No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,
-v-
BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

Marcia A. Widder (Ga. 643407)
Counsel of Record
Akiva Freidlin (Ga. 692290)
Georgia Resource Center
104 Marietta Street NW, Suite 260
Atlanta, Georgia 30303
marcy.widder @garesource.org
akiva.freidlin@garesource.org
(404) 222-9202

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

Esposito v. Warden

United States Court of Appeals for the Eleventh Circuit

June 23, 2020, Decided

No. 15-11384

Reporter
818 Fed. Appx. 962 *; 2020 U.S. App. LEXIS 19425 **

JOHN ANTHONY ESPOSITO, Petitioner-Appellant, versus WARDEN, Respondent-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of Georgia. D.C. Docket No. 5:12-cv-00163-CAR.

Esposito v. Humphrey, 2014 U.S. Dist. LEXIS 170476 (M.D. Ga., Dec. 10, 2014)

Disposition: AFFIRMED.

Core Terms

murder, tree limb, confession, witnesses, investigate, closing argument, penalty phase, ineffective, mitigation, culpability, interviewed, present evidence, trial counsel, state court, preparation, prejudiced, forensic evidence, contends, forensic, argues, reasonable probability, counsel's performance, videotaped confession, fail to investigate, death sentence, recommended, injuries, sentence, drove, guilt

Case Summary

Overview
HOLDINGS: [1]-A murder defendant's habeas petition was properly denied; his claim that counsel were ineffective for failing to investigate and present forensic evidence casting doubt on whether a tree limb was the murder weapon, based on the state's failure to test the limb for DNA evidence; counsel did investigate and use the lack of DNA testing as part of its strategy; [2]-No prejudice was shown, because footprints, palm prints, fingerprints, and a cigarette butt placed defendant at the murder scene; [3]-Even assuming counsel's mistaken belief about the admissibility of his illegally obtained confession was deficient, no prejudice was shown because the jury heard evidence that his female companion was larger and more aggressive than he and that he was a follower and unlikely to be a murderer; [4]-The mitigation evidence investigation, including interviews of 80 witnesses, was adequate.

Outcome
District court's denial of petition for a writ of habeas corpus affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

HN1[] Standards of Review, Clear Error Review

When reviewing a district court's grant or denial of habeas relief, an appellate court reviews questions of law and mixed questions of law and fact de novo, and findings of fact for clear error. When reviewing state habeas court decisions in federal habeas, the appellate court looks through unreasoned decisions of state appellate courts and presumes that they adopted the reasoning of the last related state court decision, unless the state shows that the appellate court relied, or most likely relied, on different grounds.

Criminal Law & Procedure > Habeas Corpus > Review > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Review > Standards of Review > Contrary & Unreasonable Standard

HN2[] Review, Antiterrorism & Effective Death Penalty Act

When a state court denies habeas relief on the merits, a federal court reviews that decision under the standards set by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Generally, AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was adjudicated on the merits in state court unless the state court's adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C.S. § 2254(d). Clearly established Federal law under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. With respect to § 2254(d)(2), state court fact-findings are entitled to a presumption of correctness unless the petitioner rebuts that presumption by clear and convincing evidence.

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Unreasonable Application

HN3[] Contrary & Unreasonable Standard, Unreasonable Application

Where a federal court has determined that a state court decision is an unreasonable application of federal law under 28 U.S.C.S. § 2254(d), it is unconstrained by 28 U.S.C.S. § 2254's deference and must undertake a de novo review of the record.

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN4[] Specific Claims, Ineffective Assistance of Counsel

Under Strickland v. Washington, a defendant has a Sixth Amendment right to effective assistance of trial counsel in his criminal proceedings. Counsel renders ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls below an objective standard of reasonableness, taking into account prevailing professional norms, and when the deficient performance prejudiced the defense, meaning that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability of a different outcome is a probability sufficient to undermine confidence in the outcome. The petitioner bears the burden of proving his ineffective assistance claim, and he must meet his burden on both Strickland prongs—performance and prejudice—to succeed. A court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa. When analyzing a claim of ineffective assistance under 28 U.S.C.S. § 2254(d), the court's review is doubly deferential on counsel's performance. Thus, under § 2254(d), the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN5[] Effective Assistance of Counsel, Trials

Counsel are permitted to make the strategic decision not to call an expert and instead challenge the state's forensic evidence through other means, and reviewing courts cannot second guess that strategy. Strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable. Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that a reviewing court will seldom, if ever, second guess.

Criminal Law & Procedure > ... > Review > Standards of Review > Deference

HN6[] **Standards of Review, Deference**

Federal courts must defer to the judgment of the jury in a state court case in assigning credibility to the witnesses and in weighing the evidence.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN7[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

The failure to present exculpatory evidence is more likely to be prejudicial when the conviction is based on little evidence of guilt.

Criminal Law & Procedure > Trials > Witnesses > Impeachment

Evidence > Admissibility > Illegally Obtained Evidence

Evidence > ... > Credibility of Witnesses > Impeachment > Prior Inconsistent Statements

HN8[] **Witnesses, Impeachment**

An illegally obtained confession may be introduced only for purposes of impeaching the defendant and not for rebutting defense witness testimony.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

HN9[] **Review, Burdens of Proof**

Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.

Counsel: For JOHN ANTHONY ESPOSITO, Petitioner - Appellant: John Anthony Esposito, Georgia Diagnostic and Classification SP - Inmate Legal Mail, JACKSON, GA; Akiva Freidlin, Marcia A. Widder, Georgia Resource Center, ATLANTA, GA; Brian Kammer, Law Office of Brian Kammer, DECATUR, GA.

For WARDEN, Respondent - Appellee: Clint Christopher Malcolm, Sabrina Graham, Attorney General's Office, ATLANTA, GA.

Judges: Before JILL PRYOR, TJOFLAT and MARCUS, Circuit Judges.

Opinion

[*964] PER CURIAM:

In this capital case, John Esposito appeals the district court's denial of his federal habeas petition. Esposito was sentenced to death in Georgia following his conviction for the murder of Lola Davis. Following an unsuccessful direct appeal and collateral proceedings in Georgia state courts, Esposito filed a federal habeas petition in the United States District Court for the Middle District of Georgia, which the district court denied. Esposito appeals the denial of his petition on three claims of ineffective assistance of counsel. First, he contends that his trial counsel were ineffective in failing to investigate **[**2]** and present evidence that he was less culpable than his codefendant, Alicia Woodward. Second, he contends that his trial counsel were ineffective in failing to investigate and present in the penalty phase of his trial mitigation evidence about his childhood abuse and history of mental illness. Third, he contends that his trial counsel were ineffective in making their closing argument in the penalty phase.

After a thorough review of the briefing and the record, and with the benefit of oral argument, we affirm the denial of Esposito's petition.

I. BACKGROUND

Esposito was convicted in Georgia of malice murder. A jury recommended a death sentence, and the trial court accepted the recommendation. Below we describe the events that led to Esposito's conviction and sentence, as well as evidence, as relevant here, presented at his state habeas proceedings.

A. Factual Background

Esposito and his girlfriend, Alicia Woodward, abducted Davis, an elderly woman, from a grocery store parking lot in North Carolina.[1] Woodward approached Davis in **[*965]** the parking lot and convinced Davis to give her a ride. Woodward directed Davis to drive to a nearby location, where Esposito was waiting. Esposito entered Davis's **[**3]** car and forced her to move to the passenger seat. With Woodward driving, Esposito took $1,000 and a checkbook from Davis's purse. Esposito and Woodward drove her to a local bank, where they forced her to cash a check for $300. They then drove her to a remote location, where Esposito led her into a hayfield, forced her to kneel, and beat her to death with a tree limb. After Davis's murder, Esposito and Woodward drove to Alabama, where they disposed of Davis's car and purse. When they ran out of money, they abducted an elderly couple in Oklahoma, robbed them, and bludgeoned them to death with a tire iron. *Esposito v. State, 273 Ga. 183, 538 S.E.2d 55, 57 (Ga. 2000)*.

Esposito and Woodward were arrested in Colorado. *Id. at 57-58*. Esposito gave two confessions to law enforcement. He made his first confession to FBI agents on the day of his arrest. During the 45-minute interview, Esposito admitted that he forced Davis to get out of the car and kneel on the ground. He confessed to hitting her several times with a tree limb. He also admitted to murdering the Oklahoma couple, recounting that the murder "wasn't too bad" because he "didn't get any brains on [his] face or anything." Doc. 13-13 at 58.[2] He told FBI agents that after he bludgeoned the wife, she had brain **[**4]** matter on her face and one of her eyes was coming out of her head.

A few days later, Esposito gave a more detailed confession in a videotaped interview with a Georgia Bureau of Investigations agent. He again admitted to murdering Davis. He confessed that he hit Davis with a tree limb and kicked her with his shoe.

B. Motion to Suppress

Esposito was indicted in Georgia for Davis's murder. The trial court appointed two criminal defense attorneys, Roy Robinson Kelly III and W. Dan Roberts, to represent him.

Before trial, Esposito's counsel sought to suppress both of his confessions. The trial court concluded that the first confession would be admissible in evidence at trial. The court suppressed the second, videotaped confession, however, after determining that it violated Esposito's *Miranda*[3] rights. In response, the state argued that the videotaped confession nevertheless could be used for impeachment or rebuttal purposes. After ruling that the illegally obtained confession could be introduced only if Esposito testified, the court clarified that the state could use it for impeachment or rebuttal purposes.

C. Trial

1. Guilt/innocence phase

At the guilt/innocence phase of Esposito's trial, the **[**5]** state presented evidence that Esposito and Woodward abducted Davis, stole from her, and drove her to a remote area, where Esposito brutally murdered her. FBI Agent Ron Knight testified that when he interviewed Esposito after the arrest, Esposito told him that the murders were "all [him]. [Woodward] didn't do anything." **[*966]** Doc. 14-15 at 49. Esposito admitted to kidnapping Davis from a grocery store parking lot, and when Knight asked what happened next, Esposito responded "I killed her." *Id.* at 53. Esposito confessed to hitting Davis with a tree limb. During the interview, Esposito told Knight, "I don't have any remorse [about the murder]. I don't have a conscience." *Id.* at 56. The state did not introduce into evidence the videotaped confession.

A crime scene specialist testified that Davis's car contained fingerprints, palm prints, and footprints matching those belonging to Esposito and Woodward. Also, a cigarette butt found in the car contained DNA that was consistent with Esposito's DNA. The state submitted photographs showing that a tree limb was found at the murder site, and hair was found on the limb. A forensic analyst testified that one branch contained

[1] The facts come from the evidence adduced at trial, which was summarized by the Georgia Supreme Court in *Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (Ga. 2000)* (affirming Esposito's conviction and death sentence on direct appeal).

[2] Citations in the form "Doc. #" refer to entries on the district court's docket. Documents from the state habeas proceedings have been electronically filed; this opinion cites to the electronically-generated page numbers located on the top margin of each page.

[3] *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

63 hairs that matched Davis's hair. The tree **[**6]** limb was never tested for DNA evidence.

The jury also heard testimony from the doctor who performed Davis's autopsy. The doctor testified that Davis died of blunt force trauma. He testified that he could not be sure what type of object caused the trauma, but Davis's injuries were consistent with being hit by an item with bark on it, so it was possible that a tree limb was the murder weapon.

The jury heard that Woodward was larger physically than Esposito: Esposito weighed about 160 pounds and Woodward weighed about 180 pounds. The jury learned, too, that Woodward: (1) booked and paid for their hotel rooms during their crime spree, (2) drove Davis's car, and (3) was the first to approach Davis in the grocery store parking lot.

The state rested. The defense rested without calling any witnesses. In closing argument, Esposito's counsel emphasized that the tree limb had never been tested for the presence of DNA.

The jury found Esposito guilty of murdering Davis.

2. Penalty phase

At the penalty phase, the state introduced evidence about the murder of the Oklahoma couple. The jury heard that Esposito had confessed to murdering the couple and beating the wife until her brain matter appeared on the **[**7]** side of her face and her eye popped out of her head.

Esposito called seven witnesses in mitigation. These witnesses testified about Esposito's disposition, background, and mental capacity. Specifically, the jury heard from: the chief jailer for the Jasper County jail, who testified that Esposito was a "model inmate" who "never caused any problems" while he was in jail pending trial; Esposito's high school teacher, who testified that Esposito was a "follower" who had a "totally dysfunctional" and "aggressive" mother; Esposito's aunt, who recounted that Esposito was physically, verbally, and sexually abused as a child; and Esposito's General Education Development (GED) instructor, who testified that Esposito was "very intelligent," "high functioning" in academics, and a "follower" who did not "initiate things by himself." Docs. 14-20 at 72; 14-21 at 80-81; 14-23 at 46, 48. Two witnesses—a psychiatric nurse and therapist at a state psychiatric hospital—testified that they were not convinced that Esposito was the killer.

Esposito's final mitigation witness was Dr. Daniel Grant, a psychologist who had examined Esposito, interviewed him, administered tests to him, and reviewed his medical **[**8]** records. In contrast to the GED instructor's testimony that Esposito was "very intelligent," Grant opined that Esposito had average to slightly below average intelligence and a simplistic, naïve view of **[*967]** the world. Esposito lacked confidence and was not good at making decisions. According to Grant, Esposito was "passive, submissive, dependent[,] and self-conscious." Doc. 14-24 at 24. Grant explained that Esposito had a history of five or six prior suicide attempts and had engaged in self-mutilation. He also testified that Esposito had "extreme reactivity and sensitivity." *Id.* at 25. He noted that Esposito had reported that he was sexually abused as a child and had, at one point, been forced to perform oral sex on his stepfather.

The state successfully used cross-examination to bring out unfavorable evidence about Esposito. The jury heard that: Esposito's mother obtained a restraining order against him, he had been involved in devil worship, he was placed in a psychiatric facility after he assaulted and threatened to kill his family, he was kicked out of a GED program after he threated to "kill . . . everybody," and he tortured animals and wrote letters about killing and raping. Doc. 14-23 at **[**9]** 50.

In closing argument, the state emphasized the aggravating circumstances that warranted the death penalty.[4] Esposito's counsel gave a brief closing argument—filling just over four pages of transcript—in which he stated that "there is no question that [Esposito] has . . . lots of problems," complimented the prosecutor, and noted that the "most popular thing" for the jury to do would be to sentence Esposito to death. Doc. 14-25 at 2-3.

The jury unanimously recommended a sentence of death. The judge adopted the jury's recommendation and imposed a death sentence.

D. Direct Appeal and State Habeas Proceedings

The Georgia Supreme Court affirmed Esposito's conviction and death sentence on direct appeal. *See* Esposito, 538 S.E.2d at 60. Esposito then initiated state habeas proceedings. In his counseled state habeas petition, he argued that his trial counsel were constitutionally ineffective in failing to: (1) develop and present evidence suggesting that Woodward, not Esposito, was the killer; (2) develop and present in the penalty phase evidence about Esposito's abuse as a child and his mental illness; and (3) make an adequate closing argument during the penalty phase.

[4] The aggravating circumstances were that: (1) the murder was committed in the course of an armed robbery, (2) the murder was committed in the course of a kidnapping with bodily injury, and (3) the offense was outrageously or wantonly vile because Davis was disfigured by the beating.

The state habeas court conducted an evidentiary hearing **[**10]** on Esposito's ineffective assistance of counsel claims. At the hearing, Esposito's habeas counsel presented testimony from several witnesses, including Kelly and Roberts, the investigator who worked on Esposito's trial, and Esposito's ex-girlfriend.

Kelly and Roberts testified about their legal experience and detailed their investigation and preparation for Esposito's capital trial. They both had worked on multiple capital cases before Esposito's trial, and they previously had worked together on a death penalty case. In preparing for Esposito's trial, they realized it was likely that he would be found guilty; thus, their goal was to help him avoid the death penalty.

Kelly testified that he and Roberts hired an investigator, Hector Guevara, to do the investigation into possible mitigating evidence for the penalty phase. During his investigation, Guevara regularly met with Kelly and Roberts. All three visited Esposito, whom Guevara questioned about his background, on multiple occasions. Guevara **[*968]** provided Kelly and Roberts with a list of more than 80 people he had interviewed. Among those interviewed were Esposito's family members, friends, teachers, coaches, counselors, psychiatrists, social **[**11]** workers, and army recruiters. Guevara also interviewed people who knew about Woodward's past, including her former employers, friends, and family members. Guevara provided Kelly and Roberts with written reports summarizing his findings.

Trial counsel testified that they were aware that Esposito had mental health issues and obtained his mental health records as part of their trial preparation. They also consulted a DNA expert to assist them in cross-examining the state's forensic expert. Kelly explained that part of their trial strategy was to show that no evidence—other than the confession—connected Esposito to the murder weapon because the state failed to gather DNA evidence from the tree limb.

Dr. Jonathan Arden, a forensic pathologist, testified that he reviewed Davis's autopsy report, photographs of the autopsy, and crime scene photographs. Arden opined that the shape of her injuries indicated that she had been struck with a man-made object, not a tree limb. When asked if it were possible that Davis was murdered with a tree limb, Arden responded that he did not know because "almost anything in the world is possible." Doc. 17-9 at 42.

Courtney Veach, Esposito's ex-girlfriend, testified **[**12]** that she witnessed firsthand the abuse inflicted on Esposito by his mother. She testified that he had bruises on his body from his mother's beatings. She further testified that his mother engaged in inappropriate sexual behavior. For instance, she would have loud sex when Veach and Esposito were in her home, and she tried to get them to have sex there. Veach testified that Esposito told her that when he was younger his mother made him watch her have sex with different men. Veach recounted that she was supposed to testify at Esposito's trial. Guevara was supposed to meet her at the airport; however, they could not find each other there. When she finally arrived at the courthouse, defense counsel told her that they would not call her as a witness because they did not have time to prepare her to testify.

Besides the testimony described above, Esposito presented the habeas court with affidavits from other potential fact witnesses. Esposito's kindergarten and fourth grade teachers swore that they would have testified at trial about the abuse inflicted on him by his mother and stepfather. Both teachers would have testified that, when Esposito was in the fourth grade, he reported to school **[**13]** employees that he was molested by a man while walking to school. Esposito's stepfather, Wayne Deese, swore by affidavit that Esposito would occasionally "shake uncontrollably and beat his head on the floor," and to make him stop his mother would stick his head under the faucet. Doc. 17-21 at 77. Deese's sister, Cynthia Massari, submitted an affidavit attesting that when Esposito was three years old, his mother threw him against the wall and threatened to punch him after he spilled his milk.

Lastly, Esposito submitted affidavits from witnesses who would have testified about Woodward's violent tendencies and her negative influence on him. Those witnesses included Heather Bryan, Woodward's ex-girlfriend, who described Woodward as possessive and violent and recounted a time when Woodward threatened her with a butcher knife; Robert Noble III, Woodward's ex-boyfriend, who said Woodward stalked him and tried to run him over with a car; and Patricia Holliman, Esposito's former landlord, who **[*969]** swore that before he met Woodward, Esposito was quiet, responsible, and attended church regularly, but after he met Woodward, "[e]verything changed," and he stopped going to church and would disappear for **[**14]** days at a time. Doc. 17-22 at 29.

The state habeas court denied Esposito's petition. The Georgia Supreme Court denied Esposito's application for a certificate of probable cause to appeal the state habeas court's order.

E. Federal Habeas Proceedings

After he had exhausted his state appeals, Esposito filed a petition for a writ of habeas corpus in federal district court, raising the same ineffective assistance of counsel claims he raised in state court. The district court denied Esposito's petition but granted him a certificate of appealability ("COA") on two issues: first, whether trial counsel were ineffective in failing to investigate and present evidence to support the defense theory that Esposito was less culpable than Woodward;

and second, whether trial counsel were ineffective in failing to investigate and present in the penalty phase mitigating evidence of his childhood abuse and mental illness. We expanded Esposito's COA to include his claim that his trial counsel were ineffective in presenting penalty phase closing argument.

II. STANDARDS OF REVIEW

HN1[] "When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact **[**15]** *de novo*, and findings of fact for clear error." *Reaves v. Sec'y, Fla. Dep't of Corr., 717 F.3d 886, 899 (11th Cir. 2013)* (internal quotation marks omitted). When we review state habeas court decisions in federal habeas, we "look through" unreasoned decisions of state appellate courts and presume that they adopted the reasoning of the last related state court decision, unless the state shows that the appellate court relied, or most likely relied, on different grounds. *Wilson v. Sellers, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018)*. Here, because the Georgia Supreme Court's denial was a summary one, we review the state habeas court's decision.

HN2[] When a state court denies habeas relief on the merits, we review that decision under the standards set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Williams v. Taylor, 529 U.S. 362, 402-03, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. Generally, AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was adjudicated on the merits in state court unless the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. **[**16]**

28 U.S.C. § 2254(d). "'[C]learly established Federal law' under *§ 2254(d)(1)* is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. With respect to *§ 2254(d)(2)*, "[s]tate court fact-findings are entitled to a presumption of correctness unless the petitioner rebuts that presumption by clear and convincing evidence." *Conner v. GDCP Warden, 784 F.3d 752, 761 (11th Cir. 2015)*.

HN3[] "Where we have determined that a state court decision is an unreasonable application **[*970]** of federal law under [*1 § 2254(d)*, we are unconstrained by *§ 2254*'s deference and must undertake a *de novo* review of the record." *McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1266 (11th Cir. 2009)*.

III. DISCUSSION

HN4[] Under *Strickland v. Washington*, a defendant has a *Sixth Amendment* right to effective assistance of trial counsel in his criminal proceedings. *466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Counsel renders ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when the deficient performance prejudiced the defense, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 688, 694*. A "reasonable probability" of a different outcome is "a probability sufficient **[**17]** to undermine confidence in the outcome." *Id. at 694*. The petitioner bears the burden of proving his ineffective assistance claim, and he must meet his burden on both *Strickland* prongs—performance and prejudice—to succeed. *Williams v. Allen, 598 F.3d 778, 789 (11th Cir. 2010)*. We "need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." *Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)* (internal citation omitted). When analyzing a claim of ineffective assistance under *§ 2254(d)*, this Court's review is "doubly" deferential on counsel's performance. *Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (internal quotation marks omitted). Thus, under *§ 2254(d)*, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

We now turn to Esposito's individual ineffective assistance claims.[5]

[5] We note at the outset that Esposito contends that the state habeas court applied the wrong prejudice standard in rejecting his ineffective assistance claims. He argues that the court required him not only to meet the *Strickland* prejudice standard but also to show that the "result of the proceeding was fundamentally unfair or unreliable." Supp. Appellant's Br. at 14 (quoting *Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)*); *see Williams, 529 U.S. at 391* (holding in Part IV that *Lockhart* did not modify or supplant the *Strickland* standard). We disagree. Despite arguably having suggested initially that Esposito had to clear an additional hurdle to show prejudice, a review of the court's order shows that it never actually applied the heightened prejudice standard. Throughout its order, the court explained that Esposito was required to show a "reasonable

A. Failure to Investigate and Present Evidence of Relative Culpability

Esposito first contends that his trial counsel were ineffective in failing to investigate and present evidence about his culpability in the murder relative to Woodward's. He explains that counsel's defense strategy was to cast doubt on his culpability by highlighting Woodward's potential culpability. Namely, **[**18]** counsel intended to show that Woodward was "the driving force behind the crimes and may well have committed the murders," while Esposito was a follower who was coerced into committing the crimes. Appellant's Br. at 13. He argues that counsel were deficient in pursuing this strategy at trial because they failed to: (1) investigate and present forensic evidence suggesting that the tree **[*971]** limb was not the murder weapon, which would have cast doubt on his confession that he, not Woodward, killed Davis, and (2) properly investigate and present evidence of Woodward's background and character.

The state habeas court rejected these arguments, concluding that Esposito's counsel's performance was not unconstitutionally deficient because they adequately investigated Woodward's role and elicited testimony about her relative culpability at trial. The court further concluded that even if counsel's performance were deficient, there was no reasonable probability that additional evidence regarding Woodward's culpability would have affected the outcome of the trial.

We consider these arguments in turn.

1. Failure to investigate or present forensic evidence to undermine Esposito's confession

Esposito argues **[**19]** that his counsel were ineffective for failing to investigate and present forensic evidence casting doubt on whether the tree limb was the murder weapon. First, we must review counsel's performance under AEDPA deference. *See* 28 U.S.C. § 2254(d)(1). Under § 2254(d)(1), the state habeas court's rejection of Esposito's deficient performance contention was neither contrary to, nor involved an unreasonable application of, *Strickland*. *Id.* Defense counsel retained a DNA expert in preparation for trial, cross-examined the state's forensic expert about the state's failure to test the tree limb for DNA evidence, and emphasized the lack of DNA evidence in closing argument. Esposito argues that they should have hired an expert to opine that Davis's injuries were caused not by a tree limb, but by a man-made object—as Arden did at the evidentiary hearing on Esposito's state habeas petition. But the mere fact that counsel called no such expert does not mean their performance had to have been deficient. Counsel instead focused on attacking the state's forensic evidence or lack of it by retaining an expert to prepare them to challenge the state's evidence, including through cross-examination of its witnesses. They then reinforced their **[**20]** points in closing argument. ***HN5***[] Counsel were permitted to make the strategic decision not to call an expert and instead challenge the state's forensic evidence through other means, and we cannot now second guess that strategy. *See* *Strickland, 466 U.S. at 690* ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."); *Conklin v. Schofield, 366 F.3d 1191, 1204 (11th Cir. 2004)* ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that [this Court] will seldom, if ever, second guess." (internal quotation marks omitted)). In any event, counsel were not required to pursue every forensic theory "until it [bore] fruit." *Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984)* (internal quotation marks omitted)).

But even if counsel's performance was deficient, Esposito's argument still fails because he cannot show he was prejudiced by that deficiency. *See* *Strickland, 466 U.S. at 694*. We see no reasonable probability that additional forensic evidence about the murder weapon would have led to a different result. ***HN6***[] Even if the jury had heard expert testimony that a man-made object could have caused Davis's injuries, it would be obliged to weigh that evidence against contradictory evidence suggesting that Davis was murdered **[**21]** with the tree limb. *See* *Johnson v. Alabama, 256 F.3d 1156, 1172 (11th Cir. 2001)* (explaining that "federal courts must defer to the judgment of the jury in assigning **[*972]** credibility to the witnesses and in weighing the evidence"). This evidence included Knight's testimony that Esposito confessed during a post-arrest interview to having murdered Davis with a tree limb, the state's forensic analyst's testimony that Davis's hairs were found on the tree limb, and the autopsy doctor's testimony that her injuries were consistent with being hit by an item with bark on it. Indeed, Arden could not rule out the possibility that a tree limb caused Davis's injuries. And uncontradicted evidence—including footprints, palm prints, fingerprints, and a cigarette butt—placed Esposito at the murder scene. ***HN7***[] Given this strong evidence of guilt, there is no reasonable probability that additional forensic evidence would have made a difference in the outcome of Esposito's trial. *See* *Fortenberry v. Haley, 297 F.3d 1213, 1228 (11th Cir. 2002)* (the failure to present exculpatory evidence is more likely to be prejudicial when the conviction is based on little evidence of guilt). Accordingly,

probability" that, absent his counsel's deficiencies, the "outcome of [his] trial" would have been different. Doc. 27-39 at 29, 35, 42. Thus, the court applied the correct prejudice standard from *Strickland*.

Esposito cannot establish prejudice from counsel's failure to present the testimony of a forensic expert.

*2. Deficient investigation and **[**22]** presentation of evidence related to Woodward's background and character*

Next, Esposito asserts that his counsel were deficient for failing to discover and present evidence showing that Woodward had a dominating and aggressive personality and was physically larger than Esposito—all of which would have supported their theory that she coerced Esposito to commit the murders. He points to the affidavits he presented in his habeas proceedings indicating that while he was a follower, Woodward was domineering, possessive, and violent.

The state habeas court reasonably applied *Strickland* in concluding that Esposito failed to show that trial counsel conducted a deficient investigation into Woodward's background. *See* *28 U.S.C. § 2254(d)(1)*; *Strickland, 466 U.S. at 688*. The record shows that Kelly and Roberts hired Guevara, who investigated Woodward's past by speaking with her friends, family, and employers. He also interviewed Esposito's friends and family about her. The fact that Guevara could have discovered other witnesses who knew Woodward is not enough to establish that counsel's investigation was deficient. *See* *Solomon, 735 F.2d at 402*.

Esposito also contends that his counsel's presentation of evidence related to Woodward's culpability was deficient. He argues **[**23]** that they made only minimal efforts to present evidence that Woodward was more culpable due to their concern about opening the door for the state to use his videotaped confession as rebuttal evidence. He argues that counsel's efforts to avoid admission of the videotaped confession in rebuttal were unreasonable because the confession was inadmissible for that purpose.

HN8[⬆] Esposito is correct that the videotaped confession would have been inadmissible for rebuttal purposes because the confession was obtained in violation of his *Miranda* rights. *See* *James v. Illinois, 493 U.S 307, 110 S. Ct. 648, 107 L. Ed. 2d 676 (1990)* (recognizing that an illegally obtained confession may be introduced only for purposes of impeaching the defendant and not for rebutting defense witness testimony). But even assuming that counsel's mistaken belief about the admissibility of the confession rendered their representation deficient, Esposito has failed to show that he was prejudiced by that deficiency. *See* *Strickland, 466 U.S. at 694*. He cannot show prejudice because the jury did, in fact, hear evidence that highlighted Woodward's relative culpability **[*973]** in the crime. For instance, the jury heard that Woodward was larger physically than Esposito, approached Davis initially, drove Davis to the murder site, and booked **[**24]** and paid for their hotel rooms during the crime spree. And for what it's worth, the jury heard from witnesses (Esposito's psychiatric nurse and therapist) who were unconvinced that Esposito—and not Woodward—murdered Davis. In short, because the jury heard testimony about Woodward's physical dominance and leadership role in the crime, we cannot say it was reasonably probable that any additional evidence of that nature would have made a difference in the outcome of the trial. *See id.* This is particularly so given the overwhelming evidence of his guilt, including his confession to Knight. *See* *United States v. Andrews, 953 F.2d 1312, 1327 (11th Cir. 1992)* (holding, in a direct appeal, that the defendant was not prejudiced by his trial counsel's failure to call additional witnesses because the evidence of his guilt was overwhelming). Esposito therefore failed to show that he was prejudiced by counsel's presentation of evidence related to Woodward's culpability.

B. Failure to Investigate and Present Mitigating Evidence

Esposito next argues that his counsel were ineffective for failing to properly investigate and present in the penalty phase of his trial mitigation evidence that may have convinced the jury not to recommend a death sentence. He explains **[**25]** that counsel should have discovered and presented testimony from additional witnesses who could have corroborated his claims of physical, verbal, and sexual abuse while he was a child, as well as the psychological damage inflicted by that abuse. He contends that had the jury received an accurate picture of his abuse and mental illness, there was a reasonable probability that at least one juror would have voted to impose a sentence less than death, resulting in a recommended sentence of life imprisonment. *See* *O.C.G.A. § 17-10-31(c)*. In rejecting this claim, the state habeas court concluded that Esposito's trial counsel's investigation and presentation of the evidence were adequate, and their failure to uncover every potential witness did not render their representation deficient.

Esposito has failed to show that the state habeas court's denial of this claim was an unreasonable application of *Strickland*. *See* *28 U.S.C. § 2254(d)(1)*. The record shows that, in preparation for the mitigation portion of the trial, counsel hired an investigator, Guevara, who conducted an extensive investigation into Esposito's background by interviewing over 80 witnesses, including his family members, friends, teachers, psychiatrists, and social workers. **[**26]** Guevara presented his findings from these interviews to counsel in thorough written reports that detailed Esposito's childhood abuse and psychological issues. Given this extensive investigation, it was reasonable for the state habeas court to conclude that counsel were not deficient in investigating potential mitigation

evidence for the penalty phase.

Nor was it unreasonable for the state court to conclude that there was no deficiency in counsel's presentation of the mitigation evidence. Counsel were permitted to make strategic decisions about which witnesses to call. *See* Conklin, 366 F.3d at 1204. The witnesses counsel called in mitigation described the physical and sexual abuse Esposito suffered, as well as his attendant psychological issues. Esposito contends that it was unreasonable for counsel not to call Veach, but we disagree. Although counsel had intended to call Veach and planned to pick her up at the airport, the plan went awry when she could not be found, and as a result she **[*974]** arrived at the courthouse at the end of the penalty phase. By then, counsel had no time to prepare her to testify. At that point, counsel's decision not to call her as a witness was not unreasonable. That counsel may have been **[**27]** able to avoid the mishap with more careful planning and execution does not make their performance deficient under Strickland.

Counsel's decisions to call certain witnesses but not others were made after a thorough investigation into Esposito's childhood abuse and mental illness. Esposito thus has failed to show that the state habeas court's rejection of this claim was an unreasonable application of Strickland.

C. Inadequate Closing Argument in Penalty Phase

Lastly, Esposito argues that he was denied effective assistance of counsel during the penalty phase because his counsel's brief closing argument was inadequate. He explains that the closing argument failed to reference the mitigating circumstances in evidence and "gave jurors no cogent basis on which to impose a sentence less than death." Appellant's Br. at 70. The state habeas court summarily rejected this claim.

HN9[↑] Esposito has failed to show that there was no reasonable basis for the state habeas court to reject this claim. *See* Harrington, 562 U.S. at 98 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."). Even if counsel's **[**28]** closing argument was deficient, Esposito has not shown that he was prejudiced by that deficiency. *See id.* Esposito asserts that he was prejudiced by the inadequate closing argument because it "was the culmination of counsel's many failures up to that point and independently harmful." Appellant's Br. at 73. This cumulative prejudice argument fails for the same reason as his other claim of ineffective assistance in the penalty phase—that is, counsel's performance in investigating and presenting evidence in mitigation was not deficient under Strickland. Esposito advances no argument explaining how he was prejudiced by his counsel's closing argument alone. Accordingly, he is entitled to no relief on this claim.

IV. CONCLUSION

For the above reasons, the district court's denial of Esposito's petition for a writ of habeas corpus is affirmed.

AFFIRMED.

End of Document

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11384-P

JOHN ANTHONY ESPOSITO,

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: JILL PRYOR, TJOFLAT 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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 15, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-11384-P
Case Style: John Esposito v. Warden
District Court Docket No: 5:12-cv-00163-CAR

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

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

Sincerely,

DAVID J. SMITH, Clerk of Court

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

REHG-1 Ltr Order Petition Rehearing

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

JOHN ANTHONY ESPOSITO,	:	
	:	
Petitioner,	:	
	:	
vs.	:	
	:	CIVIL ACTION NO. 5:12-CV-163 (CAR)
CARL HUMPHREY, Warden,	:	
	:	
Respondent.	:	
	:	

ORDER

JOHN ANTHONY ESPOSITO petitions the Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, Esposito's petition is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Facts

The evidence at trial, which included 21 year-old Esposito's confession to federal authorities, showed that he and his codefendant, 19 year-old Alicia Woodward, both residents of New Jersey, arrived in Lumberton, North Carolina around September 15, 1996. (Docs. 13-12 at 14; 14-6 at 83).[1] After running out of money, they decided to rob and murder someone. (Doc. 14-15 at 50). Esposito explained that he thought about robbing a younger woman, but ultimately decided an elderly person would be better

[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

because "'old people can't defend themselves. They don't have the motor skills to fight or run.'" (Doc. 14-15 at 58, 62). On Thursday, September 19, 1996, he and Woodward sat in the parking lot of a Winn-Dixie grocery store and waited for a potential victim. (Docs. 14-7 at 57-59; 14-15 at 50).

Lumberton resident Lola Davis, a 90 year-old retired high school librarian, took care of her 87 year-old husband, who suffered from Parkinson's disease and required constant assistance. (Docs. 14-6 at 66-70; 14-7 at 28-31). Mrs. Davis left him in the care of a health care attendant only once per week—for two to three hours each Thursday so she could have her hair done and buy groceries. (Docs. 14-6 at 70; 14-7 at 31, 37).

On Thursday, September 19, 1996, Mrs. Davis drove her 1978 Buick to Peggy's Beauty Salon, where she had been a regular client for seventeen years. (Docs. 14-6 at 73, 77; 14-7 at 15-18, 34). She had her hair styled and then drove to Winn-Dixie to buy groceries. (Doc. at 14-7 at 18). When Mrs. Davis exited the grocery store, Woodward approached her. (Docs. 14-7 at 89-91; 14-8 at 4). Woodward told Mrs. Davis that she was scared of, and needed to get away from, her boyfriend and asked for a ride out of the parking lot. (Doc. 14-15 at 51). Mrs. Davis agreed to help and drove Woodward to the rear of the grocery store, where Esposito jumped into the backseat of her car. (Doc. 14-15 at 51-52).

Esposito threatened to kill Mrs. Davis if she did not cooperate. (Doc. 14-15 at 51-52). He and Woodward had Mrs. Davis move to the passenger seat and Woodward

started driving. (Doc. 14-15 at 52). They told Mrs. Davis to write a check for $300.00 made payable to cash and she complied. (Doc. 14-15 at 52). On the way to the bank to cash the check, Esposito went through Mrs. Davis' purse and found approximately $1,000.00. (Doc. 14-15 at 52). They went through the drive-through window at the bank and cashed the $300.00 check. (Doc. 14-8 at 40, 44). The bank teller later identified both Woodward and Esposito. (Doc. 14-8 at 43, 46).

With Mrs. Davis in the passenger seat, they travelled approximately 300 miles from Lumberton, North Carolina to Madison, Georgia.[2] (Doc. 14-8 at 17-18). This trip took approximately five hours. (Doc. 14-8 at 18). They exited the interstate in Morgan County, Georgia and drove down a dirt road. (Docs. 14-8 at 86; 14-9 at 28). Esposito had Mrs. Davis exit the vehicle, kneel on the ground, and he proceeded beat her to death with a tree limb, and other "'stuff on the ground.'" (Doc. 14-15 at 55). In his confession, Esposito said he didn't "'have any remorse'" for murdering Mrs. Davis; he didn't "'have a conscience.'" (Doc. 14-15 at 56)

When Mrs. Davis failed to return home on the afternoon of September 19, Mr. Davis became concerned and phoned the Sheriff's department. (Docs. 14-7 at 33; 14-8 at 7-10). A missing persons report was filed that day. (Docs. 14-7 at 33; 14-8 at 7-10). The next day, Mr. Davis learned that his wife had been killed and her body had been

[2] Esposito and Woodward had traveled from New Jersey to North Carolina in Woodward's Pontiac Grand Am, but they abandoned that vehicle in the Winn-Dixie parking lot. They travelled to Georgia in Mrs. Davis' Buick. (Docs. 14-8 at 14; 14-15 at 53).

found in Georgia. (Docs. 14-7 at 34; 14-8 at 16).

A cattle ranch overseer discovered Mrs. Davis' body on September 20, 1996 under a large oak tree in a hayfield. (Docs. 14-8 at 62, 70-73; 14-9 at 34). Her head was "wedged and driven down into the tree root" and there was a large tree limb left on her body. (Doc. 14-9 at 16, 56-57). The forensic pathologist who performed the autopsy testified that Mrs. Davis died from blunt force trauma to her head. (Doc. 14-12 at 73). He explained that she had significant blunt force injuries, including contusions, lacerations, and abrasions about her face, neck, and ears; cartilage was protruding from her left ear; there was extensive hemorrhaging and bruising in her scalp; she had significant brain injury as a result of the outside head trauma; and there were defensive wounds on her right hand and left wrist. (Doc. 14-12 at 61-62, 68, 78).

After murdering Mrs. Davis, Esposito and Woodward headed to Alabama, where they abandoned her car and purse. (Docs. 14-9 at 87; 14-15 at 56-57); *Esposito v. State*, 273 Ga. 183, 183, 538 S.E.2d 55, 57 (2000). "Davis' automobile was shown at trial to contain fingerprints, palm prints, and footprints matching Esposito's and Woodard's. Saliva on a cigarette butt found in the automobile was shown to contain DNA consistent with Esposito's DNA." *Esposito*, 273 Ga. at 183, 538 S.E.2d at 57.

Evidence presented at the sentencing phase showed that, after killing Mrs. Davis, Esposito bludgeoned to death two more elderly people. In Alabama, Esposito and Woodward boarded a Greyhound bus and headed west to Oklahoma City. (Doc. 14-17

at 49). When they ran out of money in Oklahoma City, they decided to find another elderly victim to rob and murder. (Doc. 14-17 at 51). To that end, they waited in the parking lot of a grocery store until they spotted Larry and Marguerite Snider[3] leaving the store. (Doc. 14-17 at 52; 14-18 at 8-9).

Esposito approached the couple, told them his car had broken down, and asked for a ride to a hotel. After Mr. Snider agreed and started driving, Esposito had him pull over, grabbed him around the neck, and told him that he would kill Mrs. Snider if he failed to do as he was told. (Doc. 14-17 at 53). When Mr. Snider resisted, Esposito hit him in the face. (Doc. 14-17 at 53). With Woodward driving, they stopped at an automatic teller machine, where Esposito made Mr. Snider withdraw money from his account. (Doc. 14-17 at 53-54). They continued down the interstate until Esposito directed Woodward to exit and drive into a "large field with a dirt road that ran down the middle."[4] (Doc. 14-17 at 54-55).

After retrieving a tire iron from the trunk of the car, Esposito had Mr. Snider exit the car and he proceeded to hit him in the head with the tire iron until Mr. Snider fell to the ground. (Doc. 14-17 at 56). In his confession, Esposito explained that killing Mr. Snider "'wasn't too bad. I did not get any brains on my face or anything.'" (Doc. 14-17 at 56). Esposito then drug Mr. Snider to a grassy area next to the car and left him there.

[3] Mr. Snider was ninety at the time and his wife was eighty-six. (Doc. 14-18 at 8-9).
[4] By this time, they had been driving five or six hours and were in Oldham County, Texas. (Doc. 14-19 at 82-83).

(Doc. 14-17 at 57).

Esposito returned to the car, pulled Mrs. Snider out of the backseat, and hit her in the head with the tire iron. (Doc. 14-17 at 57). When she fell to the ground, he hit her again in the chin and in the right side of her face. (Doc. 14-17 at 57). In his confession, Esposito explained that hit her four times until he saw her "skull, 'pop up.'" (Doc. 14-17 at 57). He drug Mrs. Snider and placed her next to Mr. Snider. He confessed that when he placed Mrs. Snider next to her husband, Mr. Snider was not breathing and Mrs. Sniders' "eyes were open and one eye was looking at him and one eye was 'coming out of her head.'" (Doc. 14-17 at 58). He confessed that "he would never forget that sight … she was breathing 'real hard'"…not blinking" and "'[y]ou could have thrown dirt in her eyes and she wouldn't have blinked.'" (Doc. 14-17 at 58). He "recalled seeing brain matter on the side of [Mrs. Snider's] face." (Doc. 14-17 at 58).

Esposito told authorities that Woodward had thrown the tire iron into the field, but she "'didn't do anything'"; he was the one who killed the Sniders. (Doc. 14-17 at 59-60). As with Mrs. Davis' murder, Esposito said he had no remorse for killing Mr. and Mrs. Snider. He explained, "'I don't have a conscience. I really don't care.'" (Doc. 14-17 at 60).

After killing the Sniders, Esposito and Woodward took the Snider's car and drove to Colorado, where they were finally arrested on October 2, 1996 in Mesa Verde National Park. (Docs. 14-14 at 35-42; 14-17 at 61). Esposito explained that had they not been

arrested, their plan was to "go to the Wal-mart, which is located in Cortez, rob and murder another elderly woman and use the money to fly to San Diego." (Doc. 14-17 at 62).

B. Procedural history

On September 30, 1998, a jury found Esposito guilty of malice murder, felony murder, armed robbery, and hijacking a motor vehicle. *Esposito,* 273 Ga. at 183 n.1, 538 S.E.2d at 57 n.1. He was sentenced to death for the crime of malice murder, and the Georgia Supreme Court affirmed his conviction and sentence on October 30, 2000. *Id.* at 183, 538 S.E.2d at 57.

After the Georgia Supreme Court denied his motion for reconsideration and the United States Supreme Court denied his petition for writ of certiorari, Esposito filed a petition for writ of habeas corpus in the Superior Court of Butts County on May 3, 2002. (Docs. 15-19 to 15-21; 15-23; 15-25). He amended the petition on November 6, 2006 and, after a three-day evidentiary hearing on September 4, 5, and 6, 2007, the court denied relief in an order dated April 5, 2011. (Docs. 17-2; 17-8 to 27-23; 27-39). The Georgia Supreme Court denied Esposito's application for a certificate of probable cause to appeal ("CPC application") on March 19, 2012. (Docs. 27-41 to 27-42; 27-44).

On May 8, 2012, Esposito filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court. (Doc. 1). The Respondent filed his answer and the Court denied Esposito's motion for discovery, motion for an evidentiary hearing, and renewed

motion for an evidentiary hearing. (Docs. 10, 37, 42, 65). Both parties have now briefed the issues of exhaustion, procedural default, and the merits of any remaining claims. (Docs. 54 to 58).

II. STANDARD OF REVIEW

A. Exhaustion and procedural default

Procedural default bars federal habeas relief 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. *Frazier v. Bouchard*, 661 F.3d 519, 524 n.7 (11th Cir. 2011); *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 can overcome the default by 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)). 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) (quoting *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003)). A petitioner demonstrates prejudice by showing that there is a reasonable probability that the result of the proceedings would have been different. *Id*. Regarding what is necessary for a

petitioner to establish a fundamental miscarriage of justice, 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 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 and quotation marks omitted).

B. Review of claims that were adjudicated on the merits in the state courts

Under AEDPA,[5] this Court may not grant habeas relief with respect to any claim that was adjudicated on the merits in state court 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*, 131 S. Ct. 770 (2011). The phrase "clearly established Federal law" refers to 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,

[5] The Antiterrorism and Effective Death Penalty Act of 1996.

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 and quotation marks omitted).

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 determination of a factual issue 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 Esposito's claims.

III. ESPOSITO'S CLAIMS

A. Claim One: Petitioner was deprived of his right to the effective assistance of counsel at trial and on appeal, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

1. The clearly established federal law and deference

Strickland[6] 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. Esposito "must meet both the deficient performance and prejudice prongs of *Strickland*" to obtain relief. *Wong v. Belmontes*, 558 U.S. 15, 16 (2009). To establish deficient performance, he must

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

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*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689). "To overcome that presumption, [Esposito] 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, Esposito 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 [Esposito's counsel] had pursued the different path–not just the mitigation evidence [his counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Wong*, 558 U.S. at 20; *see also Porter v. McCollum*, 558 U.S. 30, 40-41 (2009).

Federal courts must "take a 'highly deferential' look at counsel's performance through the 'deferential lens of § 2254(d).'" *Pinholster*, 131 S. Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689; *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009)). Thus, Esposito 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)). That is, "[t]he question is not whether counsel's actions were reasonable [but] whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Richter*, 131 S. Ct. at 788.

Esposito argues that "two particular errors of law … fundamentally mar the habeas court's legal analysis" and, therefore, this Court should conduct a *de novo* review of several of [his] ineffectiveness claims." (Doc. 56 at 34). First, Esposito maintains this Court is unconstrained by § 2254's deference in relation to *Strickland's* prejudice prong because the state habeas court's reliance on *Lockhart*[7] constituted an unreasonable application of clearly established federal law. (Doc. 56 at 34-36). Second, he claims the state habeas court's rejection of several ineffective assistance claims was unreasonable because the "court erred as a matter of law in relying on counsel's fear of 'opening the door' to the state's presentation of an illegal custodial statement." (Doc. 56 at 36) (emphasis omitted).

The short answer to both of these arguments is that the state habeas court's analysis and reasoning are irrelevant. After the state habeas court denied relief, Esposito filed, and the Georgia Supreme Court summarily denied, his CPC application. (Docs. 27-41 to 27-42, 27-44). The Eleventh Circuit recently explained that the relevant

[7] *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

state court decision for AEDPA purposes is the Georgia Supreme Court's summary denial of a petitioner's CPC application, not the superior court's denial of his state habeas petition. *Hittson v. GDCP Warden*, 759 F.3d 1210, 1231-32 (11th Circ. 2014). This Court is not to "review the reasoning given in the Butts County Superior Court decision; rather, [it] review[s] the decision of the Georgia Supreme Court, in accordance with *Richter's* instructions." *Id*. at 1232 n.25. Because the Georgia Supreme Court did not explain its decision, "[o]ur task … is to review the record before the Georgia Supreme Court to 'determine what arguments or theories supported or, … could have supported, the state court's decisions.'" *Id*. at 1232 (quoting *Richter*, 131 S. Ct. at 786). Under this standard, Esposito "may only obtain federal habeas relief 'by showing there was no reasonable basis for the [Georgia Supreme] [C]ourt to deny relief.'" *Id*. at 1233 (quoting *Richter*, 131 S. Ct. at 784).

However, assuming for the sake of argument that the Butts County Superior Court's analysis is relevant, AEDPA deference still applies. First, the Court finds that the superior court did not unreasonably apply *Lockhart*. The complete "prejudice prong" analysis in the "legal standard" section of the superior court's order reads as follows:

> In Strickland, the Supreme Court held that there is prejudice stemming from ineffective assistance of counsel if there is a reasonable probability that, absent the deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The Supreme Court in Lockhart further defined the "prejudice" component of Strickland, holding that "an analysis focusing solely on mere outcome determination, without attention

to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law the does not entitle him. Lockhart, 506 [U.S.] at 369-70.

In Smith v. Francis, 253 Ga. at 783, the Supreme Court of Georgia interpreted the prejudice prong to require that a petitioner prove that the outcome of the proceedings would have been different. "In order to establish that trial counsel's performance was so defective as to require a new trial, [the Petitioner] must show that counsel's performance was deficient and that the deficient performance so prejudiced [the Petitioner] that there is a reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different." Roberts v. State, 263 Ga. 807, 807-808 (1994). "Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Smith v. Francis, 253 [Ga.] at 783-784.

In the instant case, this Court has applied the guiding principles set forth in Strickland and its progeny, as adopted by the Georgia Supreme Court, i.e., according a strong presumption of effectiveness to counsel's conduct; viewing counsel's representation objectively from the perspective of counsel at the time of trial; refusing to engage in hindsight analysis; presuming the reasonableness of judgment calls and trial strategy; acknowledging that even the most qualified counsel would likely represent a capital litigant differently; and recognizing that even the most experienced and effective attorney might be unable to prevent the imposition of the death penalty in a particular case. This Court finds that Petitioner failed to establish that counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. This Court also finds that Petitioner failed to establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694. Accordingly, this Court hereby denies habeas corpus relief as to the entirety of Petitioner's claims of ineffective assistance of counsel.

(Doc. 27-39 at 18-19).

While the state habeas court cited *Lockhart*, as other courts have done,[8] it clearly stated that its prejudice analysis was governed by "Strickland and its progeny." (Doc. 27-39 at 19). Also, the court found Esposito had not established prejudice because he failed to "establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different." (Doc. 27-39 at 19). This the correct prejudice standard under *Strickland*.

Furthermore, when the state habeas court analyzed each of Esposito's individual ineffective assistance claims, it applied only the *Strickland* prejudice analysis. Discussing trial counsel's investigation and presentation of life history mitigation, the state habeas court found: "Because Petitioner ... failed to prove that there is a reasonable probability that he suffered actual prejudice … Petitioner has failed to meet his burden under *Strickland*" (Doc. 27-39 at 21), and "even if the Court were to conclude that [counsel's] presentation … was deficient, Petitioner has failed to establish that he suffered any actual prejudice such that there is a reasonable probability that the outcome of the trial would have been different" (Doc. 27-39 at 29). Analyzing trial counsel's

[8] In *Rhode v. Hall*, 582 F.3d 1273 (11th Cir. 2009), the Eleventh Circuit, citing *Lockhart*, stated that "[t]he prejudice prong does not focus only on outcome; rather, to establish prejudice, the petitioner must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable." *Id*. at 1280 (citing *Lockhart*, 506 U.S. at 369)). In *Israel v. Sec'y, Fla. Dep't of Corr.*, 517 F. App'x 694, 698 (11th Cir. 2013), the Court cited *Lockhart* for the proposition that "there is no indication that Israel's sentencing was fundamentally unfair, or that its end result is unreliable." District courts have cited *Lockhart* for the general proposition that a habeas petitioner must demonstrate that "deficient performance prejudiced the defense." *See White v. Sec'y, Dep't of Corr.*, 2014 U. S. Dist. LEXIS 31296 at *10 n.5 (M. D. Fla., March 11, 2014); *West v. Sec'y, Dep't of Corr.*, 2014 U.S. Dist. LEXIS 16424 at *5 n.1 (M. D. Fla., Feb. 10, 2014).

investigation and presentation of mental health mitigation evidence, the state habeas court found: "[T]his Court further finds that Petitioner also failed to prove that the alleged deficient performance so prejudiced him that there is a 'reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different'" (Doc. 27-39 at 35), and "[w]ith regard to the evidence of Petitioner's mental health that was presented at the habeas hearing but not presented at trial, this Court is not persuaded that there is a reasonable probability that this additional evidence would have changed the outcome of the trial" (Doc. 27-39 at 35). Addressing trial counsel's failure to hire a forensic pathologist, the state habeas court explained: "Even if the Court were to find that such conduct constituted deficient performance, which the Court does not, this Court finds that Petitioner failed to establish a reasonable probability that such testimony would have affected the outcome of Petitioner's trial…." (Doc. 27-39 at 42). Thus, there are no indications that the state habeas court's prejudice analyses involved anything other than what is required by *Strickland*.[9] The court did not impose any additional requirements or make any separate inquiries into whether the outcome was "fundamentally unfair" under *Lockhart*. *Lockhart*, 506 U.S. at 843.

[9] The state habeas court did not conduct a prejudice analysis relating to trial counsel's investigation and rebuttal of the State's case, trial counsel's failure to present the polygraph expert, trial counsel's investigation and presentation of evidence to support their theories of relative culpability and reasonable doubt, or appellate counsel's performance. For these claims the state habeas court found a prejudice analysis was unnecessary because Petitioner did not prove deficient performance. (Doc. 27-39 at 35-44).

Esposito argues that the state habeas court's prejudice analysis was the same as that conducted by the Virginia Supreme Court in *Williams,* which the Supreme Court found was "'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Williams*, 529 U.S. at 367, 373 (quoting 28 U.S.C. § 2254(d)(1)) The Supreme Court faulted the state court for imposing additional requirements upon the habeas petitioner: "The Virginia Supreme Court read our decision in *Lockhart* to require a separate inquiry into fundamental fairness even when [the Petitioner] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding."[10] *Williams*, 529 U.S. at 393. In Esposito's case, the state habeas court referenced *Lockhart* in its general discussion, but it conducted a straightforward *Strickland* analysis when it addressed each of Esposito's ineffective assistance allegations. Unlike the Virginia Supreme Court, it did not find trial counsel's "ineffectiveness probably affected the outcome of the proceeding," and then conduct a separate inquiry into fundamental fairness. Instead, it found that trial counsel's performance was not deficient and, even if it were, there was not a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. (Doc. 27-39 at 21, 29, 35, 42). This is the correct *Strickland* prejudice analysis.

[10] The Virginia Supreme Court "assumed without deciding," that trial counsel's performance had been defective. *Williams*, 529 U.S. at 371. In contrast, the state habeas court in Esposito's case found that trial counsel's performance had **not** been defective.

Esposito's second argument for *de novo* review of certain ineffectiveness claims is that the state habeas court erred as a matter of law in relying on counsel's fear of "opening the door" to the State's presentation of the illegal custodial statement. (Doc. 56 at 36). Again, assuming for the sake of argument that the Butt's County Superior Court's reasoning is relevant, Esposito's argument fails.

The record shows that following his arrest, Esposito confessed on two separate occasions to murdering Mrs. Davis and the Sniders. First, on October 2, 1996, the day of his arrest, he confessed to Federal Bureau of Investigation ("FBI") Special Agent Ron Knight. (Doc. 14-15 at 43-44). On October 8, 1996, he confessed to Georgia Bureau of Investigation ("GBI") Agent James Wooten in a videotaped interview.[11] (Doc. 13-12 at 4-10; Resp't Ex. 169-170). Trial counsel sought to suppress both confessions. (Doc. 13-11 at 3-4). The trial court conducted a hearing on December 10, 1997 and ruled that Esposito's confession to Knight was admissible but reserved ruling on the videotaped confession to Wooten. (Doc. 13-13 at 44-44).

In a September 11, 1998 pretrial hearing, the trial court indicated that the videotaped confession to Wooten should be suppressed and trial counsel presented a proposed order to the court. The last sentence of the order read: "[S]aid video statement and interrogation is hereby suppressed and the State is directed not to use

[11] Texas Ranger Alvin Schmidt and David Medlin with the Oldham County Sheriff's Department were also present during this interview and Schmidt questioned Esposito as well. (Doc. 13-7 at 26; Resp't Ex. 170). Two DVDs containing this videotaped confession were manually filed with the Court and are in the record as Respondent's Exhibits 169 and 170.

such evidence in the prosecution against this Defendant." (Doc. 13-5 at 77). While the prosecutor agreed that he should not "bring it up in [the] case in chief," he argued that under *Harris v. New York*, 401 U.S. 222 (1971), he should be allowed to use the videotaped confession for impeachment or rebuttal. (Doc. 13-21 at 72). His argument was that Esposito, through his polygraph expert, sought to show that he "is not the one who delivered the fatal blow" and the videotaped confession could be used as "rebuttal or impeachment evidence of the result of that polygraph."[12] (Doc. 13-21 at 73, 75). The trial judge stated he was "not ruling on that" and explained, "I'm going to state it this way on the record. I'm going to go ahead and sign his Order and state on the record that my Order does not apply to possible use for impeachment or rebuttal and if that comes up, a hearing will be held." (Doc. 13-21 at 73, 75). Trial counsel stated they understood, but did not agree with, the court's ruling. (Doc. 13-21 at 75- 76). On the order granting Esposito's motion to suppress the videotaped confession, the trial judge wrote "this [o]rder does not apply to possible use for impeachment or rebuttal." (Doc.

[12] Although Esposito provided to law enforcement the details of how he bludgeoned to death the three elderly victims, he later changed his story and told counsel that Woodward was the actual killer. (Doc. 17-11 at 38-39). Trial counsel received funds for, and hired, Kenneth Blackstone, an expert in the area of administration and interpretation of polygraph examinations. (Doc. 17-9 at 85, 88). Blackstone conducted a polygraph examination of Esposito. (Doc. 17-10 at 10-12). The relevant questions he asked were: (1) "Did you strike Lola?"; (2) "Did you strike Lola with a tree limb immediately before her death?"; and (3) "Did you kick Lola in the head immediately prior to her death?" (Doc. 17-10 at 11-12). Esposito responded negatively to all three questions and Blackstone found his answers were "non-deceptive." (Doc. 17-10 at 17).

13-5 at 77). Thus, the trial court left open the possibility that the videotaped confession might be shown to the jury.

During the state habeas evidentiary hearing, trial counsel explained they thought the "video confession was terrible for" Esposito and its presentation to the jury "would have [had] a devastating effect." (Doc. 17-10 at 46). Therefore, throughout the sentencing phase of the trial they were careful not to open the door to the possibility of having the videotape played for the jury. Counsel explained:

> [B]etween [the District Attorney] and the judge, you know,… if anybody got up and was going to profess John's innocence, it at least had us concerned that that might be enough to do that. And so I was cautious to try to tell [our] witnesses let's don't get into an area that could possibly open up a door and let some things in that would be devastating…. [W]e didn't want that confession to come in.

(Doc. 17-10 at 78).

The state habeas court accepted this justification as legitimate and reasonable, excusing some of trial counsel's challenged actions on the ground that counsel made the tactical decision to refrain from presenting certain evidence for fear of opening the door to the videotaped confession. (Doc. 162 at 28-29, 42) Esposito argues:

> Because the trial court erred as a matter of law in ruling that a videotaped confession that it had excluded … could nonetheless be admitted to rebut any evidence presented by the defense that contradicted the suppressed statement, defense counsel's so called "strategic" decisions to avoid presenting evidence suggesting that Mr. Esposito was not the killer or otherwise challenging the degree of his culpability were inherently unreasonable. In turn, the state habeas court's reliance on this justification was an unreasonable application of clearly established federal law, and to the extent the court relied on this justification to find counsel

> performed adequately, the habeas court's rulings are not entitled to any deference.

(Doc. 56 at 36-37).

The Court disagrees because the record reveals that the state habeas court's reliance on trial counsel's justification was reasonable. Contrary to Esposito's argument, the trial court did not "rul[e] that a videotaped confession that it had excluded … could nonetheless be admitted to rebut any evidence presented by the defense that contradicted the suppressed statement." (Doc. 56 at 36). Instead, it clearly left the issue open, explaining that, if necessary, it would hold a hearing to address the admissibility of the videotape in the future. (Doc. 13-21 at 73, 76). Given that the trial court had not definitively ruled on the scope of the confession's possible admission, it was reasonable for trial counsel to believe that the court might allow the statement to be admitted, even if, as Esposito argues, the statement's admission would be contrary to Supreme Court precedent.

According to Esposito, trial counsel's actions were not strategic; they simply were unaware of the applicable law contained in *James v. Illinois*, 493 U.S. 307 (1990). In *James*, the Supreme Court held that the impeachment exception to the exclusionary rule does not permit the prosecution to introduce illegally obtained evidence to impeach the testimony of defense witnesses. *Id*. at 309. Unfortunately, the record does not show if trial counsel were aware of *James* or not. At the state habeas evidentiary hearing, they were not questioned regarding their knowledge of *James*. Therefore, the Court agrees

with Respondent that Esposito's basis for alleging that trial counsel misunderstood the law is speculative. "'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption of counsel's competency. Therefore, where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Williams v. Allen*, 598 F.3d 778, 794 (11th Cir. 2010) (quoting *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000)). Trial counsel may well have been concerned that the trial court would admit the video confession despite contrary authority.[13] Thus, their attempts to prevent such were reasonable, as was the state habeas court's reliance on this justification.

Having determined that the state courts' ineffective assistance adjudications must be afforded deference, the Court now considers the actions of counsel, the state courts' determinations, and Esposito's various arguments.

2. Trial counsel's investigation and presentation of evidence during the mitigation phase of Esposito's trial

On October 10, 1996, the trial court appointed two experienced criminal defense attorneys, Roy R. Kelly, III and Wiley Dan Roberts, to represent Esposito. (Doc. 13-1 at

[13] While it is unknown whether this trial court would have allowed the videotaped confession to impeach certain defense witnesses or rebut testimony that Esposito was not the one who bludgeoned the three victims, other trial courts have allowed the introduction of illegally obtained statements to rebut or impeach defense experts whose opinions are based, "to any appreciable extent," on the defendants' statements to the experts. *Wilkes v. United States*, 631 A.2d 880, 890-91 (D.C. 1993); *State v. DeGraw*, 196 W. Va. 261, 270, 470 S.E.2d 215, 224 (1996).

15). Kelly, who had been practicing law since 1974, concentrated on criminal defense, divorce, and real estate work. (Doc. 17-10 at 30). He had handled five death penalty cases prior to his appointment in Esposito's case. (Doc. 17-10 at 30). Two of his previous death penalty cases went to the jury and three ended in plea agreements. (Doc. 17-10 at 30). Roberts graduated from law school in the 1960s and, after working in the Navy and the Post Office, opened his private practice in 1969. (Doc. 17-11 at 5). He handled criminal cases, real estate, probate work, and some personal injury cases. (Doc. 17-11 at 6). Roberts had handled three previous death penalty cases. (Doc. 17-11 at 6-7). They all ended in pleas, but he had tried some noncapital murders. (Doc. 17-11 at 7, 40). Kelly and Roberts had worked together on one previous death penalty case. (Doc. 17-10-at 32).

Though they worked together to prepare for both phases of trial, trial counsel were aware there was a good chance Esposito would be found guilty and, therefore, they realized their realistic goal was to save him from the death sentence. (Doc. 17-10 at 34-35, 43, 65). While Kelly and Roberts originally hoped to do some of the mitigation investigation work themselves, they ultimately decided to hire an investigator. (Docs. 13-16 at 3-4). The Georgia Indigent Defense Counsel recommended Hector Guevara. (Doc. 17-10 at 47). In a March 1998 pretrial hearing, counsel explained to the trial court that they needed to hire Guevara to locate and interview witnesses "specifically for sentencing phase mitigation type testimony." (Doc. 13-16 at 5). Counsel requested

$20,000, explaining that Guevara would need to interview numerous people who resided in various states. (Doc. 13-16 at 5). The trial court expressed concern, explaining that "it seems extremely high," but eventually agreed to the amount because "witnesses [were] scattered over such a wide area of the country." (Docs. 13-16 at 7-8; 13-18 at 4-7).

Trial counsel and Guevara regularly visited Esposito, whom counsel described as cooperative. (Doc. 17-10 at 33-34; 17-11 at 8-9). Guevara questioned Esposito extensively about his background on numerous occasions. (Docs. 20-2 at 45-80, 20-3 at 1-42). Esposito provided Guevara with names of numerous potential mitigation witnesses. (Doc. 19-27 at 3-5). Guevara interviewed the suggested witnesses that he could locate, along with many additional people from Esposito's past. (Docs. 19-22 at 5-17; 20-1 at 1-16, 25-28; 20-2 at 2-11; 21-42). Guevara provided counsel with an alphabetized list of more than 80 people he interviewed. (Doc. 20-1 at 25-28). These individuals included family members, friends, teachers, high school coaches, school administrators, school counselors, psychiatrists, psychologists, social workers, mental health counselors, and army recruiters. (Doc. 20-1 at 25-28).

Guevara met with counsel regularly and provided them with hundreds of pages of written reports detailing his interviews with Esposito and potential mitigation witnesses. (Docs. 17-10 at 52; 19-26 at 63-70; 19-27 at 23-46; 20-1 at 2-86; 20-2 at 1-80; 20-3 at 1-78; 20-4 at 1-79; 20-5 at 1-5; 20-6 at 2-69, 74-82; 20-7 at 1-69). These included "A

Social History," containing detailed information about Esposito's family, childhood, sexual abuse, problems in school, mental problems, treatment in mental facilities, self-mutilation, time in the Army reserves, and his relationship with a prior girlfriend. (Doc. 19-27 at 33-46). Also included was information about domestic abuse and violence in his family, drug and alcohol abuse in his family, his mother's promiscuity, his mother's compulsive and inappropriate behaviors, his biological father's imprisonment, and Esposito's friends' opinions of Woodward. (Doc. 19-27 at 33-46). Guevara also provided trial counsel with a ten page "Analysis of Mitigation Factors," and a detailed timeline of Esposito's life history and mental treatment history. (Docs. 19-27 at 23-32; 20-1 at 2-21).

Guevara and trial counsel obtained extensive records, including: (1) enlistment and discharge records from the U.S. Army Reserves; (2) medical and mental health records, including tests and evaluations, from Kennedy Memorial Hospital ("Kennedy"), Ancora State Hospital ("Ancora"), Transitional Residence Independent Services, Inc. ("TRIS"), Central State Hospital, Underwood Memorial Hospital ("Underwood"), and Southeastern Regional Medical Centers; (3) records from W. Deptford Police Department, Paulsboro Police Department, New Jersey State Police, Georgia Police, FBI, GBI, Colorado Police, and Colorado Department of Natural Resources; (4) Jasper County Jail Records; (5) school records; and (6) psychological evaluations from Esposito's high school. (Docs. 20-1 at 22-24; 20-2 at 40-42).

Trial counsel were aware that Esposito had mental health problems that should be explored. (Doc. 17-10 at 35). They obtained Esposito's mental health records from the prosecutor's files and from Guevara. (Doc. 17-10 at 51, 57, 68-69). Guevara interviewed various mental health professionals who had treated Esposito in the past and provided trial counsel with reports detailing the information obtained during these interviews. (Docs. 20-3 at 44-45, 64-65, 72-78; 20-4 at 1-29). Trial counsel retained neuropsychologist Dr. Daniel Grant, who was recommended by the Georgia Indigent Defense Council,[14] to evaluate Esposito and "see what mitigation factors could be determined." (Doc. 17-10 at 57, 71). Grant was provided Dr. Jerold S. Lower's[15]

[14] The Georgia Indigent Defense Council also recommended Ofelia Gordon, a social worker. (Doc. 17-10 at 48). Trial counsel contacted her in 1997 and she met with Esposito for two hours on January 7, 1998. (Doc. 17-13 at 9-10). Afterwards, Guevara met with Gordon to "get her ideas on what she feels is wrong with … Esposito." (Doc. 20-2 at 13). Guevara reported to trial counsel that Gordon could not tell them much that they did not already know from their interviews with Esposito and others. (Doc. 20-2 at 13). Guevara also reported that Gordon found Esposito was evasive, had no major psychotic problems, felt little remorse for his actions, seemed to lack a conscience, probably had a personality disorder, and that Esposito's suicide attempts were just "a way for him to get into a hospital and that they conveniently occurred when he was about to become homeless." (Doc. 20-2 at 13). Given this, trial counsel decided not to use Gordon. (Doc. 17-13 at 21).

[15] The trial court ordered forensic psychologist Dr. Jerold S. Lower to evaluate Esposito to determine his "competency to stand trial and criminal responsibility." (Doc. 20-30 at 60). The order also called for Lower to assess "whether the defendant meets the definition of 'mentally ill' or 'mentally retarded.'" (Doc. 20-30 at 60). Lower diagnosed Esposito as suffering from "a personality disorder characterized by poor judgment and impulse control, inability to form close relationships with others, disregard for social mores, shifting and unstable emotional attachments, inability to assume responsibility for his situation in life, and related characteristics." (Doc. 18-11 at 17). Lower found Esposito was competent to stand trial, understood right from wrong, and was not mentally ill or mentally retarded. (Doc. 18-11 at 17). Lower opined that Esposito did not suffer "from a serious, treatable mental disorder" and that his personality disorder would "likely be highly resistant to any known type of intervention." (Doc. 18-11 at 17-18).

psychiatric report; discharge summaries and progress notes from Kennedy, Underwood, and Ancora; school records; and Guevara's interview notes. (Docs. 17-13 at 31; 18-11 at 15-24, 31-39; 18-13 at 31-77; 18-14 at 1-75; 18-15 at 1-19). Grant never asked for additional records and, if he had, counsel would have provided them. (Doc. 17-10 at 73). Grant spoke with Angela Caraccillo, one of Esposito's prior therapists. (Doc. 14-24 at 39). He interviewed Esposito and administered intelligence, problem solving, language, educational, personality, and neuropsychological tests. (Doc. 17-13 at 32). After Grant's evaluation, trial counsel reviewed his conclusions, spoke with him, and decided to call him to testify about Esposito's difficult childhood, the physical and sexual abuse Esposito suffered, and Esposito's various traumatic experiences. (Doc. 17-10 at 72).

Trial counsel had two mitigation themes. They hoped to paint Woodward as the leader or "brains" of the duo. (Doc. 17-10 at 39). They also wanted to put up mitigation witnesses to show that while Esposito had problems, he had some redeemable features and characteristics. (Doc. 17-10 at 59, 72). According to trial counsel, they were "quite frankly, trying to … get some sympathy from the jury to spare this young man's life." (Doc. 17-10 at 59-60).

During the mitigation phase, trial counsel called seven witnesses. The first was Judy Holloway, the Chief Jailer at the Jasper County Jail, who testified that she had daily contact with Esposito and he been a model inmate at the jail for almost two years. (Doc.

14-20 at 72). She described him as quiet and told the jury that he never caused any problems. (Doc. 14-20 at 72).

John Crain, a special education teacher from New Jersey, testified that he knew Esposito when Esposito was in the seventh through ninth grades in school. (Doc. 14-21 at 84). He explained that Esposito came from a dysfunctional family, was emotionally disturbed, and was a follower. (Docs. 14-21 at 79-80, 84; 14-22 at 25-26). Crain described Esposito's mother, Debra,[16] as domineering and overly aggressive. (Doc. 14-21 at 80-81). Crain told the jury that Esposito's father was in prison for murder and his step-father was not involved in his life at all. (Doc. 14-21 at 79-80, 83-84). He explained that, on the first day of class, Esposito was attacked by fellow students because Esposito's biological father had murdered the father of one of the students in the class. (Doc. 14-21 at 79. He said that Esposito was not disruptive in class, always did what was expected, did not get into fights, and showed no outward aggression toward anyone at school. (Docs. 14-21 at 82; 14-22 at 3, 6, 9). Crain stated that Esposito made every effort to fit in at school, but was never able to do so. He explained that while Esposito eventually joined the wrestling team and became involved in weightlifting, he continued to search for an identity. (Doc. 14-21 at 82-83). Crain stated that the school was unable to meet Esposito's special needs,[17] in large part because Debra refused to

[16] In the record, Esposito's mother is referred to as Debra or Deborah Jean Esposito, Debra or Deborah Jean Deese, and Debra or Deborah Jean Trueax. This Order refers to her as Debra.

[17] According to Crain, Esposito needed to be placed in a classroom with fewer children, to attend

cooperate and blocked the school's efforts.[18] (Doc. 14-21 at 83; 14-22 at 14).

Esposito's maternal aunt, Althea Holt, testified that Esposito's biological father physically abused both Esposito and Debra. (Doc. 14-23 at 5). After Debra left Esposito's biological father, she met Wayne Deese, who also verbally and physically abused both of them. (Doc. 14-23 at 5). Holt explained that Esposito was "beaten all of the time," and she personally saw the bruises and marks left on his arms. (Doc. 14-23 at 5-6). She asked Debra for custody of Esposito so she could take him out of the abusive environment. However, Debra refused and then isolated Esposito from her. (Doc. 14-23 at 5).

Holt described Esposito as quiet, shy, and respectful. (Doc. 14-23 at 13). She explained that after Esposito's father was incarcerated for murder, Esposito "was constantly reminded of the crime that his father had committed." (Doc. 14-23 at 5). According to Holt, Esposito never had a father figure and was completely controlled by Debra, who would not allow him to have friends or play sports. (Doc. 14-23 at 5, 12). Holt testified that Debra bathed Esposito until he was thirteen years old, and, during his later years, made him take three to four showers per day. (Doc. 14-23 at 7). Holt

---

counseling at least two hours per week, and to receive one-on-one tutoring. (Doc. 14-22 at 14, 23).

[18] Not all that Crain revealed was helpful for Esposito. On cross-examination he testified: Debra once had to obtain a restraining order against Esposito; Esposito's younger brother, who grew up in the same allegedly dysfunctional household, had never been in any trouble; Esposito had been in three different psychiatric hospitals; and, in 1994, Debra reported Esposito was involved in devil worship when he was in the seventh grade. (Docs. 14-21 at 89-90; 14-22 at 21-22, 26).

explained that she last visited Esposito when he was eighteen years old and in the psychiatric ward of Underwood. (Doc. 14-23 at 6). She testified that she could not put into words the terrible life that Esposito was forced to endure and Debra, his father, and his stepfather all contributed to the fact that he was on trial for his life. (Doc. 14-23 at 14).

Annette Nolan, a registered psychiatric nurse, testified that in May 1996, Esposito was discharged from Underwood and admitted into Kennedy. (Doc. 14-23 at 16-17, 26). She explained that at the time, Esposito was depressed, suicidal, and had been in-and-out of mental institutions for years. (Doc. 14-23 at 17, 26). Nolan testified that Debra physically and sexually abused Esposito. (Doc. 14-23 at 19). She also told the jury that Esposito had been sexually molested by his step-father, Deese, and Deese's sister. (Doc. 14-23 at 19, 26). According to Nolan, Esposito loved Debra, but was disappointed and hurt that Debra exposed him to such abusive situations.

Nolan testified that Esposito "accepted Jesus Christ as his Lord and Savior" while he was a patient at Kennedy. (Doc. 14-23 at 20). She explained that she stayed in touch with Esposito after he was discharged and he had continued to attend church. (Doc. 14-23 at 21). According to Nolan, it was Esposito's association with Woodward that led to the murders. She opined that Esposito was just taking the blame while Woodward may have been the actual murderer. (Doc. 14-23 at 34, 36, 38-40). She asked the jury to "spare John the death penalty and give him life imprisonment." (Doc. 14-23 at 23).

On cross-examination, Nolan acknowledged that Esposito's discharge papers from Kennedy referred to him as "superficial, dramatic, and rather histrionic in his presentation as to what happened to him." (Doc. 14-23 at 25). She stated that she still believed what Esposito told her about the past sexual and physical abuse. (Doc. 14-23 at 26). She also acknowledged that Esposito was admitted into psychiatric hospitals on numerous occasions over a two year period but, upon discharge, never followed through with outpatient treatment, never attended group therapy, and never filled his prescriptions. (Doc. 14-23 at 30). She explained that such behavior is not unusual and that many mentally ill people fail to follow-up with their treatment because they are in denial about their mental illness. (Doc. 14-23 at 27-28).

Sister Marie DiCamillo, a special education teacher at Ancora, explained that Esposito was a patient at that facility for six months in 1994. (Doc. 14-23 at 44). She prepared Esposito to take his GED test and described Esposito as a model student, who was respectful and intelligent. (Doc. 14-23 at 46-48). When he passed his GED test, he was given a graduation ceremony at Ancora, which Debra refused to attend because she wanted "nothing to do with" Esposito. (Doc. 14-23 at 47). DiCamillo testified that Esposito was never accepted by his family. (Doc. 14-23 at 48). She described Esposito as a follower in need of guidance and explained that he did well in a structured environment. (Doc. 14-23 at 48). She asked the jury for mercy and requested that they

spare his life.[19] (Doc. 14-23 at 49).

Angela Caraccillo, a therapist and program manager for the young adult program at TRIS, testified that 19 year-old Esposito was in their outpatient program while he was hospitalized at Ancora and spent one year in their residential program when he was discharged from Ancora in May 1995.[20] (Doc. 14-23 at 58-59, 65, 78). She explained that he entered the residential program because his mother would not allow him back into their home and he did not have the skills needed to live alone. (Doc. 14-23 at 58-59). According to Caraccillo, Esposito's mother had abandoned him when he was thirteen years old, did not want to have anything to do with him, refused to participate in therapy, and threatened to kill Esposito if she ever saw him again. (Doc. 14-23 at 58-61). She explained that Esposito was concerned that he did not fit in with others, was worried that he was not making anything of himself, never caused any problems, was polite and respectful, sought out therapy, and did well in vocational training. (Doc. 14-23 at 60-63, 78). She testified that he experienced "dissociative" episodes, in

[19] As with other sentencing phase witnesses, not all that DiCamillo said was helpful to Esposito. On cross-examination she acknowledged: Esposito was admitted to Ancora because he was considered a threat to others; his admission screening documents showed that he wanted to kill everyone; he had homicidal ideations; and he did get into one physical altercation with a fellow patient. (Doc. 14-23 at 50, 53).

[20] The jury heard that Esposito was hospitalized as follows: (1) Underwood from April 12, 1994 until May 3, 1994; (2) Underwood from May 4, 1994 until May 10, 1994; (3) Kennedy from January 9, 1995 until January 18, 1995; (4) Underwood on January 26, 1995; (5) Underwood from February 25, 1995 until March 2, 1995; (6) Kennedy on March 2, 1995; (7) Ancora from March 3, 1995 until May 1, 1995; (8) TRIS on May 1, 1995 until the beginning of May 1996; and (9) Kennedy from May 3, 1996 until May 13, 1996 (Docs. 14-23 at 78-79, 84, 87; 14-24 at 4). Esposito voluntarily admitted himself on all of these occasions except the April 12, 1994 hospitalization. (Doc. 14-24 at 2).

which he would "black[] out" and have no recollection of what had happened. (Doc. 14-23 at 62). She stated that he was in touch with reality only when he was in a structured environment. (Doc. 14-23 at 63, 82).

Caraccillo testified that Esposito had been physically abused by Debra and Deese, as well as sexually abused by Deese and Deese's sister. (Doc. 14-23 at 61). She stated that Esposito and his younger brother "cowered underneath the staircase hiding" every day when Deese came home from work because they knew he would either sexually or physically abuse them. (Doc. 14-23 at 62-63). She explained that Esposito had all of the "concrete symptoms" of someone who had endured sexual abuse and, therefore, she did not think he was lying or exaggerating. (Doc. 14-24 at 3, 9). She stated that, when questioned, Esposito's mother admitted physically abusing him and never denied he was sexually abused. (Doc. 14-23 at 66; 14-24 at 9). Instead of denying the abuse, his mother simply explained that she "did not want to rehash old memories." (Doc. 14-24 at 9). Like DiCamillo, Caraccillo testified that she believed Woodward might have actually committed the murders and Esposito was just protecting Woodward. (Doc. 14-24 at 6-7).

On cross-examination, Caraccillo admitted Debra told her she would not participate in Esposito's therapy because he had threatened to kill his family members, had tortured animals,[21] and he displayed violent behavior. (Doc. 14-23 at 66). She

[21] Caraccillo testified that Esposito admitted being cruel to animals, but he was remorseful for

acknowledged that in April 1994 Debra sought a restraining order against Esposito because he threatened family members. (Doc. 14-23 at 69-70). She also acknowledged that in 1994, when he appeared before the court that issued the restraining order, Esposito admitted he was involved in devil worship. (Doc. 14-23 at 70). She conceded that he burned himself with cigarettes; cut himself with knives; and never held a job for more than two weeks. (Doc. 14-23 at 72-73, 77-78). Caraccillo acknowledged that in the discharge summary from his January 9, 1995 to January 18, 1995 hospitalization at Kennedy, he admitted "lying repetitively" and that progress notes from his May 4, 1994 to May 10, 1994 stay at Underwood showed "that the likelihood of his compliance with any form of outpatient treatment is consequently and significantly compromised by his ongoing manipulation of the systems and resistance to treatment." (Doc. 14-23 at 84-85). However, she stated that she disagreed with these assessments because he was compliant and cooperative while at TRIS. (Doc. 14-23 at 86).

Grant, an expert in forensic psychology and neuropsychology, testified that he reviewed Esposito's mental health records, interviewed Esposito, and administered "a large number of tests"[22] to determine if Esposito suffered from any psychological,

---

his actions. (Doc. 14-24 at 5-6).

[22] Grant testified that he administered the Wechsler Adult Intelligence Scale (third revision), Kaufman Brief Intelligence Test, Visual Naming Test, Verbal Fluency Test, Nelson Denny Reading Comprehension Test, Wide Range Achievement Test, Thurstone Test of Verbal Fluency, Visual Discrimination Test, Line Orientation Test; Ray Complex Figure Test, Denman Neuro-psychological Memory Scale, Wisconsin Card Sorting Test, Category Test, Rhythm Test, Seashore Tonal Memory Test, Brief Test of Attention, Visual Test of Search and Attention, Finger

emotional, or behavioral problems. (Doc. 14-24 at 19-20). Grant explained that he sought to determine if there were any deficits or problems with the way Esposito's brain functions and if there were any "emotional [,] developmental and personality variables that may have bearing on [Esposito's] behavior." (Doc. 14-24 at 21).

Grant informed the jury: (1) Esposito's attitudes about the world are simplistic, naïve, and immature; (2) he is frequently absorbed in wishful thinking, daydreaming, and fantasies; (3) he has excessive feelings of emptiness; (4) he suffers from identity confusion, or confusion; (5) he needs other people to provide support, direction, guidance, security, and structure for him; (6) he is passive, submissive, dependent, and self-conscious; (7) he lacks any initiative, confidence, or self-sufficiency; (8) he is incapable of making decisions and avoids doing so; (9) he has an excessive need for someone to take care of him and is frequently helpless when left alone; (10) he has an identity disturbance characterized by a markedly persistent unstable self-image; (11) he is self-destructive, as shown by his previous five or six suicide attempts and various acts of self-mutilation; (12) he seeks relationships and institutions to take care of him; (13) his relationships are frequently unstable, intense, and volatile; (14) he is preoccupied with constant fears of being abandoned, rejected, and alone; (15) he has dissociative episodes; and (16) he does well in a structured environment, where his decisions are limited and

---

Tapping and Finger Tip Number Writing Tests, Million Clinical Multi-Axial Inventory (second version), Personality Assessment Inventory, Traumatic System Survey, Beck Hopelessness Scale, and Beck Scale for Suicide Ideation. (Doc. 14-24 at 20-21).

where there are strict boundaries placed on him. (Doc. 14-24 at 24-26, 36). Grant stated that he "would classify [Esposito] as falling within personality disorder, nos,[23] and also having a lot of features of post-traumatic stress disorder." (Doc. 14-24 at 38) He testified that a personality disorder is considered "a severe debilitating disorder" and suffering from one can be "devastating," and "extremely disruptive" to one's ability to function in daily life. (Doc. 14-24 at 38).

Grant, like others, testified that Esposito has a long history of emotional, sexual, and physical abuse. (Doc. 14-24 at 26). He explained that Deese beat Esposito with various objects and forced him to perform oral sex on several occasions. (Doc. 14-24 at 26). Because of the abuse, Esposito suffers from recurrent intrusive thoughts and nightmares and feels estranged and detached from others. (Doc. 14-24 at 26).

On cross-examination, Grant acknowledged that a Minnesota Multi-Phasic Personality Inventory performed on Esposito in 1994 revealed he was rebellious, had trouble with authority, had difficulty with social limits, had anti-social elements present, and "people who score in a similar manner tend to be self-centered, narcissistic, immature, impulsive, and emotionally superficial, and may have difficulty expressing their hostility." (Doc. 14-24 at 32). Grant confirmed that Esposito's psychiatric records show he is consistently found to be manipulative, superficial, and self-centered. (Doc.

[23] Grant explained that "nos" means "not otherwise specified" and a diagnosis of personality disorder, nos, means that Esposito does not meet the criteria of one specific personality disorder, such as anti-social personality disorder, but has aspects of several different personality disorders, including anti-social personality disorder. (Doc. 14-24 at 38).

14-24 at 34). He stated that he agrees with Lower's findings that Esposito has average or above-average intelligence, is competent to stand trial, "is clinically responsible and understands the conduct of which he is accused and considers it wrong," and would not be considered mentally ill, as that term is defined in Georgia law. (Doc. 14-24 at 42-44, 51). While not fitting Georgia's legal definition for mentally ill, Grant explained that Esposito "has a mental illness under the … Diagnostic Statistical Manual of Mental Disorders, Fourth Edition," which is the "most widely used book in the world that diagnoses mental disorders." (Doc. 14-24 at 44, 51).

Following this testimony, closing arguments, and the charge, it took the jury less than two hours to find the existence of three aggravating circumstances[24] and sentence Esposito to death. (Docs. 13-6 at 7; 14-25 at 17-18).

3. Esposito's arguments

a. Trial counsel's alleged failure to investigate and present evidence of Esposito's abusive childhood and history of mental illness

Esposito alleges that trial counsel failed to investigate and present evidence to support their strategy that he had a difficult life history and some redeemable characteristics. The state habeas court denied relief on this claim and the Georgia

[24] The jury found the following statutory aggravating circumstances existed: (1) The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery; (2) The offence of murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnaping with bodily injury; and (3) the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind to the victim. (Doc. 13-6 at 7).

Supreme Court concluded the claim had no arguable merit. (Docs. 27-39 at 21-30; 27-41 at 25-29, 34-36; 27-44). The record supports these decisions.

Esposito faults trial counsel for failing to present more witnesses who had personal knowledge of the abuse Esposito suffered as a child. At the state habeas evidentiary hearing, the only additional witness presented who had personal knowledge of Esposito's dysfunctional family life was his former girlfriend, Courtney Greco Veach. (Doc. 17-8 at 55). Esposito also introduced affidavits from friends, teachers, and family members who claimed to have knowledge of the abuse Esposito suffered at the hands of his mother, biological father, and step-father. (Docs. 17-20 at 75-77; 17-21 at 1-7, 75-77; 17-22 at 1-35).

It is well settled that "counsel is not required to present all mitigation evidence, even if additional mitigation evidence would have been compatible with counsel's strategy." *Putman*, 268 F.3d at 1244. "'The mere fact that other witnesses might have been available … is not a sufficient ground to prove ineffectiveness of counsel." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (quoting *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987)). In relation to the affidavits[25] submitted to the state habeas court, the

[25] In his brief, Esposito makes much of Deese's affidavit. (Doc. 56 at 63-67). As explained above, Deese was Esposito's step-father and the person Esposito claims physically abused him and sexually molested him on numerous occasions when he was between the ages of three and ten. (Doc. 17-12 at 8; 18-14 at 22-23). In his affidavit, Deese makes no mention of any abuse he inflicted upon Esposito, but provides details about his tumultuous marriage to Debra, the physical and mental abuse Debra inflicted on Esposito, and Debra's promiscuous and sexually inappropriate behavior. (Docs. 17-21 at 75-77; 17-22 at 1-9; 56 at 63-67). The record shows

Eleventh Circuit has repeatedly explained:

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. This case is no exception. But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. This case is no exception in that respect, either. That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.

Waters, 46 F.3d at 1513-14 (quotation marks and citations omitted).

Esposito alleges that trial counsel were ineffective for failing for present Veach, his former girlfriend, as a witnesses during the mitigation phase of Esposito's trial. Veach arrived at the courthouse on the last day of Esposito's trial and, most likely, during the testimony of the last defense witness. (Doc. 17-8 at 89). Trial counsel told her they had no time to prepare her to testify so they were not going to call her. At the state habeas evidentiary hearing, Kelly explained that he would not have put Veach on

---

Deese told a different story when Guevara interviewed him prior to Esposito's trial. (Docs. 20-4 at 41-50). At that time, Deese claimed Debra was a "good mother, perfect" and she would do anything to protect her children. (Doc. 20-4 at 41) He told Guevara that Esposito was extremely violent, had threatened to kill him, and once stabbed him with a knife. (Doc. 20-4 at 46). Pretrial, Deese claimed that he was so afraid of Esposito, he "slept behind a locked door" and kept "a knife under the mattress." (Doc. 20-4 at 46). Following this interview, Guevara was informed that Deese did not want to be involved in Esposito's case and did not want to be contacted again. (Doc. 20-7 at 36) Given all of this, it was certainly reasonable for trial counsel to refrain from calling Deese.

the stand if he did not have time to prepare her beforehand. (Doc. 17-10 at 73). He also explained that the defense team planned for Grant to be the final mitigation witness and, therefore, their strategy could not accommodate Veach's late arrival. (Doc. 17-10 at 73). "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Waters*, 46 F.3d at 1512 (citing *Solomon v. Kemp*, 735 F.2d 395, 404 (11th Cir. 1984)). Certainly, the Georgia Supreme Court could have reasonably concluded that trial counsel did not perform deficiently by failing to call Veach.

At the state habeas evidentiary hearing, Veach testified that Esposito's mother was mentally and physically abusive; Esposito was frequently in mental hospitals; he was unable to keep a job or live independently; he had to rely on others to take care of him; and he engaged in self-mutilation. (Doc. 17-8 at 56-78). This testimony was largely cumulative of that presented at trial. Thus, it was also reasonable for the state court to determine that Esposito failed to show prejudice resulted from trial counsel's failure to call Veach as a mitigation witness. *Holsey v. Warden,* 694 F.3d 1230,1259-60 (11th Cir. 2012) (explaining that evidence is largely cumulative if it "tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury").

Esposito argues that trial counsel failed to present adequate evidence regarding his mental illnesses and hospitalizations. At the state habeas evidentiary hearing,

Esposito presented testimony from forensic psychologist, Dr. David Lisak. (Docs. 17-11 at 75-89; 17-12 at 1-65). Lisak testified regarding Esposito's "pathological" relationship with his abusive, hypersexual, controlling mother; his mental and emotional problems; his vulnerability; the sexual abuse Esposito suffered when he was young, his serious mental and emotional problems; Esposito's complete inability to function independently; and his need for a structured environment. (Docs. 17-11 at 75-89; 17-12 at 1-65; 56 at 73-77). However, Lisak had to acknowledge that all of this testimony was given by others during the sentencing phase of Esposito's trial. (Doc. 17-12 at 54-64).

Esposito faults trial counsel for failing to call Lower, the court-appointed psychologist who evaluated Esposito prior to trial. (Doc. 56 at 77). Lower assessed Esposito to determine competency to stand trial, degree of criminal responsibility or mental competence at the time of the murder, and whether he met the criteria for "mentally retarded" or "mentally ill" under O.C.G.A. § 17-7-131. (Doc. 17-14 at 13). Esposito alleges that Lower would have told the jury that he was a disturbed young man with a history of mental health problems that required multiple hospitalizations; he had a personality disorder characterized by poor judgment and impulse control; and he was mentally ill from a clinical standpoint. (Doc. 56 at 77-78).

Lower's findings are the same as the findings and testimony given by Grant during the sentencing phase of trial. Both Lower and Grant found that Esposito was competent to stand trial and was criminally responsible for his actions because he

understood the difference between right and wrong and knew the conduct of which he was accused was wrong. (Docs. 14-24 at 42-44, 51; 17-14 at 19). Both Lower and Grant found that Esposito was not mentally ill or mentally retarded under the legal definitions in O.C.G.A. § 17-7-131. (Docs. 14-24 at 37, 44; 17-14 at 19). Just as Lower testified in the state habeas evidentiary hearing, Grant told that jury that while not "legally" mentally ill, Esposito was clinically mentally ill. (Docs. 14-24 at 44, 51). Lower's ultimate diagnosis, personality disorder, nos, was the same as Grant's. (Docs. 14-24 at 37-39, 43; 17-14 at 23).

In short, it was reasonable for the state courts to conclude that trial counsel reasonably investigated Esposito's mental health, reasonably presented evidence regarding his mental health issues, and Esposito was not prejudiced by trial counsel's failure to offer different witnesses or more testimony regarding his mental illnesses. Thus, relief must be denied on this claim.

Citing *Williams v. Taylor*, 529 U.S. 362 (2000), Esposito claims that the state habeas court unreasonably discounted or failed to adequately evaluate the totality of available mitigating evidence. (Doc. 56 at 87). As discussed above, the relevant order for purposes of AEDPA review is the Georgia Supreme Court's summary denial of Esposito's CPC application. *Hittson*, 759 at 1231-32. Therefore, the Butts County Superior Court's analysis is irrelevant. However, assuming that the superior court's reasoning is relevant, there is no indication that the court unreasonably discounted or

inadequately evaluated Esposito's mitigation evidence. The state habeas court was under no duty to list every piece of evidence Esposito thought relevant to his ineffective assistance claims. As the Supreme Court explained, a state court is not required to "show its work" or provide rationales and explanations for its decisions. *Richter*, 131 S. Ct. at 784. Instead, the focus is on the ultimate legal conclusion reached by the state court, "'not on whether the state court considered and discussed every angle of the evidence.'" *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1211 (11th Cir. 2013) (quoting *Gill v. Mecusker*, 633 F.3d 1272, 1290 (11th Cir. 2011)). Unless there was a conspicuous misapplication of federal law, which there was not, this Court must assume the state court knew and followed the law. *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1329-30 (11th Cir. 2013).

b. Trial counsel's alleged failure to investigate and present evidence of Woodward's domineering and violent personality

Trial counsel testified that they thought Woodward was the "brains of this group" and Esposito was "the follower … doing as she wanted him to do." (Doc. 17-10 at 39). They asked Guevara to interview Woodward's friends and family in order to obtain information about her background. (Doc. 17-10 at 70). Guevara made multiple attempts to interview Woodward's friends, former employers, and former roommates. (Docs. 20-1 at 83; 20-2 at 24-26; 20-4 at 57). While he did interview some former employers and acquaintances, several persons could not be located and others refused to speak with him. (Docs. 19-22 at 14; 20-4 at 57; 20-6 at 11, 28-29, 47-48, 63-64). Trial

counsel obtained letters from Woodward to former cellmates and from former cellmates to Woodward. (Doc. 20-1 at 23).

During both the guilt and sentencing phases of trial, trial counsel sought to establish that Woodward manipulated and controlled Esposito. (Docs 17-10 at 43-44; 17-11 at 15). Through various guilt phase State witnesses, trial counsel showed that Woodward was the one who rented all of the hotel rooms during their travels (Docs. 14-7 at 11; 14-11 at 26); she purchased the bus tickets (Doc. 14-17 at 19); she always drove (Doc. 14-8 at 41, 43); she weighed more than Esposito[26] (Docs. 14-7 at 59, 66; 14-10 at 1, 5); and she was the one who actually approached Mrs. Davis (Docs. 14-7 at 90; 14-8 at 3, 4). During the sentencing phase, witnesses testified that Esposito was a passive follower who was incapable of making decisions on his own and unable to function independently in the world. (Docs. 14-21 at 79-20; 14-24 at 24-26, 36). Witnesses testified that they thought it possible Woodward committed the murders and Esposito confessed just to protect her. (Docs 14-23 at 34, 36, 38, 40; 14-24 at 6-7). Trial counsel hoped that all of this testimony would show Woodward was the main actor and more

[26] Esposito also argues that trial counsel were ineffective for failing to call Woodward as an exhibit so the jury could see she was a "large and imposing" figure who had the "ability to dominate Mr. Esposito and the physical prowess to commit the murders." (Doc. 56 at 48). Both Esposito and Woodward were 5' 7" tall. (Doc. 17-11 at 49). He weighed 160 pounds and had a muscular build. (Doc. 17-11 at 49). She weighed 180 pounds. (Doc. 17-11 at 49). Some witnesses described Woodward as an attractive woman with long dark hair. (Docs. 14-7 at 85; 14-8 at 41). Trial counsel testified that they did not call Woodward because they did not think she could add anything beneficial to their case. (Docs. 14-7 at 85; 14-8 at 41; 17-11 at 51-52). This was a reasonable strategic decision. *See Waters*, 46 F.3d at 1512 (explaining that which witnesses to call "is the epitome of a strategic decision" that should seldom be second guessed by the courts).

culpable that Esposito. (Doc. 17-11 at 18).

Esposito faults trial counsel for failing to call witnesses who could have testified regarding Woodward's domineering personality and violent behavior. At the state habeas evidentiary hearing, Esposito introduced five affidavits from people who described Woodward as possessive, physically abusive, violent, unstable, unpredictable, and irrational. (Docs. 17-22 at 28-31; 18-9 at 66-69, 71-79, 81-85). Affiant Heather Bryan claimed that Woodward once attacked her with a knife and that Woodward physically assaulted her own mother, who suffered from multiple sclerosis.[27] (Doc. 18-9 at 66-69). Previous boyfriends stated that Woodward stalked them, forced herself on them, and became violent when they ended the relationships. (Doc. 18-9 at 75-79, 81-85) Only one of the five affiants, Patricia Holliman, had any knowledge of Woodward's relationship with Esposito. She described Esposito as a model tenant during the few months he lived in her boarding house in 1996 and stated that he did not want to accompany Woodward to North Carolina, but she was incredibly persistent and he finally relented. (Doc. 17-22 at 2831).[28]

The state court found meritless Esposito's claim that his trial counsel were ineffective for failing to investigate and present evidence to support their theory that

[27] This is in stark contrast to the pretrial information Bryan provided to the GBI on September 23, 1996. At that time, she told Special Agent Ron Braxley that she had "never known [Woodward] to be violent." (Doc. 18-9 at 70).

[28] Holliman explained that she was interviewed by Guevara prior to Esposito's trial. She does not indicate what she told Guevara at the time. (Doc. 17-22 at 31).

Woodward was more culpable than Esposito. This decision did not involve an unreasonable application of *Strickland*, nor was it based on unreasonable factual findings. Testimony such as that in the affidavits tendered at the state habeas evidentiary hearing "could have supported [Esposito's] mitigation theory during the penalty phase; however, [they] are not the silver bullet that [Esposito] tries to make [them] out to be." *Hittson*, 759 F.3d at 1253 (citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999). The jury could have heard all these witnesses had to say about Woodward and still concluded that Esposito was responsible for Mrs. Davis' murder. After all, Esposito confessed to bludgeoning her and the Sniders. This court cannot say that Esposito has shown a reasonable probability that the result of his trial would have been different had these witnesses testified regarding Woodward. Certainly, this Court cannot find that "no fairminded jurist could agree with the state court's" denial of relief. *Holsey*, 694 F.3d at 1257 (quotation marks and citations omitted).

c. Trial counsel's alleged failure to investigate and present evidence that the physical evidence was inconsistent with Esposito's confession

Esposito claims that trial counsel were ineffective for failing to retain a forensic pathologist who could have testified that Mrs. Davis' injuries were inconsistent with injuries caused by a tree limb and that whatever instrument caused her injuries should have had transfer biological material, such as blood, on it. (Doc. 56 at 42-43). He also

claims that trial counsel should have had their DNA expert examine the tree limb[29] that was found at the crime scene so she could have told the jury there was no blood on the limb. According to Esposito, such testimony would have been compelling evidence that Esposito was less culpable than Woodward and that he was untruthful when he confessed to killing Mrs. Davis. (Doc. 56 at 43).

As for trial counsel's performance, the record shows they consulted DNA expert, Dr. Linda Adkinson. (Doc. 17-10 at 73). Kelly testified that he "didn't get real good vibrations about her testifying" but he wanted her to assist him in cross-examining the State's DNA expert. (Doc. 17-10 at 74). Kelly explained that "since [the State] didn't try to take DNA from the limb, that was one of the things that we were trying to bring out, that there was nothing to put [Esposito] as the actual person who did the killing, other than the confession[]." (Doc. 17-10 at 74).

When cross-examining the State's experts, trial counsel established that whoever lifted the limb to hit Mrs. Davis may have left skin on the limb, but the State had not performed any DNA testing of the limb. (Docs. 14-13 at 3; 14-14 at 13-14, 29). During his closing argument, Kelly stressed the brutal beating should have left the victim's blood and the perpetrator's skin on the murder weapon. (Doc. 14-6 at 25). Yet, there

[29] Actually two limbs or pieces of wood are referenced in the trial transcript. One was a larger limb that was on top of Mrs. Davis' body at the crime scene. (Docs. 14-9 at 16-18; 15-4 at 9). The other was a smaller "tree branch piece" or a "piece of cast-off tree limb" that was located near her body. (Docs. 14-9 at 18; 15-4 at 10). The latter apparently came from the larger limb. (Doc. 14-9 at 58-61).

was no blood on the tree limb or the limb had not been tested for blood. (Doc. 14-16 at 25). As for any skin that might have been left by the perpetrator, Kelly argued:

> All it takes is half a microgram of skin and you could tell who held that limb. It brings me to the obvious question that I've been asking myself for a long time, until the time this case started. Why didn't they test the things that were at the crime … scene? Why didn't they run [a] DNA test on them? We have heard so much about DNA the last few months we are probably sick of it, but it's a very legitimate question, especially on an object that the State says killed a person. Would not that be the first thing you tested? Not the first DNA test. Why not…. Why did they want to go to all this trouble to try to prove it. They've got this statement. Why do they want to go through all this trouble to test this limb. And that's the whole theory that they've got. We've got this statement, so, you know, let's … pick out something and let's don't test anything else…. [M]y client is charged with murder. It's not some traffic ticket…. And you know what the stakes are. And you know who has the burden. Should you, could you leave any stone unturned when you are trying to convict someone of murder…. [I]t doesn't take a rocket scientist to say the first thing that out to be tested … is that limb. They got some hairs from Mrs. Davis, but there is nothing on that limb that puts John Esposito with it, or at that crime scene, nothing.

(Doc. 14-16 at 26-27).

The Georgia Supreme Court had ample support for finding trial counsel's performance reasonable. It appears that trial counsel was not focused on trying to establish that the limb was not the murder weapon. Instead, they focused on the State's failure to test the limb to determine who had lifted it to hit Mrs. Davis. This makes sense because the presence of Mrs. Davis's hair embedded in the limb tended to establish that she had been struck by the limb. The State's microanalyst testified that sixty-three hairs found on the cast-off piece of limb matched hairs on Mrs. Davis' head, as did five

strands of hair embedded in the larger tree limb.[30] (Doc. 14-14 at 21-26).

To show he was prejudiced by trial counsel's failure to retain a forensic pathologist to testify that Mrs. Davis' injuries were not caused by a limb, Esposito presented testimony from forensic pathologist Dr. Jonathan Arden at the state habeas evidentiary hearing. (Doc. 17-9 at 30-42). Arden testified that, based on his review of autopsy photographs,[31] Mrs. Davis' injuries were caused by two or three different man-made object, but he could not say with reasonable certainty what objects caused any of the injuries. (Doc. 17-9 at 27, 30-34, 41). On cross-examination, Arden acknowledged that some of Mrs. Davis' injuries could have been caused by the tread of an athletic shoe, which is consistent with one of Esposito's statement. (Doc. 17-9 at 61, 63-64). More importantly, Arden conceded that Mrs. Davis' hairs were found embedded in the tree limbs. (Doc. 17-9 at 71). Given this, he had to acknowledge that it was possible she was struck by the limb. (Doc. 17-9 at 71-72).

---

[30] A forensic report dated November 14, 1996 shows "CHEMICAL EXAMINATION OF THE TREE LIMB (ITEM 1) FAILS TO REVEAL THE PRESENCE OF BLOOD." (Doc. 19-11 at 78). Esposito faults trial counsel for failing to introduce the report at trial or question the forensic serologist about the report. (Doc. 56 at 44 n.31). The record does not reveal why trial counsel did not introduce the report or question the forensic serologist. Again, it appears that trial counsel were not focused on trying to establish the limb was not the murder weapon. Instead, they were focused on the lack of physical evidence linking Esposito to the limb and the State's failure to test the limb to confirm Esposito's confession that he (not Woodward) was the one who used the limb to kill Mrs. Davis. (Doc. 14-16 at 25-27). This was reasonable because the State never maintained there was blood on the limb and Davis' hair, not blood, supported the State's argument that the limb was used to bludgeon Davis. (Doc. 14-14 at 21-27).

[31] Arden had not spoken with the medical examiner or any investigator involved in Mrs. Davis' case. Nor had he actually seen the tree limb. He only saw photographs, in which the tree limb was wrapped in plastic. He had not even seen any close-up photographs of the unwrapped tree limb and its bark. (Doc. 17-9 at 57-58).

Looking at the entire record, the state courts reasonably found Esposito had not shown prejudice. He did not show a reasonable probability that the result of his trial would have been different if his DNA expert testified there was no blood on the tree limb, or the forensic report showing the lack of blood had been introduced into evidence, or had trial counsel hired a forensic pathologist, such as Arden, to testify.

d. Trial counsel's failure to object to the prosecutor's questioning of Grant and the allegedly improper characterization of mental health evidence during closing

Esposito argues trial counsel should have objected to the prosecutor's cross-examination of Grant and closing argument, both of which Esposito claims "prevented the jury from giving meaningful effect" to his mental health evidence. (Doc. 56 at 98-105). Respondent argues the claim is unexhausted, or if exhausted, it is meritless. (Doc. 57 at 98-100).

Looking first at exhaustion, in his amended state habeas petition, Esposito alleged the "prosecution attempted to remove from the jury's consideration Petitioner's history of mental illness" and "[t]o the extent that Petitioner's counsel failed to object … [they were] ineffective, and Petitioner was prejudiced thereby."[32] (Doc. 17-2 at 14-15 n.4). Additionally, in his post-hearing brief, Esposito argued that the prosecution's questioning of Grant was "improper in its own right … and defense counsel should have

[32] Esposito raised the prosecutorial misconduct claim in the body of his amended state habeas petition and raised the ineffective assistance of counsel claim in a footnote. (Doc. 17-2 at 14-15 n.4).

vigorously objected." (Doc. 27-34 at 28). He complained that "[t]rial counsel failed to object to this improper questioning and stood silently by while the State mischaracterized Dr. Grant's professional opinions…." (Doc. 27-34 at 30). The state habeas court did not specifically address this ineffective assistance claim, but the court's order contained a "catch-all" provision that provided: "As to any other claims of ineffective assistance of counsel not specifically addressed in this Order, this Court finds that Petitioner failed to meet his burden under *Strickland* of proving deficient performance and actual prejudice." (Doc. 27-39 at 44).

Any claim that is not contained within a Georgia habeas petitioner's CPC application is unexhausted. *Hittson*, 759 F.3d at 1232 n.23. In section IV(G) of his CPC application, Esposito argued the State misled the jury into believing that his mental health problems did not qualify as mitigation. (Doc. 27-41 at 52). In a footnote in the introduction of section IV, Esposito stated, "This Court cannot ignore the State's improper actions merely because Mr. Esposito's counsel were ineffective for failing to properly object and litigate them…. In addition, Mr. Esposito's attorneys were ineffective for failing to challenge the improper arguments and actions of the State that are discussed herein." (Doc. 27-41 at 44 n.17). The Georgia Supreme Court denied Esposito's CPC application.

While it is certainly debatable whether Esposito adequately presented this ineffective assistance claim to the state courts, the Court finds Esposito exhausted the

claim. The Court, however, agrees with Respondent that the claim has no merit. The Eleventh Circuit recently explained:

> When a petitioner says his attorney was ineffective for failing to make an objection, *Strickland* requires proof that the attorney fell below the standard of reasonableness under prevailing norms. This test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted.
>
> Decisions about whether to object—and when, and in what form—are tactical choices consigned by *Strickland* to a lawyer's reasoned professional judgment. Good lawyers, knowing that judges and juries have limited patience, serve their clients best when they are judicious in making objections. In any trial, a lawyer will leave some objections on the table. Some of those objections might even be meritorious, but the competent lawyer nonetheless leaves them unmade because he considers them distractive or incompatible with his trial strategy.

Bates v. Sec'y, Fla. Dep't of Corr., 768 F.3d 1278, 1295 (11th Cir. 2014) (quotation marks and citations omitted)..

Looking at the circumstances in this case, trial counsel stated that they called Grant to testify about Esposito's difficult childhood, his physical and sexual abuse, and his traumatic experiences. (Doc. 17-10 at 72). Grant provided this testimony during his direct examination. (Doc. 14-14 at 24-26, 36). During cross-examination, Grant testified that Esposito suffers from borderline personality, nos, which can be a severe, life-long, debilitating disorder. (Doc. 14-24 at 38, 43). The prosecutor asked if Esposito was mentally retarded and Grant stated he was not. (Doc. 14-24 at 35). The prosecutor asked if, "[d]espite the personality disorder," is Esposito mentally ill under Georgia law

at O.C.G.A. § 17-7-131. (Doc. 14-24 at 44). Grant responded, "[n]o, he doesn't necessarily fit that definition, but he does fit the definition of a mental disorder based on the diagnostic and psychotic manual of mental disorders." (Doc. 14-24 at 44). The exchange continued:

> Q. And is he mentally ill under the definition of the law?
> A. He's not mentally ill according to what you said, but he has a mental illness under the – the Diagnostic Statistical Manual of Mental Disorders, Fourth Edition.
> Q. So, the answer is "no."
> A. It's "no" but—it depends on which—
> Q. Under the legal definition the answer is "no."
> A. No not under that definition, but this is the most widely used book in the world that diagnoses mental disorders and he does meet them.
> Q. Which book are we using today, sir?
> A. You're asking about that one.
> Q. Thank you.

(Doc. 14-24 at 51).

Esposito argues that trial counsel should have objected because O.C.G.A. § 17-7-131 has nothing to do with the definition of relevant mitigating evidence in the sentencing phase of a capital crime. Instead, "[i]t includes a definition of the term 'mentally ill' for purposes of the legal determination whether a criminal defendant is 'guilty but mentally ill at the time of the crime.'" (Doc. 56 at 103) (citing O.C.G.A. § 17-7-131(a)(2)). Without support, Esposito argues that trial counsel did not object because they did not know the law. (Doc. 56 at 105). The record does not reveal why trial counsel failed to object. It could be that trial counsel did not want to emphasize Grant's "personality disorder, nos" diagnosis because, according to Grant, it included

aspects of borderline personality disorder, narcissistic personality disorder, and anti-social personality disorder. (Doc. 14-24 at 38). Such diagnoses can be seen damaging as opposed to mitigating. *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009). Regardless, even if counsel performed ineffectively by failing to object, the Georgia Supreme Court had a reasonable basis for concluding Esposito was not prejudiced.

Contrary to Esposito's assertion, it is not apparent that "[w]hat little mitigating evidence the jury heard was likely not considered." (Doc. 56 at 98). The jury heard from numerous witnesses, including Grant, that Esposito had longstanding psychological problems, was emotionally disturbed, suicidal, depressed, and had been in-and-out- of mental institutions for years. (Docs. 14-21 at 79-80, 84; 14-22 at 25-26; 14-23 at 17, 26). Grant repeatedly expressed that Esposito was mentally ill from a clinical standpoint. Contrary to Esposito's assertions, trial counsel's failure to object did not "allow[] the prosecution to argue that Mr. Esposito's history of psychiatric illness had no mitigating value." (Doc. 56 at 98). In fact, the State never argued that Esposito's mental health problems could be considered mitigating only if they rose to the level of "mentally ill" under Georgia law.

Esposito claims that the prosecutor exploited the improper cross-examination when, during his closing argument, he stressed that the jury was to be guided by the law in determining Esposito's sentence and observed: "Statutory means it's set out in our

statutes. It's in one of those black law books that Ms. Baskin held up. Those are our law books and this is a court of law." (Doc. 14-24 at 65-66). A review of the record reveals that the prosecutor was not underscoring the importance of Grant's cross-examination or talking about mitigating circumstances at all. Instead, he was telling the jury that before they could impose the death penalty, they had to find at least one "statutory aggravating circumstance." (Doc. 14-24 at 65-66). He told the jury that "statutory" means "it's set out in our statutes" in the "law books." (Doc. 14-24 at 65-66).

In their closing, trial counsel argued that Esposito's "problems" did not excuse his actions, but they were "a factor in mitigation." (Doc. 14-25 at 2). The trial court instructed the jury to consider all mitigating circumstances, which it defined as "those which you … find do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame." (Doc. 14-25 at 6).

There is no indication the jury failed to consider any of Esposito's potentially mitigating evidence. Moreover, given the brutality of Esposito's crimes, he has not shown a reasonable probability that the outcome of his sentencing proceeding would have been different but for trial counsel's failure to object to the prosecutor's cross-examination of Grant and closing.[33] Certainly, he has not shown "there was no

[33] Esposito can show prejudice resulting from trial counsel's failure to object to the prosecutor's closing only if the underlying improper prosecutorial argument claim would warrant relief; which would be the case only if there was a reasonable probability that the improper argument

reasonable basis for the state court to deny relief." *Hittson*, 759 F.3d at 1233.

e. Trial counsel's failure to object to the prosecutor's allegedly improper examination of additional witnesses

Esposito makes three arguments: (1) Trial counsel should have objected to the prosecutor's improper questioning of sentencing phase witnesses John Crain,[34] Alicia Holt,[35] and Annette Nolan;[36] (2) trial counsel should have objected when the prosecutor allegedly "made several comments that served to bolster the credibility of his witnesses and imply that he knew the witnesses to be sincere and trustworthy;[37] and (3) trial counsel should have objected to victim impact evidence presented in the guilt phase of the trial through witnesses George McNeill and Helena Herring[38] and during the

---

changed the outcome of the case. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Esposito has not shown that absent any improper prosecutorial argument, he would not have received a death sentence.

[34] Esposito claims that when cross-examining Crain, the prosecutor insinuated Esposito was a racist, improperly questioned Crain about Esposito's involvement in devil worship, and improperly engaged Crain in a discussion of the ties Esposito's father had to the Italian mob. (Doc. 56 at 106).

[35] Esposito claims that the prosecutor improperly questioned Holt regarding Esposito's involvement in devil worship. (Doc. 56 at 108).

[36] During direct examination, Nolan testified that Esposito was a born-again Christian. On cross-examination the prosecutor asked her if she would be surprised to hear that Esposito did not give Mrs. Davis or the Sniders a chance to pray before he beat them to death. (Doc. 56 at 108).

[37] Specifically, Esposito argues that trial counsel were ineffective for failing to object when the prosecutor referred to Alvin Schmidt as a "genuine Texas Ranger" and repeated Schmidt's answers to several questions. (Doc. 56 at 110). He also argues that counsel should have objected when the prosecutor had Knight repeat several of his answers. (Doc. 56 at 110-11)

[38] Esposito argues that trial counsel should have objected when the prosecutor elicited testimony from McNeill and Herring regarding: The poor health of Mr. Davis; the sacrifices Mrs. Davis made to care for her husband; Mrs. Davis' compassionate, caring nature; her church attendance; her good health; her love of gardening; and the affection she had for her dog and the children in her neighborhood. (Doc. 56 at 115-16).

sentencing phase of the trial through Lawrence Snider, Jr. and Shirley Snider.[39] (Doc. 56 at 106-08, 110, 113).

Respondent argues these ineffective assistance claims are unexhausted or, alternatively, they have no merit.

Looking first at exhaustion, in his amended state habeas petition, Esposito made these general allegations: "Counsel failed to object to the admission of several items of evidence and testimony offered by the State during the guilt/innocence and sentencing phases of trial"; "[c]ounsel failed to object to or otherwise litigate the improper admission of extensive irrelevant and prejudicial evidence regarding the victims"; "[c]ounsel failed to adequately object to and litigate improper testimony, including, but not limited to, testimony that was hearsay, irrelevant, cumulative, outside the personal knowledge of the witness, and testimony that was highly prejudicial"; and "[c]ounsel failed to object to improper comments and arguments by the prosecution within which the prosecution vouched for the credibility of prosecution witnesses." (Doc. 17-2 at 5-9).

In his post-hearing brief, Esposito argued that the State improperly vouched for the credibility of prosecution witnesses and, during the guilt phase of trial, improperly

[39] Esposito argues trial counsel should have objected when Lawrence Snider testified his parents had been married over 62 years at the time of their deaths and they attended church every Sunday. Also, he claims that trial counsel should have objected when Shirley Snider testified her in-laws treated her like a daughter, were caring, active, loving, and very involved with their church. (Doc. 56 at 118-19).

elicited testimony about Mrs. Davis' habits, life, and personality. (Docs. 27-34 at 78-84; 28-1 at 1, 5-7). Regarding trial counsel's response, or lack thereof, Esposito's only relevant claim was that trial counsel were ineffective for failing to ensure the jury did not base its decisions on emotion or passion. (Doc. 27-34 at 77).[40]

In his CPC application, Esposito alleged that "[d]uring the guilt/innocence phase of the trial, the State elicited extensive testimony about the victim that was irrelevant and served only to inflame the jury's emotions." (Doc. 27-41 at 45). He also complained that the State improperly vouched for the credibility of its witnesses. (Doc. 27-41 at 49-50). Finally, Esposito alleged generally that trial counsel "were ineffective for failing to challenge the improper arguments and actions of the State." (Doc. 27-41 at 44 n.17).

Given this record, Esposito arguably exhausted his claims that trial counsel were ineffective when they failed to object to the guilt phase victim impact testimony and when they failed to object when the prosecutor vouched for the credibility of his witnesses. It does not appear Esposito exhausted his claims that trial counsel were ineffective when they did not object to the prosecutor's allegedly improper questioning of sentencing phase witnesses Crain, Holt, Nolan, Lawrence Snider, and Shirley Snider.

However, the Court agrees with Respondent, even if all claims are exhausted, they are without merit. Assuming the failure to object was deficient, Esposito has not

[40] While the state habeas court did not specifically address this claim, it did state, "[a]s to any other claims of ineffective assistance of counsel not specifically addressed in this Order, this Court finds that [Esposito] failed to meet his burden under Strickland of proving deficient performance and actual prejudice." (Doc. 27-39 at 44).

established prejudice. Esposito has not shown a reasonable probability that had trial counsel objected to the questioning of, or testimony given by, any of the witnesses, there is a reasonable probability that the outcome of the guilt phase of his trial would have been any different. Witnesses placed Esposito in the car with Mrs. Davis in Lumberton, North Carolina and fingerprints, palm prints, footprints and DNA from a cigarette butt taken from Mrs. Davis' Buick all matched Esposito. *Esposito*, 273 Ga. at 183, 538 S.E.2d at 57. Not to mention that in his detailed statement to Knight, Esposito explained how he bludgeoned Mrs. Davis to death. Given this evidence, his guilt was not at issue. In relation to his sentence, Esposito has not shown a reasonable probability that had trial counsel successfully objected to the prosecutor's questions, the jury would not have imposed the death penalty. Given the extensive nonstatutory evidence in aggravation offered during sentencing—specifically the brutal murder of the Sniders—it was reasonable for the state courts to conclude that Esposito could not show prejudice. *See Clisby v. Alabama*, 26 F.3d 1054, 1057 (11th Cir. 1994) ("*Strickland* and several other cases reflect the reality of death penalty litigation: sometimes the best lawyering, not just reasonable lawyering, cannot convince the sentencer to overlook the facts of a brutal murder.").

f. Trial counsel's failure to object to the presentation of the Texas crime scene videotape introduced during sentencing

Prior to the sentencing phase of Esposito's trial, trial counsel objected to the admission of evidence related to the Sniders' murder. (Doc. 14-16 at 80). The

prosecutor argued that the evidence related to Esposito's character and was, therefore, admissible in sentencing. (Doc. 14-16 at 80-81). The trial court agreed with the prosecutor and found the "State has a right to present this evidence." (Doc. 14-16 at 81). Part of that evidence was a videotape depicting the crime scene, including the Sniders' bodies.[41] (Doc. 56 at 131). Trial counsel did not specifically object to the presentation of the crime scene video. Instead all parties agreed that the video would be played without audio and they agreed on a particular stopping point.[42] (Doc. 14-20 at 5-6).

During his state habeas proceedings, Esposito argued that trial counsel were ineffective for failing to contest the admission of the videotape. (Doc. 27-34 at 60-66). The state habeas court addressed Esposito's specific allegation regarding the videotape in the context of his broader claim that trial counsel were deficient in their attempts to suppress harmful evidence offered by the State and found trial counsel performed reasonably. (Doc. 27-39 at 37-39). Esposito argues that the state habeas court's finding that "Mr. Kelly and Mr. Roberts 'reasonably and zealously tried to keep out evidence of Petitioner's confessions and the Sniders' murder" was an unreasonable factual finding. He also claims that the state habeas court's conclusion that trial counsel's performance was reasonable involved in unreasonable application of *Strickland*. (Docs. 27-39 at 38;

---

[41] The DVD containing the videotape of the Oldham County, Texas crime scene has been manually filed and is the record as Respondent's Exhibit 168.

[42] The prosecutor stated that "we have agreed to play it and stop at a certain point. There's a scene at the morgue afterwards, and we're going to agree not to play that." (Doc. 14-20 at 5). Trial counsel complained that the audio was "not appropriate" and the prosecutor stated, "[t]here will be no audio." (Doc. 14-20 at 6).

56 at 130-33).

Under *Hittson*, the state habeas court's findings and reasoning are irrelevant. Instead, the Georgia Supreme Court's summary denial of Esposito's CPC application, in which he raised this claim, is the relevant decision and the only question is "whether the Georgia Supreme Court had any reasonable basis" to conclude that Esposito's ineffective-assistance claim was meritless. *Hittson*, 759 F.3d at 1273 (Carnes, J., concurring). It did. Had trial counsel objected, there was not a reasonable likelihood of a different result. Georgia courts have routinely held graphic, inflammatory photographs and videotapes admissible despite their gruesome and prejudicial nature. *See Crozier v. State*, 263 Ga. 866, 867, 440 S.E.2d 635, 636 (1994) (addressing admission of photographs and explaining that admission of evidence is favored in doubtful cases and photos depicting the nature and location of victim's wounds were relevant and admissible even if they were duplicative and inflammatory); *Joyner v. State*, 280 Ga. 37, 40, 622 S.E.2d 319, 323 (2005) (addressing videotape and explaining that the trial court properly admitted video although trial counsel objected on the grounds that its depiction of the victim's decomposed body was inflammatory and lacked evidentiary value); *Bullard v. State*, 263 Ga. 682, 686, 436 S.3d.2d 647, 651 (1993) (explaining the gruesome nature of the videotape complained of resulted entirely from the acts of the defendant, not from any alteration or autopsy by the state and, therefore, tape properly admitted). Also, even if trial counsel had objected and the video had been excluded,

there was not a reasonable probability that the jury would have reached a different sentencing verdict. Esposito confessed to kidnapping these elderly people, robbing them, forcing them to endure hours travelling in the car with him and his codefendant, and finally beating each of them to death. It was reasonable for the Georgia Supreme Court to find a lack of prejudice.

Furthermore, assuming the state habeas court's decision is relevant, it was not based on any unreasonable factual findings and did not involve an unreasonable application of *Strickland*. When the state habeas court found trial counsel acted "reasonably and zealously" in trying to suppress harmful evidence, it was not referring solely to trial counsel's efforts to keep out evidence of the Sniders' murder. (Doc. 27-39 at 38). Instead, the state habeas court's order clearly shows the court was referring to efforts trial counsel made to exclude evidence of Esposito's "confessions **and** the Sniders' murder." (Doc. 27-39 at 38) (emphasis added). While trial counsel made only a verbal objection to admission of evidence related to the Sniders' murder, they did more in their attempts to have his confessions suppressed. In addition to filing a motion to suppress, they filed an *ex parte* motion for funds to bring in out-of-state witnesses, presented witnesses and arguments at the lengthy hearing, and were ultimately successful in keeping Esposito's videotaped confession out of evidence. (Docs. 13-5 at 29-38, 44-46, 77; 13-11 at 1-89; 13-12 at 1-89; 13-13 at 1-64). Thus, the state habeas court's characterization of trial counsel's performance regarding their efforts to suppress

evidence of Esposito's "confessions **and** the Sniders' murder" was reasonable and the court's denial of relief did not constitute an unreasonable application of *Strickland*. (Doc. 27-39 at 38) (emphasis added). Certainly the state habeas court's ruling was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87. Thus, the Court must deny relief on this claim.

g. Trial counsel's failure to object to the jury's visit to the crime scene

During the guilt phase of Esposito's trial, the jury visited the crime scene in the company of Chief Deputy Michael Pritchett, who was a witness for the State and one of the first officers to arrive at the scene. (Doc. 56 at 133-41). The trial judge, court reporter, prosecutor, and trial counsel did not attend this visit. Esposito claims trial counsel were ineffective for agreeing to the crime scene visit. (Doc. 56 at 133-41).

The record shows the trial judge instructed the jury that they were going to be taken by bus to the crime scene and twice told them to "[r]emember my instructions not to discuss the case or allow anyone to discuss it with you or in your presence." (Doc. 14-14 at 62-63). The prosecutor explained he was not going to the crime scene; trial counsel stated they would not attend; and Esposito waived his rights to attend. (Doc. 14-14 at 63-64). The trial judge informed Pritchett that he could walk the jury "over to the tree," and then could say, "this is where the body was found." (Doc. 14-14 at 65-66). Pritchett was instructed to say only "those words," and told not to answer any

questions. (Doc. 14-14 at 65-67). The trial judge explained to Pritchett that the jurors should not be discussing the case among themselves. (Doc. 14-14 at 65-66). On direct appeal, the Georgia Supreme Court raised *sua sponte* the issue of the crime scene visit. The court advised against allowing such visits:

> Although not raised as an enumeration of error, this procedure is troubling and should not be used in the future. As we have stated before, a trial judge should attend any planned jury view. Taking a jury from the controlled environment of a courtroom to a place that has some relevance to the trial always involves the risk that something unexpected might arise requiring the trial judge's intervention. A court reporter should also attend any jury view so that any important statements or events may be thoroughly reviewed on appeal. The attorneys should also attend, unless their presence is affirmatively waived.
>
> While a defendant's presence at a jury view that involves merely the transportation of the jury to a crime scene is not absolutely required, trial courts should note that a defendant's presence is mandatory, if not waived by the defendant himself, whenever testimony or other evidence is presented to the jury. Special dangers exist whenever a witness at trial, particularly a law enforcement officer, attends a jury view, and a trial court should avoid those dangers by excluding such persons.
>
> Finally, because jury views have proved to be fertile ground for irregularity and, at times, reversible error, the parties to criminal trials and trial courts should carefully weigh the real benefits of a jury view before planning one. Frequently, as in Esposito's case, the jury has already viewed photographs of the crime scene, and nothing is to be added to the jury's understanding of the issues to be tried by an in-person visit to the scene. In such cases, a trial court would be authorized to deny a request for a jury view.

Esposito, 273 Ga. at 187, 538 S.E.2d at 59-60. Even with this criticism, however, the Georgia Supreme Court upheld Esposito's conviction and sentence.

Before the state habeas court, Esposito challenged trial counsel's acquiescence to

the jury's judicially unsupervised crime scene visit. The state habeas court explained:

> During the guilt-innocence phase of Petitioner's trial, the parties allowed an investigator in his case, the chief deputy sheriff of Morgan County, to accompany the jury to view the crime scene and to tell the jury where the body was found. The judge, the court reporter, and the attorneys did not attend the jury viewing. This Court agrees with the Supreme Court of Georgia that "this procedure is troubling and should not be used in the future."… However, on the facts of this case, this Court finds no prejudice from the procedure or trial counsel's failure to object.

(Doc. 27-39 at 44).

Esposito claims that the juror affidavits he submitted, which the state habeas court refused to consider, showed prejudice. At the state habeas evidentiary hearing, Esposito tendered four juror affidavits, two of which addressed the jury's crime scene visit. (Doc. 19-2 at 46-52). In her affidavit, alternate juror Tonya M. Samuels stated that the sheriff described details of the crime scene and, in his affidavit, juror Joe Taylor stated that the deputy showed the jurors where Mrs. Davis had been killed. (Doc. 19-2 at 46-52). Respondent objected to the admission of the affidavits because Esposito did not serve the affidavits at least ten days prior to the evidentiary hearing[43]. (Doc. 27-26 at 2). The state habeas court ruled that, in reaching its conclusions, the affidavits would not be considered. (Doc. 17-5 at 1). However, it allowed the affidavits to be proffered for the record. (Doc. 27-26 at 2). Respondent then proffered his own rebuttal affidavits from these same two jurors. (Docs. 27-26 at 2; 27-23 at 40-42, 45-46). In the affidavit

[43] For a detailed discussion of state habeas counsel's tender of the juror affidavits, see the Court's July 18, 2013 Order denying Esposito's motion for an evidentiary hearing. (Doc. 42 at 4-9).

tendered by Respondent, Samuels clarified that the sheriff who met the jurors at the crime scene only told them where Mrs. Davis' body had been located and said nothing else. (Doc. 27-33 at 41-41). Similarly, Taylor clarified that the sheriff only told them where Mrs. Davis' body had been located and "never said anything else … about the case." (Doc. 27-33 at 45). All of these affidavits were placed in the record that was transmitted to the Georgia Supreme Court when Esposito filed his CPC application. *See Hittson*, 759 F.3d at 1231 (explaining that for the Georgia Supreme Court to fully consider a CPC application, "O.C.G.A. § 9-14-52(b) directs the superior court clerk to transfer the record and transcript of the proceedings below to the Supreme Court").

In his CPC application, Esposito, in a footnote, argued that trial counsel were ineffective for failing to challenge the crime scene visit. (Doc. 27-41 at 44 n.17). As explained previously, the Georgia Supreme Court concluded all claims Esposito raised lacked arguable merit and summarily denied the CPC application. (Doc. 27-44).

Esposito has failed to show the state habeas court's findings were based on unreasonable factual determinations or involved an unreasonable application of *Strickland*. Additionally, the Georgia Supreme Court had the entire record from the superior court, including all the affidavits that had been proffered for the record, to review. (Doc. 27-26 at 2). Without elaboration, the Georgia Supreme Court found the claim lacked arguable merit. "Our task in these situations is to review the record before the Georgia Supreme Court to 'determine what arguments or theories supported or, as

here, could have supported the state court's decision.'" *Hittson*, 759 F.3d at 1232 (quoting *Pinholster* , 131 S. Ct. at 786). Esposito's failure to show prejudice from the crime scene visit, even when considering the proffered affidavits, supports the Georgia Supreme Court's determination. Certainly Esposito has not shown the Georgia Supreme Court had "'no reasonable basis'" for denying this claim. *Id*. at 1233 (quoting *Pinholster*, 131 S. Ct. at 784). Because he has not made such a showing, this Court must deny relief.

h. Trial counsel's failure to object to the prosecutor's sentencing phase closing argument

Esposito argues the prosecutor made numerous improper arguments in his sentencing phase closing argument: (1) telling the jury the Sniders, who never missed church, would never be able to go to church again (Doc. 56 at 124); (2) using "grandiose Biblical quotations in exhorting the jury to impose a death sentence"[44] (Doc. 56 at 124); (3) concluding his argument for imposition of the death penalty by stating, "But justice would be when Mr. F. M. Davis goes to the Pearly Gates in heaven and sees his beloved

[44] The prosecutor's biblical references included: (1) "How long—the good book says, 'How long shall the wicked be allowed to triumph and exalt.' He's wicked." (Doc. 14-24 at 80); (2) "'How these men of evil boast.' He is a man of evil. I'm not going to sugar coat it. And he boasted. He boasted. These are his words, … his boasting…. And what did this man of evil boast? I want you to picture him there … out in that Texas field with Mr. Snider and those six blows and his boast. What did [Esposito] tell [Knight]? 'I don't have a conscience, no remorse.'" (Doc. 14-24 at 82-83); and (3) "Dr. Harvey told us on Mrs. Marguerite Snider it was five hard blows, … so hard that one of these shattered her skull…. And what else did this man of evil—'how these men of evil boast'—on those five licks, what did he say when he was questioned by Ron Knight. 'I really do not care.' … 'Hey, I didn't even get brains on me.' 'Arise and judge the earth.' Today is judgment day for John Anthony Esposito." (Doc. 14-24 at 84-85).

wife of fifty years, Mrs. Lola, and he can say, 'honey, there was justice on this earth.'"(Doc. 56 at 124-25); (4) stating Esposito would kill again because he took pleasure from killing (Doc. 56 at 126); (5) referring to Esposito as "a serial killer" (Doc. 56 at 127); (6) asking the jurors to speculate about the last moments of Marguerite Snider's life[45] (Doc. 56 at 128); and (7) telling the jury that he "handle[s] lots of murder cases" and all killings are brutal and senseless but these were "particularly malicious and brutal." (Doc. 56 at 129). Esposito argues that "[i]n remaining silent in the face of the prosecutor's misconduct, counsel once again provided deplorably ineffective representation." (Doc. 56 at 123).

Respondent argues that Esposito raised only a general claim that trial counsel failed to object to the improper and prejudicial statements made by the State during its closing. (Doc. 57 at 95-96). He claims that none of these specific claims were alleged or argued in the state habeas proceedings and they are, therefore, unexhausted. (Doc. 57 at 95). Alternatively, Respondent argues the claims are meritless.

The record shows Esposito's amended state habeas petition contained approximately seventy-eight general ineffective assistance claims. Two of which were "[c]ounsel failed to object to improper and prejudicial statements made by the State

[45] The prosecutor stated, "Can you imagine 86 year old Marguerite Snider, married for sixty-two and a half years to her beloved husband Larry to be sitting out in that Texas field watching that man beat the brains out of her husband right in front of her. She didn't even put up a fight. We've been married sixty-two years. He's 90. Why fight him. Take me, too. I may as well go with him. I may as well go." (Doc. 14-24 at 83-84).

during opening and closing arguments of both the guilt/innocence and sentencing phases of the trial" and "[c]ounsel failed to adequately and timely object to improper statements the prosecution made during closing arguments." (Doc 17-2 at 8, 10). He also alleged that his "rights to due process and a fair trial were violated by improper, prejudicial, and misleading remarks by the prosecution in its argument at Petitioner's trial" and "[t]o the extent that … counsel failed to object to these improper comments and seek a mistrial or other appropriate relief, or to otherwise preserve objections to the State's argument …, counsel were ineffective, and Petitioner was prejudiced thereby." (Doc. 17-2 at 14-15 n.4).

In his post-hearing brief and CPC application, Esposito argued that "[a]t the close of both phases of [his] trial, the State presented argument to the jury that was improper, misleading, and prejudicial." (Doc. 28-1 at 3). His specific claims were: (1) the prosecutor improperly told the jury that, if not sentenced to death, Esposito would kill again because he liked killing people (Docs. 27-41 at 48-49; 28-1 at 3); (2) the prosecutor improperly referred to Esposito as a serial killer (Docs. 27-41 at 48-49; 28-1 at 4); and (3) the prosecutor improperly claimed he was an expert in murder cases and this murder deserved the death penalty (Docs. 27-41 at 49; 28-1 at 4-5). In his post-hearing brief, he claimed that "[a]lthough Mr. Esposito's attorneys were ineffective for failing to ensure that the jury not base its decisions o[n] emotion and passion, this Court cannot ignore the State's improper actions, merely because Mr. Esposito's counsel failed to properly object

and litigate them." (Doc. 27-34 at 77). In his CPC application, he alleged that "Esposito's attorneys were ineffective for failing to challenge the improper arguments … of the State…."[46] (Doc. 27-41 at 44 n.17).

Thus, it seems Esposito exhausted three of his seven specific claims that trial counsel were ineffective for failing to object during the prosecutor's sentencing phase closing argument. Relying on a doctrine first announced in *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983), Esposito argues the remaining four[47] claims are exhausted. According to *Vela*, if the state court that reviewed the ineffective assistance claims considered trial counsel's conduct as a whole, on the basis of the entire record, and the new claims alleged in the federal petition stem from conduct that appears in that record, the new claims are considered exhausted. *Id*. at 960. Based on this, Esposito claims that "the specific instances of counsel's ineffectiveness in failing to object to portions of the closing argument are clearly subsumed with the broader … claim that counsel were ineffective in failing to object to the prosecutor's improper argument." (Doc. 58 at 14).

It is less than clear if *Vela* is still good law in the Eleventh Circuit. While the

---

[46] As explained previously, the state habeas court's order did not address every ineffective assistance claim in detail, but the order provided that all such claims were denied on the basis of Esposito's failure to show deficient performance and prejudice and the Georgia Supreme Court summarily denied Esposito's CPC application. (Docs. 27-39 at 44; 27-44).

[47] The remaining four claims are: (1) Telling the jury the Sniders would never be able to go to church again (Doc. 56 at 124); (2) using "grandiose Biblical quotations" (Doc. 56 at 124); (3) asking the jury to speculate about the final moments of Mrs. Snider's life (Doc. 56 at 128); and (4) concluding his closing argument by saying if the death penalty is imposed, Mr. Davis will be able to tell Mrs. Davis there was justice on earth when they meet at the "Pearly Gates." (Doc. 56 at 124-25).

Court expressed approval of the *Vela* doctrine in *Francis v. Spraggins*, 720 F.2d 1190, 1193 n.6 (11th Cir. 1983), it expressly declined to address the continuing validity of V*ela* in a later case—*Footman v. Singletary*, 978F.2d 1207, 1211 n.4 (11th Cir. 1992). More recently, in *Kelly v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317 (11th Cir. 2004), the Eleventh Circuit held that generalized allegations of ineffective assistance of counsel do not preserve for federal review all specific instances of ineffectiveness. (Doc. 57 at 96). Instead, to exhaust, a habeas petitioner must first present each particular factual instance of ineffective assistance of counsel to the state courts before raising them in his federal petition. *Id*. at 1344-45.

While under *Vela*, all of Esposito's claims might be exhausted, it appears four of his specific ineffective assistance claims would not be exhausted under *Kelly*. The Court need not decide this issue because it agrees with Respondent that even if all of these ineffective assistance claims are exhausted, they are meritless because Esposito "cannot show merit in his underlying misconduct claim." (Doc. 57 at 96). He "has failed to show his trial fundamentally unfair." (Doc. 57 at 96).

Esposito can show prejudice resulting from trial counsel's failure to object to the prosecutor's closing arguments only if the improper prosecutorial argument claim itself warrants relief. *Land v. Allen*, 573 F.3d 1211, 1221 (11th Cir. 2014). "[T]he bar for granting habeas based on prosecutorial misconduct is a high one." *Id*. at 1220. To find prosecutorial misconduct, the remarks must be improper and must have "'so infected

the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

> An improper prosecutorial argument has rendered 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 the defendant would not have received a death sentence. A reasonable probability is one that is sufficient to undermine the confidence in the outcome.

Romine v. Head, 253 F.3d 1349, 1366 (11th Cir. 2001).

Even assuming that the prosecutor's arguments were improper, Esposito has not shown that, absent the remarks, he would not have received a death sentence. Given this, his underlying prosecutorial misconduct claims would not warrant relief. Esposito "cannot show prejudice in his [trial] counsel's failure to object to prosecutorial misconduct that, itself, does not warrant reversal." *Land*, 573 F.3d at 1211. Under AEDPA, Esposito certainly has not shown that no fairminded jurist could agree with the Georgia Supreme Court's decision that these ineffective assistance claims lacks merit. *Richter*, 131 S. Ct. at 786. Thus, this Court must deny relief.

i. Trial counsel's presentation of the sentencing phase closing argument

Esposito claims that trial counsel were ineffective in their presentation of the sentencing phase closing argument because they "made minimal reference to the mitigating circumstances and made a lukewarm plea to spare [his] life." (Doc. 56 at 94-95). Respondent claims the state habeas court properly denied this claim finding Esposito "failed to prove both the deficiency and prejudice prongs of the test for

reviewing claims of ineffective assistance of counsel." (Doc. 57 at 88). Esposito also raised the issue in his CPC application, which the Georgia Supreme Court summarily denied. (Docs. 27-41 at 38-40; 27-44).

In the closing argument, it appears trial counsel attempted to respond to the Sniders' gruesome murder by stressing that Esposito had not been tried or convicted for those crimes. Trial counsel emphasized that he would face those charges in the future in Texas. (Doc. 14-25 at 2).

Trial counsel asked the jury to consider Esposito's troubled past when deciding what his sentence should be. Kelly argued:

> You heard the witnesses today, and they were John's friends and family, … [and] psychologist…. And there is no question that this young man has a lot of problems. Does that excuse what he did? Absolutely not. Absolutely not. There is no one here saying that excuses what he did. Is it a factor in mitigation? Absolutely.
>
> …
>
> The only two times it appears that John had any structure in his life was when he was at the mental institution in New Jersey and strangely enough, the other time was in the Jasper County jail.

(Doc. 14-25 at 2-4).

They stressed that Esposito was not a "con man" as the prosecutor had argued. (Doc. 14-25 at 4). He had not been able to "con" the chief jailer at the Jasper County Jail, where he had lived for over two years. Instead, when he left to attend trial, she "hugged his neck" and even spoke on his behalf during the sentencing phase of the trial. (Doc. 14-25 at 5).

Kelly stressed that the jury had a tremendous responsibility and should they decide to impose death, that would be "an irreversible decision," with which they would have to live. (Doc. 14-25 at 3). He asked the jury not to get "caught up in the frenzy that [the prosecutor] is trying to get you caught up in." (Doc. 14-25 at 3). Instead, they should choose punishment, not revenge:

> It's in your hands. You've got a choice of revenge, and that's what [the prosecutor] wants you to do. If you want revenge, then death is what you will give. But I beg you to choose punishment over revenge. You can give him life or life without parole and that is a very horrible, horrible punishment. There is a young man sitting about thirty feet away from you right now that literally will live or die with your decision and I humbly bet you to choose punishment over revenge.

(Doc. 14-25 at 5).

The Eleventh Circuit has explained that "[d]eficient performance is demonstrated by an attorney's failure to use the closing argument to focus the jury's attention on his client's character or any mitigating factors of the offender's circumstances, and by his failure to ask the jury to spare his client's life." *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008). Kelly's closing argument can certainly be criticized. It was, as Esposito argues, brief. Also, he undoubtedly could have placed more emphasis on "Esposito's upbringing and psychiatric history." (Doc. 56 at 96). However, Kelly did explain to the jury that Esposito's "problems" were mitigating and he did plead with them to spare Esposito's life. Given AEDPA deference, this Court cannot find the state habeas court's decision that counsel performed reasonably and Esposito was not

prejudiced involved an unreasonable application of *Strickland* or was based on any unreasonable determinations of fact. Moreover, Esposito has not shown the Georgia Supreme Court had no reasonable basis for denying relief. This is especially true regarding prejudice. The Georgia Supreme Court could reasonably have determined that Esposito failed to show that, but for Kelly's closing argument, the result of his sentencing proceeding would have been different. Therefore, the Court denies relief on this claim.

j. Ineffective assistance at the motion for new trial and on direct appeal

Esposito argues that counsel ineffectively handled his motion for new trial and direct appeal.[48] (Doc. 56 at 141-42). In relation to the motion for new trial, Respondent argues that "during state habeas proceeding [Esposito] failed to allege much less argue counsel were ineffective during the Motion for New Trial." (Doc. 57 at 101). Therefore, according to Respondent, this claim is unexhausted. Esposito claims he exhausted this issue and points to his amended state habeas petition, in which he complained that "[c]ounsel failed to present these[49] issues during the Motion for New Trial and on appeal to the Georgia Supreme Court." (Doc. 17-2 at 10). In his CPC application, however, Esposito makes no mention of counsel's performance during the motion for new trial. Claims not contained within a petitioner's CPC application are

[48] *Strickland* applies to appellate counsel. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991).
[49] Presumably "these" refers to numerous instances of trial court error and prosecutorial misconduct that he alleged in his state habeas petition. (Doc. 17-2 at 5-10).

unexhausted. *Hittson*, 759 F.3d at 1232 n.23. Thus, Esposito's claim that counsel were ineffective during the motion for new trial is unexhausted and procedurally defaulted. *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1989) (explaining that "when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief").

Esposito alleges he can overcome the default by showing cause and prejudice. Citing *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), Esposito "makes conclusory assertions in his brief that his post-conviction counsel performed deficiently" and this deficiency provides the cause necessary to overcome default. *Fults v. GDCP Warden*, 764 F.3d 1311, 1314-15 (11th Cir 2014). He also alleges that he is entitled to an evidentiary hearing to determine whether, in fact, his post-conviction counsel were ineffective for failing to raise the claim.

Martinez and *Trevino* apply in a very limited context,[50] both in terms of when the attorney omission constituting cause occurred and what particular omission occurred. As to the first limitation, "the *Martinez* Court expressly limited its holding to attorney errors in initial-review collateral proceedings." *Arthur v. Thomas*, 739 F.3d 611, 629 (11th Cir. 2004). Specifically, the Supreme Court stated that "[t]he holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from

[50] The Eleventh Circuit has not determined if *Martinez* or *Trevino* apply at all to Georgia criminal procedures.

initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Martinez*, 132 S. Ct. at 1320. Instead, the rule in *Coleman v. Thompson*, 501 U.S. 722 (1991)—that inadequate post-conviction counsel does not provide cause to overcome procedural default—governs in all these scenarios.

In Esposito's case, assuming state habeas counsel were ineffective for failing to raise his motion for new trial ineffectiveness claim, it appears from the record that the deficient performance occurred when they failed to include the claim in the CPC application. Inadequate performance during the appeal from denial of habeas relief cannot provide cause. M*artinez*, 132 S. Ct. at 1320; *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (explaining that *Martinez* offers no support "for the contention that the failure to preserve claims on appeal from a postconviction proceedings can constitute cause").

As for the second limitation, *Martinez* and *Trevino* altered *Coleman* only with respect to "claims of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1319. In Esposito's case, his underlying claim is that counsel were deficient during the motion for new trial, not during trial. It is unclear if *Martinez* and *Trevino* would even apply in such a situation.

Assuming for the sake of argument that *Martinez* and *Trevino* apply,[51] Esposito

[51] This assumes that *Martinez* and *Trevino* apply (1) to Georgia criminal procedure, (2) when

has not established that his post-conviction counsel were ineffective under the standards of *Strickland* or that the underlying ineffective assistance of motion for new trial counsel claim is a substantial one. Nor do his general and conclusory allegations entitle him to an evidentiary hearing. "[A] petitioner does not establish constitutionally deficient performance simply by showing that (a) potentially meritorious claims existed and (b) his collateral counsel failed to raise those claims." *Hittson*, 759 F.3d at 1263 (citing *Murray v Carrier*, 477 U.S. 478, 486 (1986)). Esposito would have to "show that *no competent counsel*, in the exercise of reasonable professional judgment, would have omitted" his claim that counsel were ineffective for not raising more claims in his motion for new trial. *Id*. (emphasis in the original). State habeas counsel raised numerous ineffective assistance claims in their CPC application. (Doc 27-41 at 1-54). Esposito simply "has alleged no facts to overcome the presumption that they exercised reasonable professional judgment in deciding which claims to raise and which claims to omit." *Id*. at 1264.

As for the underlying motion for new trial ineffective assistance claim, Esposito's entire argument consists of one paragraph in his brief, in which he he criticizes the brevity of the action motion for new trial and complains that the "hearing conducted on the motion consists of a scant 11 transcript pages." (Doc. 56 at 141 -42). Counsel explained, both during the motion for new trial itself and during the state habeas

---

post-conviction counsel fail to raise the claim in a CPC application, and (3) when the underlying claim is ineffective assistance during a motion for new trial.

evidentiary hearings, why they focused on one particular argument. Their thought was that "other than the confessions, there was not anything much tying [Esposito] as the person who actually committed the crime." (Docs. 15-14 at 3; 17-10 at 43). Thus, they believed that the confession the jury heard from Knight was the "one piece of evidence that … caused the jury to find … Esposito guilty and place him in the electric chair." (Doc. 15-14 at 3; 17-10 at 44). They also believed they had good grounds[52] for challenging the admission of the confession. (Doc. 17-10 at 82). In short, they thought this was their best argument. (Doc. 17-11 at 63). "'Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.'" *Hittson*, 759 F.3d at 1263 (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Therefore, by simply alleging that counsel's motion for new trial was too short and their argument too brief, Esposito has not alleged a "substantial" ineffective assistance claim.

Esposito also claims that appellate counsel were ineffective because they raised only two claims on direct appeal: (1) a challenge to the trial court's denial of the motion to suppress Esposito's confession to the FBI and (2) a challenge to the method of execution. (Doc. 15-15). Respondent argues that some of the specific claims of ineffective assistance of appellate counsel that Esposito raises in his federal habeas

[52] They argued the confession was not freely and voluntary given because: Esposito was young; he had little education, and the interrogation took place many hours after he was given the *Miranda* warnings. (Doc. 15-14).

petition have not been exhausted and are procedurally defaulted. (Doc. 57 at 90 n.10). Alternatively, he argues the state habeas court's decision finding appellate counsel performed effectively was reasonable. (Doc. 57 at 90).

In his amended state habeas petition, Esposito alleged "[c]ounsel failed to present these issues[53]… on appeal to the Georgia Supreme Court." (Doc. 17-2 at 10). He also maintained that

> [c]ounsel rendered ineffective assistance on appeal when they unreasonably and prejudicially failed to raise meritorious issues on appeal…. Such issues include, but are not limited to, failing to argue that it was reversible error for a prosecution witness to escort the jury to view the crime scene, failing to appeal the trial court's erroneous rulings on prospective jurors, and failing to appeal the erroneous instructions that were given to the jury.

(Doc. 17-2 at 11). Esposito also claimed "the State made improper, misleading arguments," "presented irrelevant and prejudicial evidence," and "elicited extensive information about the victims." (Doc. 17-2 at 14). In a footnote, he alleged that appellate counsel were ineffective for failing to raise these issues on appeal. (Doc. 17-2 at 15 n.4).

In their post-hearing brief, state habeas counsel argued appellate counsel were ineffective because they raised only two claims on appeal while "Esposito had at least

[53] It appears "these issues" refer to the numerous alleged trial errors listed in the amended state habeas petition. These include the prosecutor's presentation of inadmissible evidence (Doc. 17-2 at 4-5, 7), the prosecutor's allegedly improper examination and cross-examination of witnesses (Doc. 17-2 at 7-9), the prosecutor's allegedly improper closing (Doc. 17-2 at 8, 10), and the crime-scene visit. (Doc. 17-2 at 9)

three viable issues that could have been properly raised." (Doc. 27-34 at 70). These "three viable issues" were (1) the improper introduction of the Texas crime scene videotape, (2) the prosecution's improper suggestion to the jury that Mr. Esposito's psychological problems do not constitute mitigation under Georgia law, and (3) a sentencing disproportionality claim. (Doc. 27-34 at 70-73).

The state habeas court ruled that counsel "were objectively reasonable when they raised their two strongest, non-frivolous claims on direct appeal to the Georgia Supreme Court." (Doc. 27-39 at 43). Having found the conduct of appellate counsel reasonable, the court did not address prejudice. (Doc. 27-39 at 43-44).

In their CPC application, state habeas counsel faulted appellate counsel for raising only two issues on appeal and pointed to the same "three viable issues" that appellate counsel should have raised. (Doc. 27-41 at 41-43).

In his federal habeas briefs, Esposito argues that appellate "counsel performed deficiently in failing to raise claims challenging the prosecutor's improper presentation of inadmissible evidence; the prosecutor's misconduct in presenting evidence and cross-examining defense witnesses; the prosecutor's improper closing arguments; and the extra-judicial crime scene visit." (Doc. 56 at 147).

Respondent claims Esposito has exhausted only his claim that appellate counsel were deficient for failing to raise the improper introduction of the Texas crime scene videotape. (Doc. 57 at 100). Presumably this claim is encompassed within Esposito's

current broader claim that appellate "counsel performed deficiently in failing to raise claims challenging the prosecutor's improper presentation of inadmissible evidence." (Doc. 57 at 100). At any rate, appellate counsel's failure to raise the admission of the Texas crime videotape was one the "three viable issues" that Esposito raised in his CPC application and the claim is, therefore, exhausted. (Doc. 27-34 at 70). Esposito also exhausted his claims that appellate counsel should have raised the prosecutor's improper suggestion that Esposito's psychological problems are not mitigating.[54] (Doc. 27-41 at 41-43).

All other claims of ineffective assistance of appellate counsel have not been exhausted and are procedurally defaulted.[55] Although Esposito makes the conclusory assertion that ineffective assistance of state habeas counsel provides cause to overcome the default, "he does not explain why the performance was deficient or how, if the performance was deficient, he was prejudiced." *Fults*, 764 F.3d at 1315. Moreover, Esposito has cited no authority for the argument that *Martinez* and *Trevino* apply when the underlying claim is ineffective assistance of appellate counsel, versus ineffective assistance of trial counsel. The Eleventh Circuit has "repeatedly underscored the

---

[54] Presumably this claim is encompassed in Esposito's current broader claims that appellate counsel should have raised the prosecutor's improper questioning of defense witnesses and improper closing argument. (Doc. 56 at 147).

[55] As for Esposito's argument that appellate counsel were ineffective for failing to raise the jury's visit to the crime scene (Doc. 56 at 147), the Georgia Supreme Court addressed this issue *sua sponte* and, while criticizing the practice, affirmed Esposito's conviction and sentence. *Esposito*, 273 Ga. at 187, 538 S.E.2d at 59-60.

narrow scope" of *Martinez* and *Trevino*, emphasizing that the equitable rule established in the cases "applies only 'to excusing a procedural default of ineffective-trial counsel claims.'" *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 945 (11th Cir. 2014).

In relation to the ineffective assistance of appellate counsel claims that have been exhausted, Esposito has not shown the state courts' determinations were unreasonable. When discussing the direct appeal, counsel testified that they did not believe in the "shotgun approach" to appeals. (Doc. 17-10 at 82). Instead, they wanted to "raise the valid issues and not just throw something out there." (Doc. 17-10 at 82). Just as with the motion for new trial, they thought the best argument they had was to challenge the trial court's denial of their motion to suppress Esposito's confession to the FBI. (Doc. 17-11 at 62-63). The state habeas court found "counsel's reasoning in raising their two[56] strongest, non-frivolous claims on appeal was objectively reasonable" and the Georgia Supreme Court found no arguable merit to Esposito's ineffective assistance of appellate counsel claim. (Docs. 27-39 at 43; 27-44).

The Supreme Court and the Eleventh Circuit have both explained the benefits of concentrating on "one central issue" or "a few key issues" for appeal. *Jones*, 463 U.S. at 751-52; *Hittson*, 759 F.3d at 1263. To show that appellate counsel "failed to provide the level of representation required by *Strickland*, [Esposito] must show more than the mere fact that they failed to raise potentially meritorious claims; he must show that no

[56] As explained above, appellate counsel also argued that execution by electrocution is cruel and unusual punishment. *Esposito*, 273 Ga. at 185-86, 538 S.E.2d at 58-59.

competent counsel, in the exercise of reasonable professional judgment, would have omitted the claims." *Hittson*, 759 F.3d at 1263. He has not made such a showing. He certainly has not shown that the Georgia Supreme Court had "no reasonable basis … to deny relief." *Id*. at 1233. Thus, this Court must deny relief.

B. Claim Two: Misconduct by the prosecution team and other state agents deprived petitioner of his constitutional rights to due process and a fair trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Esposito agrees with Respondent that his claim "the State suppressed evidence relating to improper communications between Petitioner's jailers and prospective jurors" is unexhausted and he, therefore, withdraws it. (Doc. 56 at 20).

In a footnote of his brief, Esposito claims that "the prosecutor's actions and argument" violated his due process rights. (Doc. 56 at 98 n.67). He is referring to the prosecutor's cross-examination of his mental health expert, examination of the State's witnesses, presentation of victim impact evidence, penalty phase closing argument, and presentation of the Texas crime scene videotape. (Doc. 56 at 97-133). Esposito concedes these prosecutorial misconduct claims are procedurally defaulted. (Doc. 56 at 98 n. 67). He argues that ineffective assistance of counsel provides the cause to overcome the default. For reasons discussed above, Esposito has not established ineffective assistance of counsel. Thus, these claims are procedurally defaulted and the Court does not address their merits.

C. Claims Three through Five:

Esposito does not address these three claims in his briefs. (Docs. 56, 58). "[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, and it is for this reason that any claims in [Esposito's] petition that were not argued in his brief are abandoned." *Blankenship v. Terry*, 2007 WL 4404972 at *40 (S.D. Ga.), *aff'd* 542 F.3d 1253 (11th Cir. 2008) (citing *United States v. Burkhalter*, 966 F. Supp. 1223, 1225 n.4 (S. D. Ga. 1997); *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998)).

D. Claims Six through Ten:

Esposito withdraws these claims.[57] (Doc. 56 at 21-23).

E. Claim Eleven: The execution of Petitioner by lethal injection is cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A habeas action is not the appropriate vehicle for attacking Georgia's lethal injection procedures; rather, that challenge must be raised in a 42 U.S.C. § 1983 action. *Tompkins v. Sec'y Dep't Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); see *Hill v. McDonough*, 547 U.S. 573, 579-83 (2006); *Thomas v. McDonough*, 228 F. App'x 931, 932 (11th Cir. 2007)

[57] To the extent Claim Six—allegations that the death penalty in Georgia is imposed arbitrarily and capriciously and amounts to cruel and unusual punishment—raises a challenge to the lethal injection procedure in Georgia, this issue is contained in Claim Eleven of Esposito's federal habeas petition and is discussed in section III E of this Order.

(holding that "§ 1983 and § 2254 are mutually exclusive," and that if a claim can be brought under § 1983, it "cannot be brought under § 2254"). The Eleventh Circuit has explained:

> Usually an inmate who challenges a state's method of execution is attacking the means by which the State intends to execute him, which is a circumstance of his confinement. It is not an attack on the validity of his conviction and/or sentence. For that reason, "[a] § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures." Hence, … the district court did not err in dismissing [the petitioner's] lethal injection challenge in his federal habeas petition. That avenue of relief is still available to him in a § 1983 action.

McNabb v. Comm'r Ala. Dep't of Corr., 727 F.3d 1334, 1344 (11th Cir. 2013) (quoting *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir 2009)).

Claim eleven is dismissed.

IV. CONCLUSION

For the reasons explained above, Esposito'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).

Under this standard, the Court issues a COA on the following issues: Whether trial counsel were ineffective in failing to investigate and present evidence to support their defense theories that Esposito was less culpable that Woodward and that his personal history of abuse and mental illness was mitigating.

In relation to all other claims, grounds, and issues raised in Esposito's petition for writ of habeas corpus (Doc. 1), the Court finds the standard shown above for the grant of a COA has not been met.

SO ORDERED, this 10th day of December, 2014.

S/ C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES DISTRICT COURT

SUPREME COURT OF GEORGIA
Case No. S11E1608

Atlanta, March 19, 2012

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JOHN ANTHONY ESPOSITO v. HILTON HALL, WARDEN

From the Superior Court of Butts County.

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

Trial Court Case No. 2002V321

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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

Pamela M. Fishburne, Deputy Clerk

Res. Ex. No. 166
Case No. 5:12-CV-163

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

FILED
BUTTS SUPERIOR COURT
2011 APR 29 P 1:02
BY RHONDA SMITH, CLERK

JOHN ANTHONY ESPOSITO)
)
Petitioner,) CASE NO: 2002-v-321
)
v.)
)
HILTON HALL, Warden,)
Georgia Diagnostic and)
Classification Prison,)
)
Respondent.)
)

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

This matter comes before this Court on the Petitioner's Amended Petition for Writ of Habeas Corpus as to his convictions and sentence of death from his trial in the Superior Court of Baldwin County. Having considered the Petitioner's original and amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answers to the original and amended Petitions, relevant portions of the appellate record, evidence admitted at the hearing on this matter on September 4-6, 2007, the documentary evidence submitted, the arguments of counsel, and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49. The Court denies the petition for a writ of habeas corpus.

Res. Ex. No. 162
Case No. 5:12-CV-163

TABLE OF CONTENTS

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

JOHN ANTHONY ESPOSITO,	*	**CIVIL ACTION NO.**
	*	**2002-V-321**
Petitioner,	*	
	*	
v.	*	**HABEAS CORPUS**
	*	
HILTON HALL, Warden,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

ORDER

I. STATEMENT OF THE CASE.

Petitioner, John Anthony Esposito, was indicted in Morgan County, Georgia on December 2, 1996 for malice murder, felony murder, armed robbery, and hijacking a motor vehicle. The State filed notice of its intent to seek the death penalty for Petitioner as to the murder on January 31,1997. On November 17, 1997, the trial court granted an unopposed motion to change venue and moved the trial to the Superior Court of Baldwin County. On September 30, 1998, a jury found Petitioner guilty on all counts of the indictment and on October 2, 1998, Petitioner was sentenced to death for the malice murder, life imprisonment for the armed robbery, and twenty years imprisonment for the motor vehicle hijacking. The felony murder conviction was vacated by the trial court by operation of law.

Petitioner filed a motion for new trial on October 29, 1998. After hearing the motion and argument of counsel on June 30, 1999, the trial court denied Petitioner's motion for a new trial on September 16, 1999.

On direct appeal to the Georgia Supreme Court, Petitioner's convictions and sentence were affirmed on October 30, 2000. Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000). In reviewing the sufficiency of the evidence, the Georgia Supreme Court found that the "evidence adduced at trial, viewed in the light most favorable to the verdict, was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Esposito was guilty of the crimes of which he was convicted and that statutory aggravating circumstances existed." Esposito, 273 Ga. at 184 (citing Jackson v. Virginia, 443 U.S. 307 (1979)). A timely motion for reconsideration was filed and subsequently denied on November 30, 2000.

Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court on April 27, 2001. The United States Supreme Court denied his petition for writ of certiorari on June 25, 2001. Esposito v. Georgia, 533 U.S. 935, 121 S.Ct. 2564 (2001). Petitioner then filed a petition for rehearing in the United States Supreme Court, which was denied on August 27, 2001. Esposito v. Georgia, 533 U.S. 970, 122 S.Ct. 15 (2001).

The Georgia Supreme Court issued the remittitur to the trial court on September 18, 2001. Petitioner filed the instant habeas corpus petition on May 3, 2002, and his amended petition on November 6, 2006. Thereafter, an evidentiary hearing was held on September 4-6, 2007. Respondent filed his post-hearing brief and a proposed order on February 11, 2008. Respondent submitted an amended proposed order on May 5, 2008. Petitioner filed his post-hearing brief on February 18, 2008; however, he did not submit a proposed order. Respondent's Motion to Strike Petitioner's Brief as untimely is hereby

denied in the interests of justice. The Court has considered Petitioner's argument in reaching its conclusions on Petitioner's claims.

II. STATEMENT OF FACTS.

On direct appeal from Petitioner's 1998 conviction and sentence of death, the Georgia Supreme Court found that the evidence at trial established the following facts:

> [O]n September 19, 1996, Esposito's co-conspirator, Alicia Woodward, persuaded Lola Davis to give her a ride from a parking lot in Lumberton, North Carolina. Woodward directed Davis to a nearby location where Esposito entered Davis' automobile. Esposito and Woodward then forced the elderly Davis, without the use of any weapons, to drive to a nearby parking lot and to move to the passenger seat of her automobile. Esposito removed one thousand dollars and Davis' checkbook from her purse, and Woodward drove Davis' automobile to a local bank where she cashed a check for three hundred dollars that she and Esposito had forced Davis to write. Woodward and Esposito then drove Davis to a remote location in Morgan County, Georgia, where Esposito led Davis into a hayfield, forced her to kneel, and beat her to death with tree limbs and other debris. Esposito and Woodward then drove in Davis' automobile to Alabama where they disposed of Davis' automobile and purse. Davis' automobile was shown at trial to contain fingerprints, palm prints, and footprints matching Esposito's and Woodward's. Saliva on a cigarette butt found in the automobile was shown to contain DNA consistent with Esposito's DNA.
>
> Evidence presented during the sentencing phase showed that, after murdering Davis, Esposito and Woodward traveled to Oklahoma, abducted an elderly couple, illegally obtained money using the couple's bank card, and then drove the couple to Texas where Esposito beat them to death with a tire iron. An FBI agent also testified during the sentencing phase that Esposito had described his and Woodward's plan to abduct and murder yet another elderly woman for money.

Esposito v. State, 273 Ga. at 183-184.

III. CLAIMS THAT ARE NOT BEFORE THIS COURT FOR REVIEW.

A. CLAIMS THAT ARE BARRED BY *RES JUDICATA*.

A number of Petitioner's claims were rejected by the Georgia Supreme Court on direct appeal in Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000). Georgia law is

unequivocally clear that issues that have been raised and litigated on direct appeal may not be relitigated by means of a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996). Accordingly, applying this well-established *res judicata* principle to the claims raised by Petitioner, this Court is precluded from reviewing the following claims:

a) That **portion of Claim III,** wherein Petitioner alleges that the trial court erred in allowing the introduction of illegally obtained statements and evidence, was addressed and decided adversely to Petitioner on direct appeal. Esposito v. State, 273 Ga. at 184-185(2). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

b) That **portion of Claim V**, wherein Petitioner alleges that his death sentence 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, was addressed and decided adversely to Petitioner on direct appeal. Esposito v. State, 273 Ga. at 187(5);

c) That **portion of Claim V**, wherein Petitioner alleges that his death sentence is disproportionate, was addressed and decided adversely to Petitioner on direct appeal. Esposito v. State, 273 Ga. at 187-188(6); and

d) **Claim VII**, wherein Petitioner alleges that his death sentence was arbitrarily imposed and is a disproportionate punishment, was addressed and decided adversely to Petitioner on direct appeal. Esposito v. State, 273 Ga. at 187-188(5) and (6).[1]

---

[1] To the extent that Claim VII raises new claims, it is procedurally defaulted.

As the Georgia Supreme Court has already reviewed and rejected these claims, and as this Court is precluded from relitigating these claims under the doctrine of *res judicata*, these claims are dismissed.

B. PROCEDURAL DEFAULTED CLAIMS.

Claims that Petitioner failed to raise at trial and on direct appeal, and as to which Petitioner has failed to establish cause and actual prejudice sufficient to excuse the procedural default of these claims in this collateral proceeding, are procedurally defaulted and are not reviewable by this Court. See Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Under this binding authority, the following claims have been procedurally defaulted and are thus barred from this Court's review:

a) **Claim II**, wherein Petitioner alleges prosecutorial misconduct in that:

1) the State suppressed information favorable to the defense at both phases of Petitioner's trial;

2) the State argued to the jury that which it knew or should have known to be false and/or misleading;

3) the State failed to disclose benefits or promises extended to State witnesses in exchange for their testimony and allowed its witnesses to convey a false impression to the trial judge and the jury. This alleged misconduct included the State's treatment of Petitioner's co-defendant and its decision to dispose of her case with a life sentence despite her greater culpability;

4) the State elicited false and/or misleading testimony from the State's witnesses;

5) the State knowingly or negligently presented false testimony in pretrial, guilt phase, penalty phase and

sentencing. This alleged misconduct included, but was not limited to the following: denying the existence of Petitioner's mental illness, minimizing the role of mental illness in his life and ignoring background records of Petitioner that the prosecution obtained and had in its possession;

6) the State improperly used its peremptory strikes to systematically exclude jurors on the basis of race and/or gender;

7) the State made improper, misleading arguments and presented irrelevant and prejudicial evidence. This alleged misconduct included the following: the State elicited extensive information about the victims, improper victim impact testimony, testimony regarding the search for the victims, the State introduced into evidence prejudicial photographs and a video of a crime scene and attempted to remove from the jury's consideration Petitioner's history of mental illness and longstanding personality disorder and the role of Petitioner's co-defendant and her greater culpability;

8) the jury bailiffs and/or sheriff's deputies and/or other State agents who interacted with jurors at the trial engaged in improper communications with jurors; and

9) the State gathered all of its witnesses together during the middle of the trial;

b) That **portion of Claim III**, wherein Petitioner alleges trial court error in that:

1) the trial court failed to possess and employ an accurate and proper understanding of what constitutes mitigation and what constitutes aggravation;[2]

2) the trial court failed to curtail the improper and prejudicial arguments by the State;

---

[2] During the hearing, Petitioner emphasized the post-trial report by Judge Prior, however the report by the trial judge had no bearing on the proceedings which resulted in Petitioner's conviction, and therefore, it has no relevance to this collateral habeas appeal. O.C.G.A. § 9-14-42(a).

3) the trial court admitted into evidence various items of unspecified prejudicial, unreliable, unfounded, unsubstantiated and/or irrelevant evidence tendered by the State;

4) the trial court admitted unspecified evidence despite proper objections;

5) the trial court refused to allow admissible evidence;

6) the trial court imposed an unconstitutional and disproportionate sentence;

7) the trial court failed to require the State to disclose certain items of unspecified evidence in a timely manner so as to afford the defense an opportunity to conduct an adequate investigation;

8) the trial court failed to require the State to disclose certain items of unspecified evidence of an exculpatory or impeaching nature to the defense;

9) the trial court allowed the State to present false and misleading testimony;

10) the trial court failed to act upon known improprieties of defense counsel;

11) the trial court failed to provide Petitioner with adequate counsel;

12) the trial court permitted the prosecution to elicit extensive and irrelevant victim impact evidence;

13) the trial court impermissibly injected comments during the testimony of witnesses and impermissibly questioned witnesses;

14) the trial court relied on a misunderstanding of the law in the court's rulings, report and findings;

15) the trial court excused unspecified potential jurors for improper reasons under the rubric of "hardship";

16) the trial court restricted voir dire relating to several areas of inquiry;

17) the trial court admitted into evidence prejudicial and irrelevant photographs and video;

18) the trial court placed the burden on Petitioner to prove that he was ineligible for the death penalty;

19) the trial court failed to inquire into the possibility of juror misconduct and remedy such misconduct;

20) the trial court ordered that an involuntary confession could be admitted to rebut mitigating evidence introduced by the defense;

21) the trial court refused to give proper jury instructions requested by Petitioner;

22) the trial court refused to strike unspecified prospective jurors who were unqualified for reasons such as, but not limited to, bias against the defense;

23) the trial court gave the jury erroneous and misleading instructions;

24) the trial court provided the jury with misleading and prejudicial forms on which to note their verdicts and findings as to aggravation;

25) the trial court permitted the jurors to interact with the alternate jurors during deliberations;

26) the trial court improperly restricted the scope of voir dire;

27) the trial court improperly rehabilitated prospective jurors;

28) the trial court failed to maintain order in the courtroom by allowing emotional and prejudicial actions by members of the public in the courtroom and by witnesses while on the stand;

29) the trial court failed to declare a mistrial or issue curative instructions when the State made improper and prejudicial statements in arguments; and

30) the trial court allowed the prosecution to introduce improper, unreliable and irrelevant evidence including

evidence of which the defense had not been provided adequate notice and which had been concealed from the defense;

c) **Claim IV**, wherein Petitioner alleges juror misconduct[3] that included, but was not limited to, the following:

1) improper consideration of matters extraneous to the trial;

2) improper racial attitudes which infected the deliberations of the jury;

3) false or misleading responses of jurors during voir dire;

4) improper biases of jurors which infected their deliberations;

5) improper exposure to the prejudicial opinions of third parties;

6) improper communications with third parties;

7) improper communication with jury bailiffs;

8) improper ex parte communications with the trial judge; and

9) improperly prejudging Petitioner's guilt, his defense and his claims;

d) That **portion of Claim V**, wherein Petitioner alleges that Georgia's statutory death penalty procedures, as applied, do not result in fair, nondiscriminatory imposition of the death sentence;

e) **Claim VI**, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional;[4]

---

[3] Petitioner failed to introduce any admissible evidence in these habeas proceedings to overcome the procedural default of the claim of juror misconduct. The juror affidavits that Petitioner sought to admit were excluded because they were untimely and furthermore, they were inadmissible as an improper attempt to impeach the jury's verdict in direct violation of O.C.G.A. § 9-10-9 and O.C.G.A. § 17-9-41, which provide that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict."

[4] Additionally, the Georgia Supreme Court has repeatedly held that the Unified Appeal Procedure is not unconstitutional and does not violate any of the rights of a defendant. Wellons v. State, 266 Ga. 77, 91, 463 S.E.2d 868 (1995); Ledford v. State, 264 Ga. 60, 65, 439 S.E.2d 917 (1994); Ward v. State, 262 Ga. 293, 300, 417 S.E.2d 130 (1992);

f) That **portion of Claim VIII**, wherein Petitioner alleges that he was denied due process of law when the same jury that convicted him was responsible for determining the appropriate sentence;[5]

g) That **portion of Claim VIII**, wherein Petitioner alleges that death qualification is unconstitutional;

h) **Claim IX**, wherein Petitioner alleges that the trial court erred in its instructions to the jury during the guilt/innocence phase of Petitioner's trial. Specifically, Petitioner alleges that the trial court:

1) incorrectly charged the jury on the burden of proof beyond a reasonable doubt permitting the jury to convict Petitioner upon less than "utmost certainty" of guilt";

2) gave an improper charge on impeachment of witnesses;

3) instructed the jury on inappropriate and inapplicable matters;

4) gave an unconstitutionally vague and misleading definition of insanity;

5) incorrectly instructed the jury on the consequences of certain verdicts;

6) incorrectly instructed the jury on who would take custody of Petitioner if convicted under a guilty but mentally ill verdict;

7) suggested to the jury that mental illness was not a factor in determining whether Petitioner was insane;

8) improperly instructed the jury on charges which merged into one offense;

Isaacs v. State, 259 Ga. 717, 722, 386 S.E.2d 316 (1989); Pruitt v. State, 270 Ga. 745 (6), 514 S.E.2d 639 (1999).

[5] The Georgia Supreme Court has held that a "defendant is not entitled to separate juries for the guilt and sentencing phases of the trial." Ward v. State, 262 Ga. 293, 300 (1992)(citing Miller v. State, 237 Ga. 557, 559 (1976)).

9) failed to instruct the jury on lesser included offenses;

10) improperly instructed the jury to not be swayed by sentiment, sympathy, prejudice or other factors;

11) improperly charged vague and standardless definitions of statutory terms; and

12) improperly charged the jury on the offenses charged in the indictment; and

i) **Claim XI**, wherein Petitioner alleges that he was sentenced to death because of his race and gender in violation of McCleskey v. Kemp, 481 U.S. 279 (1987).

Because Petitioner failed to raise the foregoing claims at trial and on direct appeal, and because Petitioner has failed to establish cause and actual prejudice sufficient to excuse the procedural default of these claims in this collateral proceeding, the foregoing claims are barred from review by this Court and are hereby dismissed. See Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991).

C. NON-COGNIZABLE CLAIMS.

Petitioner's allegation in **Claim XIII** that lethal injection is cruel and unusual punishment is non-cognizable in these habeas proceedings as it is not an assertion of a "substantial denial" of Petitioner's constitutional rights "in the proceedings which resulted in his conviction." O.C.G.A. § 9-14-42(a). Even if this Court were to find that this claim is cognizable, this claim is without merit because this Court is bound by the decision of the U.S. Supreme Court in Baze v. Rees, 553 U.S. 35 (2008), as well as the decisions of the Georgia Supreme Court holding that lethal injection in Georgia is

constitutional. See Braley v. State, 276 Ga. 47, 56, 572 S.E.2d 583 (2002), *citing* Dawson v. State, 274 Ga. 327, 335-336, 554 S.E.2d 137 (2001). As such, this claim is hereby dismissed.

Additionally, Petitioner's allegation of cumulative error in **Claim XII** is non-cognizable in these habeas proceedings as the Georgia Supreme Court has repeatedly held that there is no cumulative error rule in Georgia. See, e.g., Rogers v. State, 282 Ga. 659, 668 (2007); Schofield v. Holsey, 281 Ga. 809, 812 n. 1 (2007); Smith v. State, 277 Ga. 213, 219 (2003); Head v. Taylor, 273 Ga. 69, 70 (2000). As such, this claim is hereby dismissed.

IV. CLAIMS THAT ARE PROPERLY BEFORE THIS COURT FOR REVIEW

A. INEFFECTIVE ASSISTANCE OF COUNSEL.

In Claim I of Petitioner's Amended Petition for Writ of Habeas Corpus, as well as numerous footnotes throughout the petition, Petitioner alleges that he was denied effective assistance of counsel in violation of his constitutional rights at trial and on direct appeal.

This Court denies this claim. This Court finds that Petitioner failed to prove both the deficiency and prejudice prongs of the test for reviewing claims of ineffective assistance of counsel under the applicable standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). Because Petitioner failed to overcome Strickland's intentionally heavy burden of proving ineffectiveness, the writ of habeas corpus is denied as to Petitioner's claims of ineffective assistance of counsel.

1. Legal Standard.

The standards for reviewing allegations of ineffective assistance of counsel were established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must establish *both* that his attorney's performance was deficient *and* that the attorney's error resulted in prejudice to Petitioner's case. See Strickland, 466 U.S. at 698. Unless a petitioner makes both showings, his conviction or death sentence cannot be found to be the unreliable result of a breakdown in the adversarial process. Strickland, 466 U.S. at 687. The Strickland standard, which requires that a petitioner must satisfy both performance and prejudice prongs to demonstrate ineffectiveness, was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783, 325 S.E.2d 362 (1985); see also Jones v. State, 279 Ga. 854 (2005); Washington v. State, 279 Ga. 722 (2005); Hayes v. State, 263 Ga. 15 (1993). Therefore, the Strickland standard governs this Court's review of Petitioner's ineffective assistance claims.

a. Deficient Performance Prong.

In examining the deficient performance prong of the Strickland standard, the United States Supreme Court instructed, "a court must indulge **a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance**; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (internal citations omitted)(emphasis added); see also Wiggins v. State, 280 Ga. 627 (2006); Sims v. State, 278 Ga. 587 (2004); Brady v. State, 270 Ga. 574 (1999). The Court in Strickland also stressed that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the

exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; accord Smith v. Francis, 253 Ga. at 783; see also Zant v. Moon, 264 Ga. 93, 97 (1994).

With regard to this presumption in favor of finding counsel to be effective, the Supreme Court held in Burger v. Kemp that a reviewing court should "address not what is prudent or appropriate, but only what is constitutionally compelled." 483 U.S. 776, 794 (1987); see also Zant v. Moon, 264 Ga. at 97-98. In applying the Strickland standards, the Georgia Supreme Court recognized that "[t]he test for reasonable attorney performance 'has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. **We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.**'" Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993)(quoting White v. Singletary, 972 F.2d 1218, 1220-1221 (11th Cir. 1992))(emphasis added). See also Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994)(holding, "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one.").

In addition to the strong presumption in favor of effective assistance of counsel, the United States Supreme Court also has advised that courts reviewing ineffectiveness claims should "**eliminate the distorting effects of hindsight**, to reconstruct the circumstances of counsel's challenged conduct, and to **evaluate the conduct from counsel's perspective at the time.**" Strickland, 466 U.S. at 689 (emphasis added). In

Lockhart v. Fretwell, the United States Supreme Court adopted the rule of contemporary assessment of counsel's performance by holding the following:

> Ineffective assistance of counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. We adopted the rule of contemporary assessment of counsel's conduct because a more rigid requirement "could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."

506 U.S. 364, 372 (1993)(citing Strickland, 466 U.S. at 690).

b. Prejudice prong.

In Strickland, the Supreme Court held that there is prejudice stemming from ineffective assistance of counsel if there is a reasonable probability that, absent the deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The Supreme Court in Lockhart further defined the "prejudice" component of Strickland, holding that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart, 506 at 369-370.

In Smith v. Francis, 253 Ga. at 783, the Supreme Court of Georgia interpreted the prejudice prong to require that a petitioner prove that the outcome of the proceedings would have been different. "In order to establish that trial counsel's performance was so defective as to require a new trial, [the Petitioner] must show that counsel's performance was deficient and that the deficient performance so prejudiced [the Petitioner] that there is a reasonable likelihood that, absent counsel's errors, the outcome of the trial would

have been different." Roberts v. State, 263 Ga. 807, 807-808 (1994). "Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Smith v. Francis, 253 at 783-784.

In the instant case, this Court has applied the guiding principles set forth in Strickland and its progeny, as adopted by the Georgia Supreme Court, i.e., according a strong presumption of effectiveness to counsel's conduct; viewing counsel's representation objectively from the perspective of counsel at the time of trial; refusing to engage in hindsight analysis; presuming the reasonableness of judgment calls and trial strategy; acknowledging that even the most qualified counsel would likely represent a capital litigant differently; and recognizing that even the most experienced and effective attorney might be unable to prevent the imposition of the death penalty in a particular case. This Court finds that Petitioner failed to establish that counsel's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. This Court also finds that Petitioner failed to establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694. Accordingly, this Court hereby denies habeas corpus relief as to the entirety of Petitioner's claims of ineffective assistance of counsel.

2. Trial Counsel's Experience.

On October 10, 1996, Judge William Prior appointed Roy Robinson Kelly, III and W. Dan Roberts to represent Petitioner during his capital murder trial. (R. 12; HT 208). Both Mr. Kelly and Mr. Roberts had extensive experience in criminal defense and specifically had experience in capital cases. (HT 207-209, 266-268). When they were

appointed to represent Petitioner, Mr. Kelly had been practicing criminal law for over twenty years and Mr. Roberts had been practicing for approximately thirty years. (HT 207, 266-267). Prior to representing Petitioner, Mr. Kelly had been appointed to five death penalty cases and took two of them to trial. (HT 207-208). Mr. Kelly also had served on the Georgia Indigent Defense Council, which provided assistance to capital defendants. (HT 248). Mr. Roberts had handled three death penalty cases and had tried numerous non-capital murder cases. (HT 267-268, 300-301). Additionally, Mr. Kelly and Mr. Roberts had worked together as co-counsel on a death penalty trial two years before Petitioner's case. (HT 208-209; 267-268).

Because of their considerable experience, as well as the training Mr. Roberts received during death penalty litigation seminars, both Mr. Kelly and Mr. Roberts fully understood the thorough investigation necessary to prepare for a capital trial and the extensive preparation necessary for presenting an effective mitigation defense (HT 242-243, 300-302). Mr. Kelly stated that because he had handled five death penalty cases prior to Petitioner's, he was well aware of what would be expected of him in preparing mitigation case for the sentencing phase. (HT 242-243).

In reviewing the reasonableness of the decisions made by Mr. Kelly and Mr. Roberts throughout their representation of Petitioner, this Court has given additional deference to the decisions made by these attorneys because Mr. Kelly and Mr. Roberts had considerable experience in criminal and capital cases prior to representing Petitioner. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(en banc)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger."); see also Provenzano v. Singletary,

148 F.3d 1327, 1332 (11th Cir. 1998)("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel."); Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994)("The more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.").

3. Trial Counsel's Investigation and Presentation of Life History Mitigation.

In Claim I of his amended petition, Petitioner alleges that his attorneys were ineffective in the pre-trial investigation conducted by his defense team and in the presentation of mitigating evidence at trial.[6] This Court denies this claim and finds that the evidence presented in this habeas proceeding does not support Petitioner's claim. Rather, the record unquestionably demonstrates that Mr. Kelly and Mr. Roberts, along with their experienced mitigation expert, performed a thorough and comprehensive investigation in preparation for trial. The record also reflects that Petitioner's defense attorneys put forth a reasonable, strategic mitigation theory at trial that emphasized Petitioner's troubled family life and mental health issues. Because Petitioner failed to prove that his attorneys were deficient in their performance and also failed to prove that there is a reasonable probability that he suffered actual prejudice as the result of any of these alleged errors, Petitioner has failed to meet his burden under Strickland. Therefore,

---

[6] In his posthearing brief, Petitioner argued that the Court should could consider attorney Kelly's October 2007 arrest on child pornography charges as circumstances surrounding his representation of Petitioner when assessing this representation, including the investigation of life history mitigating evidence. Petitioner has presented no evidence to this Court establishing any connection between his ineffectiveness claims. In the absence of such evidence, the Court declines to consider this arrest.

this Court denies Petitioner's claim of ineffective assistance of counsel as to the investigation and presentation of life history mitigation.

a. Investigation of Life History Mitigating Evidence.

The evidence before this Court contradicts Petitioner's claim that his attorneys were ineffective in their investigation of mitigating evidence. Rather, the evidence presented at the hearing demonstrated that trial counsel and their investigator, Hector Guevara, planned and implemented a wide-ranging investigation of Petitioner's life and his family history.

With reference to the investigation required of effective counsel, the United States Supreme Court held in Strickland v. Washington that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. 668 (1984). Strickland and its progeny have held that the reasonableness of an investigation "may be determined or substantially influenced by the defendant's own statements (sic) or actions." Id. See also Mulligan v. Kemp, 771 F.2d 1436, 1441 (11th Cir. 1985).

The Court in Strickland directed that an objective standard of reasonableness should be applied to a review of trial counsel's performance. See Chandler, 218 F. 3d at 1312 (counsel's conduct is deficient when it falls "below an objective standard of reasonableness."). This Court denies Petitioner's claim because Petitioner failed to present evidence that the thorough investigation conducted by his defense team fell below this objective standard of reasonableness. Because Petitioner cannot establish deficient performance in his counsel's investigation and preparation, this Court denies Petitioner's claim of ineffective assistance of counsel.

This Court finds that Petitioner's defense team thoroughly researched his background to search for potential mitigation evidence. After petitioning the trial court for funds to hire an investigator,[7] trial counsel hired Hector Guevara as a mitigation specialist to assist them in the investigation and preparation of Petitioner's case. (HT 224, 272-273). Mr. Guevara, who had considerable mitigation investigative experience, was referred to Petitioner's defense team by the Indigent Defense Council.[8] (HT 224, 304, 4626-4635, 4667-4670).

Mr. Guevara conducted a wide-ranging investigation into Petitioner's life history. The defense investigator met with Petitioner numerous times and extensively interviewed him about his background. (HT 4780-4857). To further explore Petitioner's upbringing and personal history, Mr. Guevara made three trips to New Jersey and a trip to North Carolina to visit the places where Petitioner had grown up. (HT 246, 4215-4225). Trial counsel testified that they sent Mr. Guevara on these out-of-state trips so that he could seek out as many potential mitigation witnesses as possible and obtain a full and complete picture of Petitioner's life history. (HT 246).

Over the course of these trips, Mr. Guevara researched numerous aspects of Petitioner's life and interviewed over 75 individuals, including Petitioner's family,

---

[7] Mr. Kelly and Mr. Roberts requested funds for an investigator/mitigation specialist to assist in their preparation of the case and the trial court awarded the defense $20,000 for this purpose, which was more money than Mr. Kelly had ever received for an investigator in a death penalty case. (3/3/98 ex parte hearing, pp. 2-3; 7/21/98 ex parte hearing, p. 6; HT 252-253, 4476, 4490, 4534). The trial court also provided the defense with funds to hire a social worker/mitigation specialist. Trial counsel hired Ofelia Gordon, a social worker, and she met with Petitioner. However, Mr. Guevara reported to trial counsel that Ms. Gordon was not forthcoming and not effective at eliciting information from Petitioner. (HT 4747-4750). Trial counsel did not keep her on the case (HT 445).

[8] Mr. Kelly testified that the defense team reached out to Mike Mears for assistance with Petitioner's case because they felt that the Indigent Defense Council was one of the best resources in Georgia for assistance in defending a death penalty case. (HT 248).

friends, teachers, school administrators, coaches, doctors, nurses, mental health professionals, social workers, local police officers, and recruiters for the National Guard and the U.S. Army Reserve. (HT 4215-4225, 4675-4678, 4737-4746, 4756-4766). These interviews were in-depth and comprehensive, with many lasting multiple hours, and Mr. Guevara met repeatedly with several important witnesses, such as Petitioner's immediate family members and Petitioner's ex-girlfriend. (HT 4215-4225, 4861-4977). Mr. Guevara interviewed all of the individuals suggested by Petitioner, as well as interviewing many dozens more. (HT 4215-4225, 4675-4678, 4737-4746, 4756-4766).

This Court also finds that the defense team requested and reviewed extensive background records. (HT 4672-4674, 4775-4777). The defense acquired Petitioner's medical and mental health records from Ancora State Hospital, Kennedy Memorial Hospital, Transitional Residence Independent Services (T.R.I.S.), Underwood Memorial Hospital, and Central State Hospital, including tests and evaluations from doctors and mental health care personnel who treated Petitioner at each of these facilities. (HT 4672, 6365). The defense also obtained records from two New Jersey police departments, New Jersey police reports, the FBI and GBI reports on Petitioner's crimes, Georgia police reports, Colorado police reports, crime scene reports, and Petitioner's Jasper County jail records. (HT 4672). The defense also received school records from the five schools that Petitioner attended, including his high school psychological evaluations Furthermore, the defense acquired Petitioner's enlistment and discharge records from the U.S. Army Reserves, his vital records from New Jersey, and various personal documents such as correspondence, drawings, and poems. (HT 4672-4674).

Mr. Guevara met several times with the trial attorneys to discuss the potential mitigation evidence that he was gathering. (HT 229). Mr. Guevara provided trial counsel with a fourteen page social history of Petitioner's life. (HT 4636-4649). Mr. Guevara also provided the defense team with a ten page "Analysis of Mitigation Factors" in Petitioner's case, as well as several other documents concerning mitigation theories. (HT 4626-4635, 4667-4670, 4712-4716). Mr. Guevara further provided the trial attorneys with timelines of Petitioner's life history and his mental treatment history. (HT 4652-4666). In addition to working with Mr. Guevara, reviewing his extensive reports, and examining the large amounts of background records, the trial attorneys further took part in the mitigation investigation by interviewing Petitioner themselves and by speaking with family members on the phone. (HT 230, 4175-4194).

This Court finds that the defense team's investigation for potential mitigation evidence constituted a reasonable investigation under Strickland. 466 U.S. at 691. Given the investigation that was conducted by Petitioner's defense team prior to trial, this Court finds that Petitioner failed to prove deficiency under Strickland. The hindsight allegation by current counsel for Petitioner that "more" could have been done is insufficient to establish that defense counsel's investigation was not reasonable in this case. The number of persons interviewed, the extensive nature of the interviews conducted, the far-ranging search for potential mitigating witnesses, the consultation between counsel and the investigator, culminating in the compilation of an extensive social history, belie any assertion that trial counsel's investigation was not objectively reasonable under the Strickland standards. As such, this Court denies Petitioner habeas corpus relief as to his claim of ineffective assistance of counsel with regard to the pre-trial investigation.

Furthermore, this Court finds that trial counsel were not deficient for not uncovering every potential witness that habeas counsel has now uncovered. See Turpin v. Mobley, 269 Ga. 635, 640-641 (1998)("The failure of trial counsel to uncover every possible favorable witness does not render their performance deficient. We recognize that post-conviction counsel will almost always be able to identify a potential mitigation witness that trial counsel did not interview or a record that trial counsel did not obtain."). As stated by the Georgia Supreme Court in Head v. Carr, 273 Ga. 613, 625 (2001), "Perfection is not required; an ineffectiveness analysis is simply intended to ensure that the adversarial process at trial worked adequately. ... We understand that post-conviction counsel will almost always be able to identify some potential mitigating evidence not presented to the jury and that this alone does not render trial counsel's performance deficient."

This Court finds that the adversarial process at trial worked in this case and that the investigation into Petitioner's life history that was conducted by Petitioner's defense team was objectively reasonable. Because Petitioner has failed to prove deficient performance with regard to his defense attorneys' investigation for life history mitigation evidence, this Court need not address the prejudice prong. Because Petitioner did not satisfy his burden under Strickland, this Court denies Petitioner habeas relief regarding his claim of ineffective assistance of counsel as to the life history mitigation investigation.

b. Presentation of Life History Mitigating Evidence.

This Court finds that Petitioner failed to prove that his trial attorneys rendered ineffective assistance of counsel with regard to their presentation of life history

mitigating evidence during the penalty phase of trial. The trial record established that six of the seven witnesses called by the defense during the sentencing phase testified about Petitioner's life history, including the childhood abuse and his negligent mother.

Furthermore, the evidence presented to this Court established that trial counsel were not deficient in their selection and preparation of mitigation witnesses. Because Petitioner cannot meet his burden of establishing ineffective assistance under Strickland, this Court denies Petitioner habeas corpus relief as to this claim.

In finding that trial counsel were not deficient in the presentation of life history mitigation evidence, this Court relies upon Strickland and its progeny, which have held that effective assistance of counsel does not require that defense attorneys present all available evidence in mitigation, and that defense attorneys are not required to present any mitigating evidence in every case. See Wiggins v. Smith, 539 U.S. 510, 533 (2003); Chandler, 218 F.3d at 1319. "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995)(en banc)(emphasis added).

The Eleventh Circuit Court of Appeals has assessed the "common practice" of second-guessing what evidence should have been presented during the sentencing phase by stating that,

> [W]e have observed that "it is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." Waters, 46 F.3d at 1513-14. Such affidavits "usually prove[] at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will

> inevitably identify shortcomings in the performance of prior counsel." Id. at 1514.

Williams v. Head, 185 F.3d 1223, 1236 (11th Cir. 1999). See also, Turpin v. Lipham, 270 Ga. 208, 217 n. 4 (1998)(stating that it is "common practice for post-conviction counsel to file affidavits by witnesses who say they would have supplied additional mitigating evidence, had they been called by trial counsel. ... Usually this 'what may have been' strategy does nothing more than confirm the truism ... that everything is clearer with hindsight")(internal citation omitted).

The affidavits submitted by Petitioner in support of his claim that trial counsel were ineffective in their presentation of mitigating life history evidence are insufficient to prove deficiency. This Court finds that trial counsel made a reasonable presentation of Petitioner's life history in mitigation, especially when viewed from trial counsel's perspective at the time of trial. Furthermore, this Court finds that the trial attorneys were reasonable in their selection and preparation of the mitigation witnesses, and that counsel were reasonable in their chosen mitigation strategy and the testimony that they elicited from these witnesses.

Petitioner's experienced defense attorneys performed reasonably in their selection of which mitigation witnesses to call and in their preparation of these witnesses for trial. By using the reports created by Mr. Guevara to decide which mitigation witnesses to call, the attorneys selected witnesses who hopefully could elicit sympathy with the jury. (HT 236-237, 288-289). This Court finds that trial counsel also prepared their carefully chosen mitigation witnesses for trial by meeting with them and briefing them on the questions that they were going to be asked. (HT 254-255). Furthermore, the attorneys were objectively reasonable in warning the mitigation witnesses to avoid certain

testimony that could "open the door" to the trial court allowing the suppressed video confession back into evidence. (HT 254-255).

This Court finds that the trial attorneys had a clear mitigation strategy and elicited testimony from the witnesses designed to support this strategy, specifically with regard to Petitioner's troubled life and his redeeming qualities. (HT 236). The evidence before this Court showed that the trial attorneys elicited testimony from Petitioner's family, high school coach, and mental health care providers about Petitioner's difficult life history. This testimony included evidence about the physical, verbal, and sexual abuse that Petitioner suffered as a child, his neglectful mother, and his dysfunctional family. The trial attorneys also presented the testimony of Dr. Daniel Grant, the defense's mental health expert, who told the jury that Petitioner had a long history of childhood sexual and physical abuse, that Petitioner still had recurring thoughts and nightmares stemming from this abuse, that he felt detached and estranged from people, that he feared rejection and criticism, and that his traumatic past may cause him to have dissociative episodes. (TT 7:112, 122). In addition to the testimony about Petitioner's troubled life, the trial attorneys also elicited mitigating testimony about Petitioner's redeemable qualities through the defense witnesses.

From review of the trial record, this Court finds that Petitioner's defense attorneys were not deficient in their presentation of life history mitigation. This Court further finds that even if the Court were to conclude that such presentation, including the failure to present the testimony of Dr. Lower and Courtney Greco Veach, was deficient, Petitioner has failed to establish that he suffered any actual prejudice such that there is a reasonable probability that the outcome of the trial would have been different.

Because Petitioner has failed to establish deficient performance and prejudice, Petitioner's claim as to ineffective assistance of counsel with regard to the presentation of life history mitigation is denied.

4. Investigation and Presentation of Mental Health Mitigation.

In Claim I of his amended petition, Petitioner alleges that his attorneys were ineffective in their investigation and presentation of mental health evidence as mitigation during the penalty phase of Petitioner's trial. This Court denies this claim. The evidence before this Court demonstrated that trial counsel reasonably, competently, and thoroughly investigated Petitioner's mental health and possible mitigation evidence based on any mental health issues. The evidence also showed that his attorneys presented mitigating psychological evidence during the sentencing phase. Because Petitioner failed to prove both deficient performance and prejudice stemming from these alleged errors, this Court denies Petitioner habeas corpus relief as to his claim of ineffective assistance of counsel with regard to counsel's investigation and presentation of mental health mitigation.

a. Investigation of Petitioner's Mental Health.

This Court finds, based on the record before it, that trial counsel properly and reasonably pursued an investigation of Petitioner's mental health for potential mitigating evidence. The evidence showed that, in the course of the defense team's investigation, trial counsel became aware that Petitioner had prior psychological issues. (HT 212, 234). In order to further investigate these potential mental health issues, the defense acquired Petitioner's medical and mental health records from the various facilities that had treated him. (HT 4672; HT 5869-6037). In addition to obtaining records, Mr. Guevara also interviewed numerous mental health professionals at these hospitals about Petitioner's

mental condition, the treatment he received, and any other potentially mitigating psychological information. (HT 4859-4860, 4887-4922).

This Court finds that trial counsel were objectively reasonable in their representation because, in addition to researching Petitioner's prior mental health issues, Mr. Kelly and Mr. Roberts also retained an independent forensic psychologist and neuropsychologist, Dr. Daniel Grant, to evaluate Petitioner and specifically "determine if there [were] any emotional development personality variables that may have bearing on his behavior,"[9] (HT 233-234, 447-449; TT 7: 107), and to determine if there was any potential mitigating mental health information. (HT 234). Because Dr. Grant was well qualified and well recommended by knowledgeable death penalty practitioners, the trial attorneys were reasonable in their conclusion that they could rely upon their expert. (HT 248-249).

This Court finds that the trial attorneys were reasonable in their preparation of Dr. Grant. The evidence before this Court established that trial counsel provided Dr. Grant with all the mental health records, hospital records, and school records that they had to use in making his evaluation. (HT 250). Dr. Grant himself testified at trial that all the psychiatric and mental health records were provided to him prior to trial. (TT 7:115).

---

[9] Petitioner also claims that his counsel were ineffective for not raising his mental health as an affirmative defense. This Court finds that Petitioner failed to prove both deficient performance and actual prejudice. The evidence before this Court proved that trial counsel acted reasonably in investigating this possible defense, but found no evidence to support it. This Court also finds that Petitioner failed to prove the prejudice prong, because he did not prove that there were any psychological, medical and psychiatric factors that would have qualified as a defense during the guilt/innocence phase of the trial, and therefore did not prove that there is a reasonable probability that the pursuit of this defense would have affected the outcome of his trial. Because Petitioner failed to prove both deficiency and prejudice, this Court denies this claim.

Defense counsel testified that they would have provided Dr. Grant with more materials if he had asked for them. Furthermore, it is clear from the record that the defense team readily provided additional information to Dr. Grant when it was needed. (HT 2651).

This Court does not find Dr. Grant's testimony that he was not provided with sufficient records convincing. Additionally, as an experienced psychological expert in death penalty cases, it was up to Dr. Grant to request additional records if he believed he needed them to make his professional conclusions. The Georgia Supreme Court has held that it is unreasonable to place the onus on trial counsel to know what additional information an expert might need since a reasonable lawyer is not expected to have mental health expertise. Head v. Carr, 273 Ga. at 631.

The evidence before this Court established that trial counsel were objectively reasonable in their comprehensive investigation of background psychological records, interviews with Petitioner's prior mental health professionals, and the employment of a recommended, experienced forensic psychologist and neuropsychologist as their expert witness. This Court finds that Petitioner failed to prove that Mr. Kelly and Mr. Roberts provided ineffective representation with regard to their investigation into Petitioner's mental health. Because Petitioner failed to satisfy his burden under Strickland, this claim is denied.

b. Presentation of Petitioner's Mental Health.

Petitioner alleges in his amended petition that his defense attorneys did not provide effective representation with regard to the presentation of mitigating evidence concerning Petitioner's mental health. This Court denies this claim. Based on the record before this Court, it is evident that counsel were not deficient in their performance. This

Court further finds that Petitioner failed to prove that he suffered actual prejudice such that there is a reasonable probability that the outcome of his trial would have been different. Because Petitioner cannot prove both prongs of Strickland, this claim is denied.

This Court finds that Petitioner's mental health was a part of the defense team's mitigation strategy (HT 279). In addition to Dr. Grant's testimony, the defense called several mitigation witnesses who had personal knowledge about Petitioner's prior psychological problems, including the following: Annett Nolan, a registered psychiatric nurse who treated Petitioner while he was at Kennedy Memorial Hospital; Sister Marie DiCamillo, who was Petitioner's special education teacher at Ancora State Psychiatric Hospital; John Crain, who coached Petitioner and knew about his psychiatric hospitalizations; and Angela Caraccillo, a therapist with a master's degree in clinical psychology who counseled Petitioner. This Court finds that trial counsel met with each witness prior to their testimony, prepared them for the questions that they were likely to be asked, and elicited mitigating evidence from them about Petitioner's prior mental health background. (HT 254-255). This Court finds that it was objectively reasonable for trial counsel to call these lay witnesses to provide the jury with personal background on Petitioner's mental health problems and his prior hospitalizations.

This Court finds that trial counsel were also objectively reasonable for calling Dr. Daniel Grant, the defense psychological expert, as their final witness in mitigation. (HT 250). Mr. Kelly testified before this Court that the defense team wanted Dr. Grant to testify about Petitioner's difficult childhood, physical abuse, sexual abuse, and traumatic experiences. (HT 249). Mr. Kelly said, Dr. Grant "was someone that could hopefully

show that this young man had some problems." (HT 249). Mr. Kelly met with Dr. Grant the night before Dr. Grant's testimony and they prepared for his direct examination. (HT 249). Mr. Kelly also elicited testimony from Dr. Grant about Petitioner's various psychological problems, childhood traumas, hospitalizations, suicidal tendencies, and issues with reality.

This Court finds that the mitigation witnesses, who were selected by Petitioner's trial attorneys, presented testimony about Petitioner's psychological issues to the jury and that this testimony was part of the defense team's reasonable mitigation theory emphasizing Petitioner's prior and current mental health problems. This Court finds that Petitioner failed to prove that trial counsel were deficient in their presentation of mitigating mental health evidence, especially in light of Strickland's direction that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

This Court does not find that counsel were ineffective for not calling different witnesses or eliciting more or different testimony regarding his mental condition from the witnesses who did testify. The Georgia Supreme Court held that "[p]erfection is not required" and that "post-conviction counsel will almost always be able to identify some potential mitigating evidence not presented to the jury and that this alone does not render trial counsel's performance deficient." Head v. Carr, 273 Ga. at 625; see also Waters v. Thomas, 46 F.3d at 1514. Rather, because trial counsel's actions were objectively reasonable when viewed from their perspective at the time of trial, this Court finds that

Petitioner failed to establish deficient performance and therefore cannot satisfy his burden of proving ineffective assistance of counsel in applicable Strickland standards.

While it is unnecessary to address the prejudice prong of the Strickland test since Petitioner failed to prove deficiency, this Court further finds that Petitioner also failed to prove that the alleged deficient performance so prejudiced him that there is a "reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different." Roberts, 263 Ga. at 807-808. The evidence presented before this Court was not fundamentally different from the mitigating evidence that was presented to the jury at trial. With regard to the evidence of Petitioner's mental health that was presented at the habeas hearing but not presented at trial, this Court is not persuaded that there is a reasonable probability that this additional evidence would have changed the outcome of the trial. Because Petitioner failed to prove both prongs of Strickland with regard to the presentation of mitigating mental health evidence, this claim is denied.

5. Investigating and Rebutting the State's Case.

In Claim I of his amended petition, Petitioner alleges that his trial attorneys provided ineffective assistance of counsel due to insufficient investigation and rebuttal of the State's case. This Court denies this claim because Petitioner failed to prove that his attorneys were deficient in their performance. Rather, the evidence before this Court established that Mr. Kelly and Mr. Roberts reasonably researched the prosecution's case, ardently argued to suppress certain harmful pieces of evidence, and hired experts that could potentially rebut the State's evidence. Because Petitioner failed to prove that trial counsel were ineffective with regard to the investigation and rebuttal of the State's case,

this Court hereby denies Petitioner habeas corpus relief as to his claim of ineffective assistance of counsel.

a. Investigation of the State's Case.

This Court finds that trial counsel reasonably investigated the State's case. From the record introduced at these proceedings, it was established that Mr. Kelly and Mr. Roberts both testified that District Attorney Fred Bright provided the defense with complete access to everything in the State's file, including the GBI reports, the FBI reports, and information gathered by the State's investigators. (HT 219, 243, 278, Res. Exs. 12-14). Trial counsel testified that the State's evidence was consistent with what Petitioner told them about what he and Woodward were respectively doing during their "trip". (HT 219).

In addition to reviewing the State's file, Mr. Kelly and Mr. Roberts also investigated the persons listed on the State witness list. (HT 211). Trial counsel also utilized the December 10, 1997 hearing on the defense's motion to suppress the two confessions as an opportunity to investigate many of the State's most critical witnesses. (HT 244-245; 12/10/97 Hearing, pp. 3-160). Mr. Kelly and Mr. Roberts made their best effort to contact those persons on the State's witness list who did not testify at the motion to suppress hearing. (HT 244-245).

This Court finds that trial counsel thoroughly reviewed the prosecution's file and reasonably researched the potential testimony of the State's witnesses; therefore, Petitioner failed to prove that his attorneys were deficient in their pre-trial investigation of the State's case. An analysis of the prejudice prong is unnecessary because Petitioner did not prove deficient performance. Therefore, as Petitioner failed to meet his burden

under Strickland, his claim of ineffective assistance of counsel based on counsel's investigation of the State's case is denied.

b. Preparation and Presentation of Rebuttal Evidence.

Petitioner alleges in his amended petition that his defense attorneys rendered ineffective assistance of counsel for not adequately challenging the State's case against him. This Court finds that trial counsel reasonably prepared a logical defense, investigated experts who could assist in this defense, and effectively tried to rebut the State's evidence during trial. Because Petitioner failed to prove that trial counsel's performance was deficient with regard to their preparation and presentation of rebuttal evidence to the State's case, this claim is denied.

i. Argument for a Plea Agreement.

The evidence before this court showed that Mr. Kelly and Mr. Roberts repeatedly approached District Attorney Fred Bright about pleading out Petitioner's case. (HT 227-228, 282-283). Mr. Kelly stated that he and Mr. Roberts tried their best to secure a plea, but they could not obtain agreement from the State. Petitioner's trial counsel cannot be found to be deficient for failing to secure a plea bargain when they actively sought one. See Franks v. State, 278 Ga. 246, 258-259 (2004). Because Petitioner failed to prove that trial counsel were deficient, he failed to prove ineffective assistance as to their attempts to plead out Petitioner's case and therefore, this claim is denied.

ii. Argument to Suppress Harmful State's Evidence.

This Court finds that Petitioner's defense attorneys were not deficient in challenging the State's case, given their ardent litigation against the admissibility of the most damaging prosecution evidence. The trial attorneys felt that a critical part of their

defense against the State's evidence was the suppression of Petitioner's two confessions, (HT 213, 222-224, 275, 305-306), and therefore they filed motions to suppress both confessions. (HT 213, 223-224; 12/10/97 Hearing, pp. 1-160). The trial attorneys successfully convinced Judge Prior to keep out the videotaped confession to the GBI; however, the trial court held that the suppression order did not apply to possible use for impeachment or rebuttal. (R. 412).

Trial counsel also objected to the admission of evidence concerning the murders of Mr. and Mrs. Snider in Texas as non-statutory aggravators. (HT 238-239, 295-296). However, the trial court held that evidence concerning the Sniders' murders was admissible (HT 238-239, 295-296).

Petitioner failed to prove that trial counsel's performance was deficient in their attempts to suppress the State's evidence that was most harmful to Petitioner's case. This Court finds that Mr. Kelly and Mr. Roberts reasonably and zealously tried to keep out evidence of Petitioner's confessions and the Sniders' murders. As stated *supra*, "The test for reasonable attorney performance 'has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial ... we are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'" Jefferson v. Zant, 263 Ga. at 318 (quoting White v. Singletary, 972 F.2d 1218, 1220-1221 (11th Cir. 1992)). As the attorneys were objectively reasonable in their attempts to suppress harmful State evidence, Petitioner failed to prove the first prong of Strickland.

Therefore, this claim is denied because he cannot satisfy his burden of proving this claim of ineffective assistance of counsel.

iii. Polygraph Expert

Petitioner claims that he received ineffective assistance of counsel because his attorneys failed to present evidence by a polygraph expert. This claim is denied. The evidence before this Court establishes that trial counsel made a reasonable, strategic decision to forgo this testimony in the best interest of Petitioner's case.

Petitioner's attorneys moved to admit the results of their independent polygraph examination. (HT 222). Judge Prior held that the defense could present testimony by Mr. Blackstone, the polygraph expert; however, the judge informed both parties that if Mr. Blackstone testified that the polygraph results indicated that Petitioner was not deceptive when he said that he did not commit the murders, then the State could present the videotape of the GBI confession as rebuttal evidence. (HT 222-223, 286-287).

Petitioner's experienced defense attorneys made a strategic decision not to present the testimony of Mr. Blackstone, given that Mr. Blackstone's testimony would result in the admission of the videotaped confession that the attorneys felt was devastating to their case. (HT 223-224). Trial counsel recognized that the FBI confession was still going to be admitted into evidence, however they hoped to be able to effectively cross-examine the FBI agent about this statement. (HT 224).

The evidence before this Court demonstrates that trial counsel made a reasonable, strategic decision based on the circumstances at the time of trial. The United States Supreme Court held in Strickland that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that

is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (citations omitted). The Court in Strickland further held that strategic decisions made by defense attorneys are virtually unchallengeable. 466 U.S. at 691. The Georgia Supreme Court found that there is no deficiency when "trial strategy was at the root of trial counsel's failure to do what appellate counsel now claims should have been done." Washington v. State, 276 Ga. 655, 659 (2003).

Applying the Strickland standard, this Court finds that trial counsel's strategic decision to forgo testimony by Mr. Blackstone in order to avoid the introduction of the videotaped confession was objectively reasonable. Petitioner failed to prove that his defense counsel were deficient; therefore, an analysis of the prejudice prong for this claim is unnecessary because Petitioner cannot meet his burden of proving deficient performance under Strickland. As such, this claim is denied.

iv. Defense Strategy: Relative Culpability and Reasonable Doubt.

Petitioner claims that his trial attorneys rendered ineffective assistance of counsel because they did not adequately argue that Petitioner's co-defendant was the actual murderer. This Court finds that, based on the evidence presented at the habeas hearing, trial counsel reasonably investigated and presented a defense theory of relative culpability and reasonable doubt.

Mr. Kelly and Mr. Roberts both testified that the defense theory focused on relative culpability, and specifically the greater culpability of Petitioner's co-defendant, Alicia Woodward. (HT 216-219). Mr. Kelly stated that they arrived at this theory based on the information that they discovered during the investigation of the case. (HT 217-

218). Furthermore, the defense team investigated Ms. Woodward's background and her role in the crime spree. (HT 247). Trial counsel emphasized this theory of relative culpability at trial by cross-examining the State's witnesses about Ms. Woodward's role in the crimes and by emphasizing her apparent leadership role. (HT 216, 316).[10]

This Court finds that trial counsel were objectively reasonable in their representation on this issue because, as further support for their theory of relative culpability and reasonable doubt, the defense attorneys also hired a DNA expert. Mr. Kelly stated that the defense wanted to emphasize the lack of DNA evidence linking Petitioner to the crimes. (HT 220-221). The defense team consulted Dr. Linda Adkinson to assist the defense in their cross-examination of the State's witness. (HT 250-251). Mr. Kelly stated that the defense tried to attack the State's case and the GBI's investigation, which is why they brought out the State's failure to perform DNA testing on the tree branch. (HT 251).

---

[10] During the instant proceeding, Petitioner subpoenaed the non-public portions of the co-defendant Alicia Woodward's Parole file. The Board of Pardons and Paroles moved to quash the subpoena. Pursuant to the request of the Petitioner, the Court conducted an in camera review of the file for exculpatory material including material that might serve to support a diminished culpability in the murder for which Petitioner has been convicted and sentenced to death. The Court also agreed to inspect Woodward's parole file for mental health evidence in existence at the time of Petitioner's trial. The Court found no exculpatory evidence, no evidence that would tend to reduce Petitioner's culpability, and no mental health evidence that was both relevant to Petitioner's claims and in existence at the time of Petitioner's trial. Accordingly, the Court grants the motion to quash the subpoena. Contemporaneous with the instant order, the Court has entered an order that the contents of the parole file be sealed for purposes of appeal.

The Court notes that Ms. Woodward did not testify against Petitioner and in fact entered a guilty plea subsequent to Petitioner's trial and sentencing.

This Court finds that trial counsel were reasonable, especially given their strategic concerns about overemphasizing Petitioner's innocence and possibly allowing the admission of the videotaped confession as rebuttal.

This Court also finds that Petitioner failed to prove that trial counsel were ineffective for not hiring a forensic pathologist as an expert in Petitioner's case. Even if the court were to find that such conduct constituted deficient performance, which the Court does not, this Court finds that Petitioner failed to establish a reasonable probability that such testimony would have affected the outcome of Petitioner's trial, especially given the possibility that the admission of such testimony would have opened the door to the videotaped confession, which trial counsel adamantly did not want to come into evidence. (HT 305-306). Therefore, because Petitioner did not prove both prongs of the Strickland test, he failed to establish his claim of ineffective assistance of counsel. Given the clear evidence before this Court that trial counsel reasonably investigated and presented a defense theory of relative culpability and reasonable doubt, Petitioner's claim lacks merit and is hereby denied.

6. Ineffective Assistance of Counsel on Direct Appeal.

In Claim I of his amended petition, Petitioner alleges that his trial attorneys rendered ineffective assistance of counsel in their representation of Petitioner on his direct appeal. The evidence before this Court demonstrates that trial counsel reasonably appealed the issues that they felt were the strongest. Because Petitioner failed to meet his burden under the Strickland standard, this claim is denied.

This Court finds that Petitioner failed to prove that his attorneys were deficient in their representation on the appeal of his convictions and sentences. This Court finds that

trial counsel were objectively reasonable when they raised their two strongest, non-frivolous claims on direct appeal to the Georgia Supreme Court. Mr. Kelly explained to this Court that the defense team thought that their challenge to the admissibility of the FBI confession was the best argument that they had on direct appeal and that he did not believe in raising frivolous appeals. (HT 258-259). Mr. Kelly stated, "I felt like we were trying to raise the valid issues [in Petitioner's direct appeal] and not just throw[ing] something out there that we knew was not a valid issue." (HT 259). Mr. Kelly also stated that he believed that the Georgia Supreme Court would give more credibility to the issues they were presenting if they only raised their strongest, non-frivolous claims.

This Court finds that counsel's reasoning in raising their two strongest, non-frivolous claims on appeal was objectively reasonable. See Jones v. Barnes, 463 U.S. 745, 751-752 (1983). The Supreme Court in Barnes held,

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on **one central issue if possible,** or at most on a few key issues. ... Most cases present only one, two, or three significant questions. ... Usually, ... if you cannot win on a few major points, the others are not likely to help. ... The effect of adding weak arguments will be to dilute the force of the stronger ones. ... There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.

463 U.S. at 751-752.

The Georgia Supreme Court also has held that an appellate counsel's decision as to which claims to raise on appeal will not be considered deficient if the decision was a "reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581, 585 (2002).

As Petitioner failed to prove that Mr. Kelly and Mr. Roberts were deficient in their representation on appeal, he cannot establish ineffective assistance of counsel. An

analysis of the prejudice prong is unnecessary. Because Petitioner failed to satisfy his burden under Strickland, this claim is hereby denied.

As to any other claims of ineffective assistance of counsel not specifically addressed in this Order, this Court finds that Petitioner failed to meet his burden under Strickland of proving deficient performance and actual prejudice.[11] Therefore, all claims of ineffective assistance contained in Petitioner's amended petition are hereby denied.

V. SENTENCING PHASE JURY INSTRUCTIONS.

In Claim X of his amended petition, Petitioner alleges that he was denied due process of law by the instructions given to the jury during the sentencing phase of his trial. Petitioner further maintains that the sentencing phase jury instructions, both individually and collectively, were ambiguous, insufficient, vague, and confusing, contrary to law and the jury's decision based upon the instructions is unreliable. This claim is properly before this Court because jury charges during the sentencing phase cannot be procedurally defaulted. See Stynchcombe v. Floyd, 252 Ga. 113, 115 (1984); Head v. Ferrell, 274 Ga. 399, 401-402 (2001). This Court finds that Petitioner's constitutional rights were not violated by the penalty phase jury instructions at his trial.

The jury instructions in this case regarding mitigating circumstances, aggravating circumstances, and unanimity, which Petitioner challenges in his amended petition, have all been held to be constitutional by the Georgia Supreme Court. See, e.g., King v. State,

---

[11] During the guilt-innocence phase of Petitioner's trial, the parties allowed an investigator in his case, the chief deputy sheriff of Morgan County, to accompany the jury to view the crime scene and to tell the jury where the body was found. The judge, the court reporter, and the attorneys did not attend the jury viewing. This Court agrees with the Supreme Court of Georgia that "this procedure is troubling and should not be used in the future". Esposito v. State, 273 Ga. at 187. However, on the facts of this case, this Court finds no prejudice from the procedure or trial counsel's failure to object.

273 Ga. 258, 276 (2000); Nance v. State, 280 Ga. 125, 126 (2005); Walker v. State, 281 Ga. 157, 165 (2006). See also McClain v. State, 267 Ga. 378, 386 (1996)(holding that a jury need not be instructed as to specific standards for considering mitigating circumstances so long as the jury is allowed and instructed to consider the evidence in mitigation and is instructed that it has a discretion, notwithstanding proof of aggravating circumstances, to impose a life sentence); Ford v. State, 257 Ga. 461 (1987)(the Georgia statutory capital sentencing scheme does not require a weighing or balancing of mitigating and aggravating circumstances); Jenkins v. State, 269 Ga. 282, 296 (1998)(holding that there is no error in refusing to charge the jury that its failure to reach a unanimous verdict as to sentence would result in imposition of a life sentence). Therefore, as the sentencing phase jury instructions were constitutional, this claim is hereby denied.

VI. ALL OTHER CLAIMS RAISED IN AMENDED PETITION.

For any claim raised by Petitioner in his amended petition and not specifically addressed in this Order, this Court finds that Petitioner failed to carry his burden of establishing legal or factual support for these claims. Based on the evidence presented to this Court during these habeas proceedings, Petitioner is not entitled to the granting of relief as to any of his claims. Therefore, this Court hereby denies Petitioner's petition for writ of habeas corpus.

VII. CONCLUSION.

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing, this Court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights as set forth above.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus is denied and that Petitioner be remanded to the custody of Respondent for the service and execution of his lawful sentence.

The Clerk is directed to mail a copy of this Order to counsel for the parties.

SO ORDERED, this 5th day of April, 2011.

Honorable Marvin W. Sorrels
Sitting by Designation in Butts County
Superior Court

Esposito v. State

Supreme Court of Georgia

October 30, 2000, Decided

S00P0654.

Reporter
273 Ga. 183 *; 538 S.E.2d 55 **; 2000 Ga. LEXIS 821 ***; 2000 Fulton County D. Rep. 4026

JOHN ANTHONY ESPOSITO v. THE STATE.

Subsequent History: [*1]** Reconsideration Denied November 30, 2000. Certiorari Denied June 25, 2001, Reported at: *2001 U.S. LEXIS 4809*.

Reconsideration denied by, 11/30/2000

Writ of certiorari denied *Esposito v. Georgia, 533 U.S. 935, 121 S. Ct. 2564, 150 L. Ed. 2d 728, 2001 U.S. LEXIS 4809 (2001)*

Habeas corpus proceeding at, Motion granted by *Esposito v. Humphrey, 2012 U.S. Dist. LEXIS 69713 (M.D. Ga., May 18, 2012)*

Prior History: Baldwin County Superior. Trial Judge: Hon. William A. Prior, Jr. Date of Judgment Appealed: 09-16-99. Notice of Appeal Date: 10-14-99. Lower Ct # : 96CC349.

Disposition: Judgment affirmed.

Core Terms

electrocution, jury's view, sentence, trial court, warnings, murder, park ranger, confession, attend, scene

Case Summary

Procedural Posture
Defendant challenged the judgment of Baldwin County Superior Court (Georgia) convicting him of malice murder, armed robbery, and motor vehicle hijacking and sentencing him to death for malice murder, life imprisonment for armed robbery, and 20 years' imprisonment for motor vehicle hijacking.

Overview
A jury convicted defendant of murder and related crimes and sentenced him to death, because of statutory aggravating circumstances. The murder was committed during the commission of an armed robbery and kidnapping with bodily injury and was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind. The appellate court found the evidence was sufficient to find that defendant was guilty and that statutory aggravating circumstances existed. A lapse of 11 1/2 hours between defendant's receiving his Miranda warnings and making his confession did not make the confession inadmissible. Although the court stated that it would consider whether electrocution was cruel and unusual punishment if sufficient evidence was presented, defendant did not make a sufficient proffer of evidence. The sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Outcome
The judgment was affirmed, as the evidence was sufficient to

find beyond a reasonable doubt that defendant was guilty of the crimes and that statutory aggravating circumstances existed. The sentence of death was neither excessive nor disproportionate to the penalties imposed in similar cases.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Confessions & Interrogation

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Notice & Warning

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN1[] **Clearly Erroneous Review, Confessions & Interrogation**

The lapse of 11 1/2 hours between a defendant's receiving his Miranda warnings and making his confession does not render the confession inadmissible.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN2[] **Sentencing, Capital Punishment**

Ga. Code Ann. § 17-10-38 provides for execution by lethal injection. 1999 Ga. Laws 734 preserves execution by electrocution for persons sentenced to death for crimes committed before May 1, 2000.

Civil Procedure > Judicial Officers > Judges > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Governments > Courts > Court Personnel

Civil Procedure > Judicial Officers > Court Reporters > General Overview

HN3[] **Judicial Officers, Judges**

A trial judge should attend any planned jury view. A court reporter should also attend any jury view so that any important statements or events may be thoroughly reviewed on appeal. The attorneys should also attend, unless their presence is affirmatively waived.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN4[] **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

While a defendant's presence at a jury view that involves merely the transportation of the jury to a crime scene is not absolutely required, trial courts should note that a defendant's presence is mandatory, if not waived by the defendant himself, whenever testimony or other evidence is presented to the jury.

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN5[] **Preservation of Relevant Evidence, Exclusion & Preservation by Prosecutors**

Special dangers exist whenever a witness at trial, particularly a law enforcement officer, attends a jury view, and a trial court should avoid those dangers by excluding such persons.

Counsel: Roy R. Kelly III, W. Dan Roberts, for appellant.

Fredric D. Bright, District Attorney, Thurbert E. Baker, Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, Karen A. Johnson, Assistant Attorney General, for appellee.

Judges: Fletcher, Presiding Justice. All the Justices concur, except Benham, C. J., and Sears, J., who concur in part and dissent in part; Hunstein and Hines, JJ., who concur and also concur specially; and Carley and Thompson, JJ., who concur

specially.

Opinion by: Fletcher

Opinion

[*183] [57] Fletcher,** Presiding Justice.

A jury convicted John Anthony Esposito of murdering Lola Davis and **[***2]** related crimes and fixed his sentence at death, after finding beyond a reasonable doubt the following statutory aggravating circumstances: that the murder was committed during the commission of an armed robbery and a kidnapping with bodily injury and that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind. [1] For the reasons set forth below, we affirm his convictions and sentences.

[*3]** 1. The evidence adduced at trial, including testimony recounting Esposito's confession to federal authorities, showed that on September 19, 1996, Esposito's co-conspirator, Alicia Woodward, persuaded Lola Davis to give her a ride from a parking lot in Lumberton, North Carolina. Woodward directed Davis to a nearby location where Esposito entered Davis' automobile. Esposito and Woodward then forced the elderly Davis, without the use of any weapons, to drive to a nearby parking lot and to move to the passenger seat of her automobile. Esposito removed one thousand dollars and Davis' checkbook from her purse, and Woodward drove Davis' automobile to a local bank where she cashed a check for three hundred dollars that she and Esposito had forced Davis to write. Woodward and Esposito then drove Davis to a remote location in Morgan County, Georgia, where Esposito led Davis into a hayfield, forced her to kneel, and beat her to death with tree limbs and other debris. Esposito and Woodward then drove in Davis' automobile to Alabama where they disposed of Davis' automobile and purse. Davis' automobile was shown at trial to contain fingerprints, palm prints, and footprints matching Esposito's and **[***4]** Woodward's. Saliva on a cigarette butt found in the automobile was shown to contain DNA consistent with Esposito's DNA.

[*184] Evidence presented during the sentencing phase showed that, after murdering Davis, Esposito and Woodward traveled to Oklahoma, abducted an elderly couple, illegally obtained money using the couple's bank card, and then drove the couple to Texas where Esposito beat them to death with a tire iron. An FBI agent also testified during the sentencing phase that Esposito had described his and Woodward's plan to abduct and murder yet another elderly woman for money.

We find that the evidence adduced at trial, viewed in the light most favorable to the verdict, was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Esposito was guilty of the crimes of which he was convicted and that statutory aggravating circumstances existed. [2]

2. Esposito **[***5]** contends that the trial court erred by denying his motion to suppress a confession he made to two FBI agents during an interview conducted on the night of his arrest. We find no error.

Testimony heard by the trial court showed that Esposito and Woodward were observed unlawfully possessing a BB gun in Colorado's Mesa Verde National Park by a park ranger. Esposito was uncooperative when instructed to lay down the gun, and the park ranger **[**58]** called for assistance. Park rangers determined that the automobile Esposito and Woodward were driving had been reported missing under suspicious circumstances and that there was a warrant for their arrest. At approximately 3:00 p.m., a park ranger informed Esposito that he was under arrest and gave the

[1] The crimes occurred on September 19, 1996. Esposito was indicted by a Morgan County grand jury on December 2, 1996, for malice murder, felony murder, armed robbery, and hijacking a motor vehicle. The state filed notice of its intent to seek the death penalty for the murder on January 31, 1997. The trial court granted an unopposed motion to change venue and moved the trial to the Superior Court of Baldwin County. A further motion to change venue, made at the end of voir dire in Baldwin County, was denied. The trial began on September 23, 1998, and the jury found Esposito guilty on all counts on September 30, 1998. The jury fixed the sentence for the malice murder at death on October 2, 1998. The trial court vacated the felony murder conviction by operation of law, see *Malcolm v. State, 263 Ga. 369, 371-72 (4) (434 S.E.2d 479) (1993)*; see also *O.C.G.A. § 16-1-7*, and sentenced Esposito to death for the malice murder, life imprisonment for the armed robbery, and twenty years imprisonment for the motor vehicle hijacking. Esposito filed a motion for a new trial on October 29, 1998, and a hearing on that motion was held on June 30, 1999. The trial court denied the motion for a new trial on September 16, 1999. Esposito filed a notice of appeal on October 11, 1999, the appeal was docketed in this Court on January 6, 2000, and oral arguments were heard on April 17, 2000.

[2] *Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)*; *O.C.G.A. § 17-10-30 (b) (2)* and *(7)*.

warnings required by *Miranda v. Arizona*. [3] As each portion of his *Miranda* warnings was read, Esposito stated "yeah" and nodded affirmatively. Esposito was then asked if he understood his warnings, but, before he answered, the park ranger stated that he had no questions for Esposito. Persons who observed Esposito testified that he did not appear to be under the influence of drugs or alcohol.

[*6]** Later that evening, two FBI agents arrived at the jail where Esposito and Woodward were being held, interviewed Woodward first, and then interviewed Esposito from 11:35 p.m. until 12:22 a.m. According to testimony by one of the FBI agents, Esposito was asked before being questioned if he remembered and understood the warnings he had received earlier that day, particularly the warning that he was not required to speak with authorities. Esposito responded that he was willing to make a statement.

HN1[↑] The lapse of eleven and one half hours between Esposito's receiving his *Miranda* warnings and making his confession did not render **[*185]** the confession inadmissible. [4] **[***7]** Esposito's reliance on *Riley v. State* [5] is misplaced, as we have explicitly held that *Riley* is not applicable to adults. [6] Upon our review of the record, we conclude that the trial court's findings of fact were not clearly erroneous, and, upon our de novo application of those findings of fact to the law, we conclude that the trial court's legal conclusion regarding the confession's admissibility was correct. [7]

3. Esposito argues that execution by electrocution is cruel and unusual punishment. This issue was preserved for appeal by the trial court's ruling which allowed Esposito to adopt motions filed in the case of his co-conspirator, Alicia Woodward, which included a motion to bar the use of electrocution.

(a) The continued use of electrocution as Georgia's sole method of executing persons sentenced to death for crimes committed before May 1, 2000, presents a troubling moral and legal issue. [8] **[***9]** Many state legislatures have abandoned electrocution altogether or have allowed persons previously sentenced to death by electrocution to elect execution by lethal injection as an alternative. Grave concerns about the humaneness of electrocution have been acknowledged by members **[***8]** of this Court and of other courts. [9] Other jurists, while less concerned with the form of punishment itself, have recognized the potential for disruption in the criminal justice system created by the retention of electrocution as the sole method available for executing certain prisoners when that method of execution has been so regularly brought under serious constitutional scrutiny. [10] **[***10]** Such concerns have led some **[*186]** to suggest **[**59]** a legislative resolution of this ever-looming concern by adoption of statutes authorizing condemned prisoners to elect execution by lethal injection as an alternative to other methods. [11] Unfortunately, legislative resolution of such issues has sometimes come only after the judiciary has first begun to intervene. [12] At present, only

[3] *384 U.S. 436 (86 S. Ct. 1602, 16 L. Ed. 2d 694) (1966)*.

[4] *Haynes v. State, 269 Ga. 181, 184 (4) (496 S.E.2d 721) (1998)*; *Osbornev. State, 263 Ga. 214, 217 (4) (430 S.E.2d 576) (1993)*; *Stapleton v. State, 235 Ga. 513, 517(1) (220 S.E.2d 269) (1975)*.

[5] *237 Ga. 124 (226 S.E.2d 922) (1976)*.

[6] *McDade v. State, 270 Ga. 654, 656 (3) (513 S.E.2d 733) (1999)*.

[7] *DeYoung v. State, 268 Ga. 780, 789 (8) (493 S.E.2d 157) (1997)*; *Bright v. State, 265 Ga. 265, 279-80, 455 S.E.2d 37* (5) (b) (1995); O.C.G.A. § 24-3-50.

[8] ***HN2***[↑] See *O.C.G.A. § 17-10-38* (providing for execution by lethal injection); 1999 Ga. Laws 734 (preserving execution by electrocution for persons sentenced to death for crimes committed before May 1, 2000).

[9] See, e.g., *Wilson v. State, 271 Ga. 811, 824-28 (525 S.E.2d 339) (1999)* (Sears, J., dissenting); *DeYoung v. State, 268 Ga. 780, 791-92 (493 S.E.2d 157) (1997)* (Fletcher, P. J., concurring); ***McNair v. Haley, 97 F. Supp. 2d 1270 (M.D. Ala. 2000)*** (ordering an evidentiary hearing on whether Alabama's use of electrocution is cruel and unusual punishment); *Jones v. Butterworth, 701 So. 2d 76, 81-89 (Fla. 1997)* (Kogan, C. J., dissenting; Shaw, J., dissenting; Anstead, J., dissenting); *Provenzano. v. Moore, 744 So. 2d 413, 422-51 (Fla. 1999)* (Shaw, J., dissenting; Anstead, J., dissenting; Pariente, J., dissenting).

[10] *Jones, 701 So. 2d 76, 80-81 (Fla. 1997)* (Harding, J., concurring specially) (warning of "a possible constitutional 'train wreck'"); *Provenzano, 744 So. 2d at 416-19* (Harding, C. J., concurring specially) ("It is my view that the [Florida] Legislature can foreclose many of these claims by simply amending Florida's death penalty statute to provide that death sentences should be carried out by lethal injection unless the defendant requests execution by electrocution.").

[11] See *Jones, 701 So. 2d at 81* (Harding, J., concurring specially).

[12] See, e.g., ***Bryan v. Moore, 528 U.S. 1133 (120 S. Ct. 1003, 145 L. Ed. 2d 927) (2000)*** (dismissing writ of certiorari upon Florida's adoption of a law providing that the "death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution"); *Gomez v. Fierro, 519 U.S. 918 (117 S. Ct. 285, 136 L. Ed. 2d 204) (1996)* (vacating and remanding in light of California's adoption of a law allowing condemned prisoners to elect

Georgia, Alabama, and Nebraska retain electrocution as a required method of execution for any condemned prisoners. [13] With Alabama's use of electrocution presently under review in federal evidentiary hearings, the continued place of electrocution in American society has once again been placed in doubt. [14]

As said in 1885 by the governor of New York in calling for a modern, humane replacement for hanging, it might now be said of electrocution:

"It may well be questioned whether **[***11]** the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature." [15]

Because such fundamental constitutional rights are at stake, this Court, upon a sufficient evidentiary showing, would not be unwilling to confront these difficult questions if necessary, despite our belief that the legislative and executive branches would be better positioned to assume continued leadership in this field. [16]

[*12]** (b) Nevertheless, we conclude that in Esposito's case there has not been a sufficient proffer of evidence to compel a present finding that Georgia's practice of execution by electrocution is cruel and unusual punishment under the state or federal constitutions.

[*187] 4. During the guilt-innocence phase of Esposito's trial, the parties planned a jury view of the murder scene, but agreed that the trial judge, the court reporter, and the attorneys would not attend. However, the chief deputy sheriff of Morgan County, an investigator in Esposito's case who had already served as a witness for the state, was permitted to accompany the jury to the scene and to tell the jury where the body was found. The defendant did not object to this procedure.

Although not raised as an enumeration of error, this procedure is troubling and should not be used in the future. As we have stated before, *HN3*[] a trial judge should attend any planned jury view. [17] Taking a jury from the controlled environment of a courtroom to a place that has some relevance to the trial always involves the risk that something unexpected might arise requiring the trial judge's intervention. A court reporter should also attend any jury view **[***13]** so that any important statements or events may be thoroughly reviewed on appeal. The attorneys should also **[**60]** attend, unless their presence is affirmatively waived.

HN4[] While a defendant's presence at a jury view that involves merely the transportation of the jury to a crime scene is not absolutely required, [18] trial courts should note that a defendant's presence is mandatory, if not waived by the defendant himself, whenever testimony or other evidence is presented to the jury. [19] *HN5*[] Special dangers exist whenever a witness at trial, particularly a law enforcement officer, attends a jury view, and a trial court should avoid those dangers by excluding such persons.

[*14]** Finally, because jury views have proved to be fertile ground for irregularity and, at times, reversible error, the parties to criminal trials and trial courts should carefully weigh the real benefits of a jury view before planning one. Frequently, as in Esposito's case, the jury has already viewed photographs of the crime scene, and nothing is to be added to the jury's understanding of the issues to be tried by an in-person visit to the scene. In such cases, a trial court would be authorized to deny a request for a jury view.

5. We find that the sentence of death in Esposito's case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. [20]

6. Considering both the crime and the defendant, we find that Esposito's sentence of death was neither excessive nor disproportionate **[*188]** to the penalties imposed in similar

lethal injection as an alternative to lethal gas).

[13] *Wilson, 271 Ga. at 827-28, 828 n.25* (Sears, J., dissenting); *Provenzano, 744 So. 2d at 420 n.4* (Quince, J., concurring specially); *Fla. Stat. Ann. § 922.10* (as amended by 2000 Fla. Laws ch. 2).

[14] See ***McNair v. Haley, 97 F. Supp. 2d 1270***.

[15] *In re Kemmler, 136 U.S. 436, 444 (10 S. Ct. 930, 34 L. Ed. 519) (1890)*.

[16] See *DeYoung, 268 Ga. at 792* (Fletcher, P. J., concurring) ("I urge the General Assembly to revisit the issue in light of modern knowledge and changing attitudes as reflected in other jurisdictions."); see also *Provenzano, 744 So. 2d at 447 n.56* (Pariente, J., dissenting) ("[The Florida] Legislature, while providing for lethal injection if electrocution is declared unconstitutional, has elected to retain electrocution as its sole method of execution. This leaves the Court with no choice but to fulfill our obligation to examine the constitutional question.").

[17] *Wilson, 271 Ga. at 817* (6).

[18] *Jordan v. State, 247 Ga. 328, 343-46 (9) (276 S.E.2d 224) (1981)*.

[19] *Holsey v. State, 271 Ga. 856, 860-61 (5) (524 S.E.2d 473) (1999)*.

[20] *O.C.G.A. § 17-10-35 (c) (1)*.

cases. [21] The similar cases listed in the Appendix support the imposition of the death penalty in Esposito's case, as each involved an intentional **[***15]** killing committed during the commission of an armed robbery, motor vehicle hijacking, or kidnapping with bodily injury or involved a finding that the killing was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind.

Judgment affirmed. All the Justices concur, except Benham, C. J., and Sears, J., who concur in part and dissent in part; Hunstein and Hines, JJ., who concur and also concur specially; and Carley and Thompson, JJ., who concur specially.

Concur by: Sears (In Part); CARLEY

Concur

Carley; Sears (In Part)

Carley, Justice, concurring specially.

I fully concur in Divisions 1, 2, 5, and 6 and in the judgment. However, because I cannot **[**61]** agree with Divisions 3 and 4, I write separately.

1. Although Division 3 (b) recognizes that Esposito failed to make a sufficient proffer of evidence in support of the proposition that electrocution is cruel and unusual punishment, Division 3 (a) extensively **[***16]** discusses the issue.

"A statute is presumed to be valid and constitutional until the contrary appears…. (Cits.)" [Cit.] A presumption arises when a defendant is sentenced within the statutory limits set by the legislature that such sentence does not violate the Eighth Amendment's guarantee against cruel and unusual punishment. Such presumption remains until a defendant sets forth a factual predicate showing that such legislatively authorized punishment was so overly severe or excessive in proportion to the offense as to shock the conscience. [Cit.]

Burgos v. State, 233 Ga. App. 897, 902 (3), fn. 2 *(505 S.E.2d 543) (1998)*. This Court has repeatedly and recently upheld the constitutionality of the statutory provision for electrocution as a method of execution. *Gissendaner v. State, 272 Ga. 704, 716 (15) (532 S.E.2d 677) (2000)*; *Morrow v. State, 272 Ga. 691, 703 (16) (532 S.E.2d 78) (2000)*; *Holsey v. State, 271 Ga. 856, 863 (12) (524 S.E.2d 473) (1999)*; *DeYoung v. State, 268 Ga. 780, 786 (6) (493 S.E.2d 157) (1997)*. Because of the complete absence of any proffer, and in light of our very **[***17]** recent rulings on this issue, we do not have either jurisdictional or precedential authority to discuss this issue in this case.

2. Division 4 acknowledges that Esposito did not object to the **[*189]** procedure used for the jury view. Thus, Esposito acquiesced in that procedure. *Holsey v. State, 271 Ga. 856, 861 (5) (524 S.E.2d 473) (1999)*. See also *Wilson v. State, 271 Ga. 811, 817 (6) (525 S.E.2d 339) (1999)*. Therefore, the jury view procedure is not before us, and there is no issue on which we should express an opinion.

I am authorized to state that Justice Thompson joins in this opinion, and that Justice Hunstein joins in Division 2 and Justice Hines joins in Division 1.

Appendix.

Wilson v. State, 271 Ga. 811 (525 S.E.2d 339) (1999); *Lee v. State, 270 Ga. 798 (514 S.E.2d 1) (1999)*; *Pruitt v. State, 270 Ga. 745 (514 S.E.2d 639) (1999)*; *Whatley v. State, 270 Ga. 296 (509 S.E.2d 45) (1998)*; *Perkins v. State, 269 Ga. 791 (505 S.E.2d 16) (1998)*; *Pye v. State, 269 Ga. 779 (505 S.E.2d 4) (1998)*; *DeYoung v. State, 268 Ga. 780 (493 S.E.2d 157) (1997)*; *Bishop v. State, 268 Ga. 286 (486 S.E.2d 887) (1997)*; *Waldrip v. State, 267 Ga. 739 (482 S.E.2d 299) (1997)*; *Jones v. State, 267 Ga. 592 (481 S.E.2d 821) (1997)*; *Carr v. State, 267 Ga. 547 (480 S.E.2d 583) (1997)*; *Wellons v. State, 266 Ga. 77 (463 S.E.2d 868) (1995)*; *Crowe v. State, 265 Ga. 582 (458 S.E.2d 799) (1995)*; *Hittson v. State, 264 Ga. 682 (449 S.E.2d 586) (1994)*; *Todd v. State, 261 Ga. 766 (410 S.E.2d 725) (1991)*; *Taylor v. State, 261 Ga. 287 (404 S.E.2d 255) (1991)*; *Ferrell v. State, 261 Ga. 115 (401 S.E.2d 741) (1991)*; *Williams v. State, 258 Ga. 281 (368 S.E.2d 742) (1988)*.

Dissent by: Sears (In Part)

Dissent

Sears, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of appellant's adjudication of guilt. However, due to the concerns I

[21] *O.C.G.A. § 17-10-35 (c) (3)*.

expressed in my partial dissent to *Wilson v. State*, [22] I dissent to Division 3 (b) of the majority opinion, and to the affirmance of the death penalty only to the extent that it requires death by electrocution.

I am authorized to state that Chief Justice Benham joins me in this partial **[***18]** concurrence and partial dissent. *271 Ga. 811, 525 S.E.2d 339 (1999)*.

End of Document

[22] *271 Ga. 811 (525 S.E.2d 339) (1999)*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11384-P

JOHN ESPOSITO,

Petitioner-Appellant,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

APPLICATION TO EXPAND CERTIFICATE OF APPEALABILITY

BRIAN S. KAMMER (GA 406322)
MARCIA A. WIDDER (GA 643407)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, Georgia 30307
404-222-9202

COUNSEL FOR MR. ESPOSITO

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN ESPOSITO, Petitioner-Appellant,	)	
vs.	)	Case No. 15-11384-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

1. Roy W. Kelly III, Trial Counsel for Appellant
2. W. Dan Roberts, Trial Counsel for Appellant
3. John Esposito, Appellant
4. Alicia Woodward, Co-defendant
5. Hon. William A. Prior, Jr., Trial Judge
6. Fredric D. Bright, Prosecutor
7. Hon. Marvin Sorrells, State Habeas Judge
8. Brian Kammer, State and Federal Habeas Counsel for Appellant
9. Marcia Widder, Federal Habeas Counsel for Appellant

10. Tom Dunn, State Habeas Counsel for Appellant

11. Kimberley Sharkey, State Habeas Counsel for Appellant

12. Lindsay Bennett, State Habeas Counsel for Appellant

13. Richard Tangum, Assistant Attorney General, Counsel for Appellee (Federal habeas)

14. Sabrina Graham, Senior Assistant Attorney General, Counsel for Appellee (Federal habeas)

15. Emily Roselli, Counsel for Appellee (State habeas)

16. Theresa Schiefer, Counsel for Appellee (State habeas)

17. C. Ashley Royal, District Court Judge

18. Lola Davis, Deceased

19. Larry Snider, Deceased

20. Marguerite Snider, Deceased

_____

Brian S. Kammer
Attorney for Mr. Esposito

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Rules

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN ESPOSITO, Petitioner-Appellant,	)	
vs.	)	Case No. 15-11384-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

APPLICATION TO EXPAND CERTIFICATE OF APPEALABILITY

COMES NOW, Appellant/Petitioner, John Esposito, by and through undersigned counsel, pursuant to 28 U.S.C. §2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 22-1, and respectfully requests that this Court expand the Certificate of Appealability ("COA") granted by the district court. For cause, Mr. Esposito shows the following:

I. Procedural History and Statement of Facts

On September 30, 1998, Mr. Esposito was convicted in the Superior Court of Baldwin County, Georgia,[1] of one count of malice murder, one count of felony murder, one count of armed robbery and one count of motor vehicle hijacking. The

[1] This followed a change of venue from Morgan County, Georgia.

state proceeded to the penalty phase on the malice murder count,[2] and, on October 2, 1998, the jury returned a sentence of death on that count. The court additionally sentenced Mr. Esposito to life imprisonment on the armed robbery count and twenty years imprisonment on the motor vehicle hijacking count.

On October 20, 2000, the Georgia Supreme Court affirmed the convictions and sentences. *Esposito v. State*, 273 Ga. 183 (2000). Respondent's Exhibit ("RX") 26.[3] The court denied Mr. Esposito's timely motion for reconsideration on November 30, 2000. RX 28.

After receiving an extension of time, Mr. Esposito timely filed a Petition for Writ of Certiorari in the United States Supreme Court on April 27, 2001, which was denied on June 25, 2001. *See Esposito v. Georgia*, 533 U.S. 935 (2001), *rehearing denied*, 533 U.S. 970 (2001). RX 29, 31, 32.

On May 3, 2002, Mr. Esposito filed an application for writ of habeas corpus in the Superior Court of Butts County, Georgia ("the habeas court"), RX 33, which granted him indigent status. On November 6, 2006, he filed an amended petition raising thirteen claims and numerous sub-claims. RX 84.

[2] The felony murder count was vacated by operation of law.

[3] Respondent's Exhibits are numbered according to their designation in Respondent's Notice of Filing. *See* Doc. 13.

The habeas court held an evidentiary hearing on the petition on September 4-6, 2007, at which Mr. Esposito presented live testimony from eight witnesses:

- Mr. Esposito's former girlfriend, Courtney Greco Veach, whom trial counsel had flown to Georgia from New Jersey for the purpose of testifying at penalty, but who was left languishing overnight at the airport when the defense team failed to pick her up to transport her to the trial in Milledgeville and was thus never called as a witness;

- Dr. Jonathan L. Arden, M.D., a forensic pathologist;

- Kenneth Blackstone, a polygraph expert retained by the defense but not called as a witness at trial;

- Mr. Esposito's trial attorneys, Roy Robinson Kelly, III, and Dan Roberts;

- David Lisak, Ph.D., a clinical psychologist;

- Ofelia Gordon, M.S.W., a licensed clinical social worker, who had been retained by the defense team but was abandoned as an expert and not used at trial;

- Daniel Grant, Ph.D., a forensic psychologist who had been retained by the defense team and who testified in the penalty phase of Mr. Esposito's trial.

See RX 90-92. Mr. Esposito also submitted affidavit testimony from numerous witnesses familiar with the physical, mental and sexual abuse he suffered from early childhood and throughout his youth, and his history of psychiatric hospitalizations, and extensive records corroborating their testimony. In all, he submitted over 255 exhibits to support his habeas claims. RX 93-128. Respondent introduced 70

exhibits, but did not present live testimony by any witnesses. RX 129-48. After the hearing, the parties submitted lengthy post-hearing briefs. RX 155, 157.

On April 29, 2011, the habeas court denied the petition for writ of habeas corpus in its entirety. RX 162. The habeas court denied two claims on the merits: Claim I (alleging ineffective assistance of counsel at trial and on direct appeal) and Claim X (challenging penalty phase jury instructions). RX 162:12-42. It otherwise ruled that Mr. Esposito's claims were *res judicata* or procedurally defaulted. The Georgia Supreme Court denied Mr. Esposito's application for a certificate of probable cause to review this ruling on March 19, 2012.

Mr. Esposito timely filed his federal petition for writ of habeas corpus ("the petition") on May 8, 2012, in the United States District Court for the Middle District of Georgia. Doc. 1. Upon motion by Mr. Esposito (Doc. 2-3), the court appointed undersigned counsel, Brian Kammer, and Kirsten Salchow,[4] and declared Mr. Esposito indigent for purposes of this action, Doc. 9. On May 21, 2012, Respondent filed an answer-response to the petition. Doc. 10. On August 3, 2012, the court issued a scheduling order, Doc. 31, pursuant to which Mr. Esposito filed motions for

[4] The court subsequently allowed undersigned counsel, Marcia Widder, to substitute for Ms. Salchow. Doc 43, 47, 48, 50, 51.

leave to conduct discovery, Doc. 31, and for an evidentiary hearing, Doc. 38, which the district court denied, Docs. 37, 42.

Mr. Esposito timely filed his brief addressing both procedural issues and the merits on November 4, 2013, Doc. 54, and was allowed to file a corrected brief, Doc. 56, on November 6, 2013. Respondent filed a responsive brief, Doc. 57, on December 19, 2013, and Mr. Esposito filed a Reply Brief, Doc. 58, on January 21, 2014.

Shortly after the close of briefing and prior to the district court's ruling on the habeas petition, Mr. Esposito filed under seal a renewed motion for evidentiary hearing based on newly discovered evidence concerning lead trial counsel's prosecution for possession of child pornography.[5] Doc. 62. The district court denied the motion on August 29, 2014. Doc. 65.

On December 10, 2014, the district court issued an order denying the petition for writ of habeas corpus, but granting a COA on the following issues: "Whether trial counsel were ineffective in failing to investigate and present evidence to support

[5] The renewed motion for evidentiary hearing was based on evidence obtained entirely from public records. *See* Doc. 60 and accompanying CD. Due to the nature of the charges against Mr. Kelly, Mr. Esposito sought leave to litigate the motion under seal, *see* Docs. 59, 61, as a matter of courtesy. Because there is no ethical requirement to litigate this issue under seal, and because to do so here would be considerably more complicated, Mr. Esposito will not seek to have those aspects of the case addressing the district court's denial of his motion for a hearing, Doc. 65, conducted under seal in this Court.

their defense theories that Esposito was less culpable tha[n] Woodward and that his personal history of abuse and mental illness was mitigating." Doc. 67, at 88. It denied Mr. Esposito's Rule 59(e) motion on March 3, 2015. Docs. 69, 70.

Mr. Esposito now asks this Court to expand the COA to include the district court's rulings on the remaining challenges to trial counsel's ineffective representation, his challenge to the prosecutor's misconduct, the district court's failure to hold a hearing to determine whether any procedurally defaulted claims of ineffective representation of counsel at trial and on appeal should be excused due to state post-conviction counsel's ineffective representation, and the district court's denial of Mr. Esposito's request for a hearing to address how counsel's prurient and illegal interests impacted counsel's performance and undermine the credibility of counsel's testimony in the state habeas proceedings.

II. Standards for Issuance of a COA.

Under 28 U.S.C. §2253, a federal habeas corpus petitioner may not appeal the denial of habeas relief without the issuance of a COA. Rather, in a federal habeas corpus proceeding arising out of a state court conviction, "an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability." F.R.A.P. 22(b). This Court's rules allow a petitioner to request a COA from the court of appeals if the district court denies a COA. 11th Cir. Rule 22-1(c)(2). This Court has written that "under the plain language of the rule

[Fed.R.Civ.P. 22(b)], an applicant for the writ gets two bites at the appeal certificate apple: one before the district judge, and if that one is unsuccessful, he gets a second one before a circuit judge." *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996) (*en banc*).

COAs should issue for each issue regarding which the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). They are likewise appropriate where constitutional claims have been dismissed on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Henry v. Moore*, 197 F.3d 1361 (11th Cir. 1999).

The standard for granting COA under AEDPA is "materially identical" to that under pre-AEDPA law. *Hardwick v. Singletary*, 126 F.3d 1312, 1313 (11th Cir. 1997). Prior to AEDPA, the petitioner was required to make "'a substantial showing of the denial of [a] federal right.'" *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (quoting *Steward v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971)). The *Barefoot* standard does not require the petitioner show he should prevail on the merits. *Barefoot*, 463 U.S. at 893 n.4. Rather, it has long been understood as a formulation of the nonfrivolity standard. Under that standard, a petitioner was entitled to issuance of a certificate of probable cause – and therefore Mr. Esposito is entitled under AEDPA to the issuance of COA – where "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), or when a claim is not "*squarely* foreclosed by statute, rule or authoritative court decision." *Barefoot*, 463 U.S., at 893 n.4 (emphasis added). "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . ." *Id.* at 893.

III. Grounds for Expanding the COA.

The district court granted a COA on two subparts of Mr. Esposito's claim that he received ineffective assistance of counsel ("IAC") at the sentencing phase of trial: "Whether trial counsel were ineffective in failing to investigate and present evidence to support their defense theories that Esposito was less culpable tha[n] Woodward and that his personal history of abuse and mental illness was mitigating." Doc. 67, at 88. Mr. Esposito asks that this Court expand the COA to include the following additional meritorious issues:

1. Whether the district court erred in ruling that Mr. Esposito was not entitled to sentencing relief due to trial counsel's ineffective representation in (a) making an inadequate penalty phase summation, (b) failing to object to the admissibility of prejudicial evidence or to the prosecutor's improper examination and argument, and (c) failing to object to an extrajudicial crime scene visit by jurors;

2. Whether the district court erred in ruling that Mr. Esposito was not entitled to relief due to the prosecutor's improper conduct and argument in the sentencing phase;

3. Whether the district court erred in denying an evidentiary hearing to address (a) whether procedurally defaulted claims of ineffective representation of counsel should be excused under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); and (b) whether trial counsel's illegal prurient interests in young children, as reflected by his extensive collection of illegal hardcore child pornography (as well as his extensive collection of hardcore legal pornography), negatively impacted his investigation and presentation of Mr. Esposito's history of child sexual abuse and whether these proclivities undermine counsel's credibility in the state habeas proceedings.

For each claim Mr. Esposito has made a substantial showing of denial of a constitutional right and he is thus entitled to a COA on each of the grounds discussed below. *See* 28 U.S.C. § 2253(c) (2); *Barefoot*, 463 U.S. at 893.

A. Sentencing Phase IAC – Claim One Of The Federal Petition.

The district court granted COA on two aspects of ineffective representation of counsel ("IAC") raised in the petition, but denied COA on several other challenged acts and omissions of counsel. Because reasonable jurists could disagree with the district court's denial of relief as to the remaining aspects of Mr. Esposito's IAC

claim, and because prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984),[6] should be assessed on the basis of the cumulative effect of counsel's deficiencies,[7] a COA should issue to address the remaining IAC claims impacting sentencing, as discussed below.

1. Reasonable jurists could disagree with the district court's conclusion that AEDPA deference applies to the IAC claim, given the state habeas court's

[6] Under *Strickland*, a defendant must show that counsel performed deficiently under prevailing professional norms and that counsel's deficient performance prejudiced the defense. 466 U.S. at 687. *Strickland* prejudice is established by showing that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

[7] As this Court recently observed, *Strickland* prejudice may be found "by the alleged deficiencies in counsel's performance, considered cumulatively." *Burgess v. Terry*, 478 F.3d. Appx. 597, 601 (11th Cir. 2012) (citing *Strickland*, 466 U.S. at 694-97); *see also Magill v. Dugger*, 824 F.2d 879, 889 (11th Cir. 1987) ("The combination of Pierce's errors during the guilt phase, Stancil's errors during the penalty phase, and the trial court's instruction to the jury to ignore certain nonstatutory mitigation evidence . . . undermine our confidence in the reliability of Magills's sentencing proceeding). Numerous other circuit courts have held that prejudice under *Strickland* should be assessed on the basis of the combined effects of counsel's deficiencies. *See, e.g.*, *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006); *Boyd v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005); *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). The Georgia Supreme Court requires such review as well. *See Schofield v. Holsey*, 281 Ga. 809, 811 n.1 (2007) ("The Supreme Court of the United States has held that it is the prejudice arising from 'counsel's errors' that is constitutionally relevant, not that each individual error by counsel should be considered in a vacuum. . . . [T]he combined effects of trial counsel's errors should be considered together as one issue . . . .").

unreasonable application of governing Supreme Court law.

As an initial matter, a COA should issue to allow this Court's review of all Mr. Esposito's sentencing phase IAC claims because reasonable jurists could disagree with the district court's determination that the state court's denial of relief was entitled to deference under 28 U.S.C. § 2254(d).[8]

The state habeas court made a significant legal error in its consideration of prejudice with respect to Mr. Esposito's sentencing phase IAC claim. It concluded that the Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), modified *Strickland*'s prejudice prong. RX 162:15. Reasonable jurists could conclude that this determination was an unreasonable application of clearly

[8] Mr. Esposito acknowledges that under this Court's decisions in *Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014), and *Jones v. GDCP Warden*, 753 F.3d 1171 (11th Cir. 2014), the state habeas court's reasoning is not relevant because the Court will instead defer to the Georgia Supreme Court's summary denial of a certificate of a certificate of probable cause. The district court so held, but addressed the district court's reasoning in the alternative. *See* Doc. 67, at 13-23, 43-44. As the Court is aware, it is currently considering the continued validity of the *Jones/Hittson* approach. *See* Order dated March 19, 2015, in *Wilson v. Warden*, 11th Cir. Case No. 14-10681-P. In addition, the Supreme Court appears to be interested in this issue, as it has asked for the record in *Hittson v. GDCP Warden*, Sup. Ct. Case No. 14-8589. *See* Letter dated April 23, 2015, from Supreme Court to this Court, filed in *Hittson v. GDCP Warden*, 11th Cir. Case No. 12-16103-P.

established federal law and that, accordingly, deference was not due the state court's decision.[9]

The Supreme Court held in *Williams v. Taylor*, 529 U.S. 362 (2000), that the state court "erred in holding that our decision in *Lockhart* . . . modified or in some way supplanted the rule set down in *Strickland*." *Id.* at 391. Because the Virginia Supreme Court had erroneously applied *Lockhart* in its prejudice analysis, its determination that petitioner had failed to establish *Strickland* prejudice was an unreasonable application of governing law and its decision was not entitled to deference under 28 U.S.C. 2254(d)(1). *Id.* at 397. The state habeas court made the same mistake here, observing:

> The Supreme Court in *Lockhart* further defined the "prejudice" component of *Strickland*, holding that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Lockhart*, 506 at 369, 370.

RX 162:15.

[9] "Where [a federal court] determine[s] that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d), [the court is] unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1266 (11th Cir. 2009) (citing *Williams*, 529 U.S., at 406).

The district court, however, posited that the state habeas court's discussion of *Fretwell* was essentially surplasage that could be ignored. It concluded that "the state habeas court referenced *Lockhart* in its general discussion, but it conducted a straightforward *Strickland* analysis when it addressed each of Esposito's ineffective assistance allegations," and "[u]nlike the Virginia Supreme Court, it did not find trial counsel's 'ineffectiveness probably affected the outcome of the proceeding, and then conduct a separate inquiry into fundamental fairness." Doc. 67, at 18. The district court, however, was wrong on both counts.[10]

First, the district court's conclusion that the state habeas court's express reliance on *Lockhart* was immaterial because, unlike the Virginia Supreme Court, the state habeas court in fact applied a straight-up *Strickland* prejudice analysis ignores what happened in *Williams*. Indeed, the *Williams*' dissent made this precise argument,[11] and both the majority and concurring opinions rejected it. *See Williams*,

[10] The district court also observed that the *Lockhart* reference was immaterial because the state habeas court "clearly stated that its prejudice analysis was governed by *Strickland* and its progeny." Doc. 67, at 16. This observation is curious, as *Lockhart* was an application of *Strickland*, *see Lockhart*, 506 U.S., at 366, and thus is one of *Strickland*'s "progeny."

[11] *See Williams*, 529 U.S., at 417-18 (Rehnquist, Ch.J., dissenting) (arguing that "after the initial allusion to *Lockhart*, the Virginia Supreme Court's analysis explicitly proceeds under *Strickland* alone" and accordingly the Virginia Supreme Court did not rely on *Fretwell* in finding no prejudice and "instead appropriately relied on *Strickland*").

529 U.S., at 414 (noting the dissenting opinion's observation that the Virginia Supreme Court "also inquire[d] whether Williams had demonstrated a reasonable probability that, but for his trial counsel's unprofessional errors, the result of his sentencing would have been different," but concluding that "[i]t is impossible to determine, however, the extent to which the Virginia Supreme Court's error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice") (O'Connor, J., concurring in part).[12]

Second, the district court's observation that *Williams* does not apply because, unlike here, the Virginia Supreme Court engaged in a two-step analysis, first "find[ing] trial counsel's 'ineffectiveness probably affected the outcome of the proceeding, and then conduct[ing] a separate inquiry into fundamental fairness," Doc. 67, at 18, has no actual support in reality. *See Williams v. Warden*, 487 S.E.2d 194, 200 (Va. 1997) (prejudice analysis finding, under *Strickland*, "there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.") (quoting *Strickland*, 466 U.S. at 700).

[12] Part II of Justice O'Connor's opinion delivered the Court's opinion regarding the meaning of 28 U.S.C. 2254(d). *See* 529 U.S., at 402-13.

As in *Williams*, it is "impossible to determine" the extent to which the state habeas court's error with respect to its reading of *Lockhart* affected its ultimate conclusion that Mr. Esposito was not prejudiced by his attorneys' deficient performance.[13] Accordingly, reasonable jurists could disagree with the district court that the state habeas court's reliance on *Fretwell* had no bearing on the reasonableness of the state court's decision.[14] *See, e.g.*, *West v. Bell*, 550 F.3d 542,

[13] The district court's reasoning also reflects a fundamental misunderstanding of the *Williams* decision. The *Williams* Court did not criticize the Virginia Supreme Court for requiring a showing that the trial was "fundamentally unfair or unreliable." That language comes from *Strickland* and remains a touchstone of *Strickland*'s prejudice analysis. *See Strickland*, 466 U.S., at 686 ("[T]he ultimate focus of the [prejudice] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."). *See also Williams*, 529 U.S., at 393 n. 17 ("[T]he 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.") (quoting *Strickland*, 466 U.S., at 686). The Virginia Supreme Court's comments about fundamental fairness and reliability were thus not themselves an "unreasonable" departure from *Strickland*; rather, it was the court's conclusion that the likely effect on the outcome was not the actual focus of the prejudice inquiry.

[14] The state habeas court's prejudice analysis also suffers from another error made by the Virginia Supreme Court in *Williams*: Its prejudice analysis "failed to evaluate the totality of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams*, 529 U.S., at 397-98. Rather, the state habeas court conducted a prejudice analysis with respect to only a few subparts of Mr. Esposito's ineffective-assistance-of-counsel claim and did not contemplate the aggregate evidence that was precluded as a result of counsel's deficient performance,

553 (6th Cir. 2008); *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006); *Spears v. Mullin*, 343 F.3d 1215, 1248 (10th Cir. 2003) (citing *Williams*, 529 U.S. at 391-95)).[15]

2. Reasonable jurists could disagree that the state court reasonably found that counsel were effective in making a 4-page sentencing phase summation that failed to counter the prosecutor's predictably strong closing argument, did not discuss the mitigation evidence presented, and provided no compelling reason for jurors to impose a sentence less than death.

The district court acknowledged that trial counsel's penalty phase closing argument "can certainly be criticized" as it was "brief" and "undoubtedly could have placed more emphasis on 'Esposito's upbringing and psychiatric history,"

much less aggregate the totality of that evidence with the trial evidence when determining the impact on the jury's sentencing determination. *See, e.g.*, RX 162, at 26 (finding no prejudice from failure to present the testimony of Dr. Lower and Courtney Greco Veach); *id.* at 32 (finding no prejudice from counsel's presentation of mental health evidence); *id.* at 41 (finding no prejudice from jury's extrajudicial crime scene visit).

[15] This was not the only significant and unreasonable application of governing Supreme Court law. The state habeas court also approved trial counsel's justification for failing to present evidence that Mr. Esposito was less culpable than his co-defendant, such as forensic evidence undermining the reliability of his confession, and evidence of the co-defendant's domineering personality – that they feared opening the door to a videotaped confession the trial court had suppressed. Counsel's decision was based on their apparent ignorance of clearly established Supreme Court law and the state habeas court's conclusion that counsel performed reasonably in this regard was an unreasonable application of law. *See* Doc. 56, at 36-41; Doc. 58, at 27-33.

(inasmuch as counsel's entire discussion of Mr. Esposito's background mitigation consisted of the observation that "this young man has a lots [sic] of problems"). Doc. 67, at 74-75. Nonetheless, the court concluded, defense counsel

> did explain to the jury that Esposito's "problems" were mitigating and he did plead with them to spare Esposito's life. Given AEDPA deference, this Court cannot find the state habeas court's decision that counsel performed reasonably and Esposito was not prejudiced involved an unreasonable application of *Strickland* or was based on any unreasonable determinations of fact. . . . The Georgia Supreme Court could reasonably have determined that Esposito failed to show that, but for Kelly's closing argument, the result of his sentencing proceedings would have been different." Given the important role of counsel at closing and the record evidence indicating that trial counsel abandoned their plan to present a more robust closing argument, likely because their ill-prepared sentencing phase defense had crumbled, reasonable jurists could disagree with the district court's conclusions.

Doc. 67, at 75-76.

Mr. Kelly's notes reflect he planned to present a penalty summation focused on the mitigating evidence the defense had presented. *See* RX147, at 16693.[16] Instead, counsel simply abandoned this plan.

[16] Counsel's notes outline a closing argument focused on Mr. Esposito's childhood privations and abuse, and his substantial mental health issues:

VI John's childhood

A. Follower

B. facts proved that

Mr. Esposito had the right to be effectively represented during closing arguments. *Hunter v. Moore*, 304 F.3d 1066, 1069-70 (11th Cir. 2002). He was denied that right through his attorneys' failure to "make a proper argument on the evidence and the applicable law in his favor.'" *Herring v. New York*, 422 U.S. 853, 858 (1975) (citation omitted).

The entire defense closing argument comprises just over four pages of transcript, RX 20, at 174-78, one-sixth's of the length of the State's, RX 20, at 149-74. More importantly, the prosecutor gave an impassioned summation discussing the evidence and enumerating several specific reasons why the jury should sentence Mr. Esposito to death. The defense, in comparison, made minimal reference to the mitigating circumstances, made only a lukewarm plea to spare Mr. Esposito's life, and played into the prosecutor's argument that Mr. Esposito was a con man who was trying to con the jury, by suggesting that even counsel had no idea who their client

Abandoned by mother

Abused [by] stepfather – Althea Holt

C. Nothing works for me – psychiatric nurse Annette Nolan

D. Serious problems

RX 147, at 16693.

was. *See* RX 20:175 ("Maybe you have felt like I have sometimes during this case. Will the real John Esposito please stand up?").

Defense counsel's closing argument did not address the chosen defense (lesser culpability, mental health and redeeming qualities) and gave jurors no cogent reason to impose a sentence less than death. "Deficient performance is demonstrated by an attorney's failure to use the closing argument to focus the jury's attention on his client's character or any mitigating factors of the offender's circumstances . . . ." Lawhorn v. Allen, 519 F.3d 1272, 1295 (11th Cir. 2008). *See also Herring*, 422 U.S. at 862 (closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact," is only time counsel "can . . . argue the inferences to be drawn from all the testimony, and point out the weakness of their adversaries' positions"; it is "the last clear chance to persuade the trier of fact").[17] Mr. Esposito's attorneys failed to take advantage of this opportunity and left the jury without any reasoned basis to resist the prosecutor's focused argument for execution. The state habeas court's blithe acceptance of trial counsel's abjectly dismal performance was patently

[17] *See also Williams*, 529 U.S. at 399 (different result reasonably probable had "competent counsel ... presented and explained the significance of all the available [mitigating] evidence.").

unreasonable and contrary to the law and facts, and reasonable jurists could disagree with the district court's conclusion to the contrary.[18]

3. Reasonable jurists could disagree with the district court's determination that counsel reasonably failed to object to a host of inadmissible evidence and improper examination and argument by the prosecutor at sentencing.

Defense counsel did little to ensure that Mr. Esposito's rights to a fair trial and reliable sentence were honored at trial. They did not object to clearly improper evidence elicited or introduced by the prosecution, and simply ignored the prosecutor's grossly improper cross-examination and closing arguments. The state habeas court concluded counsel performed adequately because they had challenged the admissibility of Mr. Esposito's custodial statements and evidence of the Sniders' murders. *See* RX 162, at 35. The court's rationale that competent counsel may ignore the admission of blatantly improper evidence or prosecutorial overreaching simply because they make an effort to challenge a few other items of evidence defies understanding. Counsel's failure to ensure that the jury heard only competent and

[18] Indeed, the district court cannot reasonably have it both ways, concluding that counsel's lackluster mitigation presentation was constitutionally adequate, but that counsel had no obligation to assemble the evidence they presented into a cogent argument for a sentence less than death.

proper evidence and argument alone warrants relief, and reasonable jurists could disagree with the district court's contrary finding.

a. Counsel were ineffective in failing to object to the prosecutor's improper questioning of defense witnesses.

What little mitigating evidence the jury heard likely received little consideration because defense counsel failed to prevent the prosecution from defining it as irrelevant through its cross-examination of Mr. Esposito's mental health expert and in closing argument.[19] Moreover, through improper questioning, the prosecutor was permitted to introduce unsubstantiated and inadmissible evidence in aggravation.

The prosecutor's actions were not proper advocacy. Rather, they directly violated fundamental Eighth and Fourteenth Amendment law and should have been the subject of defense objections. Instead, the defense attorneys stood mutely by,

[19] Indeed, the *Report of the Trial Judge* reflects that even the judge was persuaded by the prosecutor that the defense had not presented any mitigating mental health evidence. *See* RX 1:447 (the only mitigating circumstances *in evidence* were the defendant's lack of significant prior criminal activity and youth). Moreover, the trial court also observed that "Dr. Daniel H. Grant testified at trial that the defendant suffered from anti-social personality disorder," RX 1, at 445, although Dr. Grant made no such diagnosis and testified that Mr. Esposito had borderline personality disorder, NOS (not otherwise specified), with features of post-traumatic stress disorder. RX 20, at 124-25. *See also* RX 92, at 493.

allowing their client's most basic right to a reliable and rational sentence to be obliterated.[20]

(1) Improper cross-examination of Dr. Grant.

During the cross-examination of Dr. Grant, the prosecutor pulled out a statute book and asked, repeatedly, whether Mr. Esposito's psychiatric problems fit within the legal definition of mental illness set forth in O.C.G.A. § 17-7-131. RX 20, at 121, 123-24, 129-30, 136-37. The prosecutor's badgering of Dr. Grant on this point was improper, particularly as this line of questioning had nothing to do with the mitigating value of the evidence. O.C.G.A. § 17-7-131 is the statute that governs "proceedings upon plea of insanity or mental incompetency at trial of crime." It includes a definition of the term "mentally ill" for purposes of the guilt-phase determination of whether a criminal defendant is "guilty but mentally ill at the time of the crime." *See* § 17-7-131(a) (2), (b)(1)(D). The statute does not define relevant mitigating evidence in the sentencing phase of a capital crime and, in fact, is completely at odds with that definition under both United States Supreme Court jurisprudence and Georgia law.

[20] "'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.'" *United States v. Cronic*, 466 U.S. 648, 657 (1984)(quoting *U.S. ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

"[T]he 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (citations omitted). While "[t]he sentencer ... may determine the weight to be given relevant mitigating evidence[, it] may not give it no weight by excluding such evidence from [its] consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). In determining relevance, "the question is simply whether the evidence is of such a character that it 'might serve' as a basis for a sentence less than death." *Tennard*, 542 U.S. at 287 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)). *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (sentence may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis original).[21]

The prosecutor's improper examination of Dr. Grant prevented the jury from giving meaningful effect to Mr. Esposito's mitigating evidence and resulted in a death sentence that was not a "reasoned moral response" to the evidence. Trial counsel's failure to object this improper cross-examination was deficient and

[21] Georgia, moreover, "provides a defendant with more protection than that provided under *Lockett*, and a trial court 'should exercise . . . broad discretion in allowing any evidence reasonably tending toward mitigation.'" *Barnes v. State*, 269 Ga. 345, 359 (1998).

prejudicial, and suggests a startling ignorance of the law.[22] The state court's finding to the contrary was contrary to and/or an unreasonable application of *Strickland*. *See*, *e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel's unreasonable failure to know and give effect to the law constituted deficient performance).

(2) Improper examination of other witnesses, which included improper testifying by the prosecutor and improper bolstering of the testimony

The prosecutor engaged in improper cross examination of other defense penalty phase witnesses, in which he questioned them about prejudicial matters that were extraneous to the witness's direct examination and wholly irrelevant to the case. Additionally, the prosecutor questioned defense witnesses so as to testify himself about matters that were not substantiated by the evidence and whose purpose was to inflame the jury. Trial counsel uttered nary a peep in objection.

For example, while cross-examining John Crain, who had taught Mr. Esposito in middle school, the prosecutor insinuated that Mr. Esposito was an outcast who

[22] The district court's unsupported suggestion that perhaps counsel did not object because they "did not want to emphasize Grant's 'personality disorder, nos' diagnosis," Doc. 67, at 54, hardly justifies counsel's conduct, as their failure to object to this improper cross allowed it to go on for pages of the transcript. *See* RX 20:121, 123-24, 129-30, 136-37.

did not fit in with the mixed race classroom because he was a racist, a suggestion that was unsupported, irrelevant and highly prejudicial, RX 19:358-59; and that his father had ties to the Italian Mob, an issue that had no bearing on the case, RX 19:368-74. The prosecutor twisted Mr. Crain's words to make it appear he was saying that witnesses who could have provided testimony favorable to the State were scared to testify for fear of reprisal from the mob, whereas Crain was actually testifying that witnesses who had information that would be helpful to Mr. Esposito were nonetheless afraid to testify for fear that their efforts would backfire. *See* RX 19:370-74. None of this evidence was relevant to the proceedings, but it was clearly very harmful. Counsel's failure to object permitted this extended testimony to continue and implicitly validated it as an appropriate topic of inquiry.

The prosecutor also, in the guise of cross-examining witnesses, essentially testified about unsubstantiated, prejudicial matters. For example, he questioned Mr. Crain about a motion for a temporary restraining order filed by Mr. Esposito's mother (a document Crain had never seen) in which she purportedly alleged that Mr. Esposito had "been into devil worship since age 12," RX. 19:381, inadmissible hearsay allegations the prosecutor did not substantiate. The prosecutor engaged in similar tactics when examining Althea Holt, *see* RX 20:9-10. *See also* RX 20:31, 34 (improper questioning of Annette Nolan suggesting without substantiation that Mr. Esposito "did not allow Lola Davis to pray before he beat her to death," and that

he "didn't give Mr. Snider or Mrs. Snider the opportunity to pray before he beat them"). Yet no objection was uttered by trial counsel, in clear contravention of counsel's duty to push back against obviously aggravating and inadmissible evidence. *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 386 n.5 (2005) (noting counsel's duty to rebut aggravating evidence encompasses but also goes beyond efforts to exclude it).

More than 75 years ago, the Supreme Court condemned the tactics employed by Mr. Esposito's prosecutor in this case. *See Berger v. United States*, 295 U.S. 78, 84 (1935) (prosecutor "overstepped the bounds of . . . propriety and fairness" by, among other things, "suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered"). *See also Lucas v. Warden, Ga. Diagnostic and Classification* Prison, 771 F.3d 785, 804 (11th Cir. 2014) ("A prosecutor may not 'misstat[e] the facts in his cross-examination of witnesses' or 'assum[e] prejudicial facts not in evidence.'") (quoting *Berger*, 295 U.S. at 84); *Harris v. Spears*, 606 F.2d 639, 642 (5th Cir. 1979) (prosecutor failed "to provide appropriate evidentiary foundation for the cross-examination" of defendant, in which he confronted defendant with statements supposedly made by a witness, but then failed to call the witness); *Booker v. Wainwright*, 703 F.2d 1251, 1259 n.16 (11th Cir. 1983) (explaining that the confrontation clause error addressed in *Harris* "occurred . . . when the [witness] was not called"). The state habeas court

contravened and/or unreasonably applied *Strickland* in finding counsel's performance non-deficient in this respect and reasonable jurists could disagree with the district court's approval of that conclusion.[23]

(3) Improper victim impact evidence in the penalty phase of trial.

Prior to trial, defense counsel filed two motions seeking to prevent the prosecution from introducing excessive victim impact evidence. *See* RX 1:109-113; RX 1:272-94. At a hearing on the motions, the prosecutor stated it was not his policy to present victim impact evidence and that he would not be doing so, but would notify the defense if his position changed. RX 5:4. *See also* RX 1, at 25 (prosecutor reiterating that he had no intention of presenting victim impact evidence).

[23] Defense counsel also failed to object to the prosecutor's improper questioning of the state's own witnesses, whereby the prosecutor, through irrelevant commentary, vouched for the credibility of his witnesses and, by having his witnesses repeat especially prejudicial testimony for emphasis, inflamed the jury's passions. *See, e.g.*, RX 19:159, 159-60, 163, 137 (bolstering credibility of Texas Ranger's testimony by virtue of his status); RX 18:223, 231-33, 235 (emphasizing particularly aggravating evidence by improperly asking witness to repeat their testimony). These tactics were improper and in violation of the prosecutor's professional and ethical duties. Prosecutors are forbidden from commenting on the credibility of a witness or personally vouching for a witness's credibility. *United States* v. *Young,* 470 U.S. 1, 17-19 (1985); *Berger*, 295 U.S. at 86-88 (finding the prosecutor's statement that he personally knew a witness was lying amounted to egregious prosecutorial misconduct).

Contrary to his representations on November 17, 1997, and with no notice to the defense, the prosecutor proceeded to deploy substantial, highly inflammatory victim impact evidence in both the guilt[24] and the penalty phases of trial.[25] Yet defense counsel, who had clearly sought to prevent the admission of such evidence, stood mutely by – and then shockingly acquiesced in the notion that no victim impact evidence had been presented, so no jury charge regarding its consideration should be given, *see* RX 20:143. As a result, the jury heard inadmissible victim impact evidence during the guilt phase and improper victim impact evidence during the penalty phase, and did not receive the mandatory instruction regarding the proper consideration of such evidence. *See Turner v. State*, 268 Ga. 213, 215 (1997) (in

[24] *See* RX 16:65-68, 115-17. Georgia law is clear that "evidence regarding 'the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community" in a death penalty trial . . . is admissibly only 'subsequent to an adjudication of guilt.'" *Lucas v. State*, 274 Ga. 640, 643 (2001).

[25] The prosecutor introduced extensive victim impact evidence regarding the victims of the unadjudicated murder introduced as non-statutory aggravation. *See, e.g.*, RX 19:6-7, 10-11, 25-32-34, much of which addressed the victims' involvement in their church, a topic that was later exploited by the prosecutor in closing argument, *see* RX 20:162-63, 166, 168-72. This evidence unnoticed, in violation of state law requiring notice and a hearing on its admissibility. *See Livingston v. State*, 264 Ga. 402, 405 (1994). Moreover, as numerous courts have held, extraneous victim impact evidence is not admissible in the penalty phase of a capital trial. *See, e.g. See, e.g.*, *People v. Hope*, 702 N.E.2d 1282, 1288 (Ill. 1998); *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim.App. 1997); *State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998).

light of importance of jury's capital sentencing decision, "in future cases in which victim impact evidence is given in the sentencing phase of a death penalty . . . case, the trial court should instruct the jury regarding the purpose of victim impact evidence"). Counsel's failure to object to this patently inadmissible evidence and to the prosecutor's blatant misconduct is inexplicable. Their performance in this regard was deficient and prejudicial. The state habeas court's finding to the contrary unreasonably applied, and/or was manifestly contrary to clearly established federal law.

Despite the patent and prejudicial nature of counsel's deficient performance in failing to object to the penalty phase victim impact testimony, state post-conviction counsel did not address this specific claim in Mr. Esposito's CPC application to the Supreme Court of Georgia, and the district court ruled the claim was unexhausted. It did not address, however, Mr. Esposito's request that, pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), in the event the court concluded any of the claims were not properly presented or exhausted, "Mr. Esposito be given an opportunity to demonstrate that his state post-conviction attorneys performed deficiently in failing to raise those specific claims in state court." Doc. 58, at 21. A COA to address this question and the underlying merits of this claim should issue.

(4) Defense counsel were ineffective in failing to object to a crime scene videotape of an extraneous offense, which the prosecution introduced at sentencing solely for its prejudicial effect.

The habeas court lauded defense counsel for "reasonably and zealously tr[ying] to keep out evidence of Petitioner's confessions and the Sniders' murders," RX 162:35, and concluded that such efforts precluded a finding of ineffectiveness for failing to seek the exclusion of any other evidence, irrespective of its inadmissibility. The court's praise of counsel's efforts to keep out the Sniders' murders is curious, as it is black letter law in Georgia that unadjudicated other crimes are admissible in the penalty phase of a capital case. *See, e.g.*, *Ross v. State*, 254 Ga. 22, 31 (1985); *Devier v. State*, 253 Ga. 604 (1984). The defense argued solely that the evidence should not be admitted because "they are cases that our clients have not been convicted of or even tried for." RX 18, at 167. As the court observed in rejecting that argument, "the State has a right to present this evidence. I note your objection and overrule it." RX 18, at 168.[26]

[26] It is certainly puzzling that the habeas court chose to characterize defense counsel's effort to keep out evidence of the Sniders' murders as "reasonab[e]" and "zealous[]," RX 162:35, inasmuch as counsel filed no motion in limine to exclude the evidence and the sum total of their argument against its admission consisted of 5.5 lines of transcript text that cited to no case law and provided no cognizable basis for its exclusion. *See* RX 18:167. The state court's characterization of counsel's performance is clearly unreasonable in light of the facts.

Counsel could, however, have made a compelling argument that the evidence of the Sniders' murder should be limited – particularly as Mr. Esposito had confessed to the murders in an unrecorded statement to the FBI that had been ruled admissible and that was in fact presented in the sentencing phase. *See* RX 18, at 220-45. Instead, defense counsel erected no barriers to the prosecutor's extended presentation of evidence, much of it needlessly inflammatory, which formed substantial portion of the state's penalty phase case-in-chief. In particular, defense counsel should have objected to a grisly 10-minute videotape of the Texas crime scene depicting a group of law enforcement officers covering the victims, moving their bodies, and placing them on gurneys. *See* RX 18:80-82; State Tr. Ex. 193. This video did not elucidate any contested issue and was not relevant to any issues before the jury. According to trial counsel, it was particularly inflammatory:

> There was video, when they found the bodies of those other two individuals they had video films of finding them in the woods and pictures of the body. I mean, it was a very gruesome scene. And, yes, sir, that was, to say the least, devastating.

RX 90:238. Despite this recognition, counsel made no effort to prevent the jury from viewing the video. *See* RX 19:182.

Defense counsel accordingly should have moved to exclude the crime scene videotape. *See, e.g.*, *Holland v. State*, 587 So.2d 848, 864 (Miss. 1991) (holding that videotape of road leading to burial site, area surrounding site and exhumation of victim's body, which revealed no more than photographs in evidence "was of no

probative value to the State's case" and should not have been admitted). By failing to seek its exclusion, counsel created an unacceptable risk that Mr. Esposito was sentenced to death on the basis of arbitrary factors, such as passion and prejudice. *Livingston*, 264 Ga. at 404-05.

The habeas court's conclusion that defense counsel did enough because they made a tepid and legally unsupportable argument to exclude evidence of the Snider murders, while they failed to make any effort to prevent the admission of excessive, irrelevant and unduly prejudicial evidence of that offense, despite the legitimate legal basis for doing so. *See*, *e.g.*, *Rompilla*, 545 U.S. at 385-86 and n.5 (counsel have a duty to rebut and try to keep out prejudicial aggravating evidence); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (same).

(5) Counsel were ineffective in failing to object to the jury's extrajudicial crime scene visit.

Counsel were also ineffective in the guilt phase in allowing the jury to visit the scene where Ms. Davis was killed outside the presence of counsel and the court, and accompanied by a sheriff's deputy who was also a witness. *See* Doc. 38, at 5-10 (motion for evidentiary hearing); Doc. 56, at 133-40 (corrected merits brief) (which are adopted as if set forth in full herein). Although the jury's trip occurred during the culpability phase, its prejudicial effect continued into the sentencing phase. *See, e.g.*, *Magill v. Dugger*, 724 F.2d 879, 888 (11th Cir. 1987) (finding that

deficiencies at both guilt and punishment phases affected the outcome of the penalty phase and observing that "[a]lthough the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect ov events occurring during the former upon the jury's decision in the latter").

The crime scene visit was so "troubling" the Georgia Supreme Court addressed it *sua sponte* on direct appeal, although counsel had not challenged it (or pretty much anything else) in their brief on appeal. The court observed that a trial judge should always accompany a jury view as "[t]aking a jury from the controlled environment of a courtroom to a place that has some relevance to the trial always involves the risk that something unexpected might arise requiring the trial judge's intervention," and noting the "[s]pecial dangers exist whenever a witness at trial, particularly a law enforcement officer, attends a jury view." *Esposito*, 273 Ga. at 187.

The district court denied a hearing to address whether the state habeas court properly refused to consider juror affidavits regarding the crime scene visit, Doc. 42, at 4-8, and concluded that counsel were not ineffective in permitting the extrajudicial crime scene visit, Doc. 67, at 64-68.[27] Because reasonable jurists could disagree with the district court's adjudication of these issues, a COA should issue.

[27] The court observed that the Supreme Court of Georgia had before it the juror affidavits when considering Mr. Esposito's CPC application, and presumably

b. Counsel were ineffective in failing to object to the prosecutor's improper penalty phase closing argument.

The prosecutor made numerous improper arguments in his penalty phase closing argument, but defense counsel failed to object to any. In remaining silent in the face of the prosecutor's misconduct, counsel once again provided deplorably ineffective representation.

(1) Improper religious arguments.

As noted in the preceding section, the prosecutor capitalized on defense counsel's failure to object to the improper introduction of extraneous victim impact evidence to argue that the death penalty should be imposed because of the Sniders' devout religious faith. *See* RX 20, at 162-63 (observing that the Sniders never missed church on Sunday unless they were sick, but that they would never go to church again). In addition to this, the prosecutor engaged in grandiose Biblical quotations in exhorting the jury to impose a death sentence. *See* RX 20, at 166 ("How long – the good book say, 'How long shall the wicked by allowed to triumph and exalt.' He's wicked."); RX 20, at 168 ("'How these men of evil boast.' He is a man of evil."); RX 20, at 169 ("I'm not going to sugar coat it. And he boasted. He

considered them when finding that Mr. Esposito had not shown the claim to have arguable merit. Doc. 67, at 67-68.

boasted. These are his words, not Fred Bright's words. These are his words, the boasting. * * * And what did this man of evil boast?"); RX 20, at 170 ("And what else did this man of evil – how these men of evil boast – on those five licks . .. . Arise and judge the earth.").[28&29] The prosecutor concluded with a poignant query about Ms. Davis's widowed husband approach to death and his heavenly meeting with his murdered wife:

> I don't know how many days Mr. Foster Miles Davis has left on this earth. It's probably few. Probably his days are numbered. He's been hanging on for two years. But justice would be when Mr. F.M. Davis goes to the Pearly Gates in heaven and sees his beloved wife of fifty years, Mrs. Lola, and he can say, "honey, there was justice on this earth." On behalf of the State of Georgia, on the front page of that document at the bottom, it says, "we,' the jury fix the punishment at," and we ask that you check off the word "death." Thank you.

RX 20, at 174.

[28] The prosecutor's words appear to have at least a couple of sources in the Bible. Psalm 94 includes the verses:

> O Lord, how long shall the wicked,
> how long shall the wicked exult?
> They pour out their arrogant words,
> All the evildoers boast.

Psalm 82 includes the lines: "Arise, O God, judge the earth; for you shall inherit all the nations."

[29] The prosecutor's reference to Mr. Esposito as "evil" was also improper and should also have been the subject of defense objection. *See, e.g.*, *Wilson v. Sirmons*, 536 F.3d 1064, 1118 (10th Cir. 2008); *People v. Johnson*, 803 N.E.2d 403, 421 (Ill. 2004); *State v. Cauthern*, 967 S.W.2d 726, 737 (Tenn. 1998).

The Georgia Supreme Court and numerous others have recognized that "biblical references inject the often irrelevant and inflammatory issue of religion into the sentencing process and improperly appeal to the religious beliefs of jurors in their decision on whether a person should live or die." *Carruthers v. State*, 272 Ga. 306, 309 (Ga. 2000). *See, e.g.*, *Farina v. Sec'y Fla. Dep't of Corr.*, __ F.3d __, 2013 U.S. App. LEXIS 19972 (11th Cir. 9/30/13) (finding that appellate counsel were ineffective in failing to challenge prosecutor's religious-based closing argument); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001) (granting sentencing relief due to prosecutor's improper religious argument in favor of death sentence). Moreover, the prosecutor's final words – attributing to Ms. Davis's husband the belief that justice could be served only by the death penalty – was not simply manufactured, but was made in outright disregard of clearly established federal and state law prohibiting victim impact evidence and argument regarding the victim's opinions about sentence. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 823-27, 830 n.2 (1991) (declining to overrule precedent establishing that "a victim's family member's characterizations and opinions about the crime" and the "defendant" and the proper penalty "violates the Eighth Amendment"); *Sermons v. State*, 262 Ga. 286 (2010) (*"Payne* left undisturbed *Booth*'s holding that the state could not use information or testimony concerning 'a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence") (citing *Booth v.*

Maryland, 482 U.S. 496 (1987)). The state habeas court's approval of counsel's performance under these circumstances was manifestly unreasonable and/or contrary to clearly established federal law.

(2) Additional improper arguments.

Defense counsel failed to object to additional improper argument. The prosecutor argued, for instance, that, if Mr. Esposito was not sentenced to death, he would kill again, because he took pleasure from killing, though the state had no evidence to support this inflammatory argument. *See, e.g.*, RX 20:155, 167. Similarly, the State called Mr. Esposito "a serial killer," though no expert witness assessed, much less testified, to that. RX 20, at 167.[30]

The prosecutor also broke the "Golden Rule" by asking jurors to speculate about the last moments of the victims. *See, e.g.*, RX 20, at 169-70 ("Can you imagine

[30] *See State v. Whitfield*, 837 S.W.2d 503, 513 (Mo. 1992) ("The terms 'mass murderer' and 'serial killer' are pejorative names associated with a small ghoulish class of homicidal sociopaths who repeatedly and cruelly murder for no apparent motive than to satisfy a perverse desire to kill or cause pain. No evidence suggests that the defendant's prior homicides were of this character. The use of these words is name calling designed to inflame passions of jurors.). Scaring the jury into believing that Mr. Esposito would kill again if not sentenced to death was entirely improper. "The only relevant issue in a capital sentencing proceeding is the particular circumstances of the defendant and his offense." *Wallace v. Kemp*, 581 F. Supp 1471, 1482 (M.D. Ga. 1984) (citing *Lockett*, 438 U.S. at 604 n.12). "The fears and passions of the jury cannot be excited by speculation as to what might happen if the death penalty is withheld." *Id.*

86 year old Marguerite Snider, married for sixty-two and a half years to her beloved husband Larry to be sitting out in that Texas field watching that man beat the brains out of her husband right in front of her. She didn't even put up a fight. *We've been married sixty-two years. He's 90. Why fight him. Take me, too. I may as well go with him. I may as well go.*") (emphasis added).[31]

The prosecutor improperly argued he was an expert in murder cases and, in his expert opinion, this is one of the few deserving the death penalty, RX 20:161-62, an argument whose effect was "to assure the jurors that someone with greater experience has already made the decision that the law imposes on them. The [argument] invites the jury to rely on the [State]'s conclusion that the defendant is deserving of death rather than to make its own evaluation of the enormity of the defendant's crime." *Tucker v. Zant*, 724 F.2d 882, 889 (11th Cir. 1984).

There is no reasonable justification for defense counsel's failure to object to the prosecutor's improper arguments. "Viewed as a whole, the prosecutor's sentencing argument had the obvious effect of inciting the jurors' passions and diverting their attention to impermissible considerations." *Tucker*, 724 F.2d. at 890.

[31] "A 'golden rule' argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position. We have repeatedly held that a golden rule argument is improper . . . ." *Braithwaite v. State*, 275 Ga. 884, 885 (2002) (citing *McClain v. State*, 267 Ga. 378 (1996)).

The state habeas court's failure to find error contravened or was an unreasonable application of clearly established federal law.

The district court suggested Mr. Esposito failed to exhaust his challenge to counsel's failure to object to some of these arguments, Doc. 67, at 71-72, but ruled that, regardless, he had not shown the arguments were improper or prejudicial, and accordingly counsel could not be faulted for failing to object to them. Doc. 67, at 72-73. Because reasonable jurists could disagree with the district court's determination,[32] a COA should issue.

Because reasonable jurists could disagree with the district court's conclusion that the state court reasonably found no fault in trial counsel's performance, a COA should issue.

B. Misconduct By The Prosecution Team Deprived Mr. Esposito Of His Constitutional Rights To Due Process And A Fair Sentencing Proceeding – Claim Two Of The Federal Petition.

Mr. Esposito separately challenged the prosecution's misconduct discussed above, none of which was the subject of a defense objection at trial. *See* Doc. 1, at 21-24; Doc. 56, at 98 n.67, 140 n.82. He incorporates the argument and legal

[32] *See, e.g.*, *Farina v. Sec'y, Fla. Dept. of Corr.*, 536 Fed. Appx. 966 (11th Cir. 2013) (finding appellate counsel ineffective for failing to challenge improper religious argument, even though the error had not been properly preserved though objection at trial).

analysis herein. The district court ruled that, because Mr. Esposito had not shown counsel were defective in failing to object to the misconduct, he could not establish cause and prejudice to overcome the procedural default. Doc. 67, at 85. Because reasonable jurists could disagree with this conclusion for the reasons set forth above, a COA should issue on this claim.

C. A COA Should Issue To Address The District Court's Failure To Conduct Hearings On State Post-Conviction Counsel's Ineffective Failure To Present And Exhaust Colorable IAC Claims and To Address Whether Trial Counsel's Extensive Possession Of Illegal Child Pornography And Hardcore, But Legal Adult Pornography Undermine The Credibility Of Counsel's Testimony In State Court And Raise Questions About The Reasonableness Of Counsel's Failure To Develop And Present Mitigating Evidence Of Petitioner's History Of Childhood Sexual Abuse.

1. The district court erred in refusing to conduct a hearing to address state post-conviction counsel's ineffective representation under *Martinez* and *Trevino*.

Mr. Esposito asked the district court to conduct a hearing to address state post-conviction counsel's ineffective representation in the event the court found that any portions of the IAC claim were procedurally defaulted, in light of the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).[33] *See* Doc. 58 at 18-21. The district court ignored this

[33] In *Martinez*, the Supreme Court carved out an exception to its earlier ruling in *Coleman v. Thompson*, 501 U.S. 722 (1991), that there is no right to adequate

request when concluding that certain aspects of Mr. Esposito's challenges to counsel's failure to object to the admission of prejudicial evidence and counsel's failure to object to prosecutorial misconduct, although it noted and repudiated the request for a hearing pursuant to *Martinez* and *Trevino* with respect to Mr. Esposito's claim that counsel were ineffective at the motion for new trial stage and on appeal. *See* Doc. 67, at 77-79. As this Court's previous grant of COA in a Georgia case demonstrates,[34] reasonable jurists could conclude that *Trevino* establishes that *Martinez* applies in cases like Mr. Esposito's and a COA should accordingly issue.

representation in state post-conviction proceedings by provides a mechanism for federal habeas petitioners to raise claims that Sixth Amendment counsel provided ineffective representation despite the failure to raise such claims in state post-conviction proceedings. The Court held that, where state collateral proceedings provide the first opportunity to raise a claim that Sixth Amendment counsel were ineffective, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 1320. In *Trevino*, the Court clarified that *Martinez* applies in jurisdictions outside Arizona where, like here, a defendant's opportunity to address ineffective assistance of trial counsel only meaningfully arises in state post-conviction proceedings. In Mr. Esposito's case, he was represented by the same attorneys at trial and on appeal and, pursuant to Georgia law, could not have challenged the adequacy of his representation until state post-conviction proceedings where he was finally represented by new counsel.

[34] *See, e.g.*, *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014) (granting COA to address whether petitioner was entitled to raise new IAC claims under *Martinez* and *Trevino*, but concluding "leav[ing] to another day" the question whether those decisions apply to Georgia habeas cases because petitioner failed to establish that counsel were ineffective or that the defaulted IAC claims were substantial) (cert. petition pending).

2. The district court erred in denying an evidentiary hearing to address newly discovered evidence bearing on both the credibility of trial counsel and the quality of counsel's investigation and presentation of evidence that Mr. Esposito was sexually abused as a child.

a. Although the defense was aware that Mr. Esposito suffered extensive sexual abuse as a child, they failed to develop and present evidence of the abuse.

The sexual abuse that Mr. Esposito suffered as a child should have been at the forefront of Mr. Esposito's mitigation case. Early on in the pretrial mitigation investigation in Mr. Esposito's case, the defense investigator, Hector Guevara, uncovered evidence that Mr. Esposito was the victim of repeated acts of child sexual abuse inflicted by his step-father, Wayne Deese, and others.[35] *See* RX 106:4781, 4783 (noting that during investigator's first interview of Mr. Esposito, on March 9, 1998, Mr. Esposito "stated that 'Wayne sexually and physically abused' him 'from the beginning" and that he "readily talk[ed] about his step-father, Wayne (Deese), and the molestation/abuse. He states that Wayne molested him from age 3 to age 9

[35] Counsel, moreover, were aware of the sexual abuse even before they hired Mr. Guevara or any other mitigation investigator. *See, e.g.*, 12/6/97 notes by trial counsel regarding Mr. Esposito's admission to Ancora State Hospital (observing that "John said he was sexually abused at home – By whom? * * * He said he was sexually abused by mother and step-father").

or 10" and that "Wayne's sister also sexually molested him . . . ."). *See also, e.g.*, RX 107:5011 (reporting that Mr. Esposito's kindergarten teacher recalled incident where Mr. Esposito once explained his tardiness by reporting that he had been molested by a man in the woods and that his " 'excuse' was not 'normal' (*for a child of that age to come up with*)") (emphasis in original); RX 107:5017 (reporting that Mr. Esposito's fourth grade teacher – *see* RX 94:857-58 – recalled the incident where Mr. Esposito alleged he had been molested, and that Mr. Esposito had talked about his mother and step-father's sex life and reported that his step-father made obscene phone calls).

Recognizing the importance that child sexual abuse would have at the penalty phase,[36] Mr. Guevara sought information about the sexual abuse from witnesses in the course of investigating Mr. Esposito's social history,[37] and Mr. Guevara's memoranda and correspondence with trial counsel are replete with references to

[36] *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 529 (2005) (recognizing child sexual abuse to be "a major aspect of Wiggins' background" that trial counsel failed to investigate). In *Wiggins*, the Supreme Court found that trial counsel provided ineffective assistance in failing to investigate their client's abusive background, which included "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."

[37] *See, e.g.*, RX 106, at 4890, 4896, 4915; RX 107, at 5065, 5067, 5078.

child sexual abuse as an important mitigating circumstance.[38] *See, e.g.* RX 140:14333, 14334; RX:105:4627, 4628, 4630, 4634, 4638; RX 106:4667, 4670. *See generally* Petitioner's Renewed Motion for Evidentiary Hearing (Filed Under Seal) ("Sealed Motion"), at 3-8 (Doc. 59-1) (incorporated by reference herein).

Although the mitigation investigator believed that the sexual abuse inflicted on Mr. Esposito as a child was an important fact in mitigation and alerted trial counsel to its significance and the need to develop it further, the record does not demonstrate that trial counsel were similarly interested in pursuing this theme or appreciated it as the mitigator that it was. Although a few penalty phase defense witnesses mentioned in passing that Mr. Esposito had been sexually abused as a child, *see* RX 20:17, 59, 112, this evidence was not directly elicited by defense counsel in their questioning, it was not developed in any fashion and no effort was made to corroborate it. In closing argument, defense counsel did not mention the sexual abuse Mr. Esposito suffered as a child at all. *See* RX 20:174-78.

[38] Mr. Guevara also drafted proposed questions for defense witnesses he anticipated would testify at trial, and he clearly believed it important to elicit testimony regarding Mr. Esposito's sexual abuse. *See, e.g.*, RX 106:4693 (proposed examination of Courtney Greco), 4707 (proposed examination of Angela Caraccilo). Ms. Greco did not testify because she was let to languish overnight at the Atlanta airport, rather than being picked up and brought to the trial. RX 90: 87-88. Although Ms. Caraccilo did testify at trial, Mr. Kelly did not follow his investigator's suggested questions and did not ask the witness anything about the sexual abuse Mr. Esposito experienced throughout his childhood.

It is clear from the trial record that defense counsel did not consider the extensive sexual abuse that Mr. Esposito suffered as a child to be a significant circumstance in mitigation of the death penalty, even though Mr. Esposito's history of childhood sexual abuse was entirely consistent with the chosen defense that Mr. Esposito was less culpable than the manipulative and violent woman with whom he committed the crime, Alicia Woodward, *see* RX 90:216; RX 91:277; RX 162:37-38, and, indeed, explained how it was that he could have ended up in a relationship with her, *see, e.g.*, RX 91:357-60, 393-97.

b. Unavailable at the time of the state habeas proceedings was significant evidence regarding lead counsel's own prurient interest in young children that explains counsel's failure to recognize and develop mitigating evidence of Mr. Esposito's history of sexual abuse as a child

Close to two months after he testified and following the close of evidence in the state habeas proceedings, Mr. Esposito's lead attorney, Roy Robinson Kelly was arrested and charged with viewing internet child pornography. Ted Dunagan, *Judge Rules for Attorney Robby Kelly*, The Monticello News (August 6, 2009). In his post-hearing brief, Mr. Esposito alerted the state habeas court to these charges. *See* RX 157:64 n.9 (noting that "[s]hortly after the evidentiary hearing in this case, in November 2007, Mr. Kelly was arrested on multiple charges related to child pornography" and alleging that, "[t]o the extent Mr. Kelly's criminal activities

influenced his representation of Mr. Esposito and played a role in the insufficient investigation, preparation, and presentation of [Mr. Esposito's] long history of being sexually abused by his mother and her lover," the court could not countenance counsel's actions). On April 29, 2011, the state habeas court denied Mr. Esposito's habeas petition, noting Mr. Esposito had not presented any evidence establishing a connection between his IAC claim and the charges against his lawyer. RX 167:18 n.6.

Information concerning the charges against Kelly were not public record until long after the evidence had closed in Mr. Esposito's post-conviction case, as the prosecution remained pending for several years. On July 29, 2009, the trial court granted Kelly's motion to suppress the evidence seized from his office and his computer; the Georgia Court of Appeals affirmed this ruling on March 16, 2010,[39] and the Georgia Supreme Court denied the State's petition for certiorari on September 7, 2010.[40] The case against Mr. Kelly remained pending until November 1, 2010, when the superior court granted a motion to nolle pros the case. On May 17, 2011, special agent Mary Holder requested that the GBI case file be closed.

[39] *State v. Kelly*, 302 Ga. App. 850 (2010).

[40] *State v. Kelly*, 2010 Ga. LEXIS 689 (2010).

Undersigned counsel has since obtained the public records of the criminal investigation of Mr. Kelly. *See* Doc. 60 and accompanying CD, submitted as an Appendix (hereinafter "App."). These reflect that Mr. Kelly had an extensive collection of internet child pornography downloaded to his office computer and, as well, an extensive collection (approximate 500 videotapes) of legal but hardcore adult pornography in his office. *See* Sealed Motion at 17-18. On the basis of the evidence seized from Mr. Kelly's office computer, a Jasper County grand jury returned an indictment charging him with 20 counts of sexual exploitation of children, in violation of O.C.G.A. § 16-12-100. *See* App. 349-60. The indictment contains graphically detailed descriptions of the photographic images Mr. Kelly allegedly possessed on his computer, all of which involved images of male and female children being sexually molested, and almost all of which depict a penis in or near a child's mouth or genitals. *See id.* *See also* Sealed Motion at 19-20.

Although the charges were ultimately dismissed against Mr. Kelly, this is not because he was acquitted or exonerated, but because the trial court suppressed the evidence against him. *See* Sealed Motion at 20-22.

c. A COA should issue to address whether the district court erred in denying a hearing on the effect of counsel's prurient interests on both the investigation and presentation of mitigating evidence, and the reliability of counsel's testimony at the habeas hearing.

In the Sealed Motion, Mr. Esposito requested:

> [A]n evidentiary hearing to address how lead counsel's interest in pornography in general, and illegal child pornography in particular, may have influenced the defense's failure to adequately develop and meaningfully present mitigating evidence regarding the sexual abuse Mr. Esposito suffered as a child, and to consider how this new evidence undermines the reliability of the state court's findings on Mr. Esposito's ineffective assistance of counsel claim.

Sealed Motion at 3; *see also id.* at 27.

The district court denied the renewed request for an evidentiary hearing on the ground that "[a]ccording to the 'unwavering language' of the Supreme Court in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), this Court's review of all claims decided by the state court is limited to the record that was presented to the state post-conviction court." Doc. 65 (Sealed Order), at 6. Because the IAC claim was adjudicated on the merits, the court ruled, "this Court's § 2254(d) inquiry is limited to the record that was before the state habeas court." *Id.*

A COA should issue because reasonable jurists could disagree with the district court's conclusion that the state court's adjudication of Mr. Esposito's IAC claim was neither an unreasonable application of governing Supreme Court law, nor an unreasonable determination of the facts in light of the record. *See supra*; Doc. 67, at 87-88 (district court order granting partial COA). "Before a habeas petitioner may be entitled to a federal evidentiary hearing on a claim that has been adjudicated by the state court, he must demonstrate a clearly established federal-law error or an

unreasonable determination of fact on the part of the state court, based solely on the state court record." *Landers v. Warden*, No. 13-11898, 2015 U.S. App. LEXIS 1005, at *15-16 (11th Cir. Jan. 23, 2015). *See also Madison v. Comm'r*, 761 F.3d 1240, 1249-50 (11th Cir. 2014) ("Nothing in *Pinholster,* or any other principle of habeas corpus, bars a District Court from conducting an evidentiary hearing where, as here (1) the federal claim was adjudicated on the merits in state court; (2) there is a determination based only on the state court record that the petition has cleared the § 2254(d) hurdle; and (3) the habeas petitioner tried, but was not given the opportunity to develop the factual bases of the claim in state court within the meaning of 28 U.S.C. § 2254(e)(2)."). Given the potential significance of the new evidence to an assessment of trial counsel's performance and the reliability of the state court findings, and the fact that this Court will already be addressing whether the state court unreasonably rejected Mr. Esposito's sentencing phase IAC claim in determining, at minimum, whether counsel were ineffective in failing to develop and present mitigating evidence, it is appropriate for COA to issue regarding whether Mr. Esposito is entitled to a hearing to address this new evidence.

CONCLUSION

For the foregoing reasons, individually and cumulatively, Mr. Esposito respectfully requests that this Court expand the Certificate of Appealability to encompass the foregoing issues.

This 4th day of May, 2015.

Respectfully submitted,

Brian S. Kammer (Ga. 406322)
Marcia A. Widder (Ga. 643407)
Georgia Resource Center
303 Elizabeth Street, NE
Atlanta, Georgia 30307
404-222-9202

Counsel for Mr. Esposito

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN ESPOSITO, Petitioner-Appellant,	)	
vs.	)	Case No. 15-11384-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

NOTICE OF ELECTRONIC FILING AND CERTIFICATE OF SERVICE

This is to certify that I have filed the foregoing corrected pleading by uploading it using this Court's ECF e-filing system, and I have served a copy by electronic mail on counsel for Appellant directed to the following:

Sabrina Graham, Esq.
Senior Assistant Attorney General
Richard Tangum, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
sgraham@law.ga.gov
rtangum@law.ga.gov

This the 4th day of May, 2015.

Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11384-P

JOHN ANTHONY ESPOSITO,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

ORDER:

John Esposito, a prisoner on Georgia's death row, seeks to expand the certificate of appealability (COA) granted by the district court. The motion is GRANTED with respect to the following issue:

> Whether the state habeas court unreasonably applied clearly established federal law when it rejected on the merits Mr. Esposito's constitutional claim that his trial counsel provided ineffective assistance with respect to the presentation of mitigating circumstances in his closing argument during the penalty phase?

The right to appeal from the denial of a habeas corpus petition is governed by the requirements of 28 U.S.C. § 2253, which provides that an appeal from a

final order in a federal habeas corpus proceeding may not be taken without a COA. *See* 28 U.S.C. § 2253(c)(1)(B). The COA must certify that "the applicant has made a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and must "indicate which specific issue or issues satisfy the showing required." *Id.* § 2253(c)(3). The Supreme Court has clarified that a petitioner satisfies § 2253(c)(2)'s standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims *or* that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (emphasis added); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As the Supreme Court has explained, this "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. Indeed, "a COA does not require a showing that the appeal will succeed." *Id.* at 337. Moreover, although the fact that a petitioner faces the death penalty does not in and of itself justify the "automatic" issuance of a certificate, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).[1]

[1] This Court has determined that the standards governing issuance of a certificate of probable cause under the pre-AEDPA regime and COAs under AEDPA are "materially identical," and that AEDPA was "intended to codify the standard established in *Barefoot*." *Peoples v. Haley*, 227 F.3d 1342, 1344 (11th Cir. 2000) (citations and internal quotation marks omitted).

Here, under the statutory standard set forth in § 2253(c)(2), Mr. Esposito's motion to expand the COA has made a substantial showing of the denial of a constitutional right as to the issue identified above. *See* 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 327. The balance of his request for a COA is denied.

UNITED STATES CIRCUIT JUDGE

No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,

-v-

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

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(a), I certify that a copy of the Appendix to Petition for a Writ of Certiorari was sent via 1st Class Mail to the U.S. Supreme Court and a digital copy was sent to counsel for the Respondent by electronic mail on February 12, 2021. The parties have consented to electronic service. Respondent's counsel's name, address and telephone number are set forth below:

Sabrina D. Graham, Esp.
Senior Assistant Attorney General
Georgia Office of the Attorney General
Capital Litigation Section
40 Capitol Square, SW
Atlanta, GA 30334
(404) 458-3239

Respectfully submitted,

/s/ Marcia A. Widder
Marcia A. Widder (Ga. 643407)
Georgia Resource Center
104 Marietta Street NW, Suite 260
Atlanta, Georgia 30303
(404) 222-9202