynolds, and called two jurors, Charlene Johnson-Booker and Janice Riley, as witnesses during the evidentiary hearing before this Court. (HT, 1:157- 165, 168; PX 162-167, 14:3892-3909). Respondent proffered counter affidavits from three of the jurors from whom Petitioner had obtained affidavits, Monique Sheffield, James Alford and Charlene Johnson-Booker. (RX 219, 220, 223, 63:18,126-129, 18,134). After review of this testimony this Court finds that the jurors that determined Petitioner's sentence did not rely upon biblical scripture in deciding Petitioner's sentence of death.

Mr. Alford stated that the jury was led in prayer prior to deliberation, however, he also testified that "there were no discussions about Biblical scriptures" and he did "not recall seeing a Bible in the jury room." (PX 162, 14:3893; RX 220, 63:18,129). Ms. Sheffield stated in her affidavit that "we began each session with prayer for guidance in our decision making", but clarified that statement by subsequently testifying, "I did not

base my verdict or sentence on the prayers. I relied only upon the evidence presented at trial and the judge's instructions." (PX 166, 14:3904; RX 219, 63:18,126). In the affidavits submitted by Petitioner from Mr. Peek, Ms. Jones and Mr. Reynolds, the affiants do not mention prayer or the Bible. (PX 164, 165, 167, 14:3898, 3901, 3907).

In the affidavit submitted by Petitioner from Ms. Johnson-Booker, she does state that she and other jurors discussed scripture and "how it applied to guide our decision-making." (PX 163, 14:3896). However, when called by Petitioner during the evidentiary hearing before this Court, Ms. Johnson-Booker fully explained this statement. Ms. Johnson-Booker testified that she did have discussions of biblical scripture but went on to state the following:

> We had discussions, but it was not to determine how we should sentence him. It was basically just comfort for us because it was a very difficult decision for us to make. So, we were not trying to say, you know, we'll take this Bible and this Bible says that we should do this. That was not how it was used.

(HT, 1:160). Ms. Johnson-Booker went on to state that the Bible was used "just as comfort" and was "not used to say, you know, God says we should do such-and-such." Id. Moreover, she testified:

> None of us were Bible scholars, so we didn't even get that deep into it. We didn't have Biblical discussions at all. We did what we were supposed to do. So, it didn't turn into your beliefs versus my beliefs, and any of that. That was not what happened.

Id. at 163.

Further, Ms. Johnson-Booker only recalled opening the Bible after the "final decision" but only for "comfort" to "endure" what she was having to go through. Id. at 161. Again, Ms. Johnson-Booker, stated that the Bible was "never used to determine how

we should sentence Mr. Sealey, never, ever used in that way" and that the jurors knew they "could not mix faith and the system." Id. Moreover, she testified that she did not believe the Bible passage that was viewed after the decision referenced punishment for certain acts. Id. at 162-163. Finally, Ms. Johnson-Booker testified that her decision to convict and sentence Petitioner to death was based "[s]olely upon the evidence" that was presented at trial. (HT, 1:166).

Petitioner's argument that the jury relied "heavily" on the Bible during deliberations is not borne out by the evidence before this Court. In fact, Petitioner misquotes one of own his witnesses, Mildred Jones, by stating that she testified in her affidavit that the jurors "relied upon prayer to reach the verdict of death after the jury was initially 'divided roughly down the middle.'" (Petitioner's Brief, pp. 94-95). Ms. Jones actually stated the following:

> When the sentencing phase concluded and we began our deliberations, our initial vote was divided roughly down the middle, half voting for a life without parole sentence and half voting for a death sentence. We talked long and hard about the sentencing because this was not an easy decision. Several members of the jury were having a difficult time with the death sentence. When this happened, one of the things we would do was revisit the crime scene photos as a way to get us all on the same page. **What prompted me personally to vote for a guilty verdict and ultimately death were the crime scene photos. They were horrible.** We also had group prayer during this time to help us with our decision-making.

(PX 165, 14:3902; emphasis added).

In Cromartie v. State, 270 Ga. 780, 514 S.E.2d 205 (1999), the defendant presented his investigator who testified that a member of the jury had told him that she relied upon the Bible and a dictionary to help her make her decision. Cromartie, 270 Ga. at 789. The jury member testified that although she did read the Bible every day for personal guidance, she did not rely upon the Bible to determine the defendant's sentence

and did not use a dictionary. Id. The Court held that, "the trial court did not abuse its discretion in crediting the testimony of the jurors and in concluding that the jury based its sentencing decision solely on the evidence and the trial court's instructions.

Likewise in this case, Petitioner has also failed to show that biblical scripture "had anything to do with [Petitioner's] case or [his] sentencing determination." Cromartie v. State, 270 Ga. 780, 789-790, 514 S.E.2d 205 (1999). Id. (citing Jones v. Kemp, 706 F.Supp. 1534, 1560 (N.D. Ga. 1989)("The court in no way means to suggest that jurors cannot rely on their personal faith and deeply-held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen." Thus, "possession, *even in the jury room*, of personal Bibles, perhaps even consulted for personal" "inspiration or spiritual guidance" is not automatically prohibited). (Emphasis added). See also Atkins v. Moore, 1997 U.S. Dist. LEXIS 24122 (June 10, 1997) (habeas relief not warranted due to a juror's consultation of a Bible during trial deliberations where "[t]here is no indication" from the evidence that the juror's actions in consulting the Bible had a substantial and injurious effect on the jury's verdict"). "Furthermore, a juror's personal use of the Bible or other religious book outside the jury room is not automatically prohibited." Id., citing, Jones v. Kemp, 706 F.Supp. 1534, 1560 (N.D. Ga. 1989).

Therefore, as Petitioner has failed to prove that the jurors that determined his sentence relied upon the Bible in deciding to sentence him to death, this Court finds this portion of Petitioner's juror misconduct claim to be without merit and is DENIED.

5(b) Other Alleged Juror Misconduct

In section VIII(C) and (D) of Petitioner's post-hearing brief, Petitioner further alleges that the jurors "prematurely discussed evidence presented at trial prior to deliberation," discussed media coverage and jury members "slept through portions of the trial." (Petitioner's Brief pp. 95-96). However, these allegations were neither raised at Petitioner's motion for new trial nor on direct appeal. This Court finds Petitioner has again failed to show cause and prejudice to overcome the procedural default of this portion of his juror misconduct claim, and dismisses this portion of Petitioner's juror misconduct claim.

Alternatively, this Court also finds Petitioner has failed to present evidence that falls within the narrow exception that this Court ruled was admissible regarding the jurors conduct during trial and this portion of Petitioner's juror misconduct claim also fails on the merits. O.C.G.A. §§ 9-10-9 and 17-9-41 explicitly provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict." See, e.g., Oliver v. State, 265 Ga. 653, 654(3), 461 S.E.2d 222 (1995); Bowden v. State, 126 Ga. 578, 55 S.E. 499 (1906) (holding "[a]s a matter of public policy, a juror cannot be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow juror, or by showing his own misconduct or disqualification, from any cause"). The Supreme Court of Georgia has carved out very limited and rare exceptions to the prohibition against juror impeachment of the verdict, specifically, the Court has limited any exception to the rule against juror impeachment to cases in which "extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." Gardiner v. State, 264 Ga. 329,

332(2), 444 S.E.2d 300 (1994).[5] This exception set forth in Watkins, 237 Ga. at 683-685, and cited in Todd v. Turpin, 268 Ga. 820, 493 S.E.2d 900 (1997), to the deeply-rooted rule against impeachment of the verdict occurs only in circumstances of extra-judicial evidence being introduced to and considered by the jury. This exception therefore only arises in situations such as a bailiff making improper statements to a sequestered jury or jurors making an unauthorized visit to the crime scene and then communicating their findings to other members of the jury ***and*** the extra-judicial information becomes in effect evidence against the defendant which denies him the fundamental right of cross examination. Thus, the distinction between what will fall within one of the limited exceptions to the rule prohibiting juror testimony to impeach the verdict depends largely upon whether the alleged events in question were "internal" or"external" to the jurors and their deliberations.

Further, the Georgia Supreme Court has remarked, "it has been repeatedly held that the affidavit of a juror will not be received to show that the jurors in arriving at their verdict acted upon private knowledge or upon matters which were not in evidence." Emmett v. State, 243 Ga. 550, 554(6), 255 S.E.2d 23 (1979). Moreover, the Georgia Supreme Court stated in Williams v. State, 252 Ga. 7, 9 (1), 310 S.E.2d 528 (1984), that a conviction does not have to be reversed even where a juror makes a statement regarding the defendant based upon external knowledge and held that "we will not allow a jury verdict to be upset solely because of such statements unless the statements are so

[5] In fact, in such cases as Gardiner v. State, the Georgia Supreme Court has affirmed the trial court's determination that post-verdict affidavits should not have been admitted for purposes of the evidentiary hearing at the motion for new trial because, "the court carefully considered the content of the affidavits and correctly determined that they did not fall within an exception to the rule against the impeachment of verdicts of any of the reasons advanced. (citations omitted)." Id. at 332-333. See also Hall v State, supra. 259 Ga. 412.

prejudicial that the verdict must be deemed inherently lacking in due process." Williams v. State, 252 Ga. at 9 (1). "Put another way, new trial will not be granted unless there is a reasonable possibility that the improper evidence collected by jurors contributed to the conviction." (Citation omitted.) Bobo v. State, 254 Ga. 146 (1), 327 S.E.2d 208 (1985). Petitioner failed to show that discussions prior to deliberations, media discussions or sleeping through trial contributed directly to Petitioner's conviction or sentence. See, e.g., Oliver, 265 Ga. at 654(3) (limited exchange between jurors regarding "news story" of a murdered prosecution witness during trial did not amount to exception to the prohibition against juror impeachment of verdict). Further, Petitioner's allegation of pre-deliberation discussion and alleged sleeping during trial are not "extrajudicial and prejudicial information [that was] brought to the jury's attention improperly." See, e.g., Gardiner, 264 Ga. at 332(2) (allegations that a juror was familiar with family members of the victim, that jurors misunderstood instruction regarding reasonable doubt, and that a juror provided legal information which unfairly influenced other jurors did not fall within an exception to the rule against impeachment of verdicts); Joachim v. State, 263 Ga. 816, 817(3), 440 S.E.2d 15 (1994) (juror's negative comment about witness based on knowledge from juror's employment as a teacher at school attended by witness did not amount to an exception to the prohibition against juror impeachment of verdict).

This claim of juror misconduct is also procedurally defaulted.[6] As Petitioner failed to raise his claim of juror misconduct at the motion for new trial or on direct appeal

[6] Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. Black v. Hardin, 255 Ga. 239, 336 S.E. 2d 754 (1985) (a procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors.)

the claim is defaulted. See Black v. Hardin, 255 Ga. 239 (1985). Petitioner has not shown cause and actual prejudice nor a miscarriage of justice with substantial denial of his constitutional rights so as to overcome the procedural basis to this claim.

Accordingly, this Court finds this portion of Petitioner's juror misconduct claim is also without merit and is DENIED.

6. Petitioner Claims The Sentence and Verdict Returned By Jury In Petitioner's Case Does Not Meet Constitutional and Statutory Requirements And The Trial Court's Entry of The Verdict And Imposition Of The Death Sentence Was Invalid

In Petitioner's indictment he was charged in Count I with the malice murder of John Tubner and in Count II with the malice murder of Fannie Mae Tubner. (R. p. 4, 11). After finding nine aggravating circumstances, the jury affixed Petitioner's sentence at death. (TT. Vol. 12, pp. 2834- 2837; R. 1386-1394). The trial court polled the jury and each member stood and stated that they "freely and voluntarily" imposed a sentence of death. (TT. Vol. 12, pp. 2837-2841). Following this colloquy, the trial court stated the following:

> Mr. Sealey, pursuant to the jury's verdict of guilty as to Counts I and II of the indictment, you are hereby sentenced to die by lethal injection or in such manner as provided by law.

Id. at 2842. The Georgia Supreme Court performed its sentence review and found no error with the sentence imposed. Sealey v. State, 277 Ga. at 621.

O.C.G.A. § 17-10-30(b) defines the statutory aggravating circumstances to be used in assessing whether a defendant is eligible for the death penalty. O.C.G.A. § 17-10-30(c) states:

> The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

O.C.G.A. § 17-10-31 states:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking.

O.C.G.A. § 17-10-31.1(a) and (c) state:

> (a) Where, upon a trial by jury, a person is convicted of murder, a sentence of death or life without parole shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed.
>
> ...
>
> (c) Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole.

None of the pertinent statutes require the jury to designate for which murder they are imposing a death sentence. Nor do the statutes require a unanimous decision of death for each murder in order to impose a death sentence. Instead, a plain reading of the

statutes shows that in order to impose a death sentence the jury must only find one statutory aggravating circumstance and unanimously recommend a sentence of death in its verdict.

At least one statutory aggravating circumstance was found for each of the murders of John and Fannie Mae Tubner. For example, for Fannie Mae, the jury found:

> We, the jury, find beyond a reasonable doubt that the offense of murder of Fannie Mae Tubner was outrageously or wantonly vile, horrible, or inhuman in that it involved torture to the victim before death.

(TT. Vol., p. 2835). The same statutory aggravating circumstance was found for John Tubner as well. Id. As previously stated, the jury then unanimously chose to impose its verdict of death. Therefore, Petitioner's argument that the statutory aggravating circumstances were "improperly aggregated" to impose its death sentence is of no consequence as it does not matter, in this instance, how the jury considered the statutory aggravating circumstances as Georgia law only requires the jury to find one aggravator to sentence Petitioner to death.[7]

Petitioner states that Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981), holds that "'double counting' of evidence in aggravation has long been held invalid under the Georgia capital sentencing scheme." (Petitioner's Brief, p. 101). The Georgia Supreme Court has held that "double counting" is, "[W]hen two aggravating circumstances are alleged by the state, but they in fact only illuminate *one* reason for selecting the defendant's case as a case eligible for the death penalty." Simpkins v.

[7] Furthermore, the Georgia Supreme Court has repeatedly made it clear that the subsequent finding of the invalidity of one statutory aggravating circumstance does not warrant reversal of a death sentence. See Whatley v. State, 270 Ga. 296, 304 (1998); Crowe v. State, 265 Ga. 582, 595 (1995); Burger v. Zant, 718 F. 2d 979, 982 (11th Cir. 1983) ("invalidity of one of a plurality of statutory aggravating circumstances does not require that the entire death sentence be vacated.")

State, 268 Ga. 219, 225, 486 S.E.2d 833 (1997). However, a different legal principle is discussed in Godfrey. Godfrey committed two murders and the jury found two statutory aggravating circumstances and each of the aggravating circumstance was that the murder of one victim was committed during the murder of another victim which prompted the Court to find:

> It is apparent that the two aggravating circumstances are "mutually supporting." Gregg v. State, 233 Ga. 117 (210 S.E.2d 659) (1974); Waters v. State, 248 Ga. 355 (283 S.E.2d 238) (1981). Therefore, one of the death penalties must be set aside. As in Waters v. State, *supra*, we arbitrarily eliminate the death penalty for the murder of Mildred Godfrey and remand to the trial court for resentencing appellant to a life sentence as to that count.

Godfrey v. State, 248 Ga. at 624-625. Clearly, "mutually supporting" statutory aggravators and "double counting" of aggravators are two entirely different issues.

Moreover, neither "double counting" of statutory aggravators nor "mutually supporting" aggravators are present in Petitioner's case. All nine of the statutory aggravating circumstances found in Petitioner's case allege separate reasons for eligibility for death and none of the aggravators are based upon one murder being committed during the commission of the other murder. (TT. Vol. 12, pp. 2835-2836). Consequently, Petitioner's reliance on Godfrey and his allegation of "double counting" of statutory aggravating circumstances fail.

Additionally, these claims were clearly available to Petitioner prior to his direct appeal. Petitioner has failed to present any evidence or even an argument explaining why this issue could not have been raised at his motion for new trial and on direct appeal. Petitioner has failed to show cause or prejudice to overcome the procedural default of these claims. See Black v. Hardin, 255 Ga.239, 336 S.E.2d 754 (1985); Valenzuela v.

Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4), 373 S.E. 2d 184 (1988); White v. Kelso, 261 Ga. 32, 410 S.E. 2d 733 (1991). See discussion of procedural default in Part 8(b) of this order.

Accordingly, this Court finds Petitioner's claim of improper verdict to be without merit and is procedurally defaulted and DENIED.

7. Petitioner's Claim That His Execution Would Be Cruel And Unusual Punishment Due To The State's Failure To Rehabilitate Him While Properly Incarcerated Is A Non-Cognizable Claim.

In Claim XXV of Petitioner's Amended Petition, section X of Petitioner's post-hearing brief, Petitioner alleges that it would be cruel and unusual to execute him as the State allegedly participated in his "corruption" as a juvenile by failing to rehabilitate him while incarcerated for attempted murder. As there is no constitutional protection from the death penalty for career criminals, this claim fails to raise a constitutional issue for this Court's review.

To the extent Petitioner is alleging he suffers from a mental illness due to this incarceration, there is also no constitutional protection from the death penalty for mentally ill offenders. While Georgia and federal law provide that a person who is mentally retarded may not be executed, see O.C.G.A. § 17-7-131(j); Fleming v. State, 259 Ga. 687 (1989); Atkins v. Virginia, 536 U.S. 304 (2002), Georgia law expressly does *not* preclude a death sentence for someone with a mental illness. See O.C.G.A. § 17-7-131. The Georgia Supreme Court held in Lewis v. State that "unlike a verdict of guilty but mentally retarded, the statute that provides for a verdict of guilty but mentally ill does

not preclude a death sentence as a result of such verdict." 279 Ga. 756, 764 (2005), *cert. denied*, 126 S. Ct. 1917 (2006).

Therefore, because Petitioner's sentence does not violate the Eighth Amendment or state a claim challenging a constitutional right violate at trial, it is non-cognizable and this Court finds it is not properly before it for review and is DENIED.

8. Additional Specific Claims Of Constitutional Violations

8(a) Claims That Are Barred

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

This Court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in Sealey v. State, 275 277 Ga. 617, and may not be raised in this habeas corpus proceeding:[8]

1. The Following Claims Are Barred from Review:

Claim I, wherein Petitioner alleges that the lack of a uniform standard for seeking and imposing the death penalty across Georgia violated Petitioner's rights,was addressed and decided adversely to Petitioner on direct appeal. Sealey v. State, 277 Ga. at 621 (14). To

[8] To the extent that there are allegations contained in supporting paragraphs of these claims which set forth new arguments in support of these issues and allege violations under different constitutional provisions, these allegations are procedurally defaulted absent a showing of cause and actual prejudice, or of a miscarriage of justice. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985).

the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default of which there is no showing;

Claim V, wherein Petitioner alleges that the trial court's restrictions on voir dire deprived Petitioner of his rights under the United States Constitution and analogous provisions of the Georgia Constitution, was addressed and decided adversely to Petitioner on direct appeal. Sealey v. State, 277 Ga. at 619-620(5)(6). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default; of which there was no showing;

Claim V, wherein Petitioner alleges that trial court erred in failing to admit exculpatory And mitigating evidence that another suspect failed a polygraph test, was addressed and decided adversely to Petitioner on direct appeal. Sealey v. State, 277 Ga. 620 (10).

Claim XXX, wherein it is alleged Petitioner's death sentence is disproportionate, was Addressed and decided adversely to Petitioner on direct appeal. Sealey v. State, 277 Ga. at 621 (15).[9]

As these claims were raised and rejected by the Georgia Supreme Court on direct

[9] To the extent Petitioner alleges that he proportionality review conducted in Georgia is constitutionally infirm, this claim is procedurally defaulted as it was not raised on direct appeal and Petitioner has failed to prove cause and prejudice sufficient to excuse his procedural default of this claim, this claim is not properly before this Court for review on the "merits."

appeal, they are barred under the well-established doctrine of *res judicata* and are not properly before this Court for review.

8(b) Claims That Are Procedurally Defaulted

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4), 373 S.E.2d 184 (1988); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. See Earp v. Angel, 257 Ga. 333, 357 S.E.2d 596 (1987). See also Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981) (holding that ineffective assistance of counsel can constitute cause under O.C.G.A. § 9-14-48(d)); Turpin v. Todd, 268 Ga. 820, 493 S.E.2d 900 (1997)(a procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors. A habeas Petitioner meets both prongs of the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

This Court concludes that the following grounds for habeas relief, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted, and that this Court is barred from considering any of these claims on their merits due to the fact

that Petitioner has failed to demonstrate cause and prejudice, or a fundamental miscarriage of justice sufficient to excuse his failure to raise these grounds:

1. The Following Claims Are Procedurally Defaulted:

Claim II[10], wherein Petitioner alleges the Unified Review Procedure, as applied, violated Petitioner's rights under the United States Constitution and analogous provisions of the Georgia Constitution;

Claim III, wherein Petitioner alleges the trial court erroneously denied Petitioner's motion for a change of venue;

Claim IV[11], wherein Petitioner alleges the pools from which Petitioner's grand and traverse jury were drawn were unconstitutionally composed and discriminatorily selected;

Claim VI, wherein Petitioner alleges the trial court violated Petitioner's rights under the United States Constitution and analogous provisions of the Georgia Constitution by excusing for cause unspecified jurors whose views on the death penalty were not extreme enough to warrant exclusion;

Claim VII, wherein Petitioner alleges the trial court erred by not removing jurors for cause or bias, either because they were directly biased against Petitioner or because they were incapable of giving proper consideration to a sentence other than death and/or to mitigating evidence;

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[10] To the extent it is alleged Petitioner suffers from any cognitive impairment or psychological defects, this claim is procedurally barred as it was not raised on direct appeal and therefore as Petitioner failed to demonstrate cause and prejudice sufficient to excuse Petitioner's procedural default, this claim is not properly before this Court for review on the "merits."

[11] To the extent Petitioner alleges that the grand and traverse jury lists under-represented Hispanic persons, this claim was addressed and decided adversely to Petitioner on direct appeal and is barred from review by the doctrine of *res judicata*. Sealey v. State 277 Ga. at 619 (3).

Claim VII, wherein Petitioner alleges the death qualification process during voir dire tainted the jury in favor of persons predisposed toward conviction, predisposed against a finding of guilty but mentally retarded, and predisposed to imposition of the death penalty;

Claim IX, wherein Petitioner alleges the State used peremptory challenges in a discriminatory and unconstitutional manner in violation of Batson v. Kentucky, and JEB v. Alabama;

Claim X, wherein it is alleged Petitioner was tried while incompetent and the trial court failed to inquire about incompetency in violation of the United States Constitution and corresponding provisions of the Georgia Constitution;

Claim XI, wherein it is alleged Petitioner was denied the right to represent himself at trial in violation of Faretta v. California, 422 U.S. 806 (1975);

Claim XV, wherein Petitioner alleges the trial court erred by denying Petitioner's motion for a continuance during the penalty phase of the proceedings;

Claim XVI, wherein Petitioner alleges misconduct by the prosecution in that:

1) the State elicited false and/or misleading testimony from State witnesses at trial in violation of Napue v. Ilinois, 360 U.S. 264 (1959);

2) the prosecution introduced the materially inaccurate testimony of multiple witnesses, including the testimony of Sherry Tubner and Gregory Fahie;

3) the prosecution introduced materially inaccurate testimony of multiple law enforcement agents in support of Petitioner's guilt and in support of aggravating circumstances at sentencing;

4) the State allowed its witnesses to convey a false impression to the jury;

5) the State knowingly or negligently presented false testimony in pretrial and trial proceedings;

6) the State suppressed information favorable to the defense at both phases of the trial in violation of Brady v. Maryland, 373 U.S. 667 (1965), and Kyles v. Whitley, 115 S.Ct. 1555 (1995);

7) the false evidence, as well as the suppressed yet exculpatory evidence includes but is not limited to: evidence of false and unsupported testimony by the State's expert witnesses; the testimony of law enforcement authorities concerning the manner and circumstances of the surviving victim's identification of Petitioner; misrepresentation of evidence by the prosecutor; and the procurement of improper character and reputation evidence[12];

8) the prosecutor improperly introduced evidence designed to appeal to inflame the jurors and inject the jurors prejudices into Petitioner's trial, including, but not limited to, gory crime scene photographs and evidence concerning the worth and value of the victims;

9) the prosecutor made misleading, improper, and unconstitutional closing arguments at both guilt and sentencing phases of trial, including but not limited to improper speculations grounded in neither the evidence nor science, including improperly speculating about Petitioner's future dangerousness, vouching for the prosecution witnesses, "testifying" to what he believed to be true and untrue from the sworn testimony, suggesting that Petitioner was not human, suggesting that trial counsel's objections were evidence of his guilt, and commenting upon Petitioner's right to remain silent and stating facts not in evidence;

Claim XVIII, wherein Petitioner alleges the trial court erroneously permitted the prosecution to introduce substantial inflammatory and prejudicial "victim impact" testimony;

Claim XIX, wherein Petitioner alleges the prosecution's introduction of prejudicial and inflammatory evidence at trial was improper.

That portion of Claim XIX, wherein Petitioner alleges the failure of the trial court to exclude prejudicial and inflammatory evidence from Petitioner's trial, violated his constitutional rights.

[12] To the extent Petitioner alleges the procurement of improper character and reputation evidence, this claim was addressed and decided adversely to Petitioner on direct appeal and is therefore barred from review. Sealey v. State, 277 Ga. at 621(12).

Claim XXI[13], wherein Petitioner alleges the instructions provided to Petitioner's jury during both phases of trial, both individually and collectively, were ambiguous, misleading, insufficient, vague, confusing, and contrary to law and fact;

Claim XXVI, wherein it is alleged that Petitioner is the moral, functional, and legal equivalent of a juvenile offender, or mentally retarded offender; and

Claim XXVIII, wherein it is alleged Petitioner did not possess the requisite intent to kill.

8(c) ISSUES WHICH FAIL TO ASSERT A CONSTITUTIONAL VIOLATION ARE PRECLUDED FROM REVIEW AS NON-COGNIZABLE

The following allegations raised by Petitioner fail to allege grounds which would constitute a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence and are therefore barred from review by this Court as non-cognizable under O.C.G.A. § 9-14-42(a).

Claim XXVII, wherein, Petitioner alleges the statutory aggravating circumstances as defined in O.C.G.A. § 17-10-30(B)(2) and (B)(7), and as applied in this case, are unconstitutionally vague and arbitrary.

Claim XXIX, wherein, it is alleged Petitioner cannot be subjected to lethal injection because to do so would be cruel and unusual punishment

Claim XXXII,[14] wherein it is alleged all claims combined resulted in an unfair trial and appeal, in violation of Petitioner's constitutional rights

[13] To the extent Petitioner alleges errors in the sentencing phase charge, these claims are deal t with in Part 6 of this order.

[14] There is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70, 538 S.E. 2d 416 (2000).

The above claims are non-cognizable claims and are not proper claims for this Court's review, are without merit and were not supported by any evidence and are DENIED.

9. Newly Discovered Evidence

9(a) Petitioner's New Mental Health Evidence

Petitioner alleges trial counsel were ineffective for failing to present newly discovered mental health evidence. This Court finds trial counsel were neither deficient nor was Petitioner prejudiced as the diagnoses currently rendered are neither supported by the record and are the product of errant analysis.

Petitioner was evaluated by Dr. Antonio Puente during his current state habeas proceeding and alleges that he suffers from "organic brain syndrome and borderline mental retardation or intellectual functions." (Petitioner's Brief, p. 40, *quoting*, HT 1:53).

1. Borderline Mental Retardation

In Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, (2002), the United States Supreme Court stated that the Wechsler Adult Intelligence Test, III (WAIS III) was the standard instrument in the United States for assessing intellectual functioning." Atkins v. Virginia, 536 U.S. at 309, fn. 5. Under the explanation of testing for malingering, Dr. Puente administered the WAIS III twice, thereby, foregoing a subsequent mental health expert from being able to administer this test due to the practice effect. (HT 1:54-55, 196). Dr. King testified that it would not have been "appropriate" for him to administer the WAIS III to Petitioner after Dr. Puente's double testing for fear that there would be a problem with the "practice effect". (HT 2:196). Dr. King testified that he could not think

of any reason why Dr. Puente would have administered this test twice and testified that there is only one portion of that test, referred to as "coding", which could possibly be administered twice to test for malingering. Id. at 218-219. Dr. King went on to explain:

> The WAIS is not in and of itself a test for malingering. There are other tests that are used for malingering. A test for memory malingering is the TOMM, T-O-M-M (spelling), test for psychological problem malingering is the MMPI and also the structured interview of reported symptoms interview. There are a variety of other tests that are designed simply to identify malingering that have normative scientific basis to them; the WAIS does not.

Id. at 219.

In addition to Dr. Puente's inappropriate double administration of the WAIS III, Dr. King also found significant errors in Dr. Puente's administration of the WAIS III that call into question the reliability of the entire test. (HT 2:225). For example, on the vocabulary portion of the WAIS III, Dr. Puente failed to ask follow-up questions and improperly scored some of Petitioner's responses. Dr. King explained the preface for these mistakes with the following testimony:

> The test manual requires on this particular sub-test that you write down the person's responses verbatim, and that means all of their responses, not a part of their response. The test manual also has a number of possible answers, and this particular sub-test is scored with either a two, a one, or a zero for each response. The manual portions have examples of two point responses, one point responses, and zero point responses. When you're dealing with these kinds of sub-tests you may get an unusual response or a one point response that the manual indicates with a large blue Q that you need to ask an additional, "Tell me more about what the word winter means," or what the word such-and-such means, in order to get a maximum performance. On both of these administrations Dr. Puente wrote down only one word responses and I doubt, I don't believe that that happened. The reason why is because even on comprehension Mr. Sealey gave more lengthy responses later on. But there are no indications of any questioning about some of these items that would have been vague, that he should have been followed up on. And there are some of the questions that were, frankly, just not scored correctly, in my opinion.

Id. at 222.

As examples, Dr. King pointed out the following mistakes: 1) When asked the definition of "winter", "consume", "sorry", "plagiarize", "fake", Petitioner's responses called for Dr. Puente to ask follow up questions but Dr. Puente failed to give any indication on the test that he did this (Dr. King testified the person administering the test should "put a Q in parentheses, indicating that you asked a question, so that anybody who reviews your data knows that you did." Id. at 222); and, 2) for the word "pout" Petitioner stated "anger" and Dr. Puente gave him zero points even though "the manual has a one point response with a question." Id. at 222-223.[15] Dr. King was also suspicious of the one word responses Dr. Puente recorded as when he administered the vocabulary portion of the Stanford-Binet intelligence test to Petitioner, Petitioner did not give one word responses. Dr. King explained that psychologists are "required, really, by the ethical code to write down verbatim everything that occurs." Id. at 224. Consequently, this Court finds test results from each of the WAIS III tests administered by Dr. Puente to be unreliable.

As he was unable to administer the WAIS III, Dr. King administered the Standford-Binet Intelligence Test whose purpose is to understand how the person "is functioning and their ability to engage in fluid reasoning, knowledge, quantitative reasoning, visual/spatial reasoning, and also working memory." (HT 2:205). From this test Dr. King found Petitioner's "nonverbal IQ score was 81", "verbal IQ score was 86" and a full scale IQ score of "82". Id. at 206. However, Dr. King explained that "the factors that make up these IQ scores range from a low of 75 to a high of 97, meaning his

[15] Dr. Puente made the same type of mistakes on the comprehension section of the WAIS III. See HT 2:225-228.

knowledge base, which is 97, right in the average range. So, for individuals his age, his general knowledge was right at average." Id.

Dr. King also administered the Wide Range Achievement Test, Version Four, (WRAT IV), whose purpose is "to get an idea about somebody's achievement abilities, basically how well you read, write, do arithmetic, and comprehend sentences." Id. at 207. Moreover, Dr. King testified that this test gives "standard scores" "that are very similar to IQ scores" and he found them to be "more helpful in this case [a]s we get a grade equivalent." Id. at 208.

Petitioner's test results were: 1) "reading words at an 11.7 grade level"; 2) "doing sentence comprehension at a 10.2 grade level; 3) "spelling at a, almost at the end of a first year of college level; and, 4) "math computation" at a "sixth grade level". Id. at 208-209. Dr. King explained that his math skills were "still good because it means he can do addition, subtraction, multiplication, division accurately." Id. at 209. However, he did diagnose Petitioner with a learning disability in arithmetic.[16](HT 2:211). Moreover, Petitioner could spell words like "loquacious, imperturbable, irresistible, occurrence, iridescent, consensus, initiative" correctly which were "at the end of the spelling test." Id. Dr. King explained that although "achievement tests are not necessarily indications of intelligence level, except that when you get functioning at, like, his spelling level and his reading level, you can't be mentally retarded and generate those kinds of levels of performance." Id. Further, Dr. King testified that Petitioner's level of performance on the WRAT IV is not consistent with an individual with borderline intelligence. Id.at 209-210.

[16] Petitioner states that trial counsel should have presented evidence of Petitioner's arithmetic learning disability, however, Petitioner fails to explain how his inability to do math would have mitigated the brutal murders he committed.

Dr. King also testified that he reviewed writings by Petitioner to help in his overall determination of Petitioner's intelligence level. Id. at 218. Dr. King described an "incident report" Petitioner had written in 1994 as "extremely well written" and went on to state, "Syntax was good, punctuation was good. He used rather large words. He used multiple and compound sentences. They were structured. That is totally inconsistent with somebody having borderline intellectual functioning." Id. Dr. King concluded, based upon his review of Petitioner's records and his evaluation that Petitioner did not "meet the criteria for mental retardation under any circumstance." Id. at 210.

2. Organic Brain Syndrome

Petitioner's expert, Dr. Puente, also diagnosed Petitioner with "organic brain syndrome". (HT 1:53). However, Dr. King testified that organic brain syndrome is "not a diagnostic category" and he was unaware of anyone using that term for the past "25 to 30 years." (HT 2:254-255). Dr. King testified that none of the tests administered by Dr. Puente indicate that Petitioner suffered from any type of brain damage. Id. at 216. Further, Dr. King found that the historical facts, head injury, chaotic childhood and problems during childbirth, upon which Dr. Puente based his diagnosis of organic brain syndrome, were unsubstantiated.

Dr. King testified that Petitioner did not describe his childhood in a manner that would lead Dr. King to conclude that his childhood had been "chaotic". (HT 2:199). Petitioner reported the following to Dr. King regarding his childhood:

> Well, he grew up in the Virgin Islands, United States territory, on St. Croix. And he had one sister, Geraldine, and then I think he had a couple, two or three half-sisters who were born to his mother. His early family life was probably spent going to school and, also, spending a lot of time playing baseball and other sports. He was apparently a pretty good athlete, and not only in track and field, but also in baseball. He attended the same

> elementary school, for example, from first through sixth grade. And as far as I could tell, he seemed to have a (sic) relatively pleasant memories about most of his childhood, especially in terms of the sports that he played. At approximately age 12 or 13 he and his mother and his sister moved to New York, spent about two or three years there. His educational history is a little spotty at that point. He moved two or three times in junior high school and then started to attended Dewitt Clinton High School in New York, when he then moved back to St. Croix at about age 15, to be with his father.

Id. at 197-198. Dr. King opined that Petitioner "was not as happy in New York as he was in the Virgin Islands" but he "progressed from one grade to the next" and "ran track and was involved in sports." Id. at 198. Petitioner described his father as "very loving" and indicated that he had a "pretty good relationship with his father." Id. Additionally, Petitioner told Dr. King that he never felt he was "physically abused by his parents". Id. at 199.

Petitioner did report to Dr. King that he had a stutter as a child but also stated that he received tutoring for his speech impediment "when he was in second or third grade." Id. at 200. Dr. King testified that approximately "one in 60 or 70 kids" have a stutter similar to Petitioner's. Id. at 202.

Petitioner also reported that he had never been hospitalized or been knocked unconscious. Id. at 200-201. Dr. King explained that if a person had received a "blow to the head" that would render them unconscious for longer than 30 to 60 seconds and the following symptoms would occur:

> It can provide a range of symptoms, from nausea, vomiting, blurred vision when one awakes, headaches that can go on for a day or two, that would be kind of a post-concussion syndrome, to motor difficulties, cognitive impairments, speech problems. Significant head trauma will result in changes in sensory perceptions and motor abilities and cognitive abilities and cognitive abilities and also affective displays. And those symptoms, if they occur after the age of 12, will usually take months if not a year to resolve.

Id. at 202. Further, there were no medical records to support a finding of head trauma. Id. at 234. Consequently, Dr. King testified that there was no evidence of a brain injury:

> If you have a brain injury or if you have brain damage, the results of that behaviorally don't show up selectively. They don't show up, like, one year or once in a while, they show up constantly. They show up every day. They are triggered by everyday life events, and there's no evidence that Mr. Sealey has had anything like that happen to him.

Id.

Petitioner did tell Dr. King that he had been hospitalized at birth due to a "problem with his umbilical cord." Id. at 202. However, Dr. King explained that problems with the umbilical cord wrapping around a baby's neck occurs "with great frequency". Id. at 203. Further, Dr. King testified that the symptoms of hypoxia, lack of oxygen to the brain, which can occur when a baby gets an umbilical cord wrapped around its neck, were not present in Petitioner. Id. Dr. King detailed the symptoms of this problem as the following:

> Well, if anybody experiences some kind of damage from lack of oxygen it affects the brain completely. I mean, there's not a selective area of the brain that gets some oxygen and others get a lot of oxygen. If you get no oxygen, you get no oxygen. So, if somebody experiences significant problems as a result of hypoxia, then they're going to show global difficulties. They're going to have motor difficulties, they're going to have problems with their speech, their motor, their going to have motor difficulties, they're going to have things like cerebral palsy or significant cognitive declines and deficits. They are usually described, what we call sever developmental delay, meaning that they have problems in all areas of their motor, sensory, and cognitive functioning.

Id. at 203.

Additionally, Dr. King explained that Petitioner did not exhibit symptoms of an individual who had any type of oxygen loss:

> The best way I can answer that is I saw no evidence from Mr. Sealey that he has any cognitive deficits that would be explained by something like

> that. He certainly has no motor problems that I could determine, especially since he was really a good athlete and did that for years. He has no sensory difficulties that I could determine. And he had some differential abilities, in terms of his cognitive functioning, but it would not be consistent with what we would expect from hypoxia.

Id. at 204.

> Dr. King also testified to the following:
>
> [T]here are no neuropsychological tests that test for frontal lobe functioning. There just are none. And the idea of that is rather naïve in the neuropsychological literature. There are some tests that would be sensitive to frontal lobe problems, but those tests are sensitive to all kinds of higher cortical functions. So, you can't use a neuropsychological test to pinpoint frontal lobe dysfunction because there just aren't any that do that.
>
> ...
>
> Ordinarily if there's been some kind of insult to the brain, whether it's head trauma, tumor, cerebral vascular accident, the initial determination is done x-ray, CAT scan, MRI, and/or PET scan, and neuropsychological testing is used to follow up to see
> the extent or lack of deficit.

(HT 2:216).

Dr. King testified that in addition to administering psychological testing to Petitioner, he also reviewed:

• Affidavits of the following individuals; Doris Walton, Pauline Brown Corbitt, Kareem Dennis, Ronald Tutein, Robert Cepeda, Maurice Gaskin, Jefferson Christian, Cristobal Encarnacion, Fabian Towers, Guido Schjang, Warren Christian, Rodney Hanson, Josephine Caproni.

• Richard Sealey history (transcription of interview notes for May 3rd, 2001).

• Memorandum to trial counsel regarding interview with Ronald Tutein and Kareem Dennis, May 28th, 2002.

• Richard Sealey's writings/letters.

• Memorandum regarding third interview with Richard Sealey on May 25, 2001.

• Memorandum to trial counsel regarding visit with Richard Sealey, April 25, 2002.

• Memorandum to trial counsel regarding Sealey's problems/concerns, dated April 2, 2002.

• Memorandum to trial counsel regarding conversation with Murine Allen, March 27, 2002.

• Letter to John Beall from Joseph Roberto, March 27, 2002.

• Letter to Richard Sealey from Jodi Monogue, March 6, 2002.

• Memorandum to trial counsel regarding a conversation with Sealey's sister.

• Memorandum to trial counsel regarding a conversation with Claudia Pennia, July 15, 2002.

• Clayton County Sheriff's Office Jail Incident Reports.

• Memorandum to trial counsel regarding interview with Pauline Corbitt, May 28, 2002.

• Records from Fulton County jail.

• Records from Federal Bureau of Prisons.

• Records form the Virgin Islands.

• School records.

• Records from Georgia Department of Corrections.

• Neuropsychological evaluation of Antonio E. Puente

• Psychological evaluation by this examiner, May 28th, 2008.

(HT 2:193-194; RX 224, 63:18,137-1388).

After reviewing all of this information and conducting his evaluation of Petitioner, Dr. King made the following conclusion regarding Petitioner's mental functions:

> I have found no evidence in any record nor in any testing that has been done or anything that I have done that indicates that he is mentally retarded or functions in the borderline range or has any evidence whatsoever for any brain damage.

(HT 2:210).

This Court finds trial counsel's decision not to pursue evidence pertaining to Petitioner's mental health was based upon a thorough and reasonable investigation and trial counsel's performance was not deficient. Furthermore, this Court finds trial counsel were not ineffective for not presenting Petitioner's newly acquired mental health diagnoses as there is no reasonable probability that Petitioner's trial would have had a different outcome given the unreliability of his newly acquired mental health diagnoses. Consequently, this portion of Petitioner's ineffective assistance claim is DENIED.

9(b) Petitioner's Newly Obtained Witness Testimony

Petitioner presented the testimony of several witnesses who he now alleges could have provided mitigating evidence that trial counsel was ineffective for failing to present. A careful review by this Court of this evidence reveals that the majority of this evidence is not mitigating and the minor evidence that could be considered mitigating is extraordinarily insignificant when compared to the heinous nature of the crimes Petitioner committed.

A good portion of the testimony from the affiants contains aggravating evidence. For example: 1) Petitioner's sister, Pauline Corbitt states that he was "spoiled" by his parents and "always had to get his way" (PX 11, 4:766); 2) Petitioner's exbrother-in-law, Joel Tutein, stated that Petitioner "threw horrible, random temper-tantrums", ran with his "old friends" who were "bad guys" and committed "a lot of petty crime" (PX 13, 4:773, 774); 3) a former neighbor in St. Croix, Rodney Hansen, stated that when Petitioner returned to St. Croix from New York he resumed his friendship with Troy Joseph and "They were known to commit petty thefts together, and they'd sometimes vandalize places or smoke pot together." (PX 15, 4:781); 4) a friend from St. Croix,

Maurice Gaskin testified that Petitioner, stated that he and Petitioner and their "group" would steal from people if he saw someone with something they wanted they would "just take it" and would "ride around in the car (the BMW Petitioner's father bought him) and smoke weed before and after school" (17.4:785, 786); 5) another friend of Petitioner's, Roberto Cepeda, also stated he and Petitioner drank and smoked marijuana together, that "[s]ometimes" Petitioner would also "sell weed", and spent "a lot" of their "time together" "going around the island and stealing" (PX 19, 4:790); 6) Petitioner's nephews, Ronald Tutein and Kareem Dennis, both testified that Petitioner smoked marijuana, and Kareem also stated that after Petitioner was released from federal prison he "spent most of his time in St. Croix partying and getting high" (PX 20-21, 4:795, 797, 798); 7) a family liaison in Atlanta, Doris Walton, who was tangentally connected to Petitioner, stated that Petitioner came by her office unannounced and "took out a bag of marijuana and placed it on her desk" and laughed; (PX 23, 4:804) and, 8) a fellow inmate, Fabian Towers, stated that Petitioner was "spoiled, became a "good fighter" in federal prison and engaged in homosexual activity while in prison (PX 25, 4:809,810).

Petitioner's affidavits also contain contradictory testimony. For example, Fabian Towers states Petitioner's "father Gerald was strict with him and ruled their house with fear" but yet other affiants state Petitioner's father never supervised him. (Compare PX 25, 4:808, PX 11, 4:767, PX 13, 4:772-773,PX 14, 4:776). Another example is the testimony of several affiants who allege Petitioner was cowardly and would not fight, but Mr. Towers describes what a "good fighter" Petitioner became in prison and Petitioner's friend Maurice Gaskin testified that if Petitioner saw someone with something he wanted he would just take it. (Compare PX 25, 4:810; PX 14,4:777, PX 17, 4:785, PX 19, 4:791).

Additionally, none of the affiants state Petitioner was abused or mistreated nor do they state Petitioner's needs of food, clothing, shelter or even love were neglected. Instead, they describe Petitioner as a spoiled child who becomes a juvenile delinquent and speculate his parents are to blame because they allegedly failed to provide adequate supervision. Petitioner was thirty-four years old when he committed these crimes, therefore, it is highly unlikely that evidence that Petitioner was unreasonably spoiled by his parents would have mitigated the brutal torture and axe murders of an elderly couple for which Petitioner was sentenced to death. See Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000)("Even assuming that trial counsel's performance was unreasonable, Petitioner clearly was not prejudiced by trial counsel's failure to present this kind of evidence. Petitioner was more than forty years old at the time of the murders, and 'evidence of an abusive and difficult childhood would have been entitled to little, if any, mitigating weight.'").

"It is common practice for Petitioner's attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." Waters, 46 F.3d at 1513-1514. Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specified parts of a made record, post conviction counsel will inevitably identify shortcomings in the performance of prior counsel ... '[i]n retrospect, one may always identify shortcomings, but perfection is not the standard for effective assistance'... 'a lawyer can almost always do something more in every case. But the Constitution requires a good deal less than

maximum performance.' ... 'the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.'" Williams v. Head, 185 F. 3d 1223, 1236 (1999) (quoting Cape v. Francis, 741 F2d 1287, 1302 (11th Cir. 1984); Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992).

As the Eleventh Circuit Court of Appeals properly noted, trial lawyers "do not enjoy the benefits of endless time, energy or financial resources." Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994). "A lawyer can almost always do something more in every case . . . at some point, [however], a trial lawyer has done enough." Atkins v. Singletary, 965 F.2d 952, 959-960 (11th Cir. 1992). Further, allegations attacking the Petitioner's childhood caregivers "may have offended the jurors" and not been mitigating. Whatley v. Terry, 284 Ga. 555, 567 (2008).

Therefore, as trial counsel conducted a reasonable investigation of Petitioner's background and there is no reasonable probability that Petitioner's newly acquired testimony from lay witnesses would have changed the outcome of his sentencing trial, this portion of Petitioner's ineffective assistance of counsel claim is DENIED.

Petitioner's admitted petition enumerates 33 claims for relief. As set forth above some claims asserted by Petitioner were procedurally barred as they were litigated on direct appeal, some claims were procedurally defaulted as they were not timely raised and failed to satisfy the cause and prejudice test or the miscarriage of justice exception, some claims are noncognizable and some claims have been ruled upon by the Court.

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

Based upon the findings of fact and conclusions of law set forth above this Court hereby:

ORDERS AND ADJUDGES that the Writ of Habeas Corpus is denied as to the conviction and to the sentence. The Clerk for the Superior Court of Butts County, Georgia is directed to serve a copy of this Order on the Petitioner, counsel of record for the parties and the Council of Superior Court Judges of Georgia.

This 26 day of July, 2012.

JUDGE J. BRYANT DURHAM, JR.
FLOYD SUPERIOR COURT
ROME JUDICIAL CIRCUIT

Sealey v. State
Ga.,2004.

Supreme Court of Georgia.
SEALEY
v.
The STATE.
No. S03P1479.

March 1, 2004.

Background: Defendant was convicted in the Superior Court, Clayton County, Matthew O. Simmons, J., of capital murder and other offenses. Defendant appealed.

Holdings: The Supreme Court, Thompson, J., held that:

(1) evidence was sufficient to support convictions;

(2) defendant was not deprived of properly qualified grand jury;

(3) entire office of district attorney was not disqualified due to prior representation of defendant by assistant district attorney in unrelated matter;

(4) order limiting scope of questions during void dire was not abuse of discretion;

(5) order excusing prospective jurors based on hardship was not abuse of discretion;

(6) evidence that aunt of victims' granddaughter had stipulated to admission of her polygraph examination in any prosecution against her was not relevant to admissibility in defendant's trial; and

(7) evidence that defendant had previously used another man's credit card after killing him was sufficiently reliable to be admissible in sentencing.

Affirmed.

West Headnotes

[1] Homicide 203 1139

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1138 First Degree, Capital, or Aggravated Murder
203k1139 k. In General. Most Cited Cases
Evidence was sufficient to support convictions for capital murder; witness saw first victim lying in pool of blood and defendant holding second victim down and wielding handgun, defendant ordered witness to search for money, defendant instructed another to find hammer to kill victims and used ax to kill victims when hammer could not be located, and defendant later told witnesses that he "had to do it" because victims had seen their faces and that victims deserved to die.

[2] Grand Jury 193 2

193 Grand Jury
193k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Statutory directive that grand jurors be selected from "most experienced, intelligent, and upright citizens of community" did not impermissibly exclude persons who did not have high school diploma. West's Ga.Code Ann. § 15-12-40(a)(1).

[3] Grand Jury 193 2

193 Grand Jury
193k2 k. Constitutional and Statutory Provisions. Most Cited Cases
Unlike constitutional requirements, the statutory procedures for creating the grand jury list are merely directory, and do not create a basis for sustaining challenges to the array. West's Ga.Code Ann. § 15-12-40.

[4] Grand Jury 193 2.5

193 Grand Jury
193k2.5 k. Constitution in General; Representation of Community. Most Cited Cases
Grand jury source list did not unlawfully underrepresent Hispanic persons, absent any evidence that Hispanic persons constituted cognizable group in county or of degree of alleged underrepresentation.

[5] Criminal Law 110 ⚿1166(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(2) k. Organization and Proceedings of Grand Jury. Most Cited Cases

Criminal Law 110 ⚿1166.16

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.16 k. Impaneling Jury in General. Most Cited Cases

Grand Jury 193 ⚿2.5

193 Grand Jury
193k2.5 k. Constitution in General; Representation of Community. Most Cited Cases

Jury 230 ⚿62(3)

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k60 Jury List
230k62 Procurement and Selection of Names
230k62(3) k. Mode of Procedure. Most Cited Cases
There is no reversible error arising out of the jury commission's reliance on the most recently available census in creating its source lists.

[6] Criminal Law 110 ⚿639.1

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k638 Counsel for Prosecution
110k639.1 k. Eligibility of Prosecuting Attorney. Most Cited Cases
Entire office of district attorney was not disqualified from prosecuting defendant in trial for capital murder based on claim that one assistant district attorney had previously represented defendant in prior, unrelated criminal cases; attorney was properly screened from any direct or indirect participation in instant trial.

[7] Jury 230 ⚿131(13)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of Examination. Most Cited Cases
Order limiting questions during voir dire regarding jurors' understanding of legal terms and questions appearing to seek prejudgment of case was not abuse of discretion, in trial for capital murder; review of questions and responses during voir dire as whole indicated jurors' willingness to consider all possible sentencing options and that they were qualified to serve.

[8] Jury 230 ⚿131(13)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(13) k. Mode of Examination. Most Cited Cases
Defendant was not entitled to pose questions to prospective jurors during voir dire that were unrelated to possible juror bias and which attempted to elicit speculative responses about how they might conduct themselves during deliberations, in trial for

capital murder.

[9] Criminal Law 110 1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and Authorities. Most Cited Cases
Defendant waived challenge on direct appeal that he was deprived of qualified jury panel, in trial for capital murder, to extent he failed to identify challenged jurors or to provide relevant citation to record. Sup.Ct.Rules, Rule 22.

[10] Jury 230 135

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k134 Peremptory Challenges
230k135 k. In General. Most Cited Cases
A defendant is entitled to a full panel of qualified jurors from which the jury will be selected by the use of peremptory strikes.

[11] Jury 230 75(2)

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k75 Excusing and Discharging Jurors from Attendance
230k75(2) k. Discretion of Court. Most Cited Cases
Trial court did not abuse its discretion in excusing prospective jurors for cause based on hardship, in trial for capital murder. West's Ga.Code Ann. § 15-12-1(a) (2, 3).

[12] Criminal Law 110 388.5(3)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.5 Lie Detector or Polygraph Tests and Procedures
110k388.5(2) Stipulations or Agreements
110k388.5(3) k. In General. Most Cited Cases
That aunt of murder victims' granddaughter entered into stipulation with State concerning admissibility of polygraph examination administered to her in any potential proceedings against her was not relevant to admissibility of polygraph results in defendant's trial for capital murder.

[13] Criminal Law 110 620(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(6) k. Particular Cases. Most Cited Cases
Trial court did not err in refusing to bifurcate the possession of a firearm by a convicted felon charge from the remaining charges for murder, felony murder, and other crimes; it was possible that the jury would convict defendant of felony murder with the possession crime serving as the underlying felony.

[14] Sentencing and Punishment 350H 1762

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 k. Other Offenses, Charges, or Misconduct. Most Cited Cases
Evidence that defendant had previously used another man's credit card shortly after killing the man was sufficiently reliable to be admissible in sentencing for instant capital murder.

[15] Sentencing and Punishment 350H 1760

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1760 k. Defendant's Character and Conduct. Most Cited Cases

Sentencing and Punishment 350H ⚿1762

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 k. Other Offenses, Charges, or Misconduct. Most Cited Cases
Reliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial.

****336*622** John A. Beall, IV, Jonesboro, for appellant.
Robert E. Keller, Dist. Atty., Todd E. Naugle, Asst. Dist. Atty., Thurbert E. Baker, Atty. Gen., Sabrina D. Graham, Asst. Atty. Gen., for appellee.
***617** THOMPSON, Justice.

A jury found Richard Lester Sealey guilty of the malice murders of John and Fannie Mae Tubner and 17 related crimes. The jury recommended a **death sentence** for the murders, after finding beyond a reasonable doubt that the murders were both outrageously or wantonly vile, horrible, or inhuman in that they involved the torture of the victims, depravity of mind, and the aggravated battery of the victims, that the murders were both committed for the purpose of receiving money or any other thing of monetary value, that the murder of Mr. Tubner was committed while Sealey was engaged in the capital felonies of armed robbery and aggravated battery, and that the murder of Ms. Tubner was committed while Sealey was ****337** engaged in the capital felonies of armed robbery, aggravated battery, and kidnapping with bodily injury. See OCGA § 17-10-30(b)(2), (4), and (7). The trial court sentenced Sealey to death and terms of imprisonment. For the reasons set forth below, we affirm Sealey's convictions and sentences.[FN1]

FN1. The crimes occurred on January 23, 2000. Sealey was indicted by a Clayton County grand jury on February 7, 2001, on two counts of malice murder, fourteen counts of felony murder, two counts of possession of a firearm during the commission of a crime, and one count of possession of a firearm by a convicted felon. The State filed written notice of its intent to seek the death penalty on February 8, 2001. The trial began on August 12, 2002, the jury convicted Sealey on all counts on August 23, 2002, and the jury recommended a **death sentence** for the murders on August 27, 2002. The trial court imposed **death sentences** for the two malice murders and imposed three five-year prison terms to run consecutively to the **death sentences** and concurrently with each other for the two counts of possession of a firearm during the commission of a crime and the one count of possession of a firearm by a convicted felon. The trial court properly imposed no sentences on the felony murder convictions, which are vacated as a matter of law. *Malcolm v. State*, 263 Ga. 369, 371-372(4), 434 S.E.2d 479 (1993). Sealey filed a motion for new trial on September 24, 2002, which was denied in an order filed on May 1, 2003. Sealey filed a timely notice of appeal on May 6, 2003, this case was docketed in this Court on June 23, 2003, and the case was orally argued on October 20, 2003.

[1] 1. The evidence at the guilt/innocence phase, construed in the light most favorable to the jury's verdict, showed the following. Sealey contacted his friend Gregory Fahie by telephone asking for a ride. Fahie asked his friend, Wajaka Battiste, to drive to Sealey's motel and then to drive Fahie and Fahie's juvenile girlfriend, Deandrea ***618** Carter, to Carter's grandparents' house. Upon arriving at Carter's grandparents' house, Sealey, Carter, and Fahie went inside, while Battiste waited in the

car listening to music. While he was in a downstairs bathroom, Fahie first heard a loud noise and then heard Carter knocking on the bathroom door and stating that Sealey was "tripping." Fahie exited the bathroom and observed Mr. Tubner lying in a pool of blood and Sealey holding Ms. Tubner down and wielding a handgun he had taken from Mr. Tubner. Sealey dragged Ms. Tubner, who had been bound with duct tape, to an upstairs bedroom. Sealey instructed Fahie to search for money, however, when no money was discovered, Sealey instructed Carter to heat a fireplace poker with which Sealey tortured Ms. Tubner in an effort to force her to reveal where she kept her money. Sealey then instructed Carter to find a hammer so he could kill the victims. Carter returned with an ax. Sealey struck Ms. Tubner multiple times in the head with the ax and then went downstairs and did the same to Mr. Tubner, who had crawled a short distance across the living room. Once back in Battiste's automobile, Sealey stated that he "had to do it" because the victims had seen their faces and further stated that the victims deserved to die because they had mistreated Carter's mother in the past. Sealey instructed Battiste never to reveal that he had seen Sealey and then added, "I will out your lights."

The evidence presented in the guilt/innocence phase included the testimony of Fahie and Battiste, Mr. Tubner's handgun and jewelry that had been discovered in Sealey's motel room, and testimony about the detection of protein residue consistent with blood on the floor and sink of Sealey's motel bathroom. Upon our review of the entire record, we conclude that the evidence presented in the guilt/innocence phase was sufficient to authorize rational jurors to conclude beyond a reasonable doubt that Sealey was guilty on all counts. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Pre-Trial

[2][3] 2. Sealey contends that his indictment was invalid under Georgia statutory law because the jury commissioners excluded some persons from grand jury service based on their levels of education in an attempt to comply with the statutory directive that grand jurors be selected from "the most experienced, intelligent, and upright citizens of the county." OCGA § 15-12-40(a)(1). Contrary to Sealey's statement in his oral argument that the jury commissioners required a high school education for grand jury service, our review of the record reveals that Sealey failed to present evidence clearly showing what educational requirement was ****338** applied. In fact, the testimony actually elicited indicated nothing more specific than that the commissioners ***619** had required prospective grand jurors to "have a third-grade education or something." The testimony also indicated that each prospective grand juror removed as a candidate for the grand jury source list was replaced with a candidate from the same race and sex categories. Under the facts in evidence in this case, we decline to depart from our previous position that, unlike *constitutional* requirements, " 'the *statutory* procedures for creating the [grand jury] list are merely directory,' and do not create a basis for sustaining challenges to the array." (Emphasis supplied.) *Frazier v. State*, 257 Ga. 690, 691(2), 362 S.E.2d 351 (1987) (quoting *Dillard v. State*, 177 Ga.App. 805, 807, 341 S.E.2d 310 (1986)).

[4][5] 3. Sealey further contends that the source lists from which his grand and traverse juries were drawn unlawfully under-represented Hispanic persons. This claim must fail on appeal, as Sealey failed to present evidence showing Hispanic persons constituted a cognizable group in the county or any evidence establishing either the existence of actual under-representation or the degree thereof. *Ramirez v. State*, 276 Ga. 158, 159-162(1), (2), 575 S.E.2d 462 (2003). There is also no reversible error arising out of the jury commission's reliance on the most recently available census in creating its source lists as the Unified Appeal Procedure directs. Id. at 160-162(1)(b, c), 575 S.E.2d 462; *Smith v. State*, 275 Ga. 715, 719(3), 571 S.E.2d 740 (2002); U.A.P. II(C)(6).

[6] 4. Sealey argues that the entire office of the district attorney should have been disqualified be-

cause one assistant district attorney, while previously in private practice, had represented Sealey in two unrelated criminal cases. Because the record confirms that the assistant district attorney was properly "screened from any direct or indirect participation" in Sealey's prosecution in this case, the trial court did not err in allowing other members of the district attorney's office to continue in the case. *Frazier*, 257 Ga. at 693-694(9), 362 S.E.2d 351.

Jury Selection

[7] 5. Upon our review of juror Delgado's entire voir dire, we conclude that the trial court did not abuse its discretion by limiting questions regarding legal terms and questions appearing to seek a prejudgment of the case. *Sallie v. State*, 276 Ga. 506, 509-510(3), 578 S.E.2d 444 (2003). The juror's responses sufficiently indicate the juror's willingness to consider all three possible sentences upon a conviction for murder when those responses are read in the light of the trial court's initial instructions and of the entirety of the questioning of the juror by the trial court and the parties. See *Rhode v. State*, 274 Ga. 377, 380(6), 552 S.E.2d 855 (2001); *Zellmer v. State*, 272 Ga. 735, 534 S.E.2d 802 (2000). Likewise, the trial court did not abuse its discretion in limiting inquiries into juror McGee's and juror ***620** Eppstaedt's knowledge of legal terms and procedures when other forms of questioning clearly showed the jurors to be qualified. *Sallie*, 276 Ga. at 509-510(3), 578 S.E.2d 444.

[8] 6. The trial court did not abuse its discretion in disallowing questions to jurors Martinez and Chambers that were unrelated to possible juror bias and that attempted to elicit speculative responses from the jurors about how they might conduct themselves in jury deliberations. Id.

[9][10] 7. A defendant is entitled to a full panel of qualified jurors from which the jury will be selected by the use of peremptory strikes. *Lance v. State*, 275 Ga. 11, 15(8), 560 S.E.2d 663 (2002); *Lively v. State*, 262 Ga. 510, 512(2), 421 S.E.2d 528 (1992). However, Sealey's claim that he was denied such a fully qualified panel, to the extent that claim is intended to address jurors other than those discussed above, has been abandoned by his failure to name those other jurors or to provide relevant citation to the record. Supreme Court Rule 22.

[11] 8. Sealey contends that the trial court erred by excusing jurors Trousdale, Adams, Barretto, Wyatt, Neal, Harris, Mosley, and Seise for reasons of personal hardship. Upon our review of the record, we conclude that the trial court did not abuse its ****339** discretion, which it possessed in addition to its statutory duty to grant excusals under certain circumstances, in excusing those jurors. *Gulley v. State*, 271 Ga. 337, 344(7), 519 S.E.2d 655 (1999); see OCGA § 15-12-1(a) (2, 3); but see *Holsey v. State*, 271 Ga. 856, 858-859(2), 524 S.E.2d 473 (1999) (decided prior to amendment adding sections (a)(2) and (a)(3) to OCGA § 15-12-1).

9. Our review of the record does not support Sealey's contention that the trial court conducted voir dire in a biased manner. See *King v. State*, 273 Ga. 258, 267(21), 539 S.E.2d 783 (2000); *Ledford v. State*, 264 Ga. 60, 64(6)(c), 439 S.E.2d 917 (1994).

Guilt/Innocence Phase

[12] 10. The trial court did not err in excluding evidence regarding a polygraph examination administered to Sherrie Tubner, Carter's aunt. The fact that Ms. Tubner entered into a stipulation with the State as to the admissibility of the results of her polygraph examination in any proceeding against *her* is irrelevant to the admissibility of those results in Sealey's trial, and Sealey had no similar stipulation with the State of his own regarding those results. *Rucker v. State*, 272 Ga. 750, 751-752(1), 534 S.E.2d 71 (2000); *Walker v. State*, 264 Ga. 79, 80(2), 440 S.E.2d 637 (1994).

[13] 11. The trial court did not err in refusing to bifurcate the possession of a firearm by a convicted felon charge from the remaining charges, because it was possible that the jury would, as they ultimately***621** did, convict Sealey of felony

murder with the possession crime serving as the underlying felony. *Jones v. State*, 265 Ga. 138, 138-141(2), 454 S.E.2d 482 (1995).

Sentencing Phase

[14][15] 12. The trial court did not err in admitting evidence in the sentencing phase showing that Sealey had illegally used a man's credit card shortly after the man's murder. "[R]eliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial." *Braley v. State*, 276 Ga. 47, 54(34), 572 S.E.2d 583 (2002); *Wilson v. State*, 271 Ga. 811, 822-823(20), 525 S.E.2d 339 (1999). The evidence of Sealey's illegal use of the man's credit card was clearly reliable, and we conclude from our review of the record that the connection between Sealey and the man's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury. Furthermore, although the charge was erroneous, we also note that the jury was charged that it was not permitted to consider non-statutory aggravating circumstances unless they were first proven beyond a reasonable doubt. See *Wilson*, 271 Ga. at 822(20), 525 S.E.2d 339.

Sentence Review

13. The evidence presented at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of the statutory aggravating circumstances in this case. OCGA § 17-10-35(c)(2); *Jackson*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

14. Upon our review of the record, we conclude that the **sentences** of **death** in this case were not imposed under the influence of passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35(c)(1).

15. Considering both the defendant and the clearly egregious facts of this torture and double murder case, we conclude that Sealey's **death sentences** are not excessive or disproportionate punishment as compared to the penalty imposed in similar cases. OCGA § 17-10-35(c)(3). The cases appearing in the Appendix support this conclusion in that each involved a multiple murder.

Judgment affirmed.

All the Justices concur.

APPENDIX

Arevalo v. State, 275 Ga. 392, 567 S.E.2d 303 (2002); *Raheem v. State*, 275 Ga. 87, 560 S.E.2d 680 (2002); *Lucas v. State*, 274 Ga. 640, 555 S.E.2d 440 (2001); *Rhode v. State*, 274 Ga. 377, 552 S.E.2d 855 (2001); *Colwell v. State*, 273 Ga. 634, 544 S.E.2d 120 (2001); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000); *Morrow v. State*, 272 Ga. 691, 532 S.E.2d 78 (2000); *Pace v. State*, 271 Ga. 829, 524 S.E.2d 490 (1999); ****340***Palmer v. State*, 271 Ga. 234, 517 S.E.2d 502 (1999); *Cook v. State*, 270 Ga. 820, 514 S.E.2d 657 (1999); *Jenkins v. State*, 269 Ga. 282, 498 S.E.2d 502 (1998); *DeYoung v. State*, 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State*, 268 Ga. 623, 491 S.E.2d 791 (1997); *McMichen v. State*, 265 Ga. 598, 458 S.E.2d 833 (1995); *Stripling v. State*, 261 Ga. 1, 401 S.E.2d 500 (1991); *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989).

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