No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

LEON TOLLETTE,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17149

D.C. Docket No. 4:14-cv-00110-CDL

LEON TOLLETTE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

(May 29, 2020)

Before ED CARNES, Chief Judge, and JORDAN and MARCUS, Circuit Judges.

PER CURIAM:

Leon Tollette traveled from Los Angeles, California, to help Xavier Womack and Jakeith Robinson with the armed robbery of a Brink's armored truck in

Columbus, Georgia. The three men followed the truck to SouthTrust bank. As John Hamilton returned to the truck with a money bag, Mr. Tollette approached from behind and shot him at close-range in the head, back, and legs, killing him in the process. The drivers of the Brink's truck and of a nearby Wells Fargo truck shot at Mr. Tollette as they chased him, with Mr. Tollette and Mr. Womack returning fire. Mr. Tollette also tried to shoot the responding police officers but surrendered when he ran out of bullets. *See Tollette v. State*, 621 S.E. 2d 742, 745–46 (Ga. 2005).

Georgia charged Mr. Tollette with malice murder, armed robbery, and other crimes related to the killing of Mr. Hamilton. On the first day of jury selection, Mr. Tollette pleaded guilty to malice murder, felony murder, armed robbery, possession of a firearm by a convicted felon, possession of a firearm during the commission of a crime, and two counts of aggravated assault.

After a sentencing proceeding, the jury returned a death sentence for Mr. Tollette's murder of Mr. Hamilton after finding beyond a reasonable doubt that there were two aggravating factors: (1) Mr. Tollette committed the murder during another capital felony (i.e., armed robbery); and (2) Mr. Tollette committed the murder to obtain money. The trial court sentenced Mr. Tollette to death for the murder, imposed a life sentence for the armed robbery, and terms of years for the other crimes. The trial court later denied Mr. Tollette's motion for a new trial.

The Georgia Supreme Court affirmed Mr. Tollette's convictions and

sentences on direct appeal. In part, it concluded that trial counsel did not render ineffective assistance with respect to mitigation at sentencing and that Mr. Tollette suffered no prejudice from counsel's failure to call his sister as a witness at the sentencing proceeding. *See id.* at 745–50.

The state post-conviction court denied Mr. Tollette's habeas corpus petition, and the Georgia Supreme Court denied a certificate of probable cause. Mr. Tollette then filed a federal habeas corpus petition under 28 U.S.C. § 2254, but the district court denied relief. Following a review of the record, and with the benefit of oral argument, we affirm the district court's decision.[1]

I

The district court's denial of Mr. Tollette's habeas corpus petition is subject to plenary review. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1313 (11th Cir. 2014). But because his habeas corpus petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996), Mr. Tollette can obtain relief only if the state court's adjudication of a claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State

[1] Because we write for the parties, we assume their familiarity with the record and set out only what is necessary to explain our decision. As to any contentions not discussed in this opinion, we summarily affirm.

court proceeding." 28 U.S.C. § 2254(d)(1)–(2). AEDPA thus "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting *Hardy v. Cross*, 565 U.S. 65, 66 (2011)). This standard is "difficult to meet." *Metrish v. Lancaster*, 569 U.S. 351, 358 (2013).

A state court decision is "contrary to" clearly established federal law when "it arrives at an opposite result from the Supreme Court on a question of law, or when it arrives at a different result from the Supreme Court on 'materially indistinguishable' facts." *Owens v. McLaughlin*, 733 F.3d 320, 324 (11th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). *See, e.g.*, *Premo v. Moore*, 562 U.S. 115, 131 (2011) ("A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be 'contrary to' *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness."). A state court decision cannot be contrary to clearly established federal law "where no Supreme Court precedent is on point." *Washington v. Crosby*, 324 F.3d 1263, 1265 (11th Cir. 2003).

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101, (2011)

(emphasis in original and quotation marks and citation omitted). As the Supreme Court has put it:

> [A]n unreasonable application [of clearly established federal law] must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

White v. Woodall, 572 U.S. 415, 419–20 (2014) (internal quotation marks and citations omitted).

Under § 2254(d)(2), a federal court must afford "substantial deference" to a state court's factual determinations. *Brumfield v. Cain*, 576 U.S. 305, 135 S. Ct. 2269, 2277 (2015). And it must presume that those findings are correct unless the petitioner rebuts that presumption by "clear and convincing evidence." *Parker v. Head*, 244 F.3d 831, 836 (11th Cir. 2001) (quoting § 2254(e)(1)). But "[i]f the petitioner can rebut that presumption, we are not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 651 (11th Cir. 2014) (citation and internal quotation marks omitted) (also explaining that the presumption of correctness is limited to findings of facts and does not apply to mixed determinations of law and fact).

With these principles in mind, we address Mr. Tollette's arguments.

II

Mr. Tollette contends that the prosecutor made several incorrect and improper statements during closing argument and argues that those statements entitle him to a new sentencing proceeding. Like the district court, we conclude that Mr. Tollette is not entitled to habeas relief on this claim.

Claims of prosecutorial misconduct based on purportedly improper remarks are subject to a two-part test: "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *Conner v. GDCP Warden*, 784 F.3d 752, 769 (11th Cir. 2015) (citation omitted). The Supreme Court has held that improper prosecutorial arguments and statements can render a death sentence unconstitutional if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quotation marks and citation omitted). To succeed, therefore, Mr. Tollette must show that the "improper argument[s] rendered the sentencing stage trial fundamentally unfair." *Romine v. Head*, 253 F.3d 1349, 1366 (11th Cir. 2001). In a capital case like this one, "[a]n improper prosecutorial argument . . . render[s] a capital sentencing proceeding fundamentally unfair if there is a reasonable probability that the argument changed the outcome, which is to say that absent the argument[s] the defendant would not have received a death sentence." *Id.* (internal citation omitted).

In deciding whether a prosecutor's arguments deny a defendant due process, a court considers "(1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3) the trial court's instructions; and (4) the weight of aggravating and mitigating factors." *Land v. Allen*, 573 F.3d 1211, 1219–20 (11th Cir. 2009) (citation omitted). Also relevant is "the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused," and "the strength of the competent proof to establish the guilt of the accused." *Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994) (citations omitted).

Mr. Tollette argues that the prosecutor obfuscated the difference between a life sentence without the possibility of parole and life imprisonment; misrepresented the number of years before he would be parole eligible; referred to life imprisonment as life with parole over the trial court's corrections; improperly told the jury that most murders are not death eligible; and invoked religious authority as mandating a death sentence. Mr. Tollette asserts that these improper statements, among other things, led to jury confusion about the possible sentences available. According to Mr. Tollette, the statements—which he says the trial court failed to cure—violated due process by making the trial fundamentally unfair, increased the likelihood of the death penalty, and undermined confidence in the outcome of the case.

On direct appeal, the Georgia Supreme Court addressed Mr. Tollette's

arguments concerning the prosecutor's remarks during closing argument. Noting that no objections to certain of the remarks had been made by the defense, the Georgia Supreme Court held that there was no "reasonable probability" that any improper arguments "led to the imposition of a death sentence." *Tollette*, 621 S.E. 2d at 747. With respect to the prosecutor's statement that "the just punishment under a lot of religions would be death for what [Mr. Tollette did]," the Georgia Supreme Court agreed with Mr. Tollette that the argument was "improper," but concluded that there was no reasonable probability that it led to the jury's imposition of a death sentence. *See id.* at 748. With respect to the prosecutor's arguments that "prison is too good for [Mr. Tollette]" and that "prison for seven years and re-paroled" was insufficient, the Georgia Supreme Court ruled that they too were improper—because the likelihood of parole is generally "an improper subject matter for argument by counsel"—but similarly concluded that they were "entirely harmless." *Id.* The "jury had life without parole as an available sentence and was properly charged, through an original charge and an additional charge given during deliberations, that a sentence of life without parole would mean that [Mr.] Tollette would never be eligible for parole unless later adjudicated innocent." *Id.*

The district court acknowledged that the Georgia Supreme Court did not cite any federal cases in discussing Mr. Tollette's prosecutorial misconduct claims but concluded that those claims had been adjudicated on the merits on direct appeal. *See*

D.E. 43 at 76–83. It noted, as well, that Mr. Tollette had also failed to cite in his direct appeal brief the federal cases on which he now relied, and perhaps that was the reason the Georgia Supreme Court did not cite or discuss federal law. *See id.* at 77–78 & nn. 24, 25. The district court also observed that the Georgia Supreme Court's substantive analysis was interchangeable (i.e., equivalent) with federal law. *See id.* at 79.

On the merits, the district court first rejected Mr. Tollette's argument that the Georgia Supreme Court failed to undertake a holistic due process review and consider all of the improper arguments together to assess their cumulative impact on the sentencing proceeding. "[W]hile the Georgia Supreme Court discussed each allegedly improper comment separately, it necessarily had to look at the entire sentencing hearing, including all other improper arguments, to determine if the death sentence was 'imposed under the influence of passion, prejudice, or any other arbitrary factor.' O.C.G.A. § 17-8-75(c)(1)." *Id.* at 81–82. The district court then concluded that the Georgia Supreme Court's lack of prejudice determination was subject to deference under AEDPA and was not unreasonable. The district court also specifically addressed the prosecutor's improper references to religion. Applying Eleventh Circuit law, it concluded for several reasons that the Georgia Supreme Court's decision about lack of prejudice was not unreasonable. First, the prosecutor's religious references were "isolated and brief," and "[r]eligion in no way

permeated [the prosecutor's] entire argument." *Id.* at 85. Second, Mr. Tollette's counsel did not object to the religious references, and that failure weighed "against finding the argument was severe enough to render the sentencing hearing fundamentally unfair." *Id.* Third, Mr. Tollette's counsel countered the prosecutor's references to religion with his own religious argument, asking the jury to ask itself "What would Jesus do"? *Id.* at 85–86. Mr. Tollette's counsel, the district court reasoned, was able to "lessen the impact of the prosecutor's improper religious argument by countering with his own plea for the jurors to look to their religious values when deciding [Mr.] Tollette's fate." *Id.* at 86. Fourth, the trial court had sua sponte instructed the jury—albeit during the defense's closing argument—that it was "not [to] invoke your religious beliefs to determine punishment in this case." *Id.* This instruction, concluded the district court, was "certainly broad enough to lessen any prejudicial impact from the prosecutor's improper comments." *Id.* at 87. Fifth, the "strength of the aggravating factors"—including the planning of the armed robbery, Mr. Tollette's lying in wait, Mr. Tollette's shooting of Mr. Hamilton from behind, and Mr. Tollette's shooting at the police—when "compared to the lack of evidence in mitigation"—the "only mitigation evidence was a plea from [Mr.] Tollette's mother"—also cut against a finding of prejudicial impact. *Id.*

Like the Georgia Supreme Court, we conclude that the prosecutor's comments about parole and religion were improper. *See, e.g.*, *Romine*, 253 F.3d at 1366–67.

Applying AEDPA deference, however, we agree with the district court that the decision of the Georgia Supreme Court regarding prejudice was not unreasonable. To the thorough analysis of the district court, we add only that the Georgia Supreme Court's decision is consistent with the Supreme Court's opinion in *Darden*.

In *Darden*, the prosecutor made a closing argument condemned by every court that reviewed it. *See Darden*, 477 U.S. at 179. There, a jury found a habeas petitioner guilty of murder, robbery, and assault with intent to kill. *See id.* at 170. During closing argument, the prosecution blamed the crime on the department of corrections for furloughing the defendant, implied that the death penalty would be the only guarantee against future similar acts, and referred to the defendant as an "animal." *Id.* at 180. The Supreme Court held that those comments "did not deprive [the defendant] of a fair trial" because the "prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or right to remain silent." *Id.* at 181–82. Overwhelming evidence supported a guilty finding on all charges and "reduced the likelihood that the jury's decision was influenced by argument." *Id.* at 182. The "bar for granting habeas based on prosecutorial misconduct is a high one." *Allen*, 573 F.3d at 1220. For the reasons given by the district court, the Georgia Supreme Court's decision with respect to prejudice was not an unreasonable application of federal law as established by the Supreme Court.

III

Mr. Tollette asserts two ineffective assistance of counsel claims. First, he contends that his trial counsel (and the counsel who represented him on the new trial motion) did not properly investigate or present available mitigating evidence at sentencing. Second, he argues that his appellate counsel failed to raise his trial counsel's (and new trial counsel's) deficient performance with respect to mitigation. These claims present "mixed question[s] of law and fact subject to *de novo* review." *Williams v. Allen*, 542 F.3d 1326, 1336 (11th Cir. 2008) (quoting *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005)). But, as noted above, claims adjudicated on the merits by a state court receive deference under AEDPA.

A

The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does not fall "below an objective standard of reasonableness" considering "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 686, 688 (1984). That standard is necessarily a general one, as it requires "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89. The question is whether counsel's conduct is "outside the wide range of professionally competent assistance." *Id.* at 690.

To succeed on his ineffective assistance of counsel claims, Mr. Tollette must show two things. He must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and he must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quotation marks and citation omitted).

When addressing performance, courts review counsel's conduct in a "highly deferential" manner and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. To overcome the *Strickland* presumption of reasonableness, Mr. Tollette must show that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). In other words, if "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial," *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc), then Mr. Tollette cannot establish deficient performance.

With respect to prejudice, Mr. Tollette must demonstrate a "reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1270 (11th Cir. 2012) (citation

omitted). In a state like Georgia, where jury unanimity is required for a sentence of death, the question is whether there is "a reasonable probability that at least one juror would have struck a different balance" and voted against the death penalty. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

A "reasonable probability" is one that is "sufficient to undermine confidence in [the sentence]," and does not require a showing that "counsel's deficient conduct more likely than not altered the outcome of [the petitioner's] penalty proceeding." *Porter v. McCollum*, 558 U.S. 30, 44 (2005) (quoting *Strickland*, 466 U.S. at 693–94). Nevertheless, "[t]he likelihood of a different result must be substantial, not just conceivable." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (en banc) (citation omitted). To assess the probability of a different outcome, courts consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (citation omitted and alterations adopted).

B

Mr. Tollette's mother was the only defense witness at sentencing. *See Tollette*, 621 S.E. 2d at 749. She testified that she never married Mr. Tollette's father; Mr. Tollette had three brothers and two sisters and was a good, loveable, and obedient child; they were a "family of love;" Mr. Tollette played sports when young

and did well in school until he met up with "the wrong group;" Mr. Tollette and his stepfather did not have a father-son relationship and were not as close as she would have liked (though Mr. Tollette did respect his stepfather); Mr. Tollette left home at sixteen without her consent because he became associated with the wrong crowd and wanted to experiment "with some things he knew" he could not do while staying at home; Mr. Tollette had a great relationship with his own son; Mr. Tollette was in jail from time to time but would call her regularly; and Mr. Tollette had no drug problem that she knew of. She apologized to Mr. Hamilton's family and begged the jury to spare Mr. Tollette's life. *See* D.E. 43 at 38 (district court order summarizing the testimony of Mr. Tollette's mother).

Mr. Tollette argues that his trial counsel (and the counsel who represented him on the new trial motion) ignored "red flags" and did not properly investigate, develop, and present mitigation evidence to counter the state's aggravating evidence and depiction of the murder. He contends that counsel conducted an 11th hour pro forma investigation that was unreasonable and that did not support their strategic decisions. Sidestepping the matter of performance, we affirm the district court's denial of habeas relief because the Georgia Supreme Court did not unreasonably conclude that Mr. Tollette failed to demonstrate prejudice under *Strickland*.

1

Mr. Tollette asserts that with a more timely investigation and expert witnesses,

counsel could have made a credible argument that his actions were a result of or impacted by his upbringing, his early exposure to alcohol, drugs, and violence, and his mental health issues. In Mr. Tollette's view, an adequate investigation would have shown the jury that he was suffering from severe mental illness, depression, impaired cognitive functioning, and substance abuse in the months leading to the murder. Mr. Tollette also argues that trial counsel's failure to use available evidence that he was not a risk of danger in prison, and failure to interview his former girlfriend, prejudiced his case.

In his brief, Mr. Tollette describes the available mitigating evidence that his counsel failed to obtain and present from several witnesses, including his sister, Gladys Lattier, and his former girlfriend, Katrina Wilson. *See* Br. for Appellant at 31–34. We summarize that evidence below.[2]

● Mr. Tollette was born to a single mother struggling with four other young children, and grew up in the Watts and Gardena neighborhoods of Los Angeles, where gunshots were a nightly occurrence, crime (including drug dealing) was rampant, and unemployment and incarceration were high. His sister was responsible for looking after him even though she was just eight years older than him. Drug use, violence and gang activity spilled into the public schools that he and his siblings

[2] Trial counsel's investigation and strategy, and the new mitigating evidence presented at the state habeas proceeding, are laid out in detail in the district court's order. *See* D.E. 43 at 16–55.

attended.

● Without a father, Mr. Tollette looked to his older brothers as father figures and protectors. Two of those brothers left home when he was, respectively, six and thirteen. After that, his grades declined, and he gravitated towards gangs. According to cultural anthropologist Dr. Diego Virgil, his gang affiliation was virtually inevitable and predictable given his upbringing, and the gangs filled the vacuum left by his dysfunctional family and impoverished community.

● Due to the problems he encountered, Mr. Tollette had low self-esteem, anxiety, and depression, which left him predisposed to drug and alcohol addiction. In the months leading up to the murder, he experienced his most serious episode of depression due to a confluence of events, including the arrest of his girlfriend (leading to his loss of living arrangements), the death of his biological father, his lack of success in the music business, and his lack of success in dealing drugs due to his own alcohol and drug abuse. He also had mental health issues, including recurrent episodes of major depression and chronic low self-esteem, as described by Dr. Michael Hilton, a forensic psychiatrist.

● Mr. Tollette had a lack of significant disciplinary history while incarcerated in California. That history indicated that he would make a positive adjustment to prison life.

On direct appeal, Mr. Tollette argued that the trial court should have granted

his motion for a new trial because his trial counsel "did not prepare adequate mitigation evidence," and asserted that counsel should have called his sister, Ms. Lattier, to testify. *See Tollette*, 621 S.E.2d at 749. The Georgia Supreme Court, applying *Strickland*, rejected Mr. Tollette's Sixth Amendment claim. Putting aside the question of whether counsel's failure to present other witnesses (including Mr. Tollette's sister) was constitutionally deficient, the Georgia Supreme Court concluded that Mr. Tollette "did not suffer sufficient prejudice to warrant relief" because the sister's testimony "would have been merely a 'reiteration of the mother's testimony.'" *Id.*

On post-conviction review, the Georgia Supreme Court denied Mr. Tollette's application for a certificate of probable cause and again concluded that he had failed to demonstrate prejudice resulting from the alleged ineffective assistance of trial counsel (and the counsel who represented him on the motion for a new trial). Although recognizing that the state habeas court had failed to apply the correct *Strickland* prejudice test, the Georgia Supreme Court concluded that the evidence Mr. Tollette presented at the state habeas hearing did not demonstrate prejudice under *Strickland*:

> Nevertheless, after independently applying the correct legal principle to the trial and habeas record, we conclude as a matter of law that, "[i]n exercising its discretion once [the Petitioner] became eligible for a death sentence," the jury would not have been significantly swayed by the testimony that the Petitioner presented on this issue in the state habeas proceedings. We further conclude that trial counsel's not

> utilizing testimony like that presented by the Petitioner's new expert to challenge the State's characterization of the circumstances of the murder did not result in prejudice sufficient to support the success of the Petitioner's underlying ineffective assistance of trial counsel claim and thus that the Petitioner cannot show a reasonable probability that, had direct appeal counsel raised the ineffective assistance of motion for new trial counsel in litigating trial counsel's ineffectiveness with respect to this issue on direct appeal, the Petitioner would have been granted a new trial on this basis. Therefore, the Petitioner cannot satisfy the cause and prejudice test to overcome the procedural bar to that claim, and it remains procedurally defaulted. Accordingly, we conclude that this issue ultimately is without arguable merit.

D.E. 12-27 at 2 (citations omitted).

Under *Hittson v. GDCP Warden*, 759 F.3d 1210, 1232 (11th Cir. 2014), this denial of a certificate of probable cause by the Georgia Supreme Court constituted an adjudication on the merits of Mr. Tollette's ineffective assistance of counsel claims for purposes of AEDPA. And it is this denial that we consider under *Wilson v. Sellers*, 138 S. Ct. 1188, 1193–95 (2018), with respect to the issue of prejudice. *See Knight v. Fla. Dept. of Corrections*, ___ F.3d ___, 2020 WL 2092592, *9 n.3 (11th Cir. May 1, 2020).

With respect to most of the mitigating evidence summarized above, the district court did not address prejudice, as it found that the state habeas court had reasonably concluded that Mr. Tollette's trial counsel (and counsel on the motion for a new trial) had conducted an adequate investigation and made a reasonable choice of trial strategy based on that investigation. *See* D.E. 43 at 55. With respect to some of the mitigating evidence summarized above, however, the district court

did analyze prejudice. For example, concerning the failure of counsel to interview Mr. Tollette's former girlfriend and present her testimony, the district court—in addition to finding that performance was constitutionally adequate—concluded that there was no resulting prejudice. *See id.* at 61–62.

Applying AEDPA deference on the issue of prejudice, we conclude that the Georgia Supreme Court's resolution of that issue was reasonable. And it was reasonable both in its decision on direct appeal (with respect to the testimony of Mr. Tollette's sister) and in its decision denying a certificate of probable cause on collateral review (with respect to the other mitigating evidence presented at the state habeas proceeding). The reasons are as follows.

First, the aggravating evidence—including the planning and carrying out of the armed robbery and murder, Mr. Tollette's three prior convictions, Mr. Tollette's gang affiliation, and the victim impact statements—was relatively strong. That is not conclusive, but it is relevant. We note as well that Mr. Tollette apparently showed no remorse during his statement to the police and even laughed during a portion of that statement. *See* D.E. 43 at 38–39. And he apparently "pursed his lips or bl[ew] a kiss at one of [Mr.] Hamilton's daughters when she was walking off the witness stand after finishing her victim impact statement." *Id.* at 39 (citing D.E. 9-2 at 61).

Second, some of the mitigating evidence presented at the state habeas

proceeding had the potential for being a two-edged sword. *See, e.g.*, *Ponticelli v. Secretary*, 690 F.3d 1271, 1296 (11th Cir. 2012). For example, the testimony about Mr. Tollette's gang membership was not all mitigating in nature. Mr. Tollette's own gang expert, Dr. James Vigil, testified that Mr. Tollette joined a drug trafficking gang, and could have been attracted to that gang because its members had money, nice cars, and women. Evidence about gang membership, moreover, could have opened the door to evidence of future dangerousness, an issue Mr. Tollette's counsel had succeeded in keeping out. Finally, such evidence could have also been countered by evidence that some of Mr. Tollette's friends eventually left the gang and pursued legitimate careers.

Third, the testimony from Mr. Tollette's former girlfriend might have opened the door to evidence of an armored truck robbery in California in which Mr. Tollette was a suspect. Significantly, that robbery bore some similarities to the armed robbery in which Mr. Tollette murdered Mr. Hamilton.

Fourth, the mental health evidence in favor of Mr. Tollette was not overwhelming. Dr. Hilton, who testified for Mr. Tollette at the state habeas proceeding, concluded that he had recurrent episodes of major depression and chronic low self-esteem. Those opinions were consistent with the initial mental evaluations of Mr. Tollette, carried out by Drs. Karen Bailey-Smith and Margaret Fahey of West Central Georgia Regional Hospital. Drs. Bailey-Smith and Fahey

found that Mr. Tollette was depressed and his insight into his condition was deficient. Drs. Bailey-Smith and Fahey also found, however, that he had a normal intellect, an IQ of 89, and judgment that was "relatively intact." *See* D.E. 43 at 30. Mr. Tollette had a profile of an individual who was seen by others as angry and argumentative, and a diagnosis of personality disorder not otherwise specified with antisocial and schizotypal features. *See id.* at 31. Dr. Hilton agreed with this diagnosis. *See id.* at 47.

Furthermore, a psychologist, Dr. Daniel Grant, testified at the state habeas proceeding that Mr. Tollette was not insane or under a delusional compulsion at the time of the murder; that he was not mentally disabled; that he was not severely mentally ill; and that he exhibited antisocial personality traits. *See id.* at 47–48. Dr. Grant had told trial counsel that there was "not much to work with," that Mr. Tollette suffered from borderline personality disorder, and that the "best" he could do was testify that Mr. Tollette could be "useful" in prison if his California prison records did not show disciplinary problems. *See id.* at 32–33.[3]

[3] Mr. Tollette argues that the state habeas court erred in not considering the totality of the post-conviction mitigating evidence he presented. *See* Br. for Appellant at 48–49. But we are not reviewing the prejudice determination of the state habeas court. Rather, we are reviewing (and giving AEDPA deference to) the Georgia Supreme Court on direct appeal and in denying a certificate of probable cause on collateral review. And there is no claim that the Georgia Supreme Court failed to view the mitigating evidence holistically. In any event, we have considered all of the mitigating evidence cumulatively in conducting our own review on the matter of prejudice.

2

Mr. Tollette separately contends that trial counsel could have and should have presented evidence to counter the state's characterization of the shooting as an execution-style murder. He asserts that, contrary to what some of the state's witnesses (such as Cornell Christian and Sherry Ziegler) testified, there was evidence that his first shot was not to Mr. Hamilton's head.

In his statement to the police after the murder (which was played for the jury at the sentencing proceeding), Mr. Tollette said that he shot when Mr. Hamilton turned around and saw him and continued to shoot out of fear because Mr. Hamilton did not fall when first shot. The testimony of Dr. Geoffrey Smith, the medical examiner, and Ralph Tressel, a crime scene analyst, at the state habeas proceeding also indicated that Mr. Tollette did not first shoot Mr. Hamilton in the head. For example, Mr. Tressel testified that Mr. Tollette's first two shots were to the legs, the third was to the back, and the fourth was to the head. Mr. Tressel did not believe that Mr. Tollette had approached Mr. Hamilton from behind and shot him in the back of the head. Dr. Smith testified that the shots to the legs entered from the front, and Mr. Hamilton most likely had to have been facing upward when he received those wounds. If Mr. Hamilton had been shot in the head first and fallen on the ground face down, then he could not have sustained those shots in the legs because the trajectories would have been wrong. So the likely scenario is that Mr. Hamilton was

shot in the legs while he was still standing. *See* Br. for Appellant at 41–47.

The district court, applying AEDPA deference, concluded that the Georgia Supreme Court's decision on prejudice as to this evidence concerning the sequence of the shots, *see* D.E. 12-27 at 1–2, was reasonable: "A fairminded jurist could conclude that there was no reasonable probability of a different sentence even if the jury thought [Mr.] Tollette shot [Mr.] Hamilton first in both of his legs to disable him and then placed the gun six inches from [Mr.] Hamilton's head and pulled the trigger." D.E. 43 at 69.

We agree with the district court that the Georgia Supreme Court's prejudice determination was reasonable. First, two eyewitnesses (Mr. Christian and Ms. Ziegler) testified that Mr. Tollette first shot Mr. Hamilton in the head. Second, Dr. Smith admitted that he did not "know the order in which the gunshot[s] were sustained," and indicated that "there are a number of possibilities." D.E. 43 at 67 (quoting D.E. 10-24 at 19). Third, Mr. Tressel based his opinion in part on Mr. Tollette's statement to the police. *See id.* at 66 n.23. Fourth, even if Mr. Tollette first shot Mr. Hamilton in the legs and in the back, he then also shot him in the head from very close range. The jury could have easily found that the sequence of shots—even under Mr. Tollette's account—still amounted to an execution-style killing of Mr. Hamilton.

3

As noted, Mr. Tollette contends that his appellate counsel rendered deficient performance by not raising the deficient performance of trial counsel (and counsel who represented him on the motion for a new trial) with respect to their representation at sentencing. Because Mr. Tollette has failed to demonstrate that his trial counsel or his new trial counsel rendered deficient performance, it follows that appellate counsel did not fall below the Sixth Amendment standard. *See Brooks v. Comm'r*, 719 F.3d 1292, 1300 (11th Cir. 2013). *See also Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013) ("It is also crystal clear that there can be no showing of actual prejudice from an appellate attorney's failure to raise a meritless claim.").

IV

The district court's denial of Mr. Tollette's habeas corpus petition is affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17149-P

LEON TOLLETTE,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

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

BEFORE: JORDAN, ED CARNES and MARCUS, 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

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

LEON TOLLETTE, Petitioner, vs. Warden BRUCE CHATMAN, Respondent.	:	NO. 4:14-CV-110 (CDL)

ORDER

LEON TOLLETTE was sentenced to death for the murder of John Hamilton. He petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For reasons discussed below, the Court denies habeas relief.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Facts

The Georgia Supreme Court summarized the facts of this case in Tollette's direct appeal:

> The trial evidence established that Xavier Wommack had been planning a crime in Columbus, Georgia, and he invited Tollette to travel from Los Angeles, California, to join him. When Tollette arrived in Columbus, he and Wommack, along with a third man, Jakeith Robinson, finalized plans for the armed robbery of an armored truck. On December 21, 1995, the group followed a Brink's armored truck to the SouthTrust bank. Tollette sat waiting with a newspaper near the bank, Wommack stood guard across the street, and Robinson sat ready as the getaway driver. As victim John Hamilton returned from the bank to the Brink's truck with a money bag, Tollette approached Hamilton from behind and then fired at close range into his head, back, and legs, killing

> him. Carl Crane, the driver of the Brink's truck, and Cornell Christianson, the driver of a nearby Lummus Fargo truck, chased Tollette and fired shots at him as he fled with the money bag; Tollette returned fire at his pursuers. Wommack fired shots from across the street to aid in Tollette's escape; however, Wommack and Robinson ultimately drove away without Tollette. Robert Oliver, a police technician, responded to the radio call of a detective at the scene. When confronted by Oliver, Tollette attempted to fire at him and at a cadet who accompanied him, but all of the bullets in Tollette's revolver were already spent. Tollette threw down his revolver and surrendered.

Tollette v. State, 280 Ga. 100, 101, 621 S.E.2d 742, 745-46 (2005).

B. Procedural History

"On the first day of jury selection, Tollette pled guilty to one count each of malice murder, felony murder, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime and to two counts of aggravated assault." *Id.* at 100, 621 S.E.2d at 745. At the conclusion of the sentencing trial on November 11, 1997, the jury sentenced him to death for malice murder, finding beyond a reasonable doubt that Tollette murdered Hamilton during the commission of the capital felony of armed robbery, and he committed the murder for the purpose of receiving money or other things of monetary value. *Id.* at 101, 621 S.E.2d at 745.

Tollette filed, and the court granted, a Motion to be

Allowed to File an Out of Time Motion for New Trial. ECF No. 8-5 at 63, 66.[1] He filed a subsequent Motion for New Trial and a First Amended Motion for New Trial. ECF No. 8-5 at 72, 76. The court held hearings on December 4, 1998 and January 25, 1999. ECF Nos. 9-1; 9-2. On January 28, 1999, the court denied Tollette's Motion for New Trial. ECF No. 8-5 at 103.

Tollette filed a notice of appeal and the Georgia Supreme Court affirmed his conviction and sentence. *Tollette*, 280 Ga. at 101, 621 S.E.2d at 745. The United States Supreme Court denied Tollette's petition for certiorari on October 2, 2006. *Tollette v. Georgia*, 549 U.S. 893 (2006).

Tollette filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on August 7, 2007. ECF No. 9-26. Tollette amended his petition once; the court conducted an evidentiary hearing; and, in an order dated February 13, 2013, the state habeas court denied relief. ECF Nos. 10-16; 10-21 to 12-11; 12-24. Tollette filed a notice of appeal and an application for certificate of probable cause to appeal ("CPC application") with the Georgia Supreme Court. ECF Nos. 12-25; 12-26. On March 28, 2014, the court denied his CPC application and on April 22, 2014, denied his motion for reconsideration. ECF Nos. 12-27; 12-29.

[1] Because all documents have been electronically filed, this Order cites to the record by using the document number and electronic screen page number shown at the top of each page by the Court's CM/ECF software.

On May 6, 2014, Tollette filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court. ECF No. 1. The Respondent filed his answer, and the Court denied Tollette's motion for discovery and an evidentiary hearing. ECF Nos. 13; 20; 23. Both parties have now briefed exhaustion, procedural default, and the merits of Tollette's various claims. ECF Nos. 34; 37; 41.

II. STANDARD OF REVIEW

A. Exhaustion and procedural default

Procedural default bars federal habeas review when a habeas petitioner has failed to exhaust state remedies that are no longer available or when the state court rejects the habeas petitioner's claim on independent state procedural grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983) (explaining that an adequate and independent finding of procedural default will generally bar review of the federal claim); *Frazier v. Bouchard*, 661 F.3d 519, 524 n.7 (11th Cir. 2011) (citations omitted); *Ward v. Hall*, 592 F.3d 1144, 1156-57 (11th Cir. 2010).

There are two exceptions to procedural default. If the habeas respondent establishes that a default has occurred, the petitioner bears the burden of establishing "cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice." *Conner v. Hall*, 645 F.3d

1277, 1287 (11th Cir. 2011) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81-88 (1977) and *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995)).

A petitioner establishes cause by demonstrating that some objective factor external to the defense impeded his efforts to raise the claim properly in the state courts. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (citations omitted). A petitioner establishes prejudice by showing that there is a reasonable probability that the result of the proceedings would have been different. *Id.*

Regarding what is necessary to establish the narrowly-drawn fundamental miscarriage of justice exception, the Eleventh Circuit has stated:

> 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 [a fundamental miscarriage of justice], 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 v. Jones, 81 F.3d 1015, 1023 (11th Cir. 1996) (citations omitted).

B. Claims that were adjudicated on the merits in the state courts

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides the standard of review for claims adjudicated on the merits in the state courts. This Court may not grant habeas relief unless the state court's decision was (1) contrary to clearly established federal law; (2) involved an unreasonable application of clearly established federal law; or (3) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2); *see also Harrington v. Richter*, 562 U.S. 86, 100 (2011). Cleary established federal law consists of only the holdings of the United States Supreme Court that were in existence at the time of the relevant state court decision. *Thaler v. Haynes*, 559 U.S. 43, 47 (2010); *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"The 'contrary to' and 'unreasonable application' clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (citing *Williams*, 529 U.S. at 404-05).

> Under § 2254(d)(1), "[a] state court's decision is 'contrary to'... clearly established law if it 'applies a rule that contradicts the governing law set forth in [the United States Supreme Court's] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a [different] result . . . .'"

Michael v. Crosby, 430 F.3d 1310, 1319 (11th Cir. 2005) (quoting

Mitchell v. Esparza, 540 U.S. 12, 15-16 2003)).

A state court's decision involves an "unreasonable application" of federal law when "'the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case, or when it unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011)). An "unreasonable application" and an "incorrect application" are not the same:

> We have explained that an "*unreasonable* application of federal law is different from an *incorrect* application of federal law." Indeed, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Rather, that application must be "objectively unreasonable." This distinction creates "a substantially higher threshold" for obtaining relief than *de novo* review. AEDPA thus imposes a "highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt."

Renico v. Lett, 559 U.S. 766, 773 (2010) (citations omitted). To obtain relief "a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded

disagreement." *Richter*, 562 U.S. at 103. In other words, a habeas petitioner must establish that no fairminded jurist could agree with the state court's decisions. *Woods v. Etherton*, 136 S. Ct. 1149, 1152-53 (2016); *Pope v. Sec'y, Fla. Dep't of Corr.*, 753 F.3d 1254, 1262 (11th Cir. 2014); *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012).

Pursuant to 28 U.S.C. § 2254(d)(2), district courts can "grant habeas relief to a petitioner challenging a state court's factual findings only in those cases where the state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Price v. Allen*, 679 F.3d 1315, 1320 (11th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(2)). A state court's factual finding is not unreasonable simply because the federal habeas court might have made a different finding had it been the first court to interpret the record. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (citing *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Again, this Court can grant relief only if it finds "no 'fairminded jurist' could agree with the state court's determination" of the facts. *Holsey*, 694 F.3d at 1257 (quoting *Richter*, 562 U.S. at 101). Also, a state court's factual determination is "presumed to be correct," and this presumption can only be rebutted by "clear and convincing evidence." 28

U.S.C. § 2254(e)(1).

Within this framework, the Court reviews Tollette's claims.[2]

III. TOLLETTE'S CLAIMS

A. Trial counsel were ineffective for failing to investigate and present mitigating evidence and for failing to meaningfully challenge the State's case in aggravation and subsequent counsel were ineffective for failing to adequately litigate trial counsel's ineffectiveness.

Tollette makes several ineffective assistance claims: (1) trial counsel failed to investigate, develop, and present mitigation evidence; (2) trial counsel failed to investigate and subject the State's presentation of evidence to meaningful adversarial testing; and (3) motion for new trial counsel and appellate counsel were ineffective for failing to investigate

[2] Tollette states that he "does not abandon any claims not herein addressed, but relies instead on factual and legal arguments contained in the petition itself, his subsequent Reply to Respondent's Answer-Response, and in briefing before the state courts in support of his claim that the State Supreme Court's rulings as to those claims were contrary to and/or an unreasonable application of clearly established U.S. Supreme Court precedent and/or were based on unreasonable determinations of fact." ECF No. 34 at 10-11. Tollette also states he "incorporates" all of the claims and allegations raised before the state habeas court. ECF No. 34 at 11 n.1. Tollette was told to brief any claim that he wished to pursue and was specifically warned that any claim not briefed would be deemed abandoned. ECF No. 14 at 2 n.2. "[M]ere recitation in a petition, unaccompanied by argument, in effect forces a judge to research and thus develop supporting arguments—hence, *litigate*—on a petitioner's behalf. Federal judges cannot litigate on behalf of the parties before them . . . ." *Blankenship v. Terry*, 2007 WL 4404972 at *40 (S.D. Ga.), aff'd, 542 F.3d 1253 (11th Cir. 2008) (citations omitted). This Order focuses on the claims and arguments addressed in the 300 pages of Tollette's two briefs. Tollette has abandoned any claim not addressed in his briefs. To any extent he has not abandoned any unaddressed claim, he certainly has failed to show that the state courts' denials of these claims were contrary to clearly established federal law, involved any unreasonable applications of clearly established federal law, or were based on any unreasonable factual determinations.

and present evidence to show trial counsel performed ineffectively.[3]

Because multiple state courts have addressed Tollette's ineffective assistance claims, "it is useful at the outset to explain which state-court decisions we look to for purposes of AEDPA review." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1231 (11th Cir. 2014). On direct appeal, Tollette argued trial counsel raised "'hardly any objections,'" did not prepare adequate mitigation evidence, and made an improper statement during closing arguments. *Tollette*, 280 Ga. at 106-07, 621 S.E.2d at 749-50. The Georgia Supreme Court held "the trial court did not err [during the motion for new trial] in denying Tollette's claim of ineffective assistance of trial counsel." *Id.* at 107, 621 S.E.2d at 750.

Next, the state habeas court found Tollette's ineffective trial counsel and motion for new trial counsel claims were either res judicata or procedurally defaulted. ECF No. 12-24 at 4, 8-16. Tollette argued that ineffective assistance of

[3] Tollette also alleges that motion for new trial counsel and appellate counsel were ineffective for failing to adequately litigate his claim that the procedure in which he was forced to litigate ineffective assistance of trial counsel violated his constitutional rights. ECF No. 34 at 156 n.55. The Court addresses these allegations in section III B below, after it addresses the constitutionality of the procedure in which Tollette was forced to litigate his ineffective assistance of trial counsel claims. Tollette also alleges that motion for new trial counsel and appellate counsel were ineffective for failing to raise trial counsel's failure to object to portions of the prosecutor's closing argument. ECF No. 34 at 200-07. The Court addresses these allegations in section III D below, after it addresses whether the prosecutor's closing argument violated Tollette's constitutional rights.

appellate counsel provided the cause and prejudice necessary to overcome the defaults. ECF No. 12-24 at 9. The state habeas court found that Tollette's ineffective assistance of appellate counsel claims were properly before the court. Moreover, the court acknowledged that ineffective assistance of trial counsel was the underlying basis for all of Tollette's ineffective assistance claims: "Tollette's claim that direct appeal counsel [were] ineffective rests on the premise that motion for new trial counsel [were] in fact ineffective in not properly litigating trial counsel's ineffectiveness, which in turn rests on the premise that trial counsel were in fact ineffective." ECF No. 12-24 at 20. Thus, to determine if Tollette was prejudiced by appellate counsel's failure to raise the ineffectiveness of previous counsel, the state habeas court reviewed the underlying ineffective assistance of trial counsel claims. Taking into consideration all of the evidence, including that introduced at the January 13, 22-23, 2009 evidentiary hearing, the state habeas court found that Tollette's trial counsel did not perform ineffectively and Tollette was not prejudiced. ECF No. 12-24. Thus, appellate counsel were not ineffective for failing to pursue the claims. ECF No. 12-24 at 42.

When denying Tollette's CPC application, the Georgia Supreme Court found the state habeas court had applied the wrong

standard for determining if Tollette was prejudiced by trial counsel's failure to use an expert to challenge the State's characterization of the circumstances of the murder. ECF No. 12-27 at 1. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Georgia Supreme Court found that Tollette was not prejudiced by trial counsel's failure to "utilize[e] testimony like that presented by the Petitioner's new expert to challenge the State's characterization of the circumstances of the murder." ECF No. 12-27 at 2. The court "conclude[d] that this issue ultimately is without arguable merit." ECF No. 12-27 at 2. Finally, the Georgia Supreme Court found that all "other claims properly raised by [Tollette] are without arguable merit." ECF No. 12-27 at 2.

Under *Hittson*, the Georgia Supreme Court's denial of Tollette's CPC application is the final state court determination of Tollette's ineffective assistance claims and the only question for this Court is whether there was any reasonable basis for the Georgia Supreme Court to deny relief. *Hittson*, 759 F.3d at 1232-33 (finding that post-*Richter*, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), no longer applies and federal courts reviewing under § 2254(d) are not required to "look through" the Georgia Supreme Court's summary denials of CPC applications to the reasons given in the "'last reasoned decision' by the state court.") (quoting *Ylst*, 501 U.S. at 804);

Lucas v. Warden, 771 F.3d 785, 792 (11th Cir. 2014) (reasoning of the state habeas court is irrelevant and petitioner must show there was no reasonable basis for the Georgia Supreme Court to deny relief). Tollette argues, however, that the Court should consider the reasoning of the state habeas court for all ineffective assistance claims except the one specifically addressed by the Georgia Supreme Court when it denied his CPC application. ECF 41 at 5-8. The Court finds that regardless of which state courts' decision is analyzed, the result is the same—Tollette is not entitled to habeas relief.[4]

[4] The analysis used in *Hittson*, which calls for the federal courts to ignore the reasons given by the state habeas court for denying relief and hypothesize reasons why the Georgia Supreme Court could have denied the CPC application, has been called into question. In *Hittson v. Chatman*, 135 S. Ct. 2126 (2015) (Ginsburg and Kagan, JJ., concurring in denial of certiorari), Justice Ginsburg stated, "[t]he Eleventh Circuit plainly erred in discarding *Ylst*." *Id.* at 2127. She explained that the instruction given in *Ylst*, that federal courts reviewing an unexplained state court order upholding a prior reasoned judgment "should presume that [the] 'later unexplained order[] upholding that judgment or rejecting the same claim rest[s] upon the same ground,'" was not disturbed by *Richter*. *Id.* (quoting *Ylst*, 501 U.S. at 803). Thus, federal courts are to look at the last reasoned decision from the state court and determine whether it "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). The courts are not to "hypothesize reasons that might have supported the [Georgia Supreme Court's] unexplained order." *Hittson*, 135 S. Ct. at 2127. Three days after the Supreme Court denied certiorari in *Hittson*, it decided *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). In *Brumfield*, the Court observed that when "conducting the § 2254(d)(2) inquiry, we, like the courts below, 'look through' the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision . . . ." *Id.* at 2276 (citing *Johnson v. Williams*, 133 S. Ct. 1088, 1094, n.1 (2013) and *Ylst*, 501 U.S. at 806). The Court confirmed what Justice Ginsburg said in *Hittson*: *Richter* applies only "where there is no 'opinion explaining the reasons relief has been denied.'" *Brumfield*, 135 S. Ct. at 2283 (quoting *Richter*, 562 U.S. at 98). On July 30, 2015, the Eleventh Circuit granted en banc review in *Wilson v. Warden, Ga. Diagnostic Prison*, No. 14-10681. The question for review is whether a federal habeas court is required to look through a state appellate court's summary decision that

1. The clearly established federal law

Strickland [5] is "the touchstone for all ineffective assistance of counsel claims." *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *Wong v. Belmontes*, 558 U.S. 15, 16 (2009).

To establish deficient performance, Tollette must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Court must apply a "'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting

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is an adjudication on the merits to the reasoning in a lower court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. § 2254(d). Given the unsettled law in this area, the Court has attempted to err on the side of caution in Tollette's case. The Court has reviewed the factual findings and legal conclusions given by the state habeas court when that court's order provides the last reasoned analysis of a claim. The Court has determined that the state habeas court's factual findings were reasonable and the legal conclusions were not contrary to, or unreasonable applications of, Supreme Court precedent. 28 U.S.C. § 2254(d). Having found the state habeas court's bases for denying relief were reasonable, the Court necessarily finds that there were "arguments or theories [that] . . . could have supported" the Georgia Supreme Court's denial of relief. *Richter*, 562 U.S. at 102.

[5] Although the *Strickland* test was announced in the context of an ineffective assistance of trial counsel claim, the same test applies to claims of ineffective assistance of appellate counsel. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).

Strickland, 466 U.S. at 689). "To overcome that presumption, [Tollette] must show that counsel failed to act 'reasonabl[y] considering all the circumstances.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (quoting *Strickland*, 466 U.S. at 688).

To establish prejudice, Tollette must show "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.* When determining if prejudice exists, "it is necessary to consider *all* the relevant evidence that the jury would have had before it if [Tollette's counsel] had pursued the different path–not just the mitigation evidence [Tollette's counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Wong*, 558 U.S. at 20 (citing *Strickland*, 466 U.S. at 695-96, 700); *see also Porter v. McCollum*, 558 U.S. 30, 40-41 (2009).

"When the claim at issue is one for ineffective assistance of counsel, . . . AEDPA review is 'doubly deferential,' with federal courts affording ' both the state court and the defense attorney the benefit of the doubt.'" *Etherton*, 136 S. Ct. at 1151 (citations omitted); *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009). Thus, Tollette must do more than satisfy the

Strickland standard. "He must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (quoting *Bell v. Cone*, 535 U.S. 685, 699 2002).

2. Claims that trial counsel failed to investigate, develop, and present mitigation evidence and subsequent counsel failed to adequately litigate their failure

a. Trial counsel's experience

The trial court appointed Robert Wadkins as lead counsel, and he filed an entry of appearance on April 30, 1996. ECF No. 8-1 at 27, 68. The trial court appointed Steve Craft as co-counsel on October 4, 1996. ECF No. 8-1 at 68.

Wadkins started practicing law in 1983 and, by the time of appointment, had handled approximately 300 criminal cases. ECF Nos. 9-2 at 39; 10-24 at 52. He had been involved in nine death penalty cases.[6] ECF No. 10-24 at 52. Prior to his appointment in Tollette's case, he attended at least one death penalty seminar each year. ECF No. 10-24 at 53.

Steve Craft started practicing law in 1993, handling mainly criminal cases. ECF No. 10-23 at 31. Prior to

[6] It is unclear the number of death penalty cases in which Wadkins was involved prior to his appointment in Tollette's case. Wadkins testified that he had been involved in nine cases total, some before and some after he represented Tollette. (ECF No. 10-24 at 52).

appointment in Tollette's case, he had not been involved in a death penalty case but had handled numerous felony cases, including some in which the defendant was charged with murder. ECF No. 10-23 at 32-33. Craft had attended two death penalty seminars before 1996. ECF No. 10-23 at 33.

b. Investigation into Tollette's background

Trial counsel spoke with witnesses about the crime and obtained police reports, Tollette's statements, and witness statements from the State. ECF Nos. 9-2 at 41-42; 10-23 at 43-45. They realized soon after appointment that "in the sense of guilt or innocence," the case was "fairly straightforward"—the evidence was overwhelming that Tollette was the shooter. ECF Nos. 10-23 at 44; 10-24 at 23. Thus, trial counsel knew "this was a sentencing phase case." ECF No. 10-24 at 24.

Trial counsel met with Tollette and discussed his childhood and family life on several occasions. ECF Nos. 9-2 at 56; 10-23 at 47. Tollette was "adamant in the beginning that, . . . [trial counsel] not contact . . . any of his family, and then once [they] did[,] he didn't want them to come here." ECF No. 10-23 at 69. Tollette "continued to tell [trial counsel] that he did not want any mitigation put up at all. And specifically, he did not want his mother here, or for [them] to bother his mother. . . . He did not want his grandparents

in Arkansas brought into the [case]." ECF No. 9-2 at 56. Ultimately, Tollette "resolved himself to [trial counsel's] argument that his mother needed to" come to his trial. ECF No. 10-23 at 69.

Trial counsel spoke with Tollette's mother, Willie Robinson, and his sisters. ECF Nos. 9-2 at 51; 10-23 at 68. Tollette's older brother "didn't want anything to do with [the case] whatsoever." ECF No. 9-2 at 72.

Trial counsel contacted the MultiCounty Public Defender and the Georgia Indigent Defense Counsel's death penalty section on several occasions regarding their need for mitigation and mental health experts. Billing records indicate the first contact with these agencies occurred around May 12, 1997. ECF No. 8-4 at 67. At that time, Pamela Blume Leonard, with the MultiCounty Public Defender, told Craft they should hire "a mitigation specialist to do a social history" before hiring a psychologist "[s]ince there is no push from the judge." ECF No. 10-41 at 54. On the same date, Leonard gave trial counsel a list of experienced investigators and a sample affidavit to use in support of their request for funds for a mitigation specialist. ECF No. 10-41 at 55.

On June 10, 1997, trial counsel filed an ex parte motion requesting funds for both a mitigation specialist and a psychologist. ECF No. 8-7 at 40-41. At a June 13, 2007

hearing, trial counsel argued that they needed a mitigation specialist, in part, because they had experienced some "difficulty in p[inning] down all of the issues of . . . [Tollette's] upbringing . . . ." ECF No. 8-7 at 80. The trial court refused to rule on the motion until trial counsel submitted an "organized plan" describing how the funds would be spent. ECF No. 8-8 at 3.

On June 16, 1997, trial counsel reported the results of the ex parte hearing to Leonard and requested her assistance:

> I want to give some background information to you and then ask you to send me . . . an outline of how you would proceed. Mr. Tollette was born and lived in the Los Angeles County area in California most of his life. His mother still lives there. His grandparents reside in Arkansas and he spent most of his summers there. What we have indicated to the Judge is that you need to go to California to interview his mother, obtain all school records and any medical records that may or may not be available. Then interview his grandparents and do likewise there. The Judge has indicated that without some idea of, more specifically, what it is that you['re] going after, he is not going to grant the funds. I understand that we have a right to interview these folks and go out and see them, but we are not even going to try to argue that point with the Judge right now. What I need from you is an outline of how you would proceed and approximately how long you think it would take and what information you would hope to glea[n] from this . . . .

ECF No. 10-41 at 42.

On June 25, 1997, Leonard responded with an "outline of the tasks and times needed to identify, locate and interpret data regarding [Tollette's] background." ECF No. 10-41 at 40.

She stated that a minimum of 150-175 total hours were needed to conduct a mitigation investigation. ECF No. 10-41 at 40.

On June 27, 1997, using the information Leonard provided, trial counsel filed an ex parte supplemental brief, stating that a mitigation specialist would need 140 to 160 hours to investigate Tollette's background and the cost would be $5,200.00. ECF No. 8-7 at 51. On July 16, 1997, the trial court held an ex parte hearing and granted $5,000.00 for a mitigation specialist. ECF No. 8-8 at 28.

On approximately July 28, 1997, trial counsel hired Cheryl Abernathy, a mitigation specialist with twenty years of experience who had "consulted on death penalty cases on both state and federal levels." ECF No. 12-4 at 66. Abernathy told trial counsel there was "little time to prepare for an extensive investigation"[7] but she would contact Tollette's family while she was on vacation in Los Angeles on July 29 to August 5, would meet with Tollette when she returned to Georgia, and would travel to California to do further investigation during the week of August 17, 1997. ECF No. 12-4 at 66-67.

On August 8, 1997, Abernathy met with trial counsel and interviewed Tollette. ECF Nos. 12-4 at 85. Tollette

[7] At the time, Tollette's trial was scheduled to start September 8, 1997. ECF No. 8-4 at 74. Realizing they needed more time to conduct the mitigation investigation and have Tollette examined by a psychologist, trial counsel moved for a six-month continuance on August 13, 1997. ECF No. 12-2 at 17-30. The trial court rescheduled the trial for November 3, 1997. ECF Nos. 8-4 at 95; 8-17.

completed a questionnaire indicating: (1) he had an unremarkable early childhood with no hospitalizations or developmental delays; (2) he attended a "pretty well kept school"; (3) he suffered no social or academic difficulties in school; (4) he was raised by his mother; (5) he received emotional support and nurturing during childhood; (6) he was disciplined by spanking but "they weren't to[o] hard"; (7) he was never physically or sexually abused; (8) he had a "very good relationship" with his siblings; (9) he never suffered any head trauma as a child; (10) the middle class suburbs in which he grew up were "a nice place to live"; (11) over the last year he had "many close friends"; (12) he started abusing drugs or alcohol at age fourteen; (13) cocaine was his drug of choice and he used drugs or alcohol daily; and (14) he had received no mental health care in the past. ECF No. 10-27 at 33-54.

On August 16, 1997, Abernathy had a telephone conversation with Tollette's mother and on August 22, 1997, Abernathy travelled to Los Angeles. ECF No. 12-4 at 85. While in Los Angeles, she interviewed Tollette's mother, his sisters, his maternal aunt, and a childhood friend. ECF Nos. 12-4 at 78, 85; 12-5 at 36-47. She told trial counsel that she found Tollette's "family to be cooperative and personable" but she thought it was "troubling that so many of them have been involved with the criminal justice system." ECF No. 12-4 at 84. She

provided trial counsel with typed notes of the interviews. ECF No. 12-5 at 36-47, 84.

Tollette's mother reported that she and her four older children moved from Mississippi to Los Angeles after she divorced her first husband. ECF No. 12-5 at 40. In 1968 she "had a one night stand with [Tollette's] father" and gave birth to Tollette on December 29, 1968. ECF No. 12-5 at 41, 48. She never married Tollette's father, and he did not support or maintain contact with Tollette. ECF No. 12-5 at 41. She married her second husband, a postal employee, in 1990. Tollette and his stepfather "never had much of a relationship." ECF No. 12-5 at 41. She and her second husband had one child together. ECF No. 12-5 at 41.

Tollette's mother stated that Tollette had no birth complications, was a healthy infant, and had no major problems during early childhood. He played baseball and did well in school until high school, when he began cutting classes and associating with "a negative group of boys who were not from their neighborhood." ECF No. 12-5 at 41. Tollette's mother stated that she lost control over Tollette and he left home without warning during his teenage years. ECF No. 12-5 at 41. He went to live with "a group of unsavory people" in San Francisco. ECF No. 12-5 at 41. Thereafter, he started "getting into trouble with legal authorities on a regular

basis." ECF No. 12-5 at 42. While she was not sure, she thought three factors contributed to Tollette's troubles: He was teased as a child because of his light complexion and short stature; he felt abandoned when his other brother, Donnelle, married and moved out of the family home; and he "always seemed to be materialistic." ECF No. 12-5 at 42.

Tollette's mother also stated her other children, three of whom abused drugs, had been charged with various crimes and served time in prison. As for herself, she was very involved in the Church of God in Christ. ECF No. 12-5 at 42-43.

Tollette's sister, Merlinda Moore,[8] reported that Tollette tried desperately to fit in when he was younger, but children teased him because he was short. ECF No. 12-5 at 45. She did not think Tollette had a close relationship with their mother or stepfather, and he had no relationship at all with his biological father. ECF No. 12-5 at 45. She opined that both she and Tollette may have "so many problems" because they did not get the attention they deserved. ECF No. 12-5 at 45. She stated that when she and Tollette were children, their family attended church, went to the beach, and enjoyed going to barbecues together. ECF No. 12-5 at 45.

[8] Moore stated she left home when she was fifteen, moved to Chicago, and started abusing drugs. When she returned to Los Angeles, she and her sister, Gladys Lattier, were convicted for armed robbery and served time in prison. She stated that during prison she turned her life around and had been in no further legal trouble. ECF No. 12-5 at 44-45.

Moore had custody of Tollette's son, TJ. ECF No. 12-5 at 44. Tollette's girlfriend, Evonne Lopez, gave birth to TJ while she was serving a prison sentence. ECF No. 12-5 at 44. Merlinda stated that Tollette and TJ had a close relationship and Tollette had always been good to both his son and his nephew. ECF No. 12-5 at 44-45.

Tollette's other sister, Gladys, recalled that her family moved to California and initially lived with her aunt, Josie Washington. After leaving Washington's home, they lived in the projects in Watts from 1968 to 1972. "She described the Watts area as having a great deal of crime, drive-by shootings, and gang bangers." ECF No. 12-5 at 38. In 1972, they moved to Gardena, California, which "was a much nicer environment." ECF No. 12-5 at 38. Lattier reported she had a good relationship with her stepfather, and their family participated in various activities, such as going to the beach and having barbecues. ECF No. 12-5 at 38. She stated she had been addicted to cocaine and served time in prison on three separate occasions. ECF No. 12-5 at 39. Lattier thought that she and her siblings had problems because they left home when they were too young and immature. ECF No. 12-5 at 39.

Tollette's aunt, Josie Washington, remembered that Tollette was born in the car on the way to the hospital, but "appeared fine." ECF No. 12-5 at 46. Tollette's mother had

no complications before or after delivery. ECF No. 12-5 at 46. Washington described Tollette as "a fairly good kid." ECF No. 12-5 at 47. He loved to play baseball, did not fight or cause disturbances, was neat and clean, and was not hyperactive. She could not explain why Tollette "got with the wrong crowd" and "chose a life of crime." ECF No. 12-5 at 47. According to Washington, Tollette's mother tried "to talk to him, advise him, preach to him, etc, however, he would not listen." ECF No. 12-5 at 47. Washington stated that Tollette's family did not know that he was charged with murder in Columbus, Georgia until FBI agents visited his mother's house. She opined that Tollette was "ashamed, especially since his mother had warned him about his behavior." ECF No. 12-5 at 47.

Shelton James stated that he first met Tollette when they were in the fourth grade. ECF No. 12-5 at 36. James and Tollette lived in the same neighborhood, which James described as "a good place to grow up," "fairly peaceful," and made up of single family homes inhabited by "a mixture of ethnic groups." ECF No. 12-5 at 36. He described Tollette as a good friend during childhood and stated that "they had much in common because neither of them had their biological fathers in the home." ECF No. 12-5 at 36. James stated that Tollette enjoyed playing baseball, had a complex about his height, liked to hang around older guys and smoke and drink, was never violent, got

along well with his peers, was not liked by his stepfather, and "had no parents to turn to." ECF No. 12-5 at 37.

Abernathy also interviewed Tollette at least two more times and reported her findings to trial counsel. ECF No. 12-4 at 68-75. During the September 19, 1997 interview, she asked Tollette "why he continued to get arrested as he had been in approximately thirteen institutions." ECF No. 12-4 at 68. Tollette responded that each time he was released from prison, he was "dumped on the street" with just $200.00 and a trip to the nearest bus station. ECF No. 12-4 at 68. After he returned to his familiar surroundings he would be lured back into criminal activities because he had no other way of supporting himself. While Tollette acknowledged that he could get a job at a fast food restaurant, "he argued that the income wouldn't have been sufficient and besides, he was impressed with the enormous material accumulation that some of the neighborhood drug dealers had amassed as a result of their drug activity." ECF No. 12-4 at 69.

During that same interview, Tollette told Abernathy that any child who grew up in Los Angeles was a member of, or affiliated with, a gang, and he was a member of the Crypts. He reported that the Crypts served as a family for him, and he joined the gang for acceptance, friendship, and protection. ECF No. 12-4 at 69. Tollette "got into 'gang banging' while

in junior high school," and he had attained a high status in the gang by the time he was in high school. ECF No. 12-4 at 69. While he had never killed anyone to achieve status and acceptance in the gang, he had stolen cars and committed robberies. ECF No. 12-4 at 69.

In an October 16, 1997 interview, Tollette provided additional information about the gangs in Gardena, California:

> [Tollette] explained that even though his neighborhood appears "safe," it is not. He elaborated that there is ample crime, drugs, and gang activity in the area. [Tollette] stated that you cannot escape it, in and around the Los Angeles area. [He] related that most of the guys he grew up with . . . got involved in gang activities. It was the norm in his neighborhood. Leon stated that getting into a gang sparked the beginning of his criminal life. Gang involvement . . . leads to an array of criminal activities and thus gets you into trouble with the police. Once you go to prison, [Tollette] asserts, you are on your way to learning more about committing crimes. Each time you're locked up and released, you psych yourself into believing that you are now a better criminal and therefore, you won't get caught the next time. When asked how many times does one need to get caught before they stop buying into that argument, [he] had no answer.

ECF No. 12-4 at 73.

Tollette reported that he started smoking marijuana in his early teens and cocaine and crack in his late teens. ECF No. 12-4 at 69. At one time, he was addicted to both alcohol and crack. ECF No. 12-4 at 70.

Regarding his home life, Tollette stated that his biological father, who was an alcoholic Vietnam veteran, came

to see him only once per year. ECF No. 12-4 at 72. He had fond memories of the summers he spent in Arkansas with his paternal grandparents.[9] His mother was supportive and caring before she married Tollette's stepfather. ECF No. 12-4 at 70. After their marriage, she "turned her back on him and his siblings." ECF No. 12-4 at 72. His stepfather would "whip [him and his siblings] severely" or beat them if they made too much noise. ECF No. 12-4 at 70. His mother never intervened or protected her children. Tollette reported that he once ran away from home because he was afraid of being whipped by his stepfather. When it was discovered that he ran away, his stepfather "beat him severely." ECF No. 12-4 at 70. His stepfather never attended his baseball games, never provided direct financial support, and never encouraged him in any way. ECF No. 12-4 at 70-71. He claimed he left home at an early age because of the mistreatment he received from his stepfather. ECF No. 12-4 at 73.

In addition to these interviews, trial counsel obtained Tollette's school, prison, and medical records. ECF Nos. 9-2 at 52; 10-23 at 57.

c. Investigation into Tollette's mental health

On November 27, 1996, trial counsel filed a notice of

[9] Tollette told Abernathy that he did not want his grandparents to be contacted. ECF No. 12-4 at 72.

intention to raise the issue of insanity, mental illness, or competency. ECF No. 8-4 at 5. On that same day, the State moved for discovery of any "written expert report" that may be made by Tollette's experts.[10] ECF No. 8-4 at 18-20.

On January 7, 1997, the trial court ordered a mental evaluation of Tollette to determine: (1) Tollette's competency to stand trial; (2) the degree of criminal responsibility or mental competence at the time of the crime; (3) whether Tollette is mentally retarded; and (4) any recommendations for disposition. ECF No. 8-4 at 43. On February 7, 1997, Drs. Karen Bailey-Smith and Margaret Fahey with West Central Georgia Regional Hospital interviewed and tested Tollette for approximately seven hours. ECF No. 12-2 at 8. They prepared two reports dated March 6, 1997 ("West Central Reports"), which they gave to the trial court, trial counsel, and the prosecutor. ECF No. 12-2 at 8-16.

The West Central Reports show that Tollette indicated as follows during his interview with Bailey-Smith and Fahey: (1) He had a good relationship with this mother and stepfather until his teenage years; (2) he knew his natural father but did not have a significant relationship with him; (3) as the youngest in his family, he received much attention and pampering; (4)

[10] At an August 15, 1997 pretrial hearing, the State again asked for any written reports that Tollette's psychologist prepared. ECF No. 8-17 at 13.

he had a good relationship with his three stepbrothers and two stepsisters; (5) he moved out of the family home in the tenth grade because of a conflict over a car; (6) he lived with friends and other family members since that time; (7) he was an average student until the tenth grade, when he became disinterested in school; (8) he received his GED in prison; (9) he supported himself primarily through selling drugs; (10) he started drinking alcohol and smoking marijuana in elementary school and started using cocaine regularly and experimenting with other drugs during high school; (11) his criminal history contains mainly drug-related charges, including sale and distribution of cocaine, possession of cocaine, and possession of a firearm by a convicted felon; and (12) the only time he saw a mental health counselor was at age sixteen because of his antisocial behavior. ECF No. 12-2 at 13-14.

Bailey-Smith and Fahey found that Tollette's intellect appeared normal, he had an IQ of 89, his judgment was "relatively intact," his mood was depressed, and his insight into his condition was deficient. ECF No. 12-2 at 10. Tollette reported that he had never harmed himself in the past, but stated that he currently thought "about hurting or killing himself as he does not think he can go through with what lays ahead of him legally." ECF No. 12-2 at 9. He claimed he heard voices and had "visions or dreams" in November 1995 when he was

"excessively preoccupied with the belief that his girlfriend was cheating on him with his best friend." ECF No. 12-2 at 10. He also "described, at length, his beliefs that an ex-girlfriend . . . may have been a witch [who] placed a curse on him" and he thought his "current legal predicament is related to that curse." ECF No. 12-2 at 10. Bailey-Smith and Fahey opined that Tollette was placing responsibility for the crime "outside of himself" as a way of dealing with the anxiety caused by his current legal problems. ECF No. 12-2 at 10.

The Minnesota Multiphasic Personality Inventory-2 "MMPI-2" revealed

> a profile which would suggest an individual who is seen by others as angry and argumentative. These individuals are usually able to control the expression of their hostility, but they do exhibit episodic, angry outbursts, especially in response to stress. The self-concept of these individuals is usually unrealistic and grandiose. They tend to exaggerate their own contributions and self-worth. They tend to view the world as a threatening place. They are suspicious and mistrustful, and often feel that they are unfairly blamed or punished. They often feel misunderstood, alienated, and estranged from others. They often blame others for their own problems and short-comings. Not surprisingly, these individuals are likely to have a long history of very poor interpersonal relationships. They are often excessively demanding of attention, affection, and sympathy. However, they tend to be resentful of any demands placed on them.
>
> Taken together, all information on Mr. Tollette would suggest that his behavior can best be described by the diagnosis of Personality Disorder NOS with Antisocial and Schizotypal Features.

ECF No. 12-2 at 10-11

Ultimately, Bailey-Smith and Fahey determined Tollette was competent to stand trial, and he had the capacity to distinguish right from wrong at the time of the crime. ECF No. 12-2 at 11, 16.

On June 10, 1997, trial counsel requested funds for a psychologist. ECF No. 8-7 at 40-41. At the June 13, 1997 ex parte pretrial hearing, trial counsel argued that the West Central Reports were "very limited and very flawed." ECF No. 8-8 at 1. On July 16, 1997, the trial court granted $2,500.00 for a psychological expert. ECF No. 8-8 at 28. The MultiCounty Public Defender recommended Dr. Daniel Grant, and trial counsel contacted Grant in September 1997. ECF Nos. 10-22 at 40; 10-41 at 12. Trial counsel gave Grant Abernathy's memos, Tollette's statements to the police, and the West Central Reports. ECF No. 10-22 at 46.

Grant spent two days with Tollette performing a neuropsychological evaluation. ECF No. 10-22 at 41-42. He "gave neuropsychological testing, which included intelligence, achievement, . . . memory, language processing, executive functions, motor functions, and … some tests that looked at … personality issues and level of adjustment." ECF 10-22 at 41. Grant determined, and reported to trial counsel,[11] that Tollette

[11] Perhaps because the State had sought discovery of any written psychological report, trial counsel did not ask Grant to provide a written report. ECF No. 10-22 at 65.

was not insane or under a delusional compulsion at the time of the crime, was not mentally retarded, and was not severely mentally ill. ECF No. 10-22 at 43-44. Grant found that Tollette was depressed and felt hopeless. ECF No. 10-22 at 43-44.

Trial counsel's notes of the conversation with Grant show that Grant reported: There was "not much to work with"; Tollette's memory problems could be "related to drug use"; Tollette suffered borderline personality disorder; he was "moody, irritable, [and had a] poor personal concept"; Tollette felt "unloved, unwanted, [and that] nobody cared for him"; he was either not depressed or "mildly depressed"; Tollette wanted to die if he was sentenced to life without the possibility of parole; he was suicidal "from [the] reality of [his] options"; he had "problems with emotions—has little or no control"; and Tollette was "self-centered, aggressive and antisocial but not much else." ECF Nos. 10-22 at 65-69; 12-2 at 2-4. Trial counsel's notes show that the "best [Grant] can do" is testify that Tollette could be "useful in prison" if his prison records from California do not show disciplinary problems. ECF No. 12-2 at 4. Although Grant requested Tollette's prison records from his numerous incarcerations in California, trial counsel did not provide him with those records. ECF No. 10-22 at 47-48, 61, 64, 69.

d. Presentation of evidence at sentencing

At the October 20, 1997 pretrial hearing, Tollette told the trial court that he "was trying to get [his] lawyers just to stop everything right here, all of the proceedings. And [he] wanted to plead guilty and request to be put to death." ECF No. 8-18 at 45. Tollette said he did not want trial counsel to put up any defense to the death penalty. ECF No. 8-18 at 46. Trial counsel objected, stating that Tollette was not making a rational decision and asked the trial court not to grant his request. ECF No. 8-18 at 46. The trial court told Tollette his request was "on the record." ECF No. 8-18 at 47. Again on October 24, 1997, Tollette told the trial court he wanted to plead guilty and be given the death penalty. ECF No. 8-19 at 4.

On November 3, 1997 Tollette pled guilty to all charges. ECF No. 8-21. Trial counsel explained that they did not "necessarily concur" in his decision to plead guilty but "it is his decision and . . . he's been consistent in that regard all along." ECF No. 8-21 at 16.

Prior to the commencement of the sentencing hearing on November 10, 1997, trial counsel sought to limit the State's evidence in aggravation. ECF No. 8-31 at 2. They argued that because Tollette pled guilty, the State should not be allowed to present all of the underlying facts of their case in chief.

ECF No. 8-31 at 2-3. Instead, only matters in aggravation and mitigation should be presented during the sentencing hearing. ECF No. 8-31 at 2-3. The Court ruled the State could present the facts "surrounding the armed robbery, surrounding the killing, surrounding the aggravating assault, but it's not necessary to go into all the peripheral matters that [they] would have to deal with if [they] were trying the case." ECF No. 8-31 at 8.

The State moved to have Bailey-Smith conduct a "risk assessment profile" so that it could present testimony concerning Tollette's future dangerousness.[12] ECF Nos. 8-31 at 9-10; 8-4 at 108. The court questioned whether trial counsel planned to present any experts and they stated "we have no intention of putting any expert up knowing what we think we know that the State is going to put up." ECF No. 8-31 at 10. The trial court ruled that the State could not conduct a "risk assessment profile" or present evidence of Tollette's future

[12] This was not the first time the State moved to present expert testimony that Tollette would not be a good risk in prison. ECF No. 8-21 at 3-4. In an October 20, 1997 Amendment to Notice of Evidence in Aggravation of Punishment and Victim Impact Evidence, the State notified trial counsel that it planned to present testimony from Bailey-Smith and Fahey "concerning the future dangerousness of . . . Tollette, based on the psychological examination, the facts of the crime, the defendant's prior criminal history, and the interview given him on February 7, 1997." ECF No. 8-4 at 108. At the November 3, 1997 pretrial hearing, the State requested the trial court to allow Bailey-Smith to conduct a risk assessment on Tollette and trial counsel opposed the motion. ECF No. 8-21 at 3. The trial court took the "motion under advisement" but denied it at that time because there was a question "whether legally . . . the State is authorized to put on this type of testimony without the defense utilizing expert testimony in whatever phase of trial it's used in." ECF No. 8-21 at 5.

dangerousness because trial counsel were not going to present expert testimony. ECF No. 8-31 at 12.

The State presented testimony regarding the armed robbery and murder of Hamilton. ECF Nos. 8-31 at 86-151; 8-32 at 1-43; 8-37 at 45-65; 8-38 at 1-15[13]. Tollette's audiotaped statement to the police was played for the jury. ECF No. 8-32 at 44-73.

In his statement, Tollette said he was from California and had been in Columbus only three or four days at the time of the robbery. ECF No. 8-32 at 52, 57. He came to Columbus when his accomplice, Xavier Womack,[14] called and told him that "he had something working." ECF No. 8-32 at 59. Tollette stated he came to Columbus "to try to hussle [sic] to make some money." ECF No. 8-32 at 57. While he and Womack had discussed robberies in the past, they did not plan this robbery until after he arrived in Columbus. ECF No. 8-32 at 58. Tollette explained that Womack became familiar with the schedules of the armored vehicles before Tollette arrived in Columbus and Womack was the one who planned this robbery. ECF No. 8-32 at 59-60. According to Tollette, he walked up as Hamilton was loading money into the Brinks truck. ECF No. 8-32 at 48. When Hamilton

[13]For reasons unknown, the sentencing hearing transcript is out of order on the Court's electronic case filings system. The transcript of testimony from the sentencing hearing starts at ECF No. 8-31 and continues through ECF No. 8-32. Exhibits tendered during the sentencing hearing start at ECF No. 8-33 and continue through ECF No. 8-37 at 44. The transcript of testimony from the sentencing hearing resumes at ECF No. 8-37 at 45.

[14] In an apparent attempt to conceal Xavier Womack's identify, Tollette actually stated his accomplice's name was Xavier Johnson. ECF No. 8-32 at 52.

turned around and saw him, Tollette started firing. ECF No. 8-32 at 48. Tollette explained that killing Hamilton was never part of the plan:

> It was something I can say happened out of, more out of my fright. You know I originally didn't want to shoot him nor kill him, but, you know. I wanted everything to go okay and get the money and run . . . . .
>
> . . . .
>
> So, so, I didn't get overly frustrated and wanted to kill him, but killing him was not what I was out to do. Like I said I shot him and he didn't fall, and that's usually what people do when they get shot they fall down. I did try to grab his gun because he was trying to grab it and he was trying to grab mine. I just wanted to grab the bag and run, so what I wanted him to do is fall down.

ECF No. 8-32 at 62-64.

Tollette stated that he was in the Shotgun Crip and Womack was in the Crips, both of which were gangs located in Los Angeles, California. ECF No. 8-32 at 66-67.

The State introduced certified copies of Tollette's previous convictions: (1) three December 2, 1988 guilty pleas to selling cocaine; (2) an August 30, 1990 guilty plea to possession of cocaine; and (3) a May 13, 1992 guilty plea to possession of a firearm by a convicted felon. ECF No. 8-38 at 16-18. The State also presented victim impact statements from Hamilton's wife, two daughters, and one co-worker. ECF No. 8-38 at 21-54.

Trial counsel presented testimony from Tollette's mother,

who brought Tollette's three-year-old son with her to the sentencing hearing. ECF No.8-38 at 76-77. She testified that she never married Tollette's father; Tollette had three brothers and two sisters; Tollette was a good, loveable, obedient child; they "were a family of love"; Tollette did well in school "until he met up with the wrong group"; Tollette played sports when he was young; Tollette and his stepfather did not have a father-son relationship and were not as close as she would have liked; Tollette did respect his stepfather; Tollette left home was he was sixteen without her consent; Tollette left home because he became associated with the wrong crowd and wanted to "experiment with some things that he knew . . . he could not do and stay" at home; Tollette had a great relationship with his son; she knew he was in jail from time to time, but he called her regularly; and he had no drug problem of which she was aware. ECF No. 8-38 at 78-87. Tollette's mother begged the jury to spare his life and she apologized to the Hamilton family. ECF No. 8-38 at 88-89.

In closing arguments, the State argued that the facts of this case are "absolutely horrendous," but Tollette "thinks the whole thing is funny."[15] ECF No. 8-38 at 95. Jurors were reminded that Tollette showed no remorse and even laughed during

[15] Tollette had apparently leaned back in his seat at some point during the sentencing hearing and grinned. ECF No. 9-2 at 58.

his statement to law enforcement. ECF No. 8-38 at 103. According to the State, Tollette had plenty of opportunity to back out of this crime as it took him and his codefendants days to plan the robbery. ECF No 8-38 at 98, 101. Jurors were told to show the same mercy for Tollette that he showed for Hamilton on the day he shot him. ECF No. 8-38 at 97-98, 100-01, 123. The State said that Tollette had "several criminal convictions in California," ECF No. 8-38 at 109, "served time in California prisons," ECF No. 8-38 at 100, and argued he was beyond rehabilitation. ECF No. 8-38 at 120. The State, however, did not reference Tollette's gang affiliation during closing.

Trial counsel explained that their closing argument was guided, in part, by the way Tollette acted during the trial. Wadkins stated that "[i]t was obvious that the jury was disgusted . . . in mild term[s], toward [Tollette]. Some of [Tollette's] actions in the courtroom during the trial, you may recall the page, the newspaper page with him leaning back and grinning." ECF No. 9-2 at 58. Apparently Tollette had also pursed his lips or blown a kiss at one of Hamilton's daughters when she was walking off the witness stand after finishing her victim impact statement. ECF No. 9-2 at 61. Wadkins thought it necessary to gain credibility with the jury by telling them that he too was disgusted by Tollette but still thought that Tollette's life should be spared. ECF No. 9-2 at 58-59

Trial counsel told the jury they did not have to invoke the death penalty just because they found aggravating circumstances existed. ECF No. 8-38 at 125. Instead they could sentence Tollette to life or life without the possibility of parole. If sentenced to life without the possibility of parole, there was no possibility "he would ever be on the street." ECF No. 8-38 at 130. Because life without the possibility of parole was available, Tollette did not have to be sentenced to death in order to protect society. ECF No. 8-38 at 131. Trial counsel argued that sentencing a defendant to life without the possibility of parole may punish him more than death because he has to "wake up every day for the rest of his life behind bars to reflect on what he's done." ECF No. 8-38 at 132. Since a sentence of life without the possibility of parole protected society, vengeance, trial counsel argued, was the only reason left to sentence a defendant to die:

> Now, I also submit to you this thought, knowing that you've got a third option of life without parole, if you don't have to . . . kill[] . . . him [to protect] society, and yet you do kill him, you are no different than him. If you kill him when you don't have too, that's exactly what he did to Mr. Hamilton. He killed him, and he didn't have to. If you kill Tollette and you don't have to, how are you different than Tollette? You are not. You won't be. You'll live the rest of your life knowing you are in the same category, deep down.

ECF No. 8-38 at 132-33. Trial counsel concluded by asking the jurors to consider what their spiritual leaders might do if

faced with such a decision. ECF No. 8-38 at 133

The jury returned a sentence of death, finding two aggravating circumstances: (1) The murder was committed while Tollette was engaged in another capital felony—armed robbery; and (2) Tollette committed the murder for the purposes of receiving money or any other thing of monetary value. ECF No. 8-5 at 43-44.

e. Motion for new trial and direct appeal

Trial counsel failed to file a timely motion for new trial because they were confused about whether they would continue to represent Tollette. ECF No. 8-5 at 63-64. On December 19, 1997, they moved to be allowed to file an out of time motion for new trial and the trial court granted the motion on December 22, 1997. ECF No. 8-5 at 66.

The trial court appointed David Grindle to represent Tollette, and he filed an amended motion for new trial on March 11, 1998. ECF No. 8-5 at 72-73. On July 21, 1998, the trial court terminated Wadkins.[16] On October 20, 1998, Grindle filed his first amended motion for new trial and alleged, *inter alia*, ineffective assistance of trial counsel. ECF No. 8-5 at 76-85. The trial court denied Grindle's motion for funds to hire an investigator. ECF Nos. 8-8 at 40-45; 9-2; 10-24 at 109. To

[16] While it is unclear when Craft's representation of Tollette ceased, it is clear that Craft did not represent Tollette at the motion for new trial or on direct appeal.

prepare for the motion for new trial hearing, Grindle spoke with Wadkins and Tollette, consulted the MultiCounty Public Defender and the Southern Center for Human Rights, and reviewed the trial transcript. ECF No. 10-24 at 95, 98, 110, 116, 122

The motion for new trial hearing was held on December 4, 1998 and January 25, 1999. ECF Nos. 9-1; 9-2. Wadkins was the only witness Grindle called. ECF No. 9-2. The court summarily denied the motion for new trial on January 28, 1999. ECF No. 8-5 at 103.

Grindle represented Tollette on direct appeal until he was replaced by Dorothy Williams, who was later replaced by Jim Elkins and Mike Reynolds.[17] ECF Nos. 10-24 at 119-21; 10-25 at 72-73, 76-77, 84-87, 92. In relation to ineffective assistance of counsel, the Georgia Supreme Court found:

> Tollette claims that his trial counsel rendered constitutionally-ineffective assistance. To prevail in his claim, Tollette must demonstrate both that his counsel performed deficiently under constitutional standards and that the deficiency in reasonable probability changed the outcome of his trial.
>
> . . . .
>
> Tollette complains that his trial counsel did not prepare adequate mitigation evidence. Tollette's lead counsel testified that he was appointed to Tollette's case more than a year before trial, interviewed potential witnesses, arranged for a mental health examination by a pair of

[17] Trial counsel's files were lost sometime during the direct appeal. ECF No. 10-24 at 119-20. Grindle testified that the files were lost after he handed all of them over to Williams. ECF No. 10-24 at 119-20.

> psychologists, arranged for an examination by a neuropsychologist, hired a "mitigation specialist," consulted with lawyers expert in death penalty cases, and obtained and weighed the usefulness of school and prison records. Counsel did not believe that the psychological experts offered anything helpful to Tollette's case, and, in counsel's appraisal, Tollette's school and prison records were also unhelpful.
>
> The investigation by counsel and the mitigation specialist led to a conclusion that Tollette's mother and one of his sisters could offer helpful testimony. Although Tollette's mother testified at trial, Tollette argues that counsel performed deficiently by failing to secure the attendance of his sister through an interstate subpoena. Pretermitting the question of whether counsel's failure to compel the attendance of the witness has been shown to be deficient performance, we conclude that Tollette did not suffer sufficient prejudice to warrant relief. The only testimony in the hearing on the motion for new trial regarding the content of the sister's potential testimony showed that it would have been merely a "reiteration of the mother's testimony."
>
> . . . .
>
> Having reviewed Tollette's arguments and the record, we conclude that the trial court did not err in denying Tollette's claim of ineffective assistance of trial counsel.

Tollette, 280 Ga. at 106-07, 621 S.E.2d at 749-50. (citations omitted).

f. State habeas proceedings

In an attempt to show what mitigation evidence trial counsel could, and allegedly should, have presented during sentencing, state habeas counsel presented testimony from seven witnesses and introduced numerous affidavits and/or

depositions from experts and from Tollette's family members, former friends, and teachers.[18] ECF Nos. 10-21 to 11-35.

Dr. James Vigil, an anthropologist with the University of California testified about Tollette's gang involvement. ECF No. 10-21 at 20-75 He stated that Tollette's family did not support or nurture him while he was growing up in a gang-infested area. ECF No. 10-21 at 42-49. He had no male role models and received no guidance from his father or stepfather. ECF No. 10-21 at 48-49. The gang offered Tollette protection and security when he left home at the age of sixteen. ECF No. 10-21 at 46. Vigil stated that the combination of Tollette's family situation and the gang presence in Gardena, California made Tollette's gang involvement "predetermined." ECF No. 10-21 at 64.

On cross examination, Vigil stated that the Westside Shotgun Crips were known as a drug trafficking gang and Tollette could have been attracted to the gang because its members had a lot of money, nice cars, and women. ECF No. 10-21 at 67, 72. He acknowledged that the "enormous material accumulation that some of the neighborhood drug dealers had amassed as a result of their drug activity" could have motivated Tollette to return

[18] In addition, Craft, Wadkins, and Grindle testified at the state habeas evidentiary hearing. ECF Nos. 10-23 at 29-94; 10-24 at 20-124. Also, Ralph Robert Tressell, an expert in forensic investigation and crime scene analysis, and medical examiner Geoferry Smith testified regarding the sequence of the gunshots and their testimony is discussed in section III A 3 of the Order.

to the gang each time he was released from prison. ECF No. 10-21 at 72-73.

Katrina Wilson testified she met Tollette in 1993, when he was hanging out with other gang members in the house next door to her grandparent's home. ECF No. 10-21 at 105-06. She was eighteen years old at the time and he was twenty-six. ECF No. 10-21 at 105. They dated until sometime in 1995. ECF Nos. 10-21 at 105; 10-25 at 5. She testified that Gardena was a violent, gang-infested neighborhood in the 1980s. ECF No. 10-21 at 82-85.

Wilson stated that Tollette treated her son and his own young son very well, and he was respectful of her grandmother. ECF No. 10-21 at 92-97. When they met, Tollette drove a BMW and wore nice clothes and jewelry. ECF No. 10-21 at 97. She knew Tollette did not have a job, and he never spoke of looking for work. ECF No. 10-21 at 108-09. Thus, she was suspicious how Tollette got the money for these luxury items, but she never asked. ECF No. 10-21 at 108.

Wilson stated that approximately two months before he left to go to Georgia, Tollette pawned his BMW and no longer wore expensive clothes and jewelry. ECF Nos. 10-21 at 97-98; 10-25 at 7. Instead, "[h]e looked aged and haggard," and started driving, and occasionally living in, an old Chevrolet Malibu. ECF Nos. 10-21 at 97-98; 10-25 at 7. He lost touch with his

friends, started drinking heavily, lost weight, and slept excessively. ECF No. 10-21 at 100. Wilson said Tollette "seemed to have hit bottom." ECF No. 10-25 at 7.

Dr. Michael Hilton, a forensic psychiatrist, testified that several factors present in Tollette's early childhood caused him to suffer from low self-esteem at an early age: his father abandoned him; his mother was neglectful; his stepfather was abusive; and his older brothers left home. ECF No. 10-21 at 119-20. After his brother Darnell moved from the home when Tollette was thirteen, Tollette's grades fell and he quit playing baseball. ECF No. 10-21 at 120. According to Hilton, Tollette essentially raised himself, and Tollette joined a gang when he was fourteen because of the safety it provided. ECF No. 10-21 at 120, 126.

Hilton testified that Tollette, who started abusing drugs and alcohol in his early teens, has a biological predisposition towards addictions. ECF No. 10-21 at 126-27. His father was an alcoholic and two of his sisters and an uncle abused drugs. ECF No. 10-21 at 126.

After spending approximately two hours with Tollette, Hilton diagnosed him as having recurrent episodes of major depression and chronic low self-esteem. ECF Nos. 10-21 at 127; 10-22 at 1. Hilton stated that Tollette suffered his first episode of major depression at eighteen and was going through

a severe depressive episode at the time he robbed and killed Hamilton. ECF No. 10-21 at 129. According to Hilton, several factors led to Tollette's 1995 major depressive episode: Tollette's girlfriend was arrested and he lost his living arrangements in early 1995; his biological father died in January 1995; he had no success in the music business; and he was no longer having success dealing drugs because of his own alcohol and drug abuse. ECF No. 10-22 at 7-8. Hilton opined that Tollette's depression impaired his impulse control and led him to make a "desperate break" from his past nonviolent illegal activities and commit armed robbery and murder. ECF No. 10-22 at 9-10.

Hilton agreed with the West Georgia Reports' diagnosis of personality disorder not otherwise specified, with antisocial traits and schizotypal features. ECF No. 10-22 at 19-20. While he disagreed, Hilton acknowledged that the MMPI results showed Tollette engages in manipulative and self-serving behavior, is hostile and aggressive, and fails to accept responsibility. ECF No. 10-22 at 29-30. He also acknowledged that while depression and substance abuse impact the ability to make choices, Tollette made the decision to abuse alcohol and drugs and commit various crimes. ECF No. 10-22 at 33.

Grant testified that Tollette's prison adaptability—or ability to be a good inmate—was an issue they could have

explored.[19] ECF No. 10-22 at 46-48. He stated that he asked trial counsel to provide him with Tollette's prison records. However, they never did. ECF No. 10-22 at 46-48. Grant agreed that Tollette exhibited antisocial personality traits. ECF No. 10-22 at 55. Grant testified that, although he found Tollette to be only "mildly depressed" when he examined him in 1997, he did not dispute Hilton's diagnosis of major depression in the months leading up to the murder. ECF No. 10-22 at 71.

Tollette also tendered several affidavits from family and friends. ECF No. 10-25 at 2-68. The affiants testified about gangs and drugs in the neighborhood and schools; the pressures that many young men feel to join a gang; Tollette's neglectful, alcoholic father; Tollette's poor home life; and Tollette's positive relationship with his young son. ECF No. 10-25 at 2-68.

g. Tollette's arguments

Tollette makes several arguments related to trial counsel's alleged failure to investigate and present mitigation evidence. First, he claims that trial counsel's mitigation investigation was less than thorough because they waited until the last minute to start the investigation and then proceeded

[19] At the state habeas evidentiary hearing, Bailey-Smith testified that she and Fahey did not review Tollette's prison records and did not assess how Tollette would adapt to prison or whether he would pose a threat in prison. ECF No. 10-24 at 7-8. She did agree that prior performance in prison is "one of the better predictors" of whether a defendant will pose a risk in prison in the future. ECF No. 10-24 at 7. However, prison adaptability was "not [her] area of expertise." ECF No. 10-24 at 9. Instead, she and Fahey normally "looked only at competency to stand trial and criminal responsibility." ECF No. 10-24 at 4-8.

in a "lackadaisical" manner. ECF No. 41 at 10. Tollette argues that armed with evidence from a timely and competent investigation, including expert assistance, trial counsel could have made a credible argument that Tollette's behavior and choices were a product of his deprived upbringing; early exposure to alcohol, drugs, and violence; family history of addiction; and mental and emotional disturbances, i.e., major depressive disorder and polysubstance abuse. ECF No. 34 at 74-75, 77. According to Tollette, they could have shown the jury that in the weeks and months leading to Hamilton's murder, he "was suffering from the combined effects of a severe and debilitating mental illness marked by desperation and impaired cognitive functioning and a severe drug and alcohol addiction." ECF No. 34 at 33. Second, Tollette claims that he was prejudiced by trial counsel's failure to use available evidence to show he would not pose a risk of future danger in prison. ECF No. 34 at 91-94. Third, Tollette states trial counsel's "most shocking and inexplicable oversight" was their failure to interview, Katrina Wilson, Tollette's former girlfriend.

Through the lens of an ineffective assistance of appellate counsel claim, the state habeas court addressed Tollette's various ineffective assistance of trial counsel claims. The court found that Tollette was not prejudiced by appellate counsel's failure to raise ineffectiveness claims against

previous counsel because the underlying ineffectiveness of trial counsel claims had no merit. ECF No. 12-24 at 20. This Court can grant relief only if it determines that no "fairminded jurist" could agree with the state court. *Etherton*, 136 S. Ct. at 1152.

According to Tollette, trial counsel started their investigation into his background too late and then did so only because they wanted to "get[] . . . on the record" that they conducted an investigation.[20] ECF No. 34 at 20. However, this is not a case in which trial counsel waited until the eve of trial to investigate their client's background. *Compare Bobby v. Van Hook*, 558 U.S. 4, 9-10 (2009) (finding that trial counsel's mitigation investigation was not started too late

[20] To support this allegation, Tollette selectively quotes a June 16, 1997 letter from Craft to Leonard. ECF Nos. 10-41 at 42-43; 34 at 20. He argues that Craft wrote Tollette was just "'cold blooded,'" but they needed to "'get . . . on the record'" that they checked into his background even though doing so would not "'bear any fruit.'" ECF No. 34 at 20 (quoting ECF No. 41 at 42). However, that is not exactly what Craft wrote. ECF No. 10-41 at 42-43. Craft requested that Leonard (1) tell him how she would gather background information on Tollette to give to a psychiatrist, and (2) provide an outline of how an independent psychiatric evaluation would proceed. ECF No. 10-41 at 42-43. Craft told Leonard that he had already spoken to Tollette "repeatedly," as well as Tollette's mother and grandmother. ECF No. 10-41 at 43. By the time he wrote the June 16, 1997 letter, Craft had already received the March 6, 1997 West Central Reports. ECF No. 12-2 at 8-16. Craft wrote that he had "begun to believe that some of what [he] perceived is not actually an identifiable problem that a psychiatrist may actually be able to do anything with. Actually, what it amounts to is that we may be dealing with just plain cold-blooded here. But, . . . Wadkins and I both agree that [funding for a mitigation specialist and psychiatrist] is something that we have to pursue and then at least let the Judge deny it at a minimum and if he approves it, get it on the record that we checked into these things." ECF No. 10-41 at 43. A reasonable interpretation is Craft was informing Leonard that, based on what they had already discovered, a psychiatrist might not be able to provide mitigating evidence, but they needed to pursue funding for a background investigation and a psychiatrist anyway.

when counsel interviewed lay witnesses "early and often," consulted an expert more than one month before trial, and looked into hiring a mitigation specialist five weeks before trial), *with Williams* 529 U.S. at 395 (explaining that trial counsel waited too late to prepare for the sentencing phase when they did not begin to prepare for that phase until a week before trial). Trial counsel spoke with Tollette about his childhood and family life in California on numerous occassions. ECF No. 9-2 at 56; 10-23 at 47. Despite Tollette's insistence that they not contact his family and no mitigation evidence be presented, trial counsel spoke, on numerous occasions, to Tollette's mother and his sisters, and they obtained school, prison, and medical records. ECF Nos. 9-2 at 47, 51, 56; 10-23 at 57, 67-69. Abernathy had three months and $5,000.00 to investigate his background. She spoke with Tollette's mother, sisters, maternal aunt, grandparents, and a childhood friend. ECF Nos. 12-4 at 78, 85; 12-5 at 36-47. Trial counsel also reviewed the West Georgia Reports and hired Grant to conduct neurological testing to find potential mitigating evidence. ECF No. 9-2 at 44-45.

From this investigation, trial counsel learned most, if not all, of the information that was later presented at the state habeas evidentiary hearing. They knew Tollette's biological father deserted him; he did not get along with his step-father,

who whipped or, in his words, "beat him severely"; he felt abandoned when his older brother married and left home; his mother was neglectful and did not intervene to protect him from his stepfather; he started abusing alcohol and drugs when he was a child; he left home at a young age; there were gangs in Gardena; Tollette was a gang member; and Tollette had a good relationship with his son. ECF Nos. 9-2 at 71; 12-2 at 13-14; 12-4 at 69-73; 12-5 at 39, 41-42, 45. They also knew Tollette was "depressed"; felt "hopeless"; suffered from Personality Disorder NOS with Antisocial and Schizotypal Feature; had memory problems that could be related to drug use; was moody, irritable, self-centered; and was aggressive with little control over his emotions. ECF No. 12-2 at 2-4, 10-11.

Trial counsel discussed how to use what they had learned during the mitigation investigation. They had "a lot of discussion[s]" about whether they could turn Abernathy's findings into the mitigation strategy that "Tollette was the person he is as a result of the problems that he had in childhood, such as the abandonment he felt, the guilt, and . . . those kinds of things." ECF No. 9-2 at 74. Ultimately, they determined nothing they found would persuade the jury to have sympathy for Tollette. They thought that trying to present evidence of a deprived childhood "would probably back fire in [their] face" because "[m]any of the jurors probably would have

had a much worse childhood than he did." ECF No. 9-2 at 76

When questioned why they did not present evidence that Tollette was physically abused by his stepfather,[21] Craft explained:

> The parental discussion about what's a beating and what's a whipping is a fine line. And based on his history, I think the State would argue that maybe he needed one more along the way to keep him out of trouble. I don't, you know, absent a trip to the hospital, DFACS intervening, those type situations where you can demonstrate an injury, are what an average person in a 40 to 60 year old age group jury would consider too much. I don't believe that that would have been considered mitigating.

ECF No. 10-23 at 71.

Trial counsel also discussed whether they should present evidence of Tollette's gang membership. ECF No. 10-23 at 71-73. Craft stated they viewed gang evidence as a "two-edged sword":

> You know, you present that as he had no choice, he was forced to join a gang, how do you show that, and as a result of that, that led him, . . ., "into a life of crime at an early age," or did he decide he wanted to be big and bad and prove himself by being part of the gang, and that was a choice, to enter this lifestyle? Which, then again, it comes back to the State's position, how are they going to counter that argument? Well, that's right, he joined a gang when he was a teenager and he has been a gangster ever since, or a thug . . . . Those types of things are a two-edged sword and you have to be very careful how

[21] Tollette's reports of physical abuse were inconsistent. He initially reported to Abernathy that he had never been physically abused and received only light spankings as punishment. ECF No. 10-27 at 42. He also reported that he left home due to a conflict with his parents over a car, not because of his stepfather's abuse. ECF No. 12-4 at 16. No other family member reported that Tollette was physically abused.

you put that in front of a jury.

ECF No. 10-23 at 72-73

While trial counsel knew evidence of Tollette's gang membership would be revealed to the jury when they heard his statement to the police, they wanted to "marginalize" such evidence "as much as possible by restricting it to one phase as opposed to two and not bringing up specific items for them to attack." ECF No. 10-23 at 89. Therefore, they made the strategic decision not to present gang evidence. ECF No. 10-23 at 72. *Strickland*, 466 U.S. at 690 (finding that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable").

Trial counsel viewed evidence of Tollette's drug and alcohol abuse similarly. ECF No. 10-23 at 73. Craft explained:

> [T]here were some issues about some of the people in his past that he was involved with as it related to the drug use, that also involved selling drugs. Again, we could argue that he grew up young and made the mistake of getting with the wrong crowd. And all of that may be true and the drug use could contribute, but at the same time if the State comes back and says, yeah, and then he decided he wanted to make a living selling drugs, and that's all he's done, is a life of crime, he's supported himself this way, tie that in with the hustling statement that the detective says he made, all those things, again, if you present something that has minimal or no mitigating factor and you open the door for more aggravating factors, . . . you're not helping your argument at all.

ECF No. 10-23 at 73. As with the gang evidence, they

strategically decided not to present the drug and alcohol abuse evidence. ECF No. 10-23 at 73; *Pace v. McNeil*, 556 F.3d 1211, 1224 (11th Cir. 2009) (holding that presenting evidence of drug use or drug abuse "may alienate the jury and offer little reason to lessen the sentence"); *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999) (holding that "a showing of alcohol and drug abuse . . . can harm a capital defendant as easily as it can help him at sentencing").

Looking at the record as a whole, this Court agrees with the state habeas court's determination that "trial counsel conducted an adequate mitigation investigation, and they made a reasonable choice of trial strategy based on the investigation." ECF No. 12-24 at 34. It certainly cannot find the state habeas court's decision was contrary to *Strickland*; involved an unreasonable application of *Strickland*; or was based on any unreasonable factual determinations.

Next, Tollette complains that trial counsel should have had Grant review his prison records so Grant could testify that Tollette would be a nonthreatening, productive inmate in prison. ECF No. at 34 at 135-39. On several occasions, the State sought to have Tollette examined for future dangerousness or adaptability to prison and have Bailey-Smith testify to such during sentencing. ECF Nos. 8-4 at 108; 8-21 at 2-5. When questioned whether they planned on presenting a mental health

expert, trial counsel stated they would not because they did not want to open the door for the State to present expert testimony. ECF No. 8-31 at 10. The trial court found the State could present evidence of future dangerousness only if trial counsel presented expert testimony. ECF No. 8-31 at 10.

At the motion for new trial hearing, trial counsel explained they feared the presentation of evidence regarding Tollette's adaptability to prison would open the door to the State's presentation of the same or of broader mental health evidence. ECF No. 9-2 at 65. Trial counsel "successfully kept out" the West Central Reports, which they did not view as mitigating at all, "by not putting Dr. Grant up." ECF No. 10-23 at 67-68. The West Central Reports showed Tollette had "Personality Disorder NOS with Antisocial and Schizotypal Features." ECF No. 8-7 at 46. Trial counsel stated, "You don't want to argue to a jury that somebody that you want to be locked up as not being a future threat suffers from . . . antisocial behavior. I don't think that the jury would concur in your opinion . . . ." ECF No. 10-23 at 67-68. Trial counsel also stated they feared some answers Grant might have to provide on cross examination would be damaging. ECF No. 10-23 at 67.

Given this record, the state habeas court reasonably determined "that the information that was available to counsel during trial 'would not have led constitutionally effective

counsel to pursue [a different trial strategy] and would not be reasonably probable to have resulted in' the jury sentencing Tollette to life without parole." ECF No. 12-24 at 42 (footnotes omitted).

Finally, Tollette argues that trial counsel's "most shocking and inexplicable oversight" was their failure to interview his former girlfriend, Wilson, and have her testify at sentencing. ECF No. 34 at 33. According to Tollette, this particular oversight "was the most damaging to" his case because Wilson "could have provided valuable and compelling insight into [his] character and the struggles he had faced throughout his life, and most importantly, in the weeks and months prior to the crime." ECF No. 34 at 13-14.

Though he now claims "Wilson held the key to an entire case in mitigation," there is no indication that Tollette ever mentioned her to anyone. ECF No. 34 at 13. Abernathy's notes of her interviews with Tollette show he mentioned two previous girlfriends: Evonne Lopez and Edy Malendez. ECF No. 10-26 at 72-75. Tollette told her that Lopez, the mother of his son, went to prison in 1993. ECF No. 10-26 at 72. In November 1993, Tollette met Malendez and moved in with her. ECF No. 10-26 at 72, 74. By May 1995, they were "on the run" from federal authorities and Malendez turned herself in. ECF No. 10-26 at 75. At the time of the interview, August 8, 1997, Malendez was

in prison in Dublin, California for selling drugs. ECF No. 10-26 at 72, 75. He also told Abernathy that one of these women "burn[ed] candles" and "put a curse on him." ECF No. 10-26 at 72, 74.

Trial counsel's notes of their conversation with Grant show Tollette told Grant he had a relationship with only one woman. ECF No. 11-21 at 7. No name is mentioned, but "candle lighter" is shown. ECF No. 11-21 at 7. Grant's notes show Tollette reported he moved in with his girlfriend when he got out of jail, she "started burning candles" and the "devil used her to get to him." ECF No. 11-22 at 45-46. Compared with Abernathy's notes, it appears Tollette was referring to either Lopez or Malendez.

Tollette contends he told Bailey-Smith and Fahey about Wilson and the West Central Reports should have put trial counsel on notice of her existence. ECF No. 34 at 12. Wilson's name, however, appears nowhere in the West Central Reports. Instead, they show that Tollette reported he had been "excessively preoccupied with the belief that his girlfriend was cheating on him with his best friend," and he thought "an ex-girlfriend of his may have been a witch [who] placed a curse on him." ECF No. 12-2 at 10. Lopez and Malendez are the only names mentioned in the notes Bailey-Smith and Fahey took during the psychiatric evaluation. ECF No. 10-32 at 62. The notes

seem to suggest that Tollette accused Malendez of "cast[ing] demons on [him]." ECF No. 10-32 at 64.

While Tollette apparently never mentioned Wilson, her name and relationship to Tollette were shown in a Los Angeles Police Department Investigation Report "LA Report" regarding a November 20, 1995 armed robbery and aggravated assault of an armored truck driver in California. The crimes were extremely similar to the Columbus armed robbery and murder, and Tollette was initially considered a suspect. ECF No. 11-34 at 15. Tollette argues trial counsel's failure to interview Wilson, a witness named therein, amounts to ineffective performance under *Rompilla v. Beard*, 545 U.S. 374 (2005). ECF No. 34 at 13, 18-19, 30, 35. Though Tollette relies heavily on *Rompilla* and makes extensive arguments, Respondent fails to address *Rompilla's* application to Tollette's case.

In *Rompilla*, trial counsel's sentencing strategy stressed residual doubt. *Id.* at 386. They were on notice that the "Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence." *Id.* at 383. They knew the prosecutor intended to establish a prior conviction for a similar offense of rape and assault by reading a transcript of the rape victim's testimony from the earlier trial. *Id.* at 383-84, 389. Yet, trial counsel failed to examine the readily

available court file on Rompilla's prior conviction. *Id.* "Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope." *Id.* at 386.

The Supreme Court held

> that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence in aggravation at the sentencing phase of trial.

Id. at 377.

In Tollette's case, he argues the State intended to introduce the LA Report against him in the sentencing phase of his trial. Thus, under *Rompilla*, trial counsel had a duty to interview Wilson, who was named in the report. ECF No. 34 at 35. The record shows a Notice of Intent to Introduce Evidence of Similar Transactions in the case of Xavier Womack, Tollette's codefendant. ECF No. 11-34 at 4-6. This was served on Womack's counsel, Michael Garner and Rory Selwynn, not Tollette's trial counsel.[22] ECF No. 11-34 at 6. In his reply brief, Tollette acknowledges that the State provided notice of the evidence it intended to introduce in aggravation against Tollette and the California robbery was not included. ECF No.

[22] Trial counsel did have a copy of the LA Report and did know that Tollette was, at some point, considered a suspect in that case. It appears the State provided trial counsel with a copy of the LA Report along with various other discovery on December 23, 1996. ECF No. 11-19 at 28-30.

41 at 20 n.40. While *Rompilla* held that trial counsel "is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence in aggravation at the sentencing phase of trial," the Court cannot read *Rompilla* to require trial counsel to not only review a report containing information that could be used in aggravation in a codefendant's case, but to also interview witnesses named in that report.

Moreover, even if Tollette's counsel should have interviewed Wilson, the state court reasonably determined that their failure to do so did not prejudice Tollette. Tollette stresses that Wilson could have told the jury about the struggles he faced growing up in a gang-infested neighborhood and how his mental state deteriorated in the months leading up to Hamilton's murder. ECF No. 34 at 38-44. As the state habeas court found, Tollette again "relies on his presumption that jurors would have construed the evidence as showing how his 'behavior was a product of his history and circumstances which he was unable to overcome.'" ECF No. 12-24 at 36 (footnote omitted). However, much of her testimony "could have just as likely been viewed unfavorably." *Id.*

For example, Wilson was questioned in connection with the November 20, 1995 California armored truck robbery and aggravated assault. ECF No. 11-34 at 15. At Tollette's

sentencing hearing, the jurors heard nothing of these previous crimes. Tollette acknowledges that Wilson might "have testified that she had been approached by FBI agents in order to discuss Mr. Tollette's possible involvement in a California robbery." ECF No. 41 at 21. Thus the jurors would have learned that Tollette had been a suspect in an armored truck robbery and aggravated assault in California that bore a striking resemblance to the Columbus armored truck robbery and murder, to which Tollette had just pled guilty. ECF No. 11-34 at 13. Also, Wilson testified that Tollette was in the Shotgun Crips; hung around with gang members in the house next door to her grandparents' home; and he never worked but always had expensive cars, nice clothes, and flashy jewelry. ECF No. 10-21 at 105-09. Such testimony would not be viewed favorably.

In conclusion, the state habeas court, through the lens of an ineffective assistance of appellate counsel claim, found trial counsel adequately investigated Tollette's background and made a reasonable choice of trial strategy based on the investigation. Therefore, Tollette was not prejudiced by appellate counsel's failure to raise the issue that motion for new trial counsel failed to effectively litigate the ineffective assistance of trial counsel claim. Because the state habeas court's decision did not involve any unreasonable applications of law or fact and was not contrary to Supreme Court

precedent, this Court must deny relief.

3. Claim that trial counsel failed to investigate and subject the State's presentation of evidence to meaningful adversarial testing

Tollette argues that trial counsel ineffectively rebutted the State's characterization of the murder. ECF No. 34 at 94-105. According to Tollette, the State presented testimony and argument that Tollette murdered Hamilton "execution style" with four quick gunshots, the first to the head and the remaining three in rapid succession after Hamilton was incapacitated. ECF No. 34 at 95, 99. He argues that trial counsel were ineffective for failing to evaluate the evidence and elicit testimony that Tollette first shot Hamilton in the legs instead of running up, shooting him in the head and then shooting him three more times after he was incapacitated. ECF No. 34 at 94-99.

No one disputes that Tollette shot Hamilton four times. In its opening statement, the State told the jury that "Hamilton got shot in the head right about in the temple . . . and went down like a ton of bricks. **Either before or after** he was shot in the head, . . . he was shot in each leg, and he was also shot in the back." ECF No. 8-31 at 65 (emphasis added).

Tollette argues that "[t]he [S]tate presented the testimony of three witnesses who described a fast, point-blank, execution-style shooting while the victim's back was turned." ECF No. 34 at 95. That is a bit of a stretch. Cornell

Christianson testified that Tollette shot Hamilton in the head, Hamilton fell, and Tollette continued to shoot. ECF No. 8-32 at 1. He said nothing about Hamilton being shot from behind. Carl Crane testified that he heard four shots fired in rapid succession and Hamilton fell. ECF No. 8-31 at 136. Again, Crane said nothing about Hamilton's back being turned at the time or which shot caused Hamilton to fall. Sherry Ziegler testified that she saw Tollette run up to the back of the armored truck and quickly shoot "four or five rounds." ECF No. 8-32 at 18. She stated that "[t]he best" she could "recall," is that Tollette shot Hamilton in the back of the head and kept shooting as Hamilton fell but she "wasn't close enough to say for sure" that Tollette shot Hamilton in the head first. ECF No. 8-32 at 18-19, 23.

The medical examiner told the jury that in 99 out of 100 cases involving multiple gunshot wounds, he could not determine the order of the wounds. ECF No. 8-37 at 65. The wounds to Hamilton's legs could have been inflicted by someone standing over and firing down at him. ECF No. 8-38 at 5-6. The "most obvious scenario" for the wound to the Hamilton's back is that Hamilton was ducking down or slumped down when he received this shot. ECF No. 8-38 at 7. However, the medical examiner stated he "wasn't at the scene to view what happened, [he was] just speculating or giving an opinion as to a number of

possibilities." ECF No. 8-38 at 8. As for the fatal shot to his head, Tollette's gun was no more than six inches from Hamilton's head and this injury would have been immediately debilitating, causing Hamilton to hit the ground. ECF No. 8-38 at 10-11.

In his audiotaped statement to the police, which was played for the jury, Tollette said he intended to rob the armored truck but did not intend to shoot Hamilton. ECF No. 8-32 at 47, 62, 66. Hamilton was turned the other way as Tollette approached him. When he turned around, Tollette started shooting. ECF No. 8-32 at 48. Tollette stated, "[A]s I started shooting him, I was getting closer to him, . . . he did reach for the gun. And like I say, he didn't fall." ECF No. 8-32 at 63. He also said that he tried to shoot Hamilton "[i]n the chest [or] [u]pper chest where his underwear was" because he thought Hamilton might be wearing a vest. ECF No. 8-32 at 62.

During its closing, the State argued that "Hamilton was shot in the head, no defensive wounds, shot on the way down. The first wound was immediately debilitating, that is it knocked him out, killed him, probably." ECF No. 8-38 at 97. Later, the State said that Tollette "ran up and shot [Hamilton], and shot him on the way down. And you've heard the medical testimony. Shot on the ground or shot on the way down." ECF No. 8-38 at 102.

During state habeas proceedings, crime scene analyst Ralph Tressel testified that Tollette's first two shots were to Hamilton's legs, the third show was to his back, and the last shot was to Hamilton's head. ECF No. 10-23 at 8-14. However, if the third and fourth shots were fired in rapid succession before Hamilton hit the ground, the third shot may have been to his head and the last one to his back as he was falling. ECF No. 10-23 at 15. Tressel stated that the physical evidence did not show that Tollette approached Hamilton "and shot him directly in the head from behind." ECF No. 10-23 at 19. He opined that Tollette tried to disable Hamilton by shooting him twice in the legs and then "got close enough to Mr. Hamilton, they started tussling over the gun and tussling over the money bag and the gun was discharged twice more."[23] ECF No. 10-23 at 21.

Smith also testified again at the state habeas evidentiary hearing. He stated that the bullets entered the front, and exited the back, of Hamilton's legs. In order for Hamilton to have received these wounds after he fell to the ground, he would

[23] Tressel based this assertion on one of Tollette's statement to the police and on J. L. Grantham's statement. ECF No. 10-23 at 19-20, 24. In his audiotaped statement, Tollette did not say he struggled with Hamilton. However, in one police report Tollette is reported to have said he struggled with Hamilton. ECF No. 11-34 at 21. In a January 10, 1996 statement, Grantham said he was travelling on First Avenue when movement near the Brinks truck caused him to look and he "saw two people at the rear of the truck [and] they looked like they were struggling or together." ECF Nos. 10-23 at 19-20, 24; 11-34 at 61-62. There is no indication trial counsel ever interviewed Grantham. Moreover, Grantham did not testify at the sentencing hearing or at the state habeas evidentiary hearing.

have had to be facing upwards. ECF No. 10-24 at 17-28. There was no evidence indicating Hamilton was ever on the ground facing upwards. ECF No. 10-24 at 18. Smith stated he did not "know the order in which the gunshot were sustained, but there are a number of possibilities." ECF No. 10-24 at 19. The most likely scenario is that Hamilton sustained the gunshot wounds while he was standing. ECF No. 10-24 at 19.

The state habeas court determined that Tollette "effectively appended" his defaulted claim that trial counsel were ineffective for failing to investigate and rebut the State's characterization of the murder "to his viable ineffectiveness claim against direct appeal counsel":

> Tollette argues that had trial counsel investigated the circumstances of the crime, counsel could have persuasively challenged the State's characterization of the crime as an execution-style shooting. Tollette contends that trial counsel could have used eyewitnesses to the shooting and forensic experts to show that Tollette did not shoot Hamilton execution style, but that he first shot Hamilton in each leg, then to the back, and finally and fatally to the head. In *Hall v. Terrell*, 285 Ga. 448, 452-454 IIC (2009), the Supreme Court held that even assuming that trial counsel should have presented forensic evidence disputing the exact number of blows inflicted and the timing of the fatal blow, the habeas petitioner failed to show "any reasonable probability that the jury would have failed to find beyond a reasonable doubt the statutory aggravating circumstance." As in *Hall v. Terrell*, Tollette failed to meet the prejudice prong of the *Strickland* test because the sequencing of gunshot wounds would not have significantly swayed the jury against finding a statutory aggravating circumstance.

ECF No. 12-24 at 41 (footnotes omitted)

When denying Tollette's CPC Application, the Georgia Supreme Court found that the state habeas court applied the incorrect prejudice standard:

> [T]he standard applied by the habeas court is not the *Strickland* test for prejudice in this context, because it fails to account for the jury's discretionary decision regarding sentencing once it has found at least one statutory aggravating circumstance. . . .
>
> Nevertheless, after independently applying the correct legal principle to the trial and habeas record, we conclude as a matter of law that, "[i]n exercising its discretion once [the Petitioner] became eligible for a death sentence," the jury would not have been significantly swayed by the testimony that the Petitioner presented on this issue in the habeas proceedings. We further conclude that trial counsel's not utilizing testimony like that presented by the Petitioner's new expert to challenge the State's characterization of the circumstances of the murder did not result in prejudice sufficient to support the success of the Petitioner's underlying ineffective assistance of trial counsel claim and thus that the Petitioner cannot show a reasonable probability that, had direct appeal counsel raised the ineffective assistance of motion for new trial counsel in litigating trial counsel's ineffectiveness with respect to this issue on direct appeal, the Petitioner would have been granted a new trial on this basis. Therefore, the Petitioner cannot satisfy the cause and prejudice test to overcome the procedural bar to that claim, and it remains procedurally defaulted. Accordingly, we conclude that this issue ultimately is without arguable merit.

ECF No. 12-27 at 1-2 (citations omitted).

The only question for this Court is whether "'some

fairminded jurists could agree with the'" Georgia Supreme Court's decision. *Holsey*, 694 F.3d at 1257 (quoting *Hill*, 662 F.3d at 1346). They could. A fairminded jurist could conclude that there was no reasonable probability of a different sentence even if the jury thought Tollette shot Hamilton first in both of his legs to disable him and then placed the gun six inches from Hamilton's head and pulled the trigger. Because the Georgia Supreme Court's denial of this claim is not contrary to, or an unreasonable application of *Strickland*, or based upon any unreasonable determinations of fact, this Court must deny relief.

B. The procedure by which Tollette was forced to litigate ineffective assistance of counsel, including the removal of trial counsel over Tollette's objections, violated his rights under the Fifth, Sixth, and Fourteenth Amendments.

Wadkins was apparently confused about whether trial counsel would handle the motion for new trial. ECF No. 8-5 at 63-64. This confusion resulted in his failure to file a timely motion for new trial. ECF No. 8-5 at 63-64. The trial court granted Wadkins' request to file an out-of-time motion for new trial and appointed Grindle to handle the motion for new trial and appeal. ECF No. 8-5 at 66, 72-75. Grindle told the trial court, "Tollette, at least as far as he is concerned[,] would have desired Mr. Wadkins to stay on the case throughout the first level of the appeal." ECF No. 9-1 at 3. The trial court found

it needed to appoint "new counsel to raise this issue of ineffective assistance of counsel. So it is all dealt with here and we don't spend five years in between dealing with that issue." ECF No. 9-1 at 8.

The trial court's decision to appoint new counsel before the motion for new trial was not raised on direct appeal. State habeas counsel argued that (1) the trial court abused its discretion when it dismissed trial counsel from their representation against Tollette's wishes prior to the motion for new trial, ECF No. 12-24 at 12; (2) the procedure by which he was forced to litigate ineffective assistance of trial counsel at the motion for new trial violated his constitutional rights, ECF No. 12-24 at 14; and (3) motion for new trial and direct appeal counsel failed to adequately object to or litigate the improper removal of trial counsel, ECF No. 12-24 at 14. The state habeas court found these claims were procedurally defaulted and/or "meritless":

> The first allegation of ineffectiveness—that direct appeal counsel should have protested the trial court's denial of Tollette's right to counsel of choice—is meritless. First, Tollette could have raised this issue on direct appeal, and he has not shown sufficient cause to explain why it was not raised. Direct appeal counsel cannot be held ineffective for failing to raise a claim that was procedurally defaulted. Second, *Davis v. State*, 262 Ga. 221 1991, cited by Tollette in support of his contention that he had a right to retain counsel of choice, actually undermines his claim. In *Davis*, the Georgia Supreme Court explicitly stated that

> "[a]n indigent defendant has no right to compel the trial court to appoint an attorney of his own choosing." The right to counsel-of-choice depends on whether objective considerations favoring the appointment of the preferred counsel are outweighed by countervailing considerations of comparable weight. . . .
>
> Tollette also cited *White v. Kelso*, 261 Ga. 32 1991 for the proposition that litigating effectiveness in habeas is the accepted practice in Georgia. While the Court in *White* noted that "claims of ineffective assistance of counsel are often properly raised for the first time in a habeas petition," it ultimately ruled that the petitioner's ineffectiveness claim was procedurally barred because appellate counsel, who was not the trial counsel, failed to assert it on direct appeal. "The rule is consistent: New counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review."
>
> Here, Tollette's preference that trial counsel continue to represent him on the motion for new trial, with the reason for such preference being to delay raising his ineffectiveness claim until habeas proceedings, does not outweigh the countervailing consideration to litigate the ineffectiveness claim at the earliest practicable opportunity. Tollette has provided no persuasive legal support for his contention that the trial court abused its discretion in appointing substitute counsel for the motion for new trial in order to litigate the ineffectiveness claim. Having failed to show an abuse of discretion by trial court, Tollette has failed to show the cause and prejudice necessary to show that his direct appeal counsel were ineffective for omitting this argument from appeal.

ECF No. 12-24 at 18-19 (footnotes omitted).

This decision is not contrary to Supreme Court precedent, does not involve an unreasonable application of Supreme Court precedent, and is not based on any unreasonable determinations

of fact. In fact, Tollette has not pointed to, and the Court is not aware of, a Supreme Court case holding that a trial court does not have discretion to replace appointed counsel. To the contrary, the Supreme Court has stated that the Sixth Amendment

> guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint as long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford."

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

Trial courts have "wide latitude" to "balance[e] the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). In this case, the trial court exercised its discretion to appoint new counsel so trial counsel ineffectiveness claims could be handled during the motion for new trial. ECF No. 10-23 at 77-78. Notes from the MultiCounty Public Defender indicate that trial court was "somewhat sympathetic" regarding the ineffective assistance issues and believed that these claims "need[ed] to be raised." ECF No. 10-41 at 79. Trial counsel stated that the court preferred to bring in new appellate counsel so ineffective assistance "could be an issue at the hearing and then the appropriate testimony

for evidentiary purposes could be made there, to document the record." ECF No. 10-23 at 78.

The state habeas court's determination that appellate counsel were not ineffective for failing to raise this issue was also reasonable and supported by the record. Appellate counsel could not be ineffective for failing to raise a claim that motion for new trial counsel had abandoned or waived. Also, the state habeas court reasonably decided that the underlying claim was "meritless." Appellate counsel are not deficient for failing to raise claims that have no merit. *Freeman v. Att'y Gen.*, 536 F.3d 1225, 1233 (11th Cir. 2008).

C. Tollette was denied due process, a fair trial, and reliable sentencing when the prosecutor made improper remarks arguments in his closing argument

Tollette argues that the prosecutor improperly invoked religion as the basis for the jury to impose a death sentence and misinformed the jury about Tollette's parole eligibility. ECF No. 34 at 159. The Georgia Supreme Court found the prosecutor's remarks were improper, but they did not amount to reversible error. Tollette alleges the Georgia Supreme Court's decisions on these issues are not entitled to deference because the court failed to adjudicate the federal claims on the merits, made unreasonable factual determinations, and/or unreasonably applied clearly established federal law. ECF No. 34 at 160-61.

1. The Georgia Supreme Court adjudicated the federal claims.

Tollette argues that the Georgia Supreme Court failed to adjudicate his due process and Eighth Amendment claims regarding the prosecutor's improper closing. Instead, according to Tollette, the court addressed only his state law claims. He alleges the court considered only whether the religious argument led to the death penalty being "'imposed under the influence of passion, prejudice, or any other arbitrary factor.'" *Tollette*, 280 Ga. at 103-04, 621 S.E.2d at 747 (quoting O.C.G.A. § 17-10-35(c)(1)). Regarding parole, he states the Georgia Supreme Court referenced only the state life without parole statute and Georgia caselaw. *Id.* at 105, 621 S.E.2d at 748. The Georgia Supreme Court's failure to adjudicate his federal claims, Tollette argues, entitles him to de novo review of these claims in this Court. While Respondent fails to address Tollette's specific arguments, he does state that the Georgia Supreme Court's opinion is due deference under § 2254(d) because the court adjudicated all of Tollette's federal claims on the merits. ECF No. 37 at 200, 211.

Section II of Tollette's appellate brief was titled, "The trial court committed reversible error by allowing the State to argue facts not in evidence and impermissible prejudicial

matters." ECF No. 8-16 at 22. In the opening paragraph, he argued that he

> was denied his rights to a fair and impartial jury, due process, equal protection, a fair trial and reliable determination of punishment, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution . . . when the State made at least five improper[,] inflammatory[,] and prejudicial comments to the jury during its closing argument.

ECF No. 9-16 at 22. According to Tollette, one of the five improper prosecutorial comments was: "And I submit to you that these facts, this crime, the proper . . . the just punishment under a lot of religions would be death for what he's done." ECF No. 9-16 at 26. Another was: "I submit to you ladies and gentlemen, prison is too good for this defendant. Prison for the rest of life, prison for seven years and re-paroled, prison for whatever." ECF No. 9-16 at 28.

The Georgia Supreme Court found:

> Tollette argues that he preserved his current objections to the prosecutor's allegedly-improper arguments through a pretrial motion. Although we have held that an adverse ruling by a trial court to a motion in limine seeking to limit a specific argument at trial serves to preserve the issue of the argument's propriety for appellate review, we find that no such ruling was obtained in this case and, therefore, that the issue has been waived. Nevertheless, if an argument by the State was improper in a death penalty case, this Court must examine whether the argument led to a death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor." In making that examination, this Court determines whether any improper arguments in reasonable probability led to

> the imposition of a death sentence.
>
> . . . .
>
> During his closing argument, the prosecutor argued that "the just punishment under a lot of religions would be death for what [Tollette did]." This argument was improper in that it emphasized the mandates of various, although unspecified, religions. However, because Tollette did not object to this argument at trial, we consider only whether it in reasonable probability led to the jury's selection of a death sentence. We find that it did not.
>
> . . . .
>
> Tollette objected to [the] reference to "how many years" might pass before Tollette would he eligible for parole. The likelihood of parole is an improper subject matter for argument by counsel . . . . Accordingly, we find that the trial court erred in overruling Tollette's objection to the prosecutor's argument. Nevertheless, we find that the argument ultimately proved entirely harmless in Tollette's case, given the fact that the jury had life without parole as an available sentence and was properly charged, through an original charge and an additional charge given during deliberations, that a sentence of life without parole would mean that Tollette would never be eligible for parole unless later adjudicated innocent.

Tollette, 280 Ga. at 103-05, 621 S.E.2d at 747-48 (citations omitted).

The Georgia Supreme Court did not acknowledge any federal basis for Tollette's claims and did not cite any federal cases. Even so, this Court cannot "assume that [the] unaddressed federal claim was simply overlooked." *Johnson v. Williams*, 133 S. Ct. 1088, 1089-90 (2013). Instead, the Court must "presume

that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted." *Id.* at 1096 (explaining that the presumption a state court addressed the federal claim is a "strong one" that may be rebutted only in "unusual circumstances"). The evidence rebutting the presumption must lead "very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." *Id.* at 1097

Tollette argues his prosecutorial misconduct claims are "cognizable under multiple sources of constitutional law," including *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Darden v. Wainwright*; 477 U.S. 168 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). ECF No. 34 at 169. According to Tollette, the Georgia Supreme Court's failure to cite these cases, or their underlying constitutional provisions, proves the court overlooked his federal claims. ECF No. 34 at 169-72. Perhaps the Georgia Supreme Court was guided by Tollette's own failure to cite any of these cases anywhere in his appellate brief.[24]

[24] Tollette's appellate brief is shown at ECF No. 9-16. There was a previous appellate brief submitted by Grindle. ECF Nos 9-3; 9-4. However, Grindle ceased representing Tollette and Tollette's case was stricken from the Georgia Supreme Court's docket. ECF No. 9-5. Afterward, Tollette's case was re-docketed and stricken from the docket two more times before it was docketed the fourth and final time on March 28, 2005. ECF Nos. 9-6; 9-10; 9-12; 9-13; 9-15. A new briefing schedule was provided and appellate counsel Elkins and Reynolds filed their May 17, 2005 appellate brief. ECF Nos. 9-15; 9-16. This is the brief that the Georgia Supreme Court had before it when it ruled on Tollette's direct appeal.

Instead, when arguing that the prosecutor's religious and parole arguments violated his rights, he cited only state law: O.C.G.A. § 17-8-75; O.C.G.A. § 17-10-6.1(c)(1); O.C.G.A. § 17-10-35, *Carruthers v. State*, 272 Ga 306, 528 S.E.2d 217 (2000), *overruled on other grounds by Vergera v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008); *Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995); and *Jenkins v. State*, 265 Ga. 539 (1995).[25] ECF No. 9-16 at 26-29. While Tollette alleged generally that his Fifth, Eighth, and Fourteenth Amendment rights had been violated, his specific arguments were based on state law. It appears, therefore, that Tollette "treated [his] state and federal claims interchangeable." *Williams*, 133 S. Ct. at 1099. Having done so, it is "hardly surprising that the [Georgia Supreme Court] did so as well." *Id.*

Tollette's litigation strategy after the Georgia Supreme Court issued its opinion also supports the conclusion that the

[25] As explained above, Tollette did, in the first paragraph of the section dealing with improper prosecutorial comments, allege his Fifth, Eighth, and Fourteenth Amendment rights were violated when the State made five improper comments. ECF No. 9-16 at 22. When making his specific arguments regarding the prosecutor's mention of religion and parole, however, he did not argue that the prosecutor's comments violated federal law; he did not cite the United States Constitution; and he did not cite Supreme Court precedent. (ECF No. 9-16 at 26-27). It might be argued that Tollette mentioned the United States Constitution only "in passing" and, therefore, his federal claims regarding the religion and parole comments are unexhausted and procedurally defaulted. *Williams*, 133 S. Ct. at 1096. Except for the claim Tollette raises under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), Respondent does not make this argument. Thus, the Court does not make this finding. The Court merely points out that Tollette is now criticizing the Georgia Supreme Court for responding to the specific arguments Tollette made in his appellate brief and for failing to cite cases that Tollette himself failed to cite.

court adjudicated the federal, as well as state, claims. *Id.* Tollette "neither petitioned [the Georgia Supreme Court] for rehearing nor argued in subsequent state . . . proceedings that the state court had failed to adjudicate [his federal] claim[s] on the merits." *Id.* To the contrary, in his Petition for Writ of Certiorari, he argued the Georgia Supreme Court wrongly denied his claim that the "prosecutor's misstatement regarding the eligibility for parole . . . resulted in violations of his constitutional rights under the Eighth and Fourteenth Amendments." ECF No. 9-23 at 16. It is, therefore, clear that until these federal proceedings, Tollette did not think the Georgia Supreme Court had inadvertently failed to adjudicate his federal claims on the merits.

Furthermore, the Georgia Supreme Court's analysis under O.C.G.A. § 17-10-35(c)(1) appears to be interchangeable with the federal analysis. *Childers v. Floyd*, 736 F3d 1331, 1335 (11th Cir. 2013) (finding no need for separate federal analysis when the state law "fit hand in glove" with the federal right guaranteed by the Constitution). In fact, the Georgia Supreme Court has stated that its analysis under this statute "is no mere matter of statutory interpretation; every decision to impose the death penalty implicates the procedural and substantive protections of the Eighth Amendment and our view must, at a minimum, be sufficient to satisfy those protections."

Conner v. State, 251 Ga. 113, 117, 303 S.E.2d 266, 273 (1983); *See also Williams*, 133 S. Ct. at 1096 (explaining that "if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the claim may be regarded as having been adjudicated on the merits").

In this case, after finding the prosecutor's religious comment improper, the Georgia Supreme Court questioned whether "it in reasonable probability led to the jury's selection of a death sentence." *Tollette*, 280 Ga. at 104, 621 S.E.2d at 748. Under clearly established federal law, a prosecutor's improper statement violates due process only if "the improper argument rendered the sentencing stage trial fundamentally unfair." *Romine v. Head*, 253 F.3d 1349, 1366 (11th Cir. 2001); *Donnelly*, 416 U.S. at 645. And, "a capital sentencing proceeding [is] fundamentally unfair if there is a reasonable probability that the argument changed the outcome, which is to say that absent the argument the defendant would not have received a death sentence." *Romine*, 253 F.3d at 1366 (citations omitted). The Court sees no difference in these two analyses.

Tollette argues that "[a]lthough the 'reasonable probability' in the Tollette opinion may appear at first blush to be similar to the fundamental fairness due process inquiry, it did not constitute such review in this case." ECF No. 34 at 174-75. According to Tollette, this is because "under

Georgia law, unless an error or instance of prosecutorial misconduct is independently sufficient to in 'reasonable probability' lead to a different sentence, there is no defect at trial." ECF No. 34 at 175. In other words, Tollette claims the Georgia Supreme Court considered each improper comment in isolation, as opposed to undertaking a due process analysis and looking at the entire record to determine whether the multiple improper arguments may have affected the trial as a whole.

The Georgia Supreme Court stated that O.C.G.A. § 17-10-35(c)(1) requires it to determine if the death penalty has been "imposed under the influence of passion, prejudice, or any other arbitrary factor." *Tollette*, 280 Ga. at 103-04, 621 S.E.2d. at 747 (citing O.C.G.A. § 17-10-35(c)(1)). The court has explained that to make this determination, it "must examine the entire record for the presence of factors improperly impacting on the decision to impose a sentence of death." *Conner*, 251 Ga. at 117, 303 S.E.2d at 272-73; *Spivey v. State*, 253 Ga. 187, 191, 319 S.E.2d 420, 427 (1984) (explaining that under O.C.G.A. § 17-10-35(c)(1), the court reviews the entire record, including the closing argument to determine if the "argument considered in its entirety, was so prejudicial or offensive, or involved such egregious misconduct . . . as to require reversal"). The Court finds that while the Georgia Supreme Court discussed each allegedly improper comment

separately, it necessarily had to look at the entire sentencing hearing, including all other improper arguments, to determine if the death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor." O.C.G.A. § 17-8-75(c)(1).

When addressing Tollette's claim regarding the prosecutor's parole comment, the Georgia Supreme Court held that the prosecutor's statement was improper and, therefore, the trial court erred in overruling Tollette's objection. *Tollette*, 280 Ga. at 105, 621 S.E.2d at 748. However, the improper argument "ultimately proved entirely harmless in Tollette's case." *Id.* In a similar case, the Eleventh Circuit applied deference to such a ruling. *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 803-05 (11th Cir. 2014). In *Lucas*, the Georgia Supreme Court, without citing federal law, found that the prosecutor's comments about prisoner escapes was improper, but "harmless." *Lucas v. State*, 274 Ga. 640, 648-49, 555 S.E.2d 440, 448-49 (2001). When addressing this issue in his federal habeas action, the Eleventh Circuit stated:

> The Georgia Supreme Court's determination, rendered on direct appeal, that any error was harmless was not an unreasonable application of Supreme Court law. This is especially true since the harmless error standard we apply as a federal habeas court—that the error is harmless unless there is "actual prejudice," meaning that the error had a "substantial and

> injurious effect or influence" on the jury's verdict—is more difficult to meet than the one applied by the Georgia Supreme Court.

Lucas, 771 F.3d at 802-03. Following *Lucas*, this Court affords deference to the Georgia Supreme Court's "harmless" determination.

In conclusion, the Court finds that Tollette has not presented evidence to rebut the "strong" presumption that the Georgia Supreme Court adjudicated his federal claims on the merits. *Williams*, 133 S. Ct. at 1096.

2. The Georgia Supreme Court's ruling on the religious comment did not involve an unreasonable determination of the facts or application of the law and was not contrary to clearly established federal law.

During closing arguments, the prosecutor stated that "the just punishment—the just punishment under a lot of religions would be death for what he's done." ECF 8-38 at 119. On direct appeal, Tollette argued this was an improper statement and the Georgia Supreme Court agreed but found it did not "in reasonable probability le[a]d to the jury's selection of a death sentence." *Tollette*, 280 Ga. at 104, 621 S.E.2d at 748.

The prosecutor also told the jury:

> You know, Mr. Wadkins is going to ask you for mercy, going to tell you to be merciful on him. Show him the same standard of mercy he showed John Hamilton. It states blessed are the merciful for they shall inherit mercy, I believe. Show him the same mercy he showed John Hamilton.

ECF No. 8-38 at 122-23. Tollette argues that the Georgia

Supreme Court's failure to mention this latter statement amounts to "an unreasonable determination of fact and once again illustrates why no deference to their ruling is due." ECF Nos. 34 at 235, 41 at 49. The Georgia Supreme Court's failure to mention this statement was not an unreasonable determination of fact; it was a direct result of Tollette failing to mention this statement anywhere in his appellate brief.[26] ECF No. 9-16 at 22-29.

Nor did the Georgia Supreme Court unreasonably apply federal law when it determined the prosecutor's religious reference did not, in reasonable probability, lead to the imposition of the death penalty. *Tollette*, 280 Ga. at 103-04, 621 S.E.2d at 747. To determine whether the prosecutor's argument rendered the trial fundamentally unfair, this Court considers the improper statements in context of the entire sentencing hearing, including such factors as "'(1) whether the remarks were isolated, ambiguous, or unintentional; (2) whether there was a contemporaneous objection by defense counsel; (3)

[26] Tollette correctly points out that "Respondent wholly misstates the portion of the State's closing argument that . . . Tollette claims constitutes an unreasonable determination of fact by the Georgia Supreme Court." ECF No. 41 at 47. Respondent alleges that Tollette is faulting the Georgia Supreme Court for failing to specifically address the prosecutor's statement: "I submit the appropriate punishment to show retribution can only be death. Forgiveness does not lie here. Forgiveness might for a lesser crime, but not for this one." ECF No. 37 at 213. Tollette never makes this argument. Respondent does not argue Tollette has failed to exhaust his claim regarding the prosecutor's statement: "It states blessed are the merciful for they shall inherit mercy . . . ." The Court, therefore, does not treat this portion of Tollette's improper religious argument claim as unexhausted.

the trial court's instructions; and (4) the weight of aggravating and mitigating factors.'" *Spencer v. Sec'y, Dep't of Corr.*, 609 F3d 1170, 1182 (11th Cir. 2010) (quoting *Land v. Allen*, 573 F.3d 1211, 1219-20 (11th Cir. 2009)).

In Tollette's case, the prosecutor's religious references were isolated and brief. Religion in no way permeated his entire argument. *Romine*, 253 F.3d at 1369. Trial counsel did not object and their failure to do so weigh against finding the argument was severe enough to render the sentencing hearing fundamentally unfair. *Romine*, 253 F.3d at 1370 (citing *Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir. 1997)); *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988); *Brooks v. Kemp*, 762 F.2d 1383, 1397 n.19 (11th Cir. 1985).

Instead of objecting, trial counsel countered with his own religious argument:

> Now, I think when we went through the voir dire, most people said they had some kind of religious affiliation. Knowing that you don't have to kill Tollette to keep him out of society, what is our religious teaching telling us, say about how we should handle this problem?
>
> And I saw a young lady with a—not too long ago with a wrist bracelet that had some letters on it, it was WWJD. And I asked her what that meant. And she told me, she said that's, what would Jesus do. She said I wear it when I—it helps to remind when I get in a situation, it helps to tell me how to think about the situation and how to handle it, how to make decisions.
>
> So, I thought that might be a good question here.

> Whoever your spiritual leader is, what would that person do?

ECF No. 8-38 at 133. Thus, trial counsel were able to lessen the impact of the prosecutor's improper religious argument by countering with his own plea for the jurors to look to their religious values when deciding Tollette's fate. *See Tucker v. Kemp*, 762 F.2d 1497, 1509 (11th Cir. 1985) (explaining that prosecutor's improper argument regarding parole board was effectively countered by defense counsel's argument that defendant probably would never be released).

The trial court, sua sponta, instructed the jury that it was to follow the law, not religious commands:

> Just—ladies and gentlemen of the jury, you are not to invoke—the jury may use whatever personal reasons it finds to impose sentences, but you will invoke secular. You will not invoke your religious beliefs to determine punishment in this case. But you will follow the law as the Court gives you.

ECF No. 8-38 at 133-34.

Tollette complains that "it was not until the defense closing argument—after all of the prosecutor's religious arguments were made without objection or instruction—that the judge gave an instruction." ECF No. 41 at 46. This is true. However, "all of the prosecutor's religious arguments" consisted of a few brief sentences. ECF No. 8-38 at 119, 123. The trial court allowed trial counsel to make a lengthy religious appeal and only cut him off after he implored the

jurors to ask themselves "what would Jesus do" or what their religious leaders would do if faced with deciding Tollette's fate. Though it came after trial counsel's religious appeal, the trial court's instruction to determine punishment based on the law was certainly broad enough to lessen any prejudicial impact from the prosecutor's improper comments.

The strength of the aggravating factors compared to the lack of evidence in mitigation is relevant to the Court's determination that the prosecutor's improper argument did not render Tollette's trial fundamentally unfair. Evidence showed that Tollette, a career felon, and two of his friends planned an armed robbery of an armored truck. *Tollette*, 280 Ga. at 101, 621 S.E.2d at 745. They followed a Brink's armored truck to the bank and Tollette waited in front of the bank until Hamilton exited with bags of money. *Id.* Tollette approached Hamilton from behind and shot him at close range four times before fleeing with a bag of money and shooting at those who pursued him. *Id.*, 621 S.E.2d at 745-46. When confronted by police, he attempted to shoot them, but all of the bullets in his revolver were spent. *Id.* The only mitigation evidence was a plea from Tollette's mother. Taking all of these relevant factors into consideration, the Court finds that the prosecutor's religious comments did not render the trial fundamentally unfair. Certainly the Georgia Supreme Court's finding that it did not

in reasonable probability lead to the jury's selection of a death sentence did not involve an unreasonable application of clearly established federal law.

Finally, Tollette argues that the prosecutor's improper religious argument relieved the jury of its obligation to decide Tollette's sentence in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). ECF No. 34 at 198-203. Respondent states that the claim is unexhausted because Tollette "made no claim on direct appeal or in state habeas based upon *Caldwell*." ECF No. 37 at 202. Tollette did not, in fact, cite *Caldwell* or make this particular argument on direct appeal. He argues, however, that he exhausted the claim on direct appeal by citing "to the Eighth and Fourteenth Amendments, as well as federal law, with regard to his improper arguments claim." ECF No. 41 at 34. A review of Tollette's appellate brief shows he did not cite any federal law when he argued the prosecutor made an improper appeal to the jurors' religious beliefs. ECF No. 9-16 at 26-27. Nor did he argue that the prosecutor's religious argument relieved the jury of its obligation to decide Tollette's sentence. Therefore, this claim is unexhausted and procedurally defaulted. *Turner v. Crosby*, 339 F.3d 1247, 1280 (11th Cir. 2003) ("Procedural default arises when 'the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would not be procedurally

barred due to state-law procedural default.'") (quoting *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999)).

Even if the claim is exhausted, however, it has no merit. In *Caldwell*, the prosecutor told the jury not to consider itself the final decision maker regarding whether the defendant would die because a death sentence is automatically reviewed for correctness by the state supreme court. *Caldwell*, 472 U.S. at 323, 325-26. The Supreme Court vacated the death sentence, holding "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 329. *Caldwell*, however, applies only to comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden*, 477 U.S. at 183 n.15. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Sec'y Fla. Dep't of Corr.*, 489 U.S. 401, 407 (1989).

In this case, "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The prosecutor did not misinform the jury about its role in sentencing under Georgia

law. Instead, he stated it was the jury's responsibility to deliberate and determine Tollette's fate. ECF No. 8-38 at 97, 108, 113, 115. Trial counsel told the jury that if one them "refuse[d] to vote for the death sentence then Tollette will not die." ECF No. 8-38 at 127. When the prosecutor objected, trial counsel stated that, "All I am saying is if any one of them [does not vote for the death sentence], then he won't die . . . . Because that makes each one responsible." ECF No. 8-38 at 128. The trial court stated that was "a reasonable argument." *Id.* Furthermore, the trial court made clear during its charge that it was up to the jury to determine which punishment to impose for Hamilton's murder. ECF No. 8-39 at 3-4, 6, 9. Taking all of this into consideration, the Court cannot find that the jury was "led to believe that the responsibility for determining the appropriateness of [Tollette's] death rest[ed] elsewhere." *Caldwell*, 472 U.S. at 329.

In conclusion, considering all the prosecutor's improper arguments in the context of the entire sentencing hearing, the Court finds the Georgia Supreme Court denial of relief was not based on any unreasonable factual findings. Additionally, the state court's decision was not contrary to, or involve any

unreasonable applications of, federal law.[27]

3. The Georgia Supreme Court's ruling on the parole comment did not involve an unreasonable determination of the facts or application of the law and was not contrary to clearly established federal law.

Tollette argues that the Georgia Supreme Court "simplistically concluded" that the prosecutor's mention of parole after seven years was harmless. ECF No. 34 at 179. Basically, Tollette faults the state court for failing to say more. ECF No. 34 at 182. Allegations that a state court "failed to say enough" and should have "provided a detailed

[27] Tollette compares his case to that of *Romine* and *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F. App'x 966 (11th Cir. 2013). In both, the Eleventh Circuit found that the prosecutor's improper religious comments rendered the sentencing stage trial fundamentally unfair. *Romine*, 253 F.3d at 1371; *Farina*, 536 F. Appx. at 983-84. Respondent does not cite these cases or respond to Tollette's arguments. District courts have been cautioned not to rely on circuit precedent when determining if the state court made an unreasonable application of clearly established federal law. *Renico*, 559 U.S. at 779; *Grossman v. McDonough*, 466 F.3d 1325, 1335-36 (11th Cir. 2006) ("Clearly established federal law is not the case law of the lower federal courts, including this Court.") (quoting *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001)). "Even if we were permitted to consider Eleventh Circuit law in resolving a habeas claim under AEDPA, the prosecutor's Biblical references in this case do not constitute error under *Romine*" or *Farina*. *Shere v. Fla. Dep't of Corr.*, 537 F.3d 1304, 1310 (11th Cir. 2008). In *Romine*, the prosecutor used scripture to cross examine a witness; the jurors were lodged in the Baptist Assembly; the trial judge arranged for the jurors to have a Bible and attend a religious service on Sunday; the prosecutor told the jurors to sentence Romine to death, after prayer, because the Bible required it; the defense "quoted no scripture and did not argue religion at all"; and a juror testified that they discussed one of the Biblical passages the prosecutor told them to consider. *Romine*, 253 F.3d at 1358-63. In *Farina*, the prosecutor referenced religion three times during voir dire; told the entire venire to follow their religious beliefs if they conflicted with the law; cross examined a witness to establish that, as a matter of Christian faith, the jury could sentence Farina to death; and quoted the Bible during his closing. *Farina*, 536 F. App'x at 971-73. Unlike these situations, religions did not "permeate[] virtually every aspect " of Tollette's sentencing hearing. *Romine*, 253 F.3d at 1358. Tollette has pointed to two religious references during the prosecutor's closing. These references did not render his trial fundamentally unfair.

explanation" cannot prevail. *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1329 (11th Cir. 2012). Nothing in § 2254 requires the state court to recite every relevant fact or argument for its decision. *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013). "AEDPA 'focuses on the result' of a state court's decision, 'not on the reasoning that led to that result,' and nothing in the statute requires a state court to accompany its decision with any explanation, let alone an adequate one." *Gissendaner v. Seabolt*, 735 F.3d 1311, 1329 (11th Cir. 2013) (quoting *Wright v. Sec'y for the Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002)). The Georgia Supreme Court clearly found that the trial court erred when it overruled trial counsel's objection to the prosecutor's statement regarding parole, but the error was harmless. This Court must decide only whether that decision is contrary to Supreme Court precedent or whether it was based on unreasonable facts or an unreasonable application of clearly established federal law. The record shows it was not.

Before closing arguments began, the trial judge instructed the jury that they had "heard all of the evidence [they were] going to hear in this case." ECF No. 8-38 at 90. They were told to "[r]emember that nothing the attorneys say in their closing arguments is evidence." ECF No. 8-38 at 90.

The prosecutor argued as follows:

> Rehabilitation, we've touched on it. We know he cannot be rehabilitated. Parole, insane. The idea of him on our streets again is something I submit you don't want to take a chance on.
>
> I submit to you life without parole in prisons, in the government supported prisons of the United States is too good for him. Government supported, taxpayer funded, taxpayer maintained.

ECF No. 8-38 at 120-21.

Trial counsel's objection was sustained and the following exchange occurred:

> Mr. Conger: I submit to you ladies and gentlemen, prison is too good for this defendant. Prison for the rest of his life, prison for seven years and re-paroled, prison for whatever.
>
> Mr. Wadkins: I object to that, too, your Honor. He's ta[l]king about how many years.
>
> Mr. Conger: I don't know how many years.
>
> Mr. Wadkins: I thought I heard him mention a number, several years or something.
>
> The Court: I overrule the objection, that objection.
>
> Mr. Conger: All right.
>
> If you give him life with the possibility of parole, I don't know if he would be paroled or when he would be paroled. But I submit to you that any prison sentence after what he's done is a slap on the wrist. He deserves the maximum.

ECF No. 8-38 at 121-22.

During his closing, trial counsel told the jury:

> So, is there any real reason that you would have to kill him. In the old days, there were only two choices in a murder case where the District Attorney

> sought the death penalty. There were only two choices, life in prison, and death. That's all.
>
> So, your choice was to have a person, if you gave him life, at some point the possibility of parole was there.
>
> . . . .
>
> There may have been times in those days and, I'm sure there were, when a person was so dangerous that even the possibility of parole, possibility that he would ever get out was too big a risk to take. And that would have been a justification for them killing somebody, give them the death penalty. Death would be the only answer.
>
> But I tell you, and if I never say anything else, let me get this point to you, that is no longer the case. Georgia law is not that way anymore. You no longer only have two choices. Now, you have a third choice. In 1993, I believe, the Georgia legislature added another possible sentence for you to deliberate, and that is life without the possibility of parole. . . .
>
> So now, since '93, we have life without the possibility of parole so the risk that you had beforehand that somebody would ever get out is eliminated. You can put people like Leon Tollette away with assurance they will be in jail until they die. You can do that now.

ECF No. 8-38 at 129-31.

Following oral arguments, the trial court reminded the jury that "the opening statements or closing arguments by the attorneys" were not evidence. ECF No. 8-39 at 2. The jury was instructed that they could sentence Tollette to death, life without the possibility of parole, or life and told that "[l]ife imprisonment without parole means that the defendant will spend

the remainder of his natural life incarcerated and shall not be eligible for parole." ECF No. 3-39 at 5.

During deliberations, the jury asked the trial court to clarify "if the defendant is given life without parole, is there any possibility of release under any circumstances, overcrowding, et cetera, et cetera." ECF No. 8-39 at 17. Referring to O.C.G.A. § 17-10-16, the judge responded:

> Nothwithstanding any other provision of law, any person who is convicted of an offense for which the death penalty may be imposed, and who was sentenced to imprisonment for life without parole shall not be eligible for any form of parole during such person's natural life. It says unless the State Board of Pardon and Parole or a Court of this state after notice and public hearing determined that such person was innocent of the offense for which the sentence of imprisonment for life without parole was imposed. Such person shall not be eligible for any work release program or any other program administered by the Department of Corrections, the effect of which would be to reduce the term of actual imprisonment.
>
> In answer to your question, it says shall not.

ECF No. 8-39 at 17-18.

Although unclear in the record, the jury apparently asked the question again and the trial judge read the statute again. ECF No. 8-39 at 19. The jury asked for a copy of the statute and, over the prosecutor's objection, the judge provided them with a copy. ECF No. 8-39 at 24-25.

Viewed in the context of the entire sentencing hearing, the Court finds the Georgia Supreme Court reasonably determined

the trial court's failure to sustain the objection to prosecutor's parole reference was harmless. After saying that Tollette might be eligible for parole in seven years, the prosecutor stated that, if given life with the possibility of parole, he did not know when, or if, Tollette would ever be eligible for parole. ECF No. 8-38 at 122. Also, life without parole was an option and the trial court properly instructed the jury regarding life without the possibility of parole. Though Tollette maintains the instruction was confusing, the Georgia Supreme Court has repeatedly found the language in O.C.G.A. § 17-10-31.1(d) adequately informs the jury of the meaning of life without parole. *Henry v. State*, 269 Ga. 851, 855, 507 S.E.2d 419, 422 (1998); *Bishop v. State*, 268 Ga. 286, 292, 486 S.E.2d 887, 895 (1997); *Henry v. State*, 265 Ga. 732, 741, 462 S.E.2d 737, 746 (1995).

Tollette now [28] maintains that the prosecutor's misrepresentation about parole, coupled with the confusing jury instruction, are analogous to the denial of due process recognized in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and its progeny. ECF Nos. 34 at 182; 41 at 35. These cases

[28] The Court fails to see where Tollette made this argument during direct appeal to the Georgia Supreme Court. However, he did generally allege that his due process rights were violated by the Prosecutor's comment regarding parole. Respondent has not argued that Tollette failed to exhaust this claim. In fact, as Tollette points out, Respondent does not "dispute, distinguish, or even cite the *Simmons* line of cases that [Tollette] relied on in his main brief." ECF No. 41 at 39. The Court, therefore, treats this claim as exhausted.

hold that "'where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole,' the Due Process Clause 'entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel."'" *Lynch v. Arizona*, 136 S. Ct. 1818, 1818 (2016) (quoting *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001)).

In Tollette's case, there were three alternatives available to the jury: death, life without the possibility of parole, and life with the possibility of parole. ECF No. 3-39 at 5. Trial counsel told the jury that it had the option of putting "people like Leon Tollette away with assurance they will be in jail until they die." ECF No. 8-38 at 131. The trial court instructed the jury that "[l]ife imprisonment without parole means that the defendant will spend the remainder of his natural life incarcerated and shall not be eligible for parole." ECF No. 3-39 at 5. Language in the Georgia statute informing the jury that Tollette would spend his natural life in prison unless he was later found innocent of the underlying crime did not misinform the jury or deny him due process under *Simmons*.

In conclusion, the Georgia Supreme Court's ruling that the trial court's error for failing to sustain the objection to the prosecutor's improper parole comment was not contrary to

Simmons or any other Supreme Court precedent; nor did it involve an unreasonable application of *Simmons* or any other Supreme Court precedent. Finally, it was not based on any unreasonable factual determinations.

D. Appellate counsel were unconstitutionally ineffective for failing to raise trial counsel's failure to object to the prosecutor's impermissible religious arguments

Tollette argues that appellate counsel were ineffective for failing to raise trial counsel's failure to object to the prosecutor's impermissible religious arguments, and further that trial counsel's underlying failure to object to the closing argument was prejudicially deficient performance. Respondent argues these claims were not adequately raised during the state habeas proceedings and are, therefore, unexhausted and procedurally defaulted. ECF No. 37 at 222. Alternatively, he argues the claims have no merit.

The record shows, and Respondent acknowledges, that in Claim One of his first amended state habeas petition, Tollette alleged generally that trial counsel failed to object to improper and prejudicial comments at the sentencing phase. ECF No. 10-16 at 8. In a footnote, Tollette alleged that "[t]o the extent appellate counsel failed to adequately litigate trial counsel's errors at motion for new trial or appeal, appellate counsel rendered prejudicially deficient performance." ECF No. 10-16 at 14 n.2. The state habeas court specifically quoted

this footnote. ECF No. 12-24 at 3. The court then noted:

> Of the numerous claims and sub-claims set forth in the Amended Petition, Tollette's post-hearing brief argues only Claim One and Claim Seven. The brief states, however, that Tollette "does not abandon any of the claims or arguments previously made . . . and incorporates by this reference all of the claims raised in his Petition and amended Petition, in all motions and pleadings he has filed, and in the evidentiary hearing." In an abundance of caution, the Court rules on every claim enumerated in the Amended Petition.

ECF No. 12-24 at 4 footnotes omitted.

The state habeas court found that "[o]f the claims that are not barred by res judicata, the Court finds that, except for the portion of Claim One that alleges the ineffectiveness of direct appeal counsel, the remaining claims are procedurally defaulted." ECF No. 12-24 at 8. Thus, it appears the state habeas court found Tollette's claim that trial counsel were ineffective for failing to object to the prosecutor's religious comments was procedurally defaulted.[29] *Id.* Tollette relied on ineffective assistance of appellate counsel to supply the requisite cause and prejudice to overcome the procedural default. *Id.* The state habeas court found that Tollette failed to show direct appellate counsel were ineffective. ECF No. 12-24 at 9.

[29] The state habeas court found that Tollette's general argument that trial counsel made "'hardly any objections'" had been resolved on direct appeal and was barred by res judicata. ECF No. 12-24 at 4 (quoting *Tollette*, 280 Ga. at 106, 621 S.E.2d at 749). Tollette does not argue that his specific claim that trial counsel were ineffective for failing to object to the prosecutor's religious comments was exhausted in the Georgia Supreme Court.

Tollette maintains any reasonable appellate attorney would have raised a claim that trial counsel were ineffective for failing to object to the prosecutor's religious comments. Appellate counsel is not required to raise every non-frivolous issue. *Jones v. Barnes*, 463 U.S. 745, 752-54 (1983). "Counsel's performance is deficient only if it falls below the wide range of competence demanded of attorneys in criminal cases." *Farina*, 536 F. App'x at 979 (citing *Strickland*, 466 U.S. at 688). Furthermore, prejudice results only if "'the neglected claim would have a reasonable probability of success on appeal.'" *Id.* (quoting *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991)). If the underlying substantive claim lacks merit, appellate counsel's failure to raise the claim does not constitute ineffective assistance of counsel. *Shere*, 537 F.3d at 1311.

Here, the underlying trial counsel ineffectiveness claim is without merit because the underlying improper prosecutorial arguments claim has no merit. "The relevant question under *Strickland's* performance prong, which calls for an objective inquiry, is whether any reasonable lawyer would have elected not to object for strategic or tactical reasons, even if the actual defense counsel was not subjectively motivated by those reasons." *Castillo v. Florida*, 722 F.3d 1281, 1285 n.2 (11th Cir. 2013). "Decisions about whether to object . . . are

tactical choices consigned by *Strickland* to a lawyer's reasoned professional judgment." *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1295 (11th Cir. 2014).

Here, Wadkins may have thought it was "incompatible with his trial strategy" to object to the prosecutor's religious comments. *Id.* Specifically, he might have refrained from objecting because he planned to rely on religious values and make his own religious comments during closing. He perhaps hoped his lack of objection to the prosecutor's comment would enable him to make his "what would Jesus do" argument without objection from the prosecutor. ECF No. 8-38 at 133. Also, Wadkins thought it essential that he gain credibility with the jury during his closing argument. ECF No. 9-2 at 58-60. He may have worried that he would lose credibility and appear hypocritical if he made his own religious pleas for mercy and compassion right after objecting to the prosecutor's reference to religion.

As for prejudice, Tollette has not shown that but for trial counsel's failure to object to the prosecutor's religious comments, there is a reasonable probability that he would not have received a death sentence. *Strickland*, 466 U.S. at 687. As discussed above, the Georgia Supreme Court determined that the prosecutor's religious statements did not "in reasonable probability" lead the jury to select the death sentence.

Tollette, 280 Ga. at 104, 621 S.E.2d at 748. The Court has found this was reasonable, both factually and legally. Because there is not a reasonable likelihood that the religious comments affected the sentence, appellate counsel's failure to raise trial counsel's lack of objection did not prejudice Tollette. *Cox v. McNeil*, 638 F.3d 1356, 1362 (11th Cir. 2011) (finding that petitioner failed to satisfy *Strickland's* prejudice prong regarding trial counsel's failure to object to prosecutor's misstatements of the law because no "reasonable probability" that misstatements contributed to the sentence). Having found the underlying trial counsel ineffectiveness claim, which was based on the underlying improper prosecutorial comments claim, without merit, Tollette's ineffective assistance of appellant counsel claim is, likewise, meritless.

E. Claim that Tollette's death sentence is disproportionate punishment in violation of the Eighth Amendment

The Georgia Supreme Court found that "[t]he evidence in this case show that Tollette carefully planned his crimes and killed without mercy for monetary gain." *Tollette*, 280 Ga. at 107, 621 S.E.2d at 750. Citing twenty-three cases that "involved an intentional killing in furtherance of an armed robbery or an intentional killing committed for the purpose of receiving money or other things of value," the court "conclude[d], considering both the crime and the defendant,

that the death sentence imposed for the murder in this case was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia." *Id.* at 107-08, 621 S.E.2d at 750. Despite this analysis, Tollette argues that in affirming his death sentence, the Georgia Supreme Court abdicated its constitutionally required duty to thoroughly review whether it was proportional with other sentences imposed in Georgia courts. ECF No. 34 at 217-35.

There is no constitutional right to proportionality review, and the Eleventh Circuit has instructed the district courts not to conduct proportionality reviews in death penalty habeas corpus cases. According to the Supreme Court, "[t]here is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed." *Pulley v. Harris*, the 465 U.S. 37, 50 (1984). The Eleventh Circuit has held:

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, "get out the record" to see if the state court's findings of fact, their conclusion based on a review of similar cases, was supported by the "evidence" in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state. It is the state's responsibility to determine the procedure to be used, if any, in sentencing a criminal to death.

Moore v. Balkcom, 716 F.2d 1511, 1518 (11th Cir. 1983) (citing

California v. Ramos, 463 U.S. 992, 996-1001 (1983)); *Mills v. Singletary*, 161 F.3d 1273, 1282 (11th Cir. 1998) (("We have instructed district courts to refuse [proportionality review] requests when deciding habeas petitions.") (citing *Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987)).

Because the Constitution does not entitle Tollette to proportionality review and the Eleventh Circuit has specifically instructed district courts not to review the proportionality review undertaken by the state supreme court, the Court must refuse Tollette's request to do so.

IV. CONCLUSION

For the reasons explained above, Tollette's petition for writ of habeas corpus is **DENIED.**

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A). As amended effective December 1, 2009, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a [COA] when it enters a final order adverse to the applicant," and, if a COA is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)."

The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether or, for that matter, agree that the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court is firmly convinced that its rulings in this Order are correct and that they are likely not reasonably debatable. Nevertheless, understanding that no one is infallible and the consequences of today's rulings, the Court does issue a COA on the following issue:

Whether trial counsel were ineffective for failing to investigate and present mitigating evidence and for failing to investigate and challenge the State's presentation of evidence about the circumstance of the murder and whether subsequent

counsel were ineffective for failing to adequately litigate trial counsel's failure.

In relation to all other claims, grounds, and issues raised in Tollette's Petition for Writ of Habeas Corpus, ECF No. 1, the Court finds the standard for the grant of a COA has not been met.

SO ORDERED, this 17th day of August, 2016.

s/Clay D. Land
CLAY D. LAND, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

SUPREME COURT OF GEORGIA
Case No. S13E1348

Atlanta, March 28, 2014

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

LEON TOLLETTE v. STEPHEN UPTON, WARDEN

From the Superior Court of Butts County.

After reviewing the habeas court's order, we conclude that the habeas court applied the incorrect legal standard in determining whether the Petitioner was prejudiced by trial counsel's not utilizing an expert to challenge the State's characterization of the circumstances of the murder. The habeas court concluded that "[the Petitioner] failed to meet the prejudice prong of the *Strickland* [*v. Washington*, 466 U. S. 668 (104 SCt 2052, 80 LE2d 674) (1984),] test because the sequencing of gunshot wounds would not have significantly swayed the jury against finding a statutory aggravating circumstance." Order, 41 (HR, 836). However, the standard applied by the habeas court is not the Strickland test for prejudice in this context, because it fails to account for the jury's *discretionary* decision regarding sentencing once it has found at least one statutory aggravating circumstance. See Williams v. Taylor, 529 U. S. 362, 397-398 (IV) (120 SCt 1495, 146 LE2d 389) (2000) (finding that a state supreme 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" and stating that, when conducting this reweighing, a court must consider that "[m]itigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case").

Nevertheless, after independently applying the correct legal principle to the trial and habeas record, we conclude as a matter of law that, "[i]n exercising its discretion once [the Petitioner] became eligible for a death sentence," the jury would not have been significantly swayed by the testimony that the Petitioner presented on this issue in the habeas proceeding. Hall v. Terrell, 285 Ga. 448, 453 (II) (C) (679 SE2d 17) (2009). We further conclude that trial counsel's not utilizing testimony like that presented by the Petitioner's new expert to challenge the State's characterization of the circumstances of the murder did not result in prejudice sufficient to support the success of the Petitioner's underlying ineffective assistance of trial counsel claim and thus that the Petitioner cannot show a reasonable probability that, had direct appeal counsel raised the ineffective assistance of motion for new trial counsel in litigating trial counsel's ineffectiveness with respect to this issue on direct appeal, the Petitioner would have been granted a new trial on this basis. See Hall v. Lewis, 286 Ga. 767, 783-784 (II) (D) (692 SE2d 580) (2010). Therefore, the Petitioner cannot satisfy the cause and prejudice test to overcome the procedural bar to that claim, and it remains procedurally defaulted. See id. Accordingly, we conclude that this issue ultimately is without arguable merit. See Supreme Court Rule 36. Our review of the record similarly reveals that the other claims properly raised by the Petitioner are without arguable merit.

In light of the foregoing and upon consideration of the entirety of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is hereby denied.
All the Justices concur.

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

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

Sue C. Fulton, Chief Deputy Clerk

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

LEON TOLLETTE,	:	
	:	
Petitioner,	:	
	:	
v.	:	**Habeas Corpus No. 2007-V-822;**
	:	
STEPHEN UPTON, Warden, Georgia Diagnostic and Classification Prison.	:	
	:	
Respondent.	:	

ORDER

This case is before the Court on Petitioner Leon Tollette's Petition for Writ of Habeas Corpus. The trial evidence was summarized on direct appeal as follows.[1] Tollette travelled from Los Angeles, California to help Xavier Wommack and Jakeith Robinson plan the armed robbery of a Brink's armored truck. When they executed the plan on December 21, 1995, Tollette snuck up behind victim John Hamilton, a Brink's employee, and fired into the head, back, and legs, killing him. The drivers of the Brink's truck and of another armored truck fired at Tollette and gave chase. Tollette returned fire while fleeing with a money bag. He also tried shooting at a police technician and a cadet who responded to the radio call, but he had already emptied his revolver. Wommack and Robinson drove away without Tollette, and Tollette threw down his gun and surrendered.

The procedural history of Tollette's capital case is as follows. Tollette was indicted for the shooting death of John Hamilton, and the State decided to seek the death

[1] *Tollette v. State*, 280 Ga. 100, 101 (2005).

penalty.[2] Attorneys Robert Wadkins and Steve Craft were appointed as lead defense counsel. On the first day of jury selection, November 3, 1997, Tollette pleaded guilty to malice murder, felony murder, armed robbery, two counts of aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. A jury trial was then held on the issue of sentencing for the malice murder and eight days later, on November 11, 1997, a jury returned a verdict of death, finding two statutory aggravating circumstances:

(a) The offense of murder was committed while the defendant was engaged in another capital felony. Armed Robbery is a capital felony under the law.

(b) The Defendant committed the offense of Murder for himself for the purpose of receiving money or any other thing of monetary value.

In addition to the death sentence, Tollette also received a concurrent life sentence for armed robbery, concurrent 20-year sentences for each count of aggravated assault, a concurrent five-year sentence for possession of a firearm by a convicted felon, and a consecutive five-year sentence for possession of a firearm during the commission of a crime. The felony murder conviction was vacated by operation of law.

New counsel, attorney David Grindle, was appointed. A Motion for New Trial was filed on March 11, 1998, amended on October 20, 1998, and denied on January 28, 1999. A number of attorneys successively represented Tollette on the direct appeal, and on November 7, 2005, the Georgia Supreme Court affirmed his convictions and sentence

[2] He was indicted by a Muscogee County grand jury on March 19, 1996, and re-indicted on August 5, 1996. The State filed written notices of its intent to seek the death penalty on March 21, 1996 and September 27, 1996.

of death.[3] Tollette's Motion for Reconsideration was denied on December 2, 2005. He then filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 2, 2006.[4] Tollette filed this habeas action on August 7, 2007, and an amendment thereto on November 3, 2008. The Court held a three-day evidentiary hearing starting on January 13, 2009 and continuing on January 22 and 23.

Tollette's Amended Petition for Writ of Habeas Corpus sets forth nine claims, but within many of the claims are a multitude of allegations. Claim One in the Amended Petition contains 33 asterisked allegations of ineffective assistance of counsel. The Court identifies the asterisked subparts in Claim One as (a) through (gg): subsections (a) through (v) allege ineffectiveness against trial counsel, and subsections (w) through (gg) allege ineffectiveness against motion for new trial counsel and direct appeal counsel. Claim Four contains 11 asterisked allegations of trial court error. The Court identifies each asterisked subpart in Claim Four as (a) through (k). Claim Six has six subparts that are already identified with alphabetical bullets. Also, each claim contains footnotes asserting sub-claims. For instance, Claim Two alleges prosecutorial misconduct, and a footnote to Claim Two contains sub-claims against trial counsel, the trial court, motion for new trial counsel, and direct appeal counsel:

> To the extent that Petitioner's counsel failed to object to these improper comments and seek a mistrial or other appropriate relief . . . counsel was ineffective, and Petitioner was prejudiced thereby. To the extent that the Court attempted to cure the improper comments by instructing the jury, the Court's instructions failed to cure the error and actually exacerbated it by drawing the jury's attention to the

[3] Id.

[4] *Tollette v. Georgia*, 549 U.S. 893 (2006).

> improper comments. . . . To the extent direct appeal counsel failed to adequately litigate trial counsel's errors at motion for new trial or appeal, direct appeal counsel rendered prejudicially deficient performance.

Of the numerous claims and sub-claims set forth in the Amended Petition, Tollette's post-hearing brief argues only Claim One and Claim Seven. The brief states, however, that Tollette "does not abandon any of the claims or arguments previously made . . . and incorporates by this reference all of the claims raised in his Petition and Amended Petition, in all motions and pleadings he has filed, and in the evidentiary hearing."[5] In an abundance of caution, the Court rules on every claim enumerated in the Amended Petition.

CLAIMS THAT ARE BARRED

Some of Tollette's claims are barred by res judicata because they were raised and litigated in his direct appeal. As codified in OCGA § 9-12-40, res judicata prevents relitigation of issues that were raised and litigated on direct appeal. In *Walker v. Penn*, 271 Ga. 609, 611 (1999), the Supreme Court reiterated that "[t]he principle of res judicata . . . is binding on habeas corpus proceedings." The following claims were raised and litigated in Tollette's direct appeal.

In Claim One, Tollette lists 21 different allegations of ineffective assistance of trial counsel, which the Court has identified as subsections (a) through (u).[6] (Subsection (v) asserts that Tollette was prejudiced by trial counsel's incompetence, and subsection (w) contends that the claims are not procedurally defaulted.) This ineffectiveness claim

[5] Tollette's Post-Hearing Brief at 6.

[6] Amended Petition at 3, ¶16(a) - (u).

was previously raised in Tollette's motion for new trial. The trial court denied the claim, and the Supreme Court affirmed the denial.[7] On appeal, the Court rejected Tollette's criticisms that trial counsel raised "hardly any objections" and that the trial court "rescued" trial counsel by sua sponte excluding certain victim impact testimony.[8] Ruling that trial counsel had prepared adequate mitigation evidence, the Court detailed trial counsel's pre-trial investigation, consultation, and analysis, including the decision to only call Tollette's mother and not his sister to testify.[9] The Court also held that trial counsel's statement during closing, "I have great loathing for my own client," was not an unreasonable strategy under the circumstances of the case.[10] To the extent that the 21 allegations of ineffectiveness of trial counsel were denied in Tollette's appeal, they are barred by res judicata.

In Claim Two, Tollette alleges, in part, that his "rights to due process and a fair trial were violated by improper and prejudicial remarks by the prosecution in its arguments at the guilt/innocence [sic] and sentencing phases of trial."[11] Sub-claims are contained in Footnote 2 against the trial court, trial counsel, motion for new trial counsel, and direct appeal counsel. In his direct appeal, Tollette complained of the prosecutor's closing argument and received an adverse ruling.[12] The Court ruled that the prosecutor

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[7] *Tollette*, 280 Ga. at 106(13).

[8] *Id.*

[9] Id at 107.

[10] Id.

[11] Amended Petition at 14, ¶20.

[12] *Tollette*, 280 Ga. at 103-104(8).

properly asked the jury to consider Tollette's confession to draw a reasonable inference of Tollette's involvement in other robberies, that the prosecutor's reference to Tollette's travel from California was tied to the relevant issues of intent and premeditation, and that the prosecutor's reference to religion, though improper, did not in reasonable probability lead to the jury's selection of a death sentence.[13] Additionally, the Court held that even assuming that the prosecutor had improperly referenced Tollette's inappropriate gesture to one of the victim's children and improperly argued that prison was "too good" for Tollette, the trial court's sustaining of Tollette's objections ensured that Tollette suffered no harm.[14] To the extent that criticisms of the prosecutor's closing argument were rejected in Tollette's appeal, they are barred by res judicata.

In Claim Four, Tollette argues, in part, that "[t]he trial court improperly failed to strike for cause several [unspecified] venirepersons whose attitudes towards the death penalty would have prevented or substantially impaired their performance as jurors."[15] He also contends that "[t]he court erred in its rulings on motions to challenge prospective jurors for cause based on their attitudes about the death penalty and stated biases . . . and allowed fair and impartial jurors to be struck for cause."[16] Sub-claims are contained in Footnote 7 against trial counsel, motion for new trial counsel, and direct appeal counsel. These allegations were raised and litigated in Tollette's direct appeal, and were rejected with a finding that the trial court had not abused its discretion in refusing to excuse nine

[13] Id at 104(8).

[14] Id at 104-105(9).

[15] Amended Petition at 18, ¶26(a).

[16] Id.

jurors and in excusing three jurors for cause.[17] To the extent that the trial court's conduct of voir dire was affirmed in Tollette's appeal, the claim is barred by res judicata.

In Claim Six, Tollette contends, in part, that the death penalty "was imposed arbitrarily and capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia."[18] Sub-claims are contained in Footnote 10 against trial counsel, motion for new trial counsel, and direct appeal counsel. This allegation was ruled on in Tollette's direct appeal. The Court concluded that the death sentence "was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia," and the "death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor."[19] To the extent that the claim of arbitrary and capricious imposition of the death penalty was denied in Tollette's appeal, it is barred by res judicata.

In Claim Eight, Tollette alleges, in part, that his death sentence is disproportionate.[20] A sub-claim is contained in Footnote 12 against trial counsel, and sub-claims are contained in Footnote 14 against motion for new trial counsel and direct appeal counsel. This allegation was ruled on in Tollette's direct appeal. The Court ruled that the death sentence "was neither excessive nor disproportionate to the penalties

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[17] *Tollette*, 280 Ga. at 102(3).

[18] Amended Petition at 22, ¶31.

[19] *Tollette*, 280 Ga. at 107(14) and 108(15).

[20] Amended Petition at 28, ¶42.

imposed in similar cases in Georgia."[21] To the extent that the claim of disproportionality was denied in Tollette's appeal, it is barred by res judicata.

CLAIMS THAT ARE DEFAULTED

Of the claims that are not barred by res judicata, the Court finds that, except for the portion of Claim One that alleges ineffectiveness of direct appeal counsel, the remaining claims are procedurally defaulted. Under OCGA § 9-14-48(d), procedural default prevents a habeas petitioner from litigating issues that could have been raised at trial or on direct appeal but which were not. An exception to the bar of procedural default arises when the petitioner satisfies the cause-and-prejudice test.[22] The cause of the default must arise either from an objective factor external to the defense that impeded counsel's efforts to raise the claim or from the ineffective assistance of counsel in waiving an issue at trial or omitting an issue on appeal. Further, the default must have resulted in actual prejudice of constitutional dimensions. A petitioner need not meet the cause-and-prejudice test if he can show that denial of habeas relief would result in a miscarriage of justice, but an extremely high standard applies in such a case.[23]

It is common to rely on ineffective assistance not as a separate claim, but as supplying the requisite cause and prejudice to overcome procedural default.[24] A habeas

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[21] *Tollette*, 280 Ga. at 107(14).

[22] *Turpin v. Todd*, 268 Ga. 820, 824(2)(a) (1997)(explaining the cause-and-prejudice test for overcoming procedural default).

[23] See *Head v. Ferrell*, 401-402(III) (2001)(reviewing exception to bar of procedural default).

[24] *Greer v. Thompson*, 281 Ga. 419, 422 (2006). See also *Perkins v. Hall*, 288 Ga. 810, 822 (2011) ("A common method of satisfying the cause and prejudice test is to show that trial and direct appeal counsel rendered ineffective assistance.")

petitioner who meets both the deficient performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984) "has established the necessary cause and prejudice to overcome the procedural bar of OCGA § 9-14-48(d)."[25] Tollette argues that his claims are not procedurally defaulted because direct appeal counsel erred in omitting them on appeal.

As discussed later in this Order, Tollette has failed to show that direct appeal counsel was ineffective. Nor does Tollette provide any other evidence or argument to meet the cause-and-prejudice test to overcome procedural default. Most of the ineffectiveness claims are raised in a summary fashion in the Amended Petition, and they are not supported by any evidence or argument from the evidentiary hearing or in post-hearing briefs.[26] Therefore, the following claims remain barred by procedural default.

In Claim One, Tollette lists 21 different allegations of ineffective assistance of trial counsel, which the Court has identified as subsections (a) through (u), and 10 different allegations of ineffective assistant of motion for new trial counsel, which the Court has identified as subsections (x) through (gg).[27] The portion of Claim One that alleges ineffectiveness of trial counsel premised on issues raised and litigated on direct appeal is res judicata, and the remaining allegations in Count One against trial counsel and motion for new trial counsel are procedurally defaulted.

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[25] *Battles v. Chapman*, 269 Ga. 702, 702 (1998).

[26] *Head v. Hill*, 277 Ga. 255, 265 (2003).

[27] Amended Petition at 3-9, ¶16(a)-(u); also at 10-12, ¶16(x)-(gg).

In Claim Two, Tollette alleges that "[t]he jury bailiff's and/or sheriff's deputies and/or other State agents who interacted with jurors engaged in improper communications with jurors which deprived Petitioner of a fair trial and reliable sentencing.[28] Tollette also alleges that "[t]he State suppressed information favorable to the defense at both phases of the trial, and the materiality of the suppressed evidence undermines confidence in the outcome of the guilt/innocence [sic] and penalty phases of Petitioner's trial, and Petitioner's direct appeal."[29] Sub-claims are contained in Footnotes 3 and 4 against trial counsel, motion for new trial counsel, and direct appeal counsel. The portion of Claim Two that alleges improper closing arguments is barred by res judicata, and the remainder of Claim Two concerning bailiff misconduct and evidence suppression is procedurally defaulted.

In Claim Three, Tollette alleges that "[m]isconduct on the part of the jurors included, but was not limited to, improper consideration of matters extraneous to the trial, false or misleading responses of jurors on voir dire, failure to reveal U.S. citizenship status, serving on a jury while not a citizen of the U.S., harboring improper biases which infected deliberations, putting undue pressure on individual jurors to vote for death, exploiting individual jurors' inability to fully understand the English language in order to pressure them to vote for death, improper exposure to the prejudicial opinions of third parties, improper communications with the trial judge, and improperly prejudging the

[28] Amended Petition at 14, ¶21.

[29] Amended Petition at 15, ¶22 .

guilt/innocence [sic] and penalty phases of Petitioner's trial."[30] Sub-claims are contained in Footnotes 5 and 6 against the trial court, the State and any of its entities, trial counsel, motion for new trial counsel, and direct appeal counsel.

Claim Four contains 11 asterisked allegations of trial court error, which the Court identifies as (a) through (k).[31] Sub-claims are contained in Footnotes 7 and 8 against trial counsel, motion for new trial counsel, and direct appeal counsel. Res judicata bars the portion of subsection (a) concerning the trial court's conduct of voir dire, and the remainder of the allegations in Claim Four are procedurally defaulted:

(a) The trial court erred by phrasing his voir dire questions in a manner which suggested to jurors who gave neutral responses that they were or should be in favor of the death penalty . . . and by [engaging] in improper voir dire. . .

(b) The trial court failed to ensure that Petitioner was adequately informed of his rights prior to accepting his guilty plea.

(c) The trial court excused potential jurors or moved them to the back of the venire for improper reasons under the rubric of "hardship."

(d) The trial court erred in admitting various items of prejudicial, unreliable, unsubstantiated and irrelevant evidence tendered by the State at either phase of trial.

(e) The trial court erred in allowing the prosecution to introduce improper, unreliable and irrelevant evidence in aggravation at sentencing, as well as evidence of which the defense had not been provided adequate notice and which had been concealed from the defense.

(f) The trial court erred in failing to require the State to disclose certain items of evidence or witnesses in a timely manner so as to afford the defense an opportunity to conduct an adequate investigation.

(g) The trial court erred in failing to require the State to disclose certain items of evidence of an exculpatory or impeaching nature to the defense.

[30] Amended Petition at 16, ¶24.

[31] Amended Petition at 18, ¶26(a)-(k).

(h) The trial court failed to provide adequate funding and time to allow trial counsel to properly investigate the circumstances of the crime and Petitioner's background in order to marshal a defense to the charges and the State's case in aggravation.

(i) The trial court abused its discretion in dismissing trial counsel from their representation of Petitioner against his wishes prior to motion for new trial proceedings.

(j) The trial court, having dismissed trial counsel from Petitioner's representation prior to motion for new trial proceedings, crippled Petitioner's ability to litigate his ineffective assistance of counsel claims by appointing attorneys with no experience litigating such claims in capital cases and who were unprepared to conform to prevailing norms of post-conviction capital defense representation in litigating such claims. The trial court further hampered Petitioner's ability to adequately litigate his ineffectiveness claims by refusing to dispense adequate resources for investigative and expert assistance with which Petitioner could have developed evidentiary support for his ineffectiveness claims. The trial court's imposition of multiple layers of attorneys in this case distorted and misapplied the rule that ineffectiveness claims must be raised at the first practicable opportunity, and effectively denied Petitioner his due process right to a meaningful adversarial testing of the issue of trial counsel's effectiveness.

(k) The trial court made other improper rulings and otherwise conducted the trial in such a way as to deprive Petitioner of a reliable conviction and fair and reliable sentencing and motion for new trial proceedings.[32]

In Claim Five, Tollette alleges that "[t]he trial court's instructions at sentencing violated Petitioner's right to due process and a fair and reliable sentencing determination in that they failed, *inter alia*, to adequately guide the jurors' discretion, failed to adequately explain the meaning and purpose of mitigating circumstances, failed to adequately explain to the jury that aggravating circumstances must be found beyond a reasonable doubt but that mitigating circumstances need not be, and failed to adequately explain that not only a death verdict must be unanimous, but that each individual juror

[32] Id.

may vote for life regardless of how the other jurors vote."[33] Sub-claims are contained in Footnote 9 against trial counsel, motion for new trial counsel, and direct appeal counsel.

Claim Six contains six allegations challenging the death penalty.[34] Sub-claims are contained in Footnote 10 against trial counsel, motion for new trial counsel, and direct appeal counsel. Res judicata bars subsection (b), which alleges that the death penalty was imposed arbitrarily and capriciously, and the remainder of the allegations in Claim Six are procedurally defaulted:

> (a) Georgia' statutory death penalty procedures, as applied, do not result in fair, nondiscriminatory imposition of the death sentence.
>
> . . . .
>
> (c) Georgia cases similar to that of Petitioner with regard to both the nature and circumstances of the offense, prior record, culpability and life and character of the accused have resulted in lesser punishments than death.
>
> (d) Georgia cases more aggravated than that of Petitioner with regard to both the nature and circumstances of the offense, prior record, culpability, and life and character of the accused, have resulted in lesser punishments than death.
>
> (e) There is no constitutionally-permissible way to distinguish the few cases in which the death penalty has been imposed, and Petitioner's case in particular, from the many similar cases in which a lesser punishment has been imposed.
>
> (f) There exists in Georgia a pattern and practice of prosecuting authorities, courts, and juries to discriminate on the basis of race, gender, and poverty in deciding whether to seek or impose the death penalty in cases similar to that of Petitioner.[35]

In Claim Seven, Tollette claims that "[i]n general and as applied to Petitioner's case, the rule that defendants must litigate an ineffective assistance of counsel claim at

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[33] Amended Petition at 21, ¶28.

[34] Amended Petition at 22, ¶31(a)-(f).

[35] Id.

the motion for new trial stage if new counsel attaches at that time, violates the defendant's [constitutional] rights. . ."[36] Sub-claims are contained in Footnote 11 against motion for new trial counsel and direct appeal counsel, and these sub-claims correspond to the allegation in subsection (z) of Claim One that "[m]otion for new trial and direct appeal counsel failed to adequately object to or litigate the issue of the improper removal of trial counsel from Petitioner's case prior to motion for new trial and direct appeal proceedings, in opposition to Petitioner's wishes." Tollette expands on this claim in Section IV of his post-hearing brief, arguing that "[t]he Procedure by which Mr. Tollette was forced to litigate ineffectiveness at the motion for new trial violated his right to due process of law." As discussed in Section III of this Order, this claim is barred by procedural default, and it is also meritless.

In Claim Eight, Tollette argues that "[t]he proportionality review conducted in the State of Georgia is constitutionally infirm in general and as applied. *Walker v. Georgia*, __ S.Ct. __, 2008 WL 2847268 (2008)(statement of Stevens, J., respecting denial of cert.) The constitutional mandate against disproportionate sentencing does not merely require that the Georgia Supreme Court be able to find other instances in which the death penalty is applied to similar facts, but rather, to view the state system as a whole to see that sentences are proportionate across the spectrum. . . . To conduct an equitable proportionality review, it is crucial that this Court review other similarly situated defendants in cases where life sentences resulted. . . ."[37] Sub-claims are contained in

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[36] Amended Petition at 24, ¶33.

[37] Amended Petition at 29-30, ¶42.

Footnotes 12 and 14 against trial counsel, motion for new trial counsel, and direct appeal counsel. In a recent decision of *Fults v. Upton*, Slip Copy, 2012 WL 884766 (N.D.Ga., 2012), the U.S. District Court for the Northern District of Georgia pointed out that the Court in *Walker* denied cert because the proportionality claim was barred by procedural default:

> Petitioner contends that *Walker v. Georgia*, —U.S. —, 129 S.Ct. 453, 172 L.Ed.2d 344 (2008), requires that Georgia courts compare cases in which the death penalty was not imposed. In *Walker*, Justice Stevens argues that in approving Georgia's capital punishment scheme in *Gregg*, the Supreme Court "assumed that the court would consider whether there were 'similarly situated defendants' who had not been put to death because that inquiry is an essential part of any meaningful proportionality review." Id. at 454. The Court in *Walker*, however, denied the petitioner a writ of certiorari after finding that his proportionality claim had been procedurally defaulted. Indeed, Justice Stevens' accompanying statement is not precedent. . .[38]

Similarly, in *Head v. Carr*, 273 Ga. 613, 615 (2001), the Supreme Court held that an objection to the proportionality review was procedurally defaulted because the habeas petitioner did not raise it on direct appeal and did not show sufficient cause to explain why it was not raised. Here, Tollette could have raised it on direct appeal, and he has not shown sufficient cause or prejudice to overcome the procedural bar.

In Claim Nine, Tollette contends that execution by lethal injection constitutes cruel and unusual punishment.[39] Sub-claims are contained in Footnote 15 against trial counsel, motion for new trial counsel, and direct appeal counsel. In *Davis v. Turpin*, 273 Ga. 244, 245(1)(2000), the Supreme Court held that the habeas petitioner was

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[38] Id.

[39] Amended Petition at 31, ¶¶45-49.

procedurally barred from arguing that execution by electrocution was cruel and unusual punishment. Further, the Georgia Supreme Court has held in *Dawson v. State*, 274 Ga. 327, 334–335 (2001), that execution by lethal injection is not unconstitutional. Tollette could have raised this claim on direct appeal, and he has not shown sufficient cause or prejudice to overcome the procedural bar.

ALLEGED INEFFECTIVENESS OF DIRECT APPEAL COUNSEL

In Claim One, Tollette argues, in part, that direct appeal counsel was ineffective. In his post-hearing brief, Tollette explicitly argues that direct appeal counsel was ineffective in two ways: (1) "[a]ppellate counsel were ineffective in failing to raise the issue of the trial court's denial of Mr. Tollette's right to counsel of choice," and (2) "[a]ppellate counsel was ineffective in failing to raise the issue of Motion for New Trial counsel's ineffectiveness."[40]

A successful ineffectiveness claim must meet both the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). The performance prong requires a showing that counsel's performance, without the aid of hindsight, was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[41] Trial counsel, however, is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[42] As further clarified by the Georgia

[40] Tollette's Post-Hearing Brief, Section II(D)(1) and (2).

[41] *Strickland*, 466 U.S. at 687.

[42] *Strickland*, 466 U.S. at 690.

Supreme Court in *Battles v. Chapman*, 269 Ga. 702, 703 (1998), "in determining under the first *Strickland* prong whether an appellate counsel's performance was deficient for failing to raise a claim, the question is not whether [an appellate] attorney's decision not to raise the issue was correct or wise, but rather whether his decision was an unreasonable one which only an incompetent attorney would adopt." "With respect to the prejudice prong, a petitioner must show that, but for direct appeal counsel's errors or omissions, there was a reasonable probability that the outcome of the appeal would have been different."[43]

In addition to evaluating counsel's performance under *Strickland*, Tollette maintains that trial counsel's performance should be assessed in light of the prevailing professional norms for capital case representation, and he contends that the ABA Guidelines have provided well-defined norms for capital representation since 1989. The Court accedes that the U.S. Supreme Court and the Georgia Supreme Court have acknowledged that the ABA Guidelines "may serve as a guide to reasonable defense preparations in capital cases."[44] "While it is appropriate to measure counsel's performance against prevailing norms of practice as reflected in publications such as . . . the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, . . . such publications are *only guides* in determining the reasonableness of counsel's performance, as no set of rules can adequately allow for the variety of

[43] *Hall v. Lewis*, 286 Ga. 767, 770 (2010)(Citation and punctuation omitted).

[44] *Perkins v. Hall*, 288 Ga. 810, 814 (2011). See also *Wiggins v. Smith*, 539 U.S. 510, 524(II)(B)(1), 123 S.Ct. 2527 (2003); *Franks v. State*, 278 Ga. 246, 261(B)(7) (2004).

circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[45]

Applying the *Strickland* test, relevant statutory and case law, and the prevailing professional norms as a guide, the Court evaluates Tollette's grounds for ineffective assistance of direct appeal counsel.

(1) No Right to Counsel of Choice

The first allegation of ineffectiveness – that direct appeal counsel should have protested the trial court's denial of Tollette's right to counsel of choice – is meritless. First, Tollette could have raised this issue on direct appeal, and he has not shown sufficient cause to explain why it was not raised. Direct appeal counsel cannot be held ineffective for failing to raise a claim that was procedurally defaulted. Second, *Davis v. State*, 262 Ga. 221 (1991), cited by Tollette in support of his contention that he had a right to retain counsel of choice, actually undermines his claim. In *Davis*, the Georgia Supreme Court explicitly stated that "[a]n indigent defendant has no right to compel the trial court to appoint an attorney of his own choosing."[46] The right to counsel-of-choice depends on whether objective considerations favoring the appointment of the preferred counsel are outweighed by countervailing considerations of comparable weight:

> The choice of appointed counsel is a matter governed by the trial court's sound exercise of discretion . . . However, when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is

[45] *Hall v. Lee*, 286 Ga. 79, 81(FN1) (2009)(Emphasis original. Citations and punctuation omitted).

[46] Davis, 262 Ga. at 222.

> an abuse of discretion to deny the defendant's request to appoint the counsel of his preference.[47]

"This standard applies equally to the removal of appointed counsel because the effect of removal is that counsel of choice is not appointed."[48]

Tollette also cited *White v. Kelso*, 261 Ga. 32 (1991) for the proposition that litigating effectiveness in habeas is the accepted practice in Georgia. While the Court in *White* noted that "claims of ineffective assistance of counsel are often properly raised for the first time in a habeas corpus petition," it ultimately ruled that the petitioner's ineffectiveness claim was procedurally barred because appellate counsel, who was not the trial counsel, failed to assert it on direct appeal.[49] "The rule is consistent: New counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review."[50]

Here, Tollette's preference that trial counsel continue to represent him on the motion for new trial, with the reason for such preference being to delay raising his ineffectiveness claim until habeas proceedings, does not outweigh the countervailing consideration to litigate the ineffectiveness claim at the earliest practicable opportunity. Tollette has provided no persuasive legal support for his contention that the trial court abused its discretion in appointing substitute counsel for the motion for new trial in order to litigate the ineffectiveness claim. Having failed to show an abuse of discretion by the

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[47] Id (citation omitted).

[48] *Davenport v. State*, 283 Ga. 29, 31(2(b))(2008) (citing *Chapel v. State*, 264 Ga. 267(2) (1994)).

[49] *White*, 261 Ga. at 32.

[50] Id.

trial court, Tollette has failed to show the cause and prejudice necessary to show that his direct appeal counsel were ineffective for omitting this argument from appeal.

(2) Direct Appeal Counsel's Failure to Raise Ineffectiveness Claim

The second allegation of ineffectiveness – that direct appeal counsel should have claimed that motion for new trial counsel was ineffective – is also unavailing. Tollette's claim that direct appeal counsel was ineffective rests on the premise that motion for new trial counsel was in fact ineffective in not properly litigating trial counsel's ineffectiveness, which in turn rests on the premise that trial counsel were in fact ineffective. Thus, Tollette has effectively appended the barred and defaulted ineffectiveness claims against trial counsel and motion for new trial counsel to his viable ineffectiveness claim against direct appeal counsel.

To decide whether a habeas petitioner was prejudiced by direct appeal counsel's failure to raise ineffectiveness against prior counsel, the habeas court "must examine the underlying ineffectiveness of trial counsel claim and determine whether that claim would have had a reasonable probability of success."[51]

> [O]ur analysis requires us to determine whether, but for the alleged deficiencies of [the habeas petitioner's] trial counsel, there is a reasonable probability that the jury would have returned a [sentence of life imprisonment rather than death]. In order to conduct such an analysis, it is necessary to look both at the evidence actually presented at trial and the evidence available to trial counsel that they failed to present.[52]

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[51] *Hall v. Lewis*, 286 Ga. 767, 770 (2010)(citation omitted).

[52] Id.

Tollette's various allegations of ineffectiveness can be distilled into the contention that trial counsel were ineffective in failing to procure and present (a) evidence and expert analysis of his disadvantaged life history, (b) evidence rebutting the brutal characterization of the murder, and (c) his good candidacy for a life sentence.

(a) Evidence and Expert Analysis of Tollette's Life History

Investigation and presentation of trial counsel. Because Tollette pleaded guilty, trial counsel knew that they needed to put up a vigorous case for mitigation. Attorney Wadkins testified at the motion for new trial hearing that "the only chance to keep Leon alive was to put a vigorous mitigation on, and we tried to find that mitigation and we just did not find it."[53] Trial counsel were hindered in investigating and presenting the mitigation case due to Tollette's reluctance to involve his family:

> Leon asked me not to do any mitigation for him. . . . I believe he was somewhat upset that we were contacting his grandparents about this, but we did it anyway, of course.[54]
>
> . . . .
>
> He continued to tell us that he did not want any mitigation put up at all. And specifically, he did not want his mother here, or for us to bother his mother with it. He did not want his grandparents in Arkansas brought into the thing.[55]

To build a mitigation case, trial counsel hired neuropsychologist, Dr. Daniel Grant, and a mitigation expert, Cheryl Abernathy.

Dr. Grant interviewed and evaluated Tollette "for two whole eight hour days."[56] In addition to his examination of Tollette, Dr. Grant also reviewed a copy of the

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[53] RX 27, Motion for New Trial Tr. at 57.

[54] RX27, MNT Trans. at 47-48. See also HT, Vol. 2 at 273.

[55] Id at 56. See also PX 15, Abernathy's Report of October 16, 1997.

competency report prepared by Dr. Karen Bailey-Smith and Dr. Margaret Fahey of West Central Georgia Regional Hospital. The report found Tollette to be competent but also diagnosed him with Personality Disorder NOS (not otherwise specified) with Antisocial and Schizotypal Features.[57] Similarly, Dr. Grant did not find that Tollette suffered from any neurological impairments or mental retardation, but he suggested a diagnoses of borderline personality disorder. Dr. Grant, as well as Drs. Bailey-Smith and Fahey, found Tollette to be depressed. But this depression did not correlate to a feeling of remorse, but rather with a desire to die rather than spend life in prison without parole.[58] According to Attorney Wadkins, "Dr. Grant . . . said don't put me on the stand, don't use me. There is nothing that I can help you with."[59]

Mitigation expert Abernathy was recommended to trial counsel by the Multi-County Public Defender. Abernathy's credentials include being a licensed social worker with over 20 years of experience specializing in child abuse/neglect, substance abuse, and overall familial dysfunction. She has provided consultation and testimony on death penalty cases in both state and federal levels. Abernathy had three months and $5,000 to investigate Tollette's early childhood, medical history, school records, prison records, friends, family, and "[a]ny path that look[ed] in anyway [sic] inviting as far as producing

[56] Resp. X 27, MNT Transcript at 45.

[57] PX 25.

[58] RX 27, MNT Trans. at ##.

[59] Id at 45-46.

mitigation."[60] Abernathy provided trial counsel with typed summaries of her interviews of Tollette; his mother, Willie Clentries Robinson; his two sisters, Gladys Mae Lattier and Merlinda Moore; a maternal aunt, Josie Clay Washington; and a childhood friend and neighbor, Shelton James.[61]

From her interviews, Abernathy learned about Tollette's family. Tollette's deceased father, Arthur Desmond Tollette, had been an alcoholic Vietnam war veteran who had all but deserted him. Tollette fondly remembered a childhood trip with his father to Arkansas to visit his paternal grandparents and other aunts and cousins, but Tollette's father rebuffed all of Tollette's attempts to establish a relationship with him. Tollette's mother seemed to have provided Tollette with the love and attention that he desired when she was single, but after her marriage to Freddy Robinson, she became preoccupied with marital life and religious activities. Freddy, his step-father, was not interested in being a father to his step-children, and he was an abusive disciplinarian. Despite Freddy's avid interest in sports, he never showed much interest in Tollette's little league baseball games even though Tollette enthusiastically excelled at the sport.

Tollette grew up with two older brothers and two older sisters. He also has a significantly younger brother from his mother's marriage to Freddy. Tollette's older siblings were born during their mother's first marriage in Mississippi. Tollette is the product of a one-night relationship after she moved to Los Angeles. Tollette's oldest brother, Willie, was sent to live with his father in Chicago when Tollette was about 8

[60] Id at 47. See also Motion for Continuance attaching Aff. of Abernathy detailing "page after page of things that she want[ed] to look at." Id at 48.

[61] PX 15.

years old. Willie left because he started hanging out with the wrong crowd, cutting school, and smoking marijuana. At the time of Abernathy's investigation, Willie had been incarcerated twice but appeared to be doing better with his life. Tollette's other brother, Donnell, is considered the successful sibling, having stayed out of trouble during his youth, graduated from college, married, and obtained long-term employment with the postal service. When contacted by Tollette's defense team, Donnell "didn't want anything to do with [the case] whatsoever."[62] Both of Tollette's sisters, Gladys and Merlinda, left home early and have histories of drug abuse and criminal activity. Gladys lost custody of her two children due to her drug use and crimes. Abernathy stated in an October 24, 2007 memo to attorney Wadkins, "It seemed that all of the children were motivated by deprivation and financial gain. All felt as though they had been deprived and neglected as children and somehow needed to make up for lost time."

Childhood friend Shelton James and Tollette's sister Gladys described their neighborhood of Gardena as a nice place comprised of single-family homes with a mixture of ethnic groups. But Tollette explained that even though his neighborhood appeared safe, it was just like everywhere in and around the Los Angeles area – lots of crime, drugs, and gang activity.[63] Tollette said that joining a gang was considered normal, and most of the guys that Tollette grew up with were involved with gangs.[64] Abernathy noted that "[a]ccording to family accounts, Leon was quite intelligent in

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[62] Id at 72.

[63] PX 15, Abernathy's Report of October 16, 1997.

[64] Id.

school . . . [but his] life began to take a turn for the worse . . . when he gravitated toward gangs." Tollette joined the Crypts gang in middle school. According to Tollette, "he had no choice in the matter" and "getting into a gang sparked the beginning of his criminal life."[65] Tollette left home around the tenth grade because of a disagreement over a car, sold drugs because he was impressed with the potential for enormous wealth, and was incarcerated 13 times. He started using alcohol and drugs in his early teens, and he never received treatment other than what was offered in prison. Abernathy also found that Tollette was self-conscious about his short stature of 5'2", his recurring eczema, and his surname which people sometimes likened to a toilet or sewer.

Tollette has a son, T.J., who was five years old at the time of his trial. T.J. was born while his mother, Yvonne Lopez, was in prison, and he was living with Merlinda until his mother was released. Tollette expressed great affection for T.J. He stated that he provided for and spent time with T.J., and he was never abusive to him because he wanted his son to have good memories of him.

When asked whether Abernathy's mitigation investigation had produced anything useful, attorney Wadkins responded:

> No. Every avenue was just was bad. Nothing was good. The [extensive] prison record, the school records didn't help. There was nothing that she could find in the childhood that we thought was of any use. We thought that much of the other stuff that was uncovered or discovered would have been more in aggravation than mitigation.
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> . . . .

[65] Id.

> [W]e looked for, you know, like good behavior type stuff and all of that. But the circumstances were, basically, that he never stayed in jail long enough in one thing to get really any accolades from the prison system. [66]
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> . . . .
>
> Leon lived in a middle to upper middle class neighborhood, a nice neighborhood with nice houses. Leon went to school, a local school as a child. He wasn't bused anywhere and he didn't have a long way to go, and he didn't have any problems with that. He played sports like an average normal teenager – I mean, child would. He didn't have any money problems to speak of. He had all of the necessities and all that he, extras I supposed that other people in his surroundings had. Baseball uniforms, money for school, money for lunch, money for this and that. It was no deprivation in other words in his life, except the fact that his father had left him, and he got a stepfather that he didn't much like.
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> We could find nothing that we thought would help persuade the jury that his childhood was bad. Many of the jurors would have had a much worse childhood than he did. So, we decided that we just couldn't afford to try to put that on because that would probably back fire in our face.[67]

Upon speaking with Tollette's mother and two sisters, trial counsel learned that Merlinda refused to testify, and they believed that Gladys "was unsuitable and would have hurt us rather than help us."[68] Because trial counsel did not know of any other mitigation witnesses that would have testified favorably,[69] they only called one witness, Tollette's mother, in mitigation.

Alleged failure to investigate and present evidence of Tollette's life leading up to the crimes. According to Tollette, his mother's testimony inaccurately portrayed an "average, safe, loving home . . . [which] served only to bolster the State's prosecution theme – that despite every 'chance,' Mr. Tollette perversely chose not to turn his life

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[66] Id at 52.

[67] Id at 75.

[68] Id at 53-54.

[69] Id at 54.

around."[70] Tollette insists that if trial counsel had performed a better mitigation investigation, the jury would have learned that Tollette's neighborhood and home life were so bad that his change from a "good and polite" kid to a depressed, drug-using gang member was inescapable. Tollette maintains that trial counsel should have located and presented additional witnesses to testify about his neighborhood's gang activity, his neglectful and abusive home life, his genetic predisposition to drug and alcohol abuse, and his mental and emotional disturbances.

To show that trial counsel's mitigation investigation was inadequate, Tollette provided affidavits from family members:

- Gladys Moore-Lattier, Tollette's oldest sister;[71]
- Frankye Charles, Tollette's paternal aunt;[72]
- Julius Caesar Crofton, Tollette's paternal second-cousin.[73]

Several neighborhood friends and acquaintances submitted affidavits:

- Katrina Wilson, Tollette's girlfriend at the time of the crime;[74]
- Shirley McCarty, Tollette's eighth-grade school teacher and across-the-street neighbor;[75]
- Shelton Franklin, another across-the-street neighbor, friend, and former fellow gang member;[76]
- Michael Chapman, a schoolmate, friend, and former fellow gang member;[77]

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[70] Id at 12.

[71] PX 2 (Moore-Lattier Aff.);

[72] PX 3 (Charles Aff.),

[73] PX 7 (Crofton Aff.).

[74] Testimony in HT Vol. 1 at 79-108 and PX 1 (Wilson Aff.).

[75] PX 4 (McCarty Aff.);

[76] PX 5 (Franklin Aff.);

[77] PX 6 (Chapman Aff.);

- Renauld Walker, a neighborhood friend and former fellow gang member;[78] and
- Ronald Williams, a neighborhood friend and a former affiliate of Tollette's gang.[79]

Tollette also retained experts to submit affidavits and testify:

- Dr. James Diego Vigil, an expert on gangs and gang socialization;[80]
- Dr. Michael Hilton, a forensic psychiatrist;[81] and
- Dr. R. Robert Tressel, a forensic pathologist.[82]

Based on the affidavits and testimony at the evidentiary hearing, Tollette asserts that the following evidence was readily available to trial counsel and should have been presented as mitigation.

Tollette contends that Katrina Wilson "held the key to an entire case in mitigation," but trial counsel never contacted her.[83] Wilson met Tollette in 1993 and became his girlfriend. She testified about the good qualities that made Tollette likeable, described the drugs and violence of the neighborhood where they lived, and detailed the negative change in Tollette's behavior during the first year that she knew him. When Wilson met him, Tollette was courteous, helped with chores, played with her son Spencer and his son T.J., wore nice clothes, and drove a nice car. Within a year, Tollette "hit bottom," with poor grooming, an old car, a defeatist attitude, and alcohol abuse.

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[78] PX 8 (Walker Aff.);

[79] PX 9 (Williams Aff.)

[80] Vigil's testimony in HT Vol. 1 at 18-78 and PX 17 (Vigil's Report);

[81] Hilton's testimony in HT Vol. 1 at 110-165, PX 19 (Hilton's Report), and PX 21 (Hilton's Dep.);

[82] Tressel's testimony in HT Vol. 2 at 206-232, PX 22 (Tressel's Report), PX 24 (Diagram of gunshot wounds);

[83] Id at 11.

According to Tollette, Wilson's account of "the weeks and months prior to the crime . . . [would have] provided critical information regarding [his] impaired functioning and deteriorating mental state."[84] Trial counsel could then have traced the origin of his mental decline to his gang-infested neighborhood and his terrible home life.

Tollette's sister Gladys provided a habeas affidavit that gave a much darker description of their neighborhood than she had given Abernathy in 1997. She described the dangers of living in Nickerson Garden Housing Projects in South Central Los Angeles where Tollette was born, and she also described the deterioration of Gardena, the neighborhood that the family moved to when Tollette was seven years old. The neighborhood of Gardena was about ten miles away from Nickerson Gardens. It was originally a neighborhood that promised a fresh-start, but Moore-Lattier described the decline of Gardena as the drugs and gangs moved in from Nickerson Gardens. Similar descriptions of the neighborhood were given by Shirley McCarty, Leon's eighth-grade teacher who had also moved from Nickerson Garden to Gardena[85]; Shelton Franklin, Tollette's neighbor, friend, and former gang member[86]; and Ronald Williams, another neighborhood friend.[87] By the time Tollette was in junior high school, Gardena was known to be the territory of the Shotgun Crips gang.[88] Dr. James Diego Vigil, an expert on gangs and gang socialization, detailed the underprivileged social, economic, and

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[84] Tollette's Post-Trial Brief at 11.

[85] PX 4 (McCarty Aff.).

[86] PX 5 (Franklin Aff.).

[87] PX 9 (Williams Aff.).

[88] PX 9 at 495 (Williams Aff.).

political climate of South Central Los Angeles, in which Gardena was located, and explained its affects on the youth, particularly Tollette.[89]

Tollette's mother was described by Moore-Lattier, as someone who played around and drank. According to McCarty, Tollette's mother eventually "realized that she was setting a poor example for her children . . . [and] became religious and started trying to clean up her life." Tollette's step-father was disinterested in being a father figure and was often a harsh disciplinarian.[90] Tollette's father lived nearby but did not involve himself as a parent. He was described by Frankye Charles and Julius Caesar Crofton as a Vietnam veteran who drank a lot and who completely neglected his parenting duties to Leon as well as to the two other children that he fathered. Moore-Lattier described how Tollette as a child would dress in his best clothes and vainly wait for hours for his father to show up for visitation.[91] Charles and Crofton both described similar instances when Tollette was older and sought his father's attention and support but was rebuffed.[92]

One bright spot in Tollette's childhood was a passion for baseball. According to Tollette's childhood friend Michael Chapman, whose father coached little league, Tollette enthusiastically participated in drills and practice, but his parents did not support

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[89] Vigil's testimony in HT Vol. 1 at 18-77.

[90] PX 15 (Investigation file of Abernathy); PX 4 at 464 (McCarty Aff.); PX 2 at 447 (Moore-Lattier Aff.); PX 8 at 487 (Walker Aff.); PX 5 at 471-72 (Franklin Aff.).

[91] PX 2 at 446-47 (Moore-Lattier Aff.); PX 7 at 483 (Crofton Aff.); PX 3 at 456 (Charles Aff.).

[92] PX 3 at 456 (Charles Aff.) and PX. 7 at 483 (Crofton Aff.)

his efforts.[93] Also, Tollette did not physically mature as quickly as other boys, and eventually his slighter height and weight resulted in his quitting the team.[94]

Home life became worse after his younger brother was born and his older siblings moved out.[95] Gladys had acted as primary caretaker, and she moved out and eventually became a drug addict. Tollette's older brother Donnell was a positive role model who did well in school and stayed out of trouble.[96] But Donnell's departure coincided with Tollette's entering junior high school. Tollette stopped doing well academically and, a year later, he became a full-fledged member of the Shotgun Crips.[97] His friends Shelton Franklin, Michael Chapman, and Renauld Walker were also members of the Shotgun Crips, and Ronald Williams was affiliated with the gang.

Frankye Charles, a paternal aunt, and Julius Caesar Crofton, a paternal second-cousin, both lived near Tollette when he was growing up and described him as a good and polite child who unfortunately got pulled into gang life. Shirley McCarty, who lived across the street from Tollette, stated that it saddened her to watch Tollette start associating with gang members because "[a]s a kid he had always been very polite and respectful to me and the other parents on our street."[98]

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[93] PX 6 (Chapman Aff.).

[94] PX 6 at 478 (Chapman Aff.).

[95] PX 2 at 449-50 (Moore-Lattier Aff.); Vigil's testimony in HT Vol. 1 at 45-46.

[96] Vigil's testimony in HT Vol. 1 at 45-46; Hilton's testimony Id at 122; Grant's testimony Id at 181-182.

[97] PX 28 at 1489 (Los Angeles Unified School District File); Hilton's testimony in HT Vol. 1 at 118.

[98] PX 4 (McCarty Aff.).

Tollette hung out with older boys, started drinking and smoking marijuana, and, in eighth grade, learned how to steal cars.[99] When Tollette was 16 years old, he left home to live on the streets. As Tollette points out in his post-trial brief, there is conflicting evidence about why he left home. His mother did not remember the details; Gladys recalled that Tollette was kicked out for bringing home a car that he had purchased with drug money; and Tollette told defense mitigation investigator Cheryl Abernathy that his step-father had kicked him out.[100] Regardless of the reason for leaving, after he left home, Tollette became wholly dependent on his gang. His role in the gang was "street soldier," or entry-level drug dealer. He did not advance in the gang hierarchy because of his drug addiction. He was arrested several times, and after the third time he seemed to find a manageable balance between using drugs and selling them. He met Katrina Wilson in 1993, and they dated until 1995. In June 1994, Tollette had a son, T.J., by Yvonne Lopez. By 1995, Tollette had relapsed and started abusing drugs again. Later that year, he received a phone call from Xavier Womack, a friend from the neighborhood, asking Tollette to come to Georgia to help with the robbery of an armored truck.

Alleged failure to obtain and present expert analysis of life history. Tollette contends that had trial counsel conducted an adequate investigation into his disadvantaged life history, experts could have explained the impact and relevance of that life history on Tollette's moral culpability. The mental health evaluation that Dr. Grant performed prior to trial revealed that Tollette suffered from depression, poor personal

[99] PX 17 at 883-85 (Report of Vigil); PX 19 at 904-910 (Report of Hilton); Dr. Daniel Grant's testimony in HT Vol. 1 at 185, 200; PX 3 at 456 (Charles Aff.); and PX 8 at 487 (Walker Aff.).

[100] Tollette Post-Hearing Brief at 70.

concept, and bizarre thinking.[101] But the evaluation did not include the effects of gang socialization or delve deeper into Tollette's history of mental health issues. For the habeas proceeding, Dr. Grant reviewed Tollette's life history, some of which he did not have when he performed the pre-trial evaluation, and he identified and discussed the numerous risk factors in Tollette's early development for developing substance abuse problems, mental health issues, and criminal and antisocial behaviors.[102]

In addition to having Dr. Grant testify at the evidentiary hearing, Tollette also retained two other experts, Dr. Vigil, and Dr. Michael Hilton, a forensic psychiatrist. Dr. Vigil testified at the evidentiary hearing and submitted a report explaining and contextualizing Tollette's gang affiliation, tracing the influence of street socialization on Tollette's life trajectory which culminated in the armed robbery and shooting death of Hamilton.[103] Dr. Hilton testified and submitted a report diagnosing Tollette with polysubstance abuse and moderate major depressive disorder, i.e., clinical depression.[104] The depression was aggravated by drug use that started at a very early age, and Tollette likely had an episode of severe depression in 1995 at the time of the crime.

Cumulatively, the expert testimony opined on the allure of gangs to disadvantaged youths and how Tollette's home life made him particularly, almost unavoidably, vulnerable to gang recruitment. The experts noted the predisposition to addiction on

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[101] Grant testimony in HT Vol. 1 169, 172-73; PX 38 at 2460 (Trial counsel's notes of conversation with Dr. Grant).

[102] Grant testimony in HT Vol. 1 at 166-199.

[103] Vigil testimony at HT Vol. 1 at 18-77; PX 17 (Report of Vigil).

[104] Hilton testimony in HT Vol. 1 at 110-163; PX 19 at 909 (Report of Hilton).

Tollette's paternal side of the family, and explained how use of alcohol and drugs during childhood impairs brain development, including executive functions like judgment and impulse control. Finally, they reviewed Tollette's history of depression, explaining that "[t]he chronic sense of loss, worthlessness, hopelessness and low self-esteem impairs concentration, good judgment and impulse control."[105] Tollette contends that this expert testimony would have shown the jury how Tollette's life trajectory inexorably led to his committing the crime.

Findings of Court. The record shows that trial counsel conducted an adequate mitigation investigation, and they made a reasonable choice of trial strategy based on the investigation. Tollette's mental examinations by the state for competency and by defense expert Dr. Grant did not reveal any useful mental trauma or impairment. Abernathy's investigation revealed much of Tollette's life history, including the neighborhood of Gardena, the imperfect home life, gang involvement, and drug history. When asked at the motion for new trial hearing whether there was "ever any discussion or plan to try and turn what Ms. Abernathy's findings were into some sort of a coherent mitigation strategy of showing that Mr. Tollette was the person he is as a result of the problems that he had in his childhood, such as the abandonment that he felt, the guilt, and all along those kinds of things," attorney Wadkins replied, "Yeah. There was a lot of discussion about that." But ultimately, trial counsel decided that much of the evidence revealed by the

[105] PX 19 at 909 (Report of Hamilton).

investigation could have been both aggravating and mitigating, noting that "[m]any of the jurors would have had a much worse childhood than [Tollette]."[106]

Due to the lack of mitigating evidence, trial counsel put Tollette's mother on the stand to plead for her son's life. Also, Tollette's behavior during trial – "leaning back grinning" and possibly blowing a kiss to one of the victim's daughters – did not help his case.[107] Realizing that the jury held no sympathy for Tollette, trial counsel attempted to gain credibility with the jury by conceding his dislike for his own client but emphasizing how justice would best be served by a sentence of life in prison without the possibility of parole.[108]

Great deference is generally given to counsel over matters of trial strategy.[109] This deference is conditioned on the requirement that the chosen strategy be supported by adequate investigation.[110]

> Before selecting a strategy, counsel must investigate the defendant's background for mitigation evidence to use at sentencing. An attorney is not ineffective for failing to follow every evidentiary lead; instead, the adequacy of the scope of an attorney's investigation is to be judged by the standard of reasonableness.[111]

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[106] Id at 75.

[107] RX27, MNT Trans. at 58 and 60-61.

[108] RX27, MNT Trans. at 58-59; 62

[109] Turpin v. Christenson, 269 Ga. 226, 239, 497 S.E.2d 216 (1998). See also *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(strong presumption that counsel's conduct falls within range of sound trial strategy and reasonable professional judgment).

[110] See *Turpin v. Christenson*, 269 Ga. 226, 239 (1998).

[111] *Turpin v. Lipham*, 270 Ga. 208, 216(3)(B)(3) (1998) (citations and punctuation omitted).

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court "emphasize[d] that Strickland does not require counsel to investigate every conceivable line of mitigating evidence."[112]

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.[113]

Here, the trial counsel's choice of strategy was supported by adequate investigation. The fact that trial counsel's investigation and resulting analysis of Tollette's life history differs from the investigation and analysis performed by Tollette's habeas counsel is not due to trial counsel's inattention, but rather from reasoned strategic judgment.

Much of the evidence that Tollette argues would have allowed the jury to sympathize with him could have just as likely been viewed unfavorably. Tollette stresses that Wilson's testimony was "key to an entire case in mitigation" because she "could have provided valuable and compelling insight into Mr. Tollette's character and the struggles he had faced throughout his life, and most importantly, in the weeks and months prior to the crime."[114] Again, Tollette relies on his presumption that jurors would have construed the evidence as showing how his "behavior was a product of his history and circumstances which he was unable to overcome."[115] Tollette's repeated criminal

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[112] *Wiggins v. Smith*, 539 U.S. 510, 533(II)(B)(3)(2003).

[113] *Wiggins v. Smith*, 539 U.S. 510, 521-522(II)(A) (2003)(Citations and punctuation omitted).

[114] Tollette's Post-Hearing Brief at 11.

[115] Tollette's Post-Trial Brief at 6.

activity, however, would have been in sharp contrast to the maturity that his four childhood friends eventually developed.

The affidavits of Tollette's four friends and former fellow gang members show that they all came from the same circumstances and faced many of the same struggles, but each of his friends eventually broke free of gang life to pursue legitimate careers. Shelton Franklin stated in his habeas affidavit that his mother kicked him out of the house when she learned about his gang membership,

> [b]ut unlike [Tollette], . . . [m]y grandmother and my aunts took me in with hopes that I might change my lifestyle. It took a while, but in time I did. . . . It was not until I had my first son that I was able to realize that I needed to change.

Similarly, Renauld Walker stated in his habeas affidavit that his daughter was the reason for turning his life around. Michael Chapman described in his habeas affidavit how he became a successful businessman. Ronald Williams explained in his habeas affidavit how he became a dean at Gardena High School where he works to keep kids from joining gangs. The evidence shows that Tollette had maternal and paternal family who lived nearby and who might have taken him in after he left home. He also had some family outside of California. And the birth of his son T.J. did not prompt Tollette to change his life for the better like fatherhood did Franklin or Walker.

Furthermore, Tollette's second-chair defense attorney, Stephen Craft, testified that it was a strategic decision to not present evidence of gang involvement.

> It's a two-edge sword. You know, you present that as he had no choice, he was forced to join a gang, how do you show that, and as a result of that, that led him, quote, "into a life of crime at an early age," or did he decide he wanted to be big and bad and prove himself by being part of the gang, and that was a choice, to enter to this lifestyle? Which, then again, it comes back to the State's position,

> how are they going to counter or argue that? Well, that's right, he joined a gang when he was a teenager and he has been a gangster ever since, or a thug, or however you want to characterize that. Those types of things are a two-edged sword and you have to be very careful how you put that in front of the jury.[116]

Trial counsel clearly considered and rejected introducing this evidence to the jury due to the potential for it being used not only favorably by the defense, but unfavorably by the prosecution

The cases cited by Tollette, *Turpin v. Christenson*, 269 Ga. 226, 238 (1998), *Hall v. McPherson*, 284 Ga. 219, 234 (2008), and *Williams v. Taylor*, 529 U.S. 362, 398 (2000), are distinguishable. Ineffective assistance was found in *Turpin v. Christenson* because the inadequacy of the investigation was evidenced by trial counsel's ignorance of their client's impaired mental condition and of the prevalence of mental illness and substance abuse in his family.[117] Christenson had "an extensive history of psychiatric problems and substance abuse," including in-patient treatment at a private psychiatric hospital three years before the murder.[118] The Court in *Christenson* found that "[p]sychiatric evidence may have provided the jury with an explanation for Christenson's actions" and also noted that "the jury found only one statutory aggravating factor, that the murder was committed during the course of an armed robbery."[119] Here, there is no evidence that Tollette had an extensive history of psychiatric problems and substance abuse like the defendant in *Christenson*, let alone that trial counsel were ignorant of the

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[116] Vol. 2, HT 276.

[117] 269 Ga. at 236.

[118] 269 Ga. at 235.

[119] 269 Ga. at 242.

evidence. Tollette's trial counsel retained a neuropsychologist to determine whether he had any mental condition that could be used as mitigation. They also hired a mitigation expert who investigated his background, including any history of mental illness. Neither the doctor nor the investigator found anything remotely similar to the documented psychiatric treatment in *Christenson*. And whereas the jury in *Christenson* found one statutory aggravating factor, Tollette's jury found two, the murder was committed during an armed robbery and Tollette committed the murder for the purpose of receiving money.

Ineffective assistance was found in *Hall v. McPherson* because "trial counsel's failure to investigate further into McPherson's life history was not a strategic decision but stemmed from counsel's inattention."[120] Rather than hire a mitigation investigator, trial counsel relied almost exclusively on McPherson's mother to provide life history mitigation evidence even though trial counsel had information that "should have raised concerns regarding the role McPherson's mother played in his childhood abuse and neglect."[121] Also, trial counsel chose not to obtain McPherson's drug treatment records which would have shown that McPherson had felt remorse and had also voluntarily sought treatment for his drug addiction. Here, Tollette's trial counsel hired an experienced mitigation expert who found that Tollette never received drug treatment other than in prison.

Tollette cites *Williams v. Taylor*, 529 U.S. 362, 398 (2000) for the proposition that the information of his underprivileged background might "well have influenced the jury's

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[120] 284 Ga. at 223.

[121] 284 Ga. at 222.

appraisal of [his] moral culpability" and persuaded at least one juror that "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation." The ineffectiveness found in *Williams* was based on an array of egregious failures by trial counsel, one being trial counsel's failure "to conduct an investigation that would have uncovered extensive records of Williams' nightmarish childhood." Moreover, Williams' trial counsel's failure was not due to "any strategic calculation but because they incorrectly thought that state law barred access to such records."[122] An investigation would have shown that "Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that Williams had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody."[123] Here, there is no evidence that the trial counsel's investigation failed to uncover any childhood abuse of the magnitude detailed in *Williams*, let alone that the failure was based on a misunderstanding of the law.

The cases cited by Tollette are clearly distinguishable and do not call for a finding of ineffectiveness. Here, the evidence shows that trial counsel conducted a reasonable mitigation investigation into his life history by retaining experts in neuropsychology and mitigation. Both experts were highly qualified within their fields. Moreover, there is no

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[122] 529 U.S. 395.

[123] Id.

evidence that the jury, presented with the additional evidence provided in the habeas proceeding, would have returned a different verdict.

(b) Evidence Rebutting the State's Brutal Characterization of the Murder

Tollette argues that had trial counsel investigated the circumstances of the crime, counsel could have persuasively challenged the State's characterization of the crime as an execution-style shooting. Tollette contends that trial counsel could have used eye witnesses to the shooting and forensic experts to show that Tollette did not shoot Hamilton execution-style, but that he first shot Hamilton in each leg, then to the back, and finally and fatally to the head.[124] In *Hall v. Terrell*, 285 Ga. 448, 452-454(II(C)) (2009), the Supreme Court held that even assuming that trial counsel should have presented forensic evidence disputing the exact number of blows inflicted and the timing of the fatal blow, the habeas petitioner failed to show "any reasonable probability that the jury would have failed to find beyond a reasonable doubt the statutory aggravating circumstance." As in *Hall v. Terrell*, Tollette failed to meet the prejudice prong of the *Strickland* test because the sequencing of gunshot wounds would not have significantly swayed the jury against finding a statutory aggravating circumstance.

(c) Evidence That Tollette Would Be A Good Candidate for Life Sentence

Tollette asserts that trial counsel were ineffective in failing to present evidence that he would not be a future danger in prison. Attorney Wadkins' notes of a phone call with Dr. Grant indicate that Dr. Grant might have been able to testify about Tollette's

[124] (Vol. 2, HT 219-220).

adaptability to prison life, noting that Leon had no known disciplinary problems during his previous incarcerations and had possibly become certified as an upholsterer and a firefighter while in prison. Tollette concedes, however, that Dr. Grant would not unequivocally testify that Tollette would be a good candidate for life without parole.[125]

Tollette points out that Dr. Grant and Dr. Karen Bailey-Smith testified at the evidentiary hearing that one of the better predictors of prison adaptation is prior performance in prison.[126] And Dr. Grant testified that Tollette's prior history did not indicate an inability to adapt to prison.[127] Trial counsel testified, however, that he was concerned that addressing Tollette's prior incarceration history – consisting of 13 imprisonments – would open the door for the prosecution to bring in a Brinks robbery in California the month prior to the murder in which Tollette was a strong suspect as well as Dr. Bailey-Smith's evaluation that described Tollette's "anti-social and schizotypal features."[128]

The Court finds that the information that was available to counsel during trial "would not have led constitutionally effective counsel to pursue [a different trial strategy] and would not be reasonably probable to have resulted in" the jury sentencing Tollette to life without parole.[129] Tollette has failed to show how direct appeal counsel was ineffective for not pursuing this issue.

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[125] Vol. 2, HT 270.

[126] HT, Vol. 1 at 176 and HT, Vol. 3 at 306.

[127] HT, Vol. 1 at 176.

[128] Vol. 3 at 349; Vol. 23, Res. Ex. 33, HT 5701).

[129] *Perkins v. Hall*, 288 Ga. at 822-823 (citations omitted).

CONCLUSION

Tollette has not satisfied his burden of showing that trial counsel's preparation for the mitigation phase was inadequate and that he was prejudiced by their pre-trial decisions. For these reasons, the Court hereby DENIES the Petition for Writ of Habeas Corpus. SO ORDERED this 31st day of Feb. 2013.

Daniel M. Coursey, Jr.
Judge, DeKalb Superior Court

cc: Kirsten Salchow, Georgia Resource Center
Theresa Schiefer, Asst Attorney General
Shannon Weathers, Council of Superior Court Judges

In the Supreme Court of Georgia

Decided: November 7, 2005

S05P1114. TOLLETTE v. THE STATE.

THOMPSON, Justice.

Leon Tollette was indicted for malice murder, armed robbery, and other crimes, stemming from the shooting death of John Hamilton, a Brinks employee who, at the time, was picking up cash from a SouthTrust bank. The State served written notice of intent to seek the death penalty. On the first day of jury selection, Tollette pled guilty to one count each of malice murder, felony murder, armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime and to two counts of aggravated assault.[1] At the conclusion of the sentencing trial, the jury fixed the

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[1] Tollette committed the crimes on December 21, 1995; he was indicted by a Muscogee County grand jury on March 19, 1996, and was re-indicted on August 5, 1996. The State filed written notices of its intent to seek the death penalty on March 21, 1996, and on September 27, 1996. The trial court properly merged the felony murder charge into the malice murder charge by operation of law. See Malcolm v. State, 263 Ga. 369, 371-372 (4) (434 SE2d 479) (1993); OCGA § 16-1-7 (a). The trial court sentenced Tollette to death for the malice

sentence for malice murder at death after finding beyond a reasonable doubt that Tollette committed the murder during the commission of the capital felony of armed robbery and that he committed the murder for the purpose of receiving money or any other thing of monetary value. See OCGA § 17-10-30 (b) (2) and (4). For the reasons set forth below, we affirm.

1. The trial evidence established that Xavier Wommack had been planning a crime in Columbus, Georgia, and he invited Tollette to travel from Los Angeles, California, to join him. When Tollette arrived in Columbus, he and Wommack, along with a third man, Jakeith Robinson, finalized plans for the armed robbery of an armored truck. On December 21, 1995, the group followed a Brink's armored truck to the SouthTrust bank. Tollette sat waiting with a newspaper near the bank, Wommack stood guard across the street, and Robinson sat ready as the getaway driver. As victim John Hamilton returned

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murder, to a concurrent sentence of life for the armed robbery, to two concurrent sentences of 20 years for the aggravated assaults, to a concurrent sentence of five years for possession of a firearm by a convicted felon, and to a consecutive sentence of five years for the possession of a firearm during the commission of a crime. Tollette filed a motion for new trial on March 11, 1998, which he amended on October 20, 1998, and which was denied on January 28, 1999. Tollette filed a notice of appeal on February 25, 1999. The appeal was docketed in this Court three times but stricken for various reasons. The instant appeal was docketed on March 28, 2005, and was orally argued on June 20, 2005.

from the bank to the Brink's truck with a money bag, Tollette approached Hamilton from behind and then fired at close range into his head, back, and legs, killing him. Carl Crane, the driver of the Brink's truck, and Cornell Christianson, the driver of a nearby Lummus Fargo truck, chased Tollette and fired shots at him as he fled with the money bag; Tollette returned fire at his pursuers. Wommack fired shots from across the street to aid in Tollette's escape; however, Wommack and Robinson ultimately drove away without Tollette. Robert Oliver, a police technician, responded to the radio call of a detective at the scene. When confronted by Oliver, Tollette attempted to fire at him and at a cadet who accompanied him, but all of the bullets in Tollette's revolver were already spent. Tollette threw down his revolver and surrendered.

Viewed in the light most favorable to the verdict, we find that the evidence adduced 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. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979); OCGA § 17-10-35 (c) (2).

Voir Dire Proceedings

2. Tollette contends that the trial court violated the mandate of Morgan v. Illinois, 504 U. S. 719 (112 SC 2222, 119 LE2d 492) (1992), by failing to question several jurors regarding their willingness to consider a sentence less than death and by, instead, allowing the parties to conduct such questioning. Contrary to Tollette's contention, we find that Morgan requires only that such questioning occur on request, and does not specify whether the trial court or the parties actually conduct the questioning.

3. Tollette argues that the trial court erred by refusing to excuse prospective jurors Glover, Grillo, Bigbee, Weekly, Wadsworth, Tillman, Bauer, Bone, and Wiggins based on their views of the sentencing options in a death penalty case. Tollette, similarly, complains that the trial court erred by excusing jurors Sankey, Bell, and Vining, over his objection, based on the court's determination that these jurors evidenced an inability or unwillingness to consider a death sentence.

Upon a proper motion, a juror should be excused based on his or her views on the death penalty, life imprisonment without parole, or life imprisonment with the possibility of parole if "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance

with his instructions and his oath'" Greene v. State, 268 Ga. 47, 48 (485 SE2d 741) (1997) (quoting Wainwright v. Witt, 469 U. S. 412, 424 (II) (105 SC 844, 83 LE2d 841) (1985)). The same standard applies to a court's decision to qualify a prospective juror over defendant's objection. Id. This Court reviews a trial court's decision regarding a juror's qualification with deference to the trial court's application of this standard to the juror's voir dire responses. Id. See also Raheem v. State, 275 Ga. 87, 90-91 (5) (a) (560 SE2d 680) (2002) (discussing jurors' views regarding life with the possibility of parole). Upon review of the record, we find no abuse of discretion in the trial court's rulings in light of the views expressed by each of the jurors in question as to their willingness or unwillingness to consider the sentencing options available.

4. Pretermitting the State's argument that Tollette has not preserved the issue for appeal, we find that the trial court did not abuse its discretion in excusing prospective juror Laney based on a showing that he was a federal bankruptcy judge, that notice for various parties to appear before him during the week of Tollette's trial had already been sent out, and that his access to an available courtroom was limited. See OCGA § 15-12-1 (a); McClain v. State,

267 Ga. 378, 381-382 (1) (c) (477 SE2d 814) (1996) (noting a trial court's "broad discretion" in applying statutory exemptions from jury duty).

5. The trial court properly excused prospective juror Butler because the juror was the second cousin of Jakeith Robinson, Tollette's co-indictee. Cambron v. State, 164 Ga. 111 (137 SE 780) (1927).

Sentencing Trial

6. The widow of the victim testified that "the grief [the victim's mother] carried over the murder of her son indirectly led to her death." A co-worker of the victim described the murder as "senseless, explicit, and apparently ruled by greed" and as showing "a blatant disregard for human life." Tollette waived his right to complain on appeal regarding this testimony, because he failed to object during the trial proceedings. See Earnest v. State, 262 Ga. 494, 495 (1) (422 SE2d 188) (1992) ("[e]rrors not raised in the trial court will not be heard on appeal").

7. Tollette argues that the trial court erred by allowing the jury to hear portions of his confession wherein he referred to his own gang affiliation. He has waived his right to raise this claim on appeal, however, by failing to raise this issue before the trial court. Id.

Pretermitting whether the State was required to give pretrial notice of its intent to use Tollette's confession as non-statutory aggravating evidence at his sentencing trial, which confession would have been admissible in the guilt/innocence phase of his overall trial had he not pled guilty on the first day of jury selection, we find that he waived his right to complain about the lack of notice by failing to object. Whatley v. State, 270 Ga. 296, 300-301 (11) (509 SE2d 45) (1998) (citing Earnest, 262 Ga. at 495 (1)). But see also Berryhill v. State, 249 Ga. 442, 450-451 (11) (291 SE2d 685) (1982) (holding that pretrial notice of intent to re-use guilt phase evidence in the sentencing phase is not required).

8. Tollette argues that he is entitled to a new trial based on various allegedly-improper closing arguments made by the prosecutor to which no objections were raised at trial. Tollette argues that he preserved his current objections to the prosecutor's allegedly-improper arguments through a pretrial motion. Although we have held that an adverse ruling by a trial court to a motion in limine seeking to limit a specific argument at trial serves to preserve the issue of the argument's propriety for appellate review, see Carruthers v. State, 272 Ga. 306, 310 (2) (528 SE2d 217) (2000), we find that no such ruling

was obtained in this case and, therefore, that the issue has been waived. Earnest, 262 Ga. at 495 (1). Nevertheless, if an argument by the State was improper in a death penalty case, this Court must examine whether the argument led to a death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor." OCGA § 17-10-35 (c) (1). See Gissendaner v. State, 272 Ga. 704, 713-714 (10) (b) (532 SE2d 677) (2000). In making that examination, this Court determines whether any improper arguments in reasonable probability led to the imposition of a death sentence. Id.

(a) Tollette argues that the prosecutor improperly stated in his closing argument that a portion of Tollette's confession suggested his involvement in other robberies. Tollette contends that the issue of this allegedly-improper argument is preserved for appeal because it falls within the mandate of OCGA § 17-8-75: "Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same." Pretermitting whether a waiver occurred, we note that the argument in question did not violate the statute, because it simply urged the jury to draw a reasonable inference from Tollette's statement. See Waldrip v. State, 267 Ga. 739, 743 (5) (482 SE2d 299) (1997) (pretermitting

issue of waiver of a claim based on OCGA § 17-8-75). See also Messick v. State, 276 Ga. 528, 529 (2) (580 SE2d 213) (2003) (arguing reasonable inferences is permissible under OCGA § 17-8-75). Because the argument was not improper, we need not address its effect on the jury's selection of a death sentence. See Gissendaner, 272 Ga. at 713-714 (10) (b).

(b) Tollette acknowledges that a prosecutor may argue the deterrent effect of a death sentence, see Pace v. State, 271 Ga. 829, 844 (32) (f) (524 SE2d 490) (1999), but he argues that the prosecutor's deterrence argument coupled with the prosecutor's references to the fact that Tollette came from California to commit his crimes collectively constituted improper argument. Because the prosecutor's references to Tollette's travel stressed the relevant issues of intent and premeditation, we find no impropriety, either alone or in conjunction with the prosecutor's argument regarding deterrence. Having concluded that the arguments, which were not objected to at trial, were not improper, we need not address their effect on the jury's sentence. See Gissendaner, 272 Ga. at 713-714 (10) (b).

(c) During his closing argument, the prosecutor argued that "the just punishment under a lot of religions would be death for what [Tollette did]."

This argument was improper in that it emphasized the mandates of various, although unspecified, religions. See Carruthers, 272 Ga. at 308-311 (2). See also King v. State, 273 Ga. 258, 275 (35) (539 SE2d 783) (2000). However, because Tollette did not object to this argument at trial, we consider only whether it in reasonable probability led to the jury's selection of a death sentence. See Gissendaner, 272 Ga. at 713-714 (10) (b). We find that it did not.

9. Tollette complains about the prosecutor's reference to the possibility that Tollette waved at or blew a kiss at one of the victim's children as he or she left the witness stand. Tollette also asserts that the prosecutor improperly argued that "[g]overnment supported, taxpayer funded, taxpayer maintained" prison was "too good" for Tollette. However, because the trial court sustained Tollette's objections to these arguments, he suffered no harm, even assuming the arguments were improper.

10. The prosecutor argued as follows:

> I submit to you, ladies and gentlemen, prison is too good for this defendant. Prison for the rest of his life, prison for seven years and re-paroled, prison for whatever.

Tollette objected to this reference to "how many years" might pass before Tollette would be eligible for parole. The likelihood of parole is an improper

subject matter for argument by counsel, except for the limited exception allowing counsel to refer to the significance of life without parole and life with eligibility for parole as those meanings are set out in OCGA § 17-10-31.1 (d). See McClain, 267 Ga. at 386 (5). Accordingly, we find that the trial court erred in overruling Tollette's objection to the prosecutor's argument. Nevertheless, we find that the argument ultimately proved entirely harmless in Tollette's case, given the fact that the jury had life without parole as an available sentence and was properly charged, through an original charge and an additional charge given during deliberations, that a sentence of life without parole would mean that Tollette would never be eligible for parole unless later adjudicated innocent.

11. In a pretrial hearing, the prosecution presented the victim impact evidence it intended to present at trial, including a short videotape of the victim alive in various settings. See Turner v. State, 268 Ga. 213, 214-215 (2) (a) (486 SE2d 839) (1997) (commending procedure whereby objections to victim impact testimony can be raised pretrial). At trial, the videotape was played without sound as the victim's oldest daughter described the scenes depicted. Tollette argues in this appeal, as he argued in the pretrial hearing, that the videotape did not fit the statutory description of admissible victim impact evidence and that

the videotape could not be subjected to cross-examination. See OCGA § 17-10-1.2. OCGA § 17-10-1.2 (a) (1) permits "*evidence* from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics." (Emphasis supplied.) We find that such "evidence" encompasses a silent videotape of the victim in life. We also find that the language in OCGA § 17-10-1.2 (a) (1) providing that "[s]uch evidence shall . . . be subject to cross-examination" is satisfied where the person identifying a videotape of the victim is subject to cross-examination. Id. Tollette's additional argument that presentation of the videotape violated the statute's requirement that victim impact evidence not be used "to inflame or unduly prejudice the jury" was not preserved for appeal by objection in the trial court. Id. See Earnest, 262 Ga. at 495 (1). Upon consideration of the issues preserved for our review on appeal, we find no violation of OCGA § 17-10-1.2; therefore, we need not address the provision that "[n]o sentence shall be invalidated because of failure to comply with the provisions of [that] Code section." OCGA § 17-10-1.2 (d).

12. The trial court did not abuse its discretion in replaying Tollette's audiotaped confession for the jury in open court upon the jury's request.

Roberts v. State, 278 Ga. 541, 543-544 (4) (604 SE2d 500) (2004); Cromartie v. State, 270 Ga. 780, 788 (20) (514 SE2d 205) (1999). Tollette has failed to show any special circumstance in his case that made it "unjust to allow the jury" to rehear his confession. Watkins v. State, 273 Ga. 307, 309-310 (3) (540 SE2d 199) (2001). His guilty plea is not, as he contends, such a special circumstance, because any "residual doubt" regarding his guilt remained a relevant issue for the jury's sentencing deliberations, despite his adjudication of guilt. See Head v. Ferrell, 274 Ga. 399, 405 (V) (A) (554 SE2d 155) (2001).

Tollette also complains that the jury had the audiotape of his confession in the jury room during their deliberations. See Fields v. State, 266 Ga. 241, 243 (2) (466 SE2d 202) (1996). But because the jury had no tape player in the jury room, he obviously suffered no harm. Furthermore, this issue is waived because he did not object to the procedure at trial. Earnest, 262 Ga. at 495 (1).

13. Tollette claims that his trial counsel rendered constitutionally-ineffective assistance. To prevail in his claim, Tollette must demonstrate both that his counsel performed deficiently under constitutional standards and that the deficiency in reasonable probability changed the outcome of his trial. Strickland

v. Washington, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984); Smith v. Francis, 253 Ga. 782, 783-784 (1) (325 SE2d 362) (1985).

Tollette outlines the testimony and evidence presented by the State at trial and complains that "hardly any objections" were raised by trial counsel; however, this generalized complaint fails entirely to set out what particular aspects of counsel's performance were deficient and why. His allegation that the trial court "had to rescue the defense attorney" by excluding sua sponte certain victim impact testimony the prosecutor had planned to present obviously cannot show that Tollette was prejudiced, as that testimony was never heard by the jury.

Tollette complains that his trial counsel did not prepare adequate mitigation evidence. Tollette's lead counsel testified that he was appointed to Tollette's case more than a year before trial, interviewed potential witnesses, arranged for a mental health examination by a pair of psychologists, arranged for an examination by a neuropsychologist, hired a "mitigation specialist," consulted with lawyers expert in death penalty cases, and obtained and weighed the usefulness of school and prison records. Counsel did not believe that the

psychological experts offered anything helpful to Tollette's case, and, in counsel's appraisal, Tollette's school and prison records were also unhelpful.

The investigation by counsel and the mitigation specialist led to a conclusion that Tollette's mother and one of his sisters could offer helpful testimony. Although Tollette's mother testified at trial, Tollette argues that counsel performed deficiently by failing to secure the attendance of his sister through an interstate subpoena. See OCGA § 24-10-91, et. seq. Pretermitting the question of whether counsel's failure to compel the attendance of the witness has been shown to be deficient performance, we conclude that Tollette did not suffer sufficient prejudice to warrant relief. The only testimony in the hearing on the motion for new trial regarding the content of the sister's potential testimony showed that it would have been merely a "reiteration of the mother's testimony."

Tollette notes with disapproval that his lead counsel stated in his closing argument, "I have great loathing for my own client." However, as trial counsel's testimony in the motion for new trial hearing indicated, this statement was made as part of a strategy to appear "credible to the jury." Counsel's argument continued by emphasizing that the jury was not required to impose a

death sentence in order to "keep [Tollette] out of society" and encouraging the jurors not to impose a death sentence so that they would not "always think of [themselves] as someone who put another person to death when [they] didn't have to." We find that trial counsel's strategy in forging his overall argument was not unreasonable under the circumstances of the case.

Having reviewed Tollette's arguments and the record, we conclude that the trial court did not err in denying Tollette's claim of ineffective assistance of trial counsel.

14. The evidence in this case shows that Tollette carefully planned his crimes and killed without mercy for monetary gain. We conclude, considering both the crime and the defendant, that the death sentence imposed for the murder in this case was neither excessive nor disproportionate to the penalties imposed in similar cases in Georgia. See OCGA § 17-10-35 (c) (3). The cases cited in the Appendix support this finding in that each also involved an intentional killing in furtherance of an armed robbery or an intentional killing committed for the purpose of receiving money or other things of value. See OCGA § 17-10-35 (e).

15. We find that Tollette's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See OCGA § 17-10-35 (c) (1).

Judgment affirmed. All the Justices concur, except Benham, J., who concurs in judgment only as to Division 10.

APPENDIX

Perkinson v. State, 279 Ga. 232 (610 SE2d 533) (2005); Franks v. State, 278 Ga. 246 (599 SE2d 134) (2004); Braley v. State, 276 Ga. 47 (572 SE2d 583) (2002); Arevalo v. State, 275 Ga. 392 (567 SE2d 303) (2002); Raheem v. State, 275 Ga. 87 (560 SE2d 680) (2002); Lucas v. State, 274 Ga. 640 (555 SE2d 440) (2001); Rhode v. State, 274 Ga. 377 (552 SE2d 855) (2001); Fults v. State, 274 Ga. 82 (548 SE2d 315) (2001); King v. State, 273 Ga. 258 (539 SE2d 783) (2000); Jones v. State, 273 Ga. 231 (539 SE2d154) (2000); Esposito v. State, 273 Ga. 183 (538 SE2d 55) (2000); Gissendaner v. State, 272 Ga. 704 (532 SE2d 677) (2000); Lee v. State, 270 Ga. 798 (514 SE2d 1) (1999); Cromartie v. State, 270 Ga. 780 (514 SE2d 205) (1999); Whatley v. State, 270 Ga. 296 (509 SE2d 45) (1998); Jenkins v. State, 269 Ga. 282 (498 SE2d 502) (1998);

DeYoung v. State, 268 Ga. 780 (493 SE2d 157) (1997); Jones v. State, 267 Ga. 592 (481 SE2d 821) (1997); Carr v. State, 267 Ga. 547 (480 SE2d 583) (1997); Crowe v. State, 265 Ga. 582 (458 SE2d 799) (1995); Mobley v. State, 265 Ga. 292 (455 SE2d 61) (1995); Ledford v. State, 264 Ga. 60 (439 SE2d 917) (1994); Ferrell v. State, 261 Ga. 115 (401 SE2d 741) (1991).

No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

LEON TOLLETTE,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

PROOF OF SERVICE

I declare that on January 8, 2021, pursuant to Supreme Court Rule 29, I served the Petition for a Writ of Certiorari and Appendix on Respondent's counsel by filing a copy of the documents with this Court's electronic filing system and by directing that the documents be placed in an envelope and deposited with the United States Postal Service for delivery to:

Sabrina D. Graham, Esp.
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334

Respectfully submitted,

/s/ Anna M. Arceneaux
Anna M. Arceneaux (Ga. 401554)*