APPENDIX 1

975 F.3d 1145
United States Court of Appeals, Eleventh Circuit.

Michael William LEDFORD, Petitioner - Appellant,
v.
WARDEN, GEORGIA DIAGNOSTIC PRISON, Respondent - Appellee.

No. 19-11090
|
(September 15, 2020)

Synopsis

Background: After convictions for malice murder, aggravated battery, and related crimes, and sentence of death, were affirmed on direct appeal, 289 Ga. 70, 709 S.E.2d 239, and state habeas relief was denied, prisoner filed federal petition for writ of habeas corpus. The United States District Court for the Northern District of Georgia, No. 4:17-cv-00211-MHC, denied petition, and prisoner appealed.

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

[1] claim that prosecutor's use of nine of twelve peremptory strikes against female prospective jurors was discriminatory on basis of gender was properly exhausted, under Georgia law;

[2] prisoner failed to make out prima facie case of gender discrimination with respect to State's use of peremptory strikes against female prospective jurors;

[3] counsel's presentation of evidence regarding antisocial personality disorder (ASPD) and psychopathy as part of theory of defense, during penalty phase of trial, was matter of reasonable trial strategy;

[4] claim that counsel were ineffective for failure to raise claim on direct appeal that juror lied during voir dire when he stated that he would consider all alternatives to punishment, i.e., death, life without parole, and life, if prisoner was convicted was procedurally barred, on federal habeas review;

[5] prisoner's general, conclusory assertions that appellate counsel's failure to argue juror misconduct was deficient performance and that prisoner was prejudiced by such deficiency was insufficient to demonstrate cause for procedural default; and

[6] prisoner was not entitled to evidentiary hearing on procedurally defaulted claim.

Affirmed.

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

West Headnotes (30)

[1] Habeas Corpus Matters determined on appeal

In Georgia, an issue actually litigated and decided on direct appeal is precluded from being relitigated on state habeas corpus, at least absent compelling reasons, such as a miscarriage of justice.

[2] Habeas Corpus Direct review; appeal or error

Defendant's claim that prosecutor's use of nine of twelve peremptory strikes against female prospective jurors, who made up 42% of venire, was discriminatory on basis of gender, in trial for malice murder, aggravated battery, and related crimes, was properly exhausted, under Georgia law, for purposes of federal habeas review, where claim was raised and addressed on direct appeal.

[3] Habeas Corpus Federal or constitutional questions

A state court decision is "contrary to clearly established federal law," as a ground for obtaining federal habeas relief, if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[4] **Habeas Corpus** Federal Review of State or Territorial Cases

A state court decision involves an "unreasonable application of federal law," as the basis for obtaining federal habeas relief, if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d).

[5] **Habeas Corpus** Federal Review of State or Territorial Cases

When a state prisoner applies for federal habeas relief based on a claim that the state court decision being challenged involves an unreasonable application of federal law, "unreasonable" means more than simply incorrect; rather, the state court's application of federal law is "unreasonable" only if no fairminded jurist could agree with the state court's determination or conclusion. 28 U.S.C.A. § 2254(d).

[6] **Habeas Corpus** Federal Review of State or Territorial Cases

The requirement for an applicant to obtain federal habeas relief based on a claim that the state court's decision being challenged constituted an unreasonable application of federal law, the standard for proving "unreasonableness" is difficult to meet and highly deferential, which demands that state-court decisions be given the benefit of the doubt. 28 U.S.C.A. § 2254(d).

[7] **Jury** Peremptory challenges

Ordinarily, parties may exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to rational basis review, but they may not exercise such strikes solely because of race or gender.

[8] **Constitutional Law** Juries

The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. U.S. Const. Amend. 14.

[9] **Constitutional Law** Equal protection

Constitutional Law Peremptory challenges

A well-established burden-shifting framework governs claims that the prosecution exercised peremptory strikes in a discriminatory manner, in violation of the Equal Protection Clause: first, the defendant must make out a prima facie case by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose in the exercise of peremptory strikes; second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the exclusion by offering permissible non-discriminatory/neutral justifications for the strikes; and third, if a non-discriminatory/neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. U.S. Const. Amend. 14.

[10] **Constitutional Law** Peremptory challenges

Jury Peremptory challenges

Defendant failed to make out prima facie case of gender discrimination with respect to State's use of nine of twelve peremptory strikes against women, in alleged violation of Equal Protection Clause, in trial for malice murder, aggravated battery, and related crimes, where he relied solely on statistical disparities, specifically alleging that females made up 15 of 36 prospective jurors, or 42% of venire, that State used 75% of its peremptory strikes against women, which resulted in jury containing only two female jurors

(17%), he presented no additional facts, and State accepted two women to sit on jury, plus two female alternates. U.S. Const. Amend. 14.

[11] **Civil Rights** Criminal law enforcement; prisons

Civil Rights Weight and Sufficiency of Evidence

Not just any statistical disparities will suffice to demonstrate a prima facie case of discrimination in the exercise of peremptory strikes, in violation of equal protection. U.S. Const. Amend. 14.

[12] **Jury** Peremptory challenges

An inference of discrimination in the exercise of peremptory strikes is weakened where the State accepts jurors in the allegedly targeted group.

[13] **Habeas Corpus** Counsel

On state prisoner's application for federal habeas relief on claim that trial counsel was ineffective during penalty phase of trial for malice murder, because the Supreme Court of Georgia summarily denied prisoner certificate of probable cause on claim, federal court would "look through" to state habeas court's order denying claim to determine whether that court unreasonably applied clearly established federal law, under *Strickland*, when it declined to find that trial counsel rendered constitutionally ineffective assistance. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[14] **Criminal Law** Deficient representation and prejudice in general

Under the familiar *Strickland* two-part test governing a claim of ineffective assistance of counsel, a defendant must show that counsel's performance (1) fell below an objective standard of reasonableness and (2) prejudiced the defense. U.S. Const. Amend. 6.

[15] **Habeas Corpus** Adequacy and Effectiveness of Counsel

Habeas Corpus Counsel

When a habeas petitioner in state custody raises a *Strickland* claim in federal court, the commands of *Strickland* and the Antiterrorism and Effective Death Penalty Act (AEDPA) operate in tandem so that a federal court's review of the state court's decision on a claim of ineffective assistance of counsel is doubly deferential, and thus, a federal court will grant federal habeas relief only if the state court unreasonably determined that trial counsel performed reasonably—i.e., where there is no possibility fair-minded jurists could disagree that defense counsel acted outside the range of professionally competent assistance. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

[16] **Courts** Number of judges concurring in opinion, and opinion by divided court

The Court of Appeals is bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision.

[17] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel's presentation of evidence regarding antisocial personality disorder (ASPD) and psychopathy as part of theory of defense, during penalty phase of trial for malice murder, aggravated battery, and related crimes, was not deficient performance, as required to support claim of ineffective assistance of counsel; rather, counsel's decision to present such evidence was matter of trial strategy, as counsel could have reasonably concluded that brain injury suffered by defendant as innocent child, as alleged cause of ASPD and psychopathy, might provide some excuse that, in minds of jurors, might eliminate defendant's culpability for crime, and that evidence of abuse suffered by defendant during

childhood, by itself, would not sufficiently explain why defendant committed heinous acts that gave rise to charges and formed basis of convictions. U.S. Const. Amend. 6.

[18] **Habeas Corpus** Availability of Remedy Despite Procedural Default or Want of Exhaustion

Habeas Corpus Cause and prejudice in general

When a state court determines that a claim was defaulted on procedural grounds, the federal habeas court will review it on the merits only in two narrow circumstances: a petitioner must show either (1) cause for the default and actual prejudice resulting from the default, or (2) a "fundamental miscarriage of justice"—i.e., that a constitutional violation has resulted in the conviction of someone who is actually innocent.

[19] **Habeas Corpus** Cause or Excuse

When a state prisoner seeks federal habeas review of a procedurally defaulted claim that was not exhausted before the state court, under the "cause and prejudice" test, the prisoner must demonstrate some objective factor external to the defense that impeded his effort to raise the claim properly in state court.

[20] **Habeas Corpus** Prejudice

To establish the "prejudice" prong of the cause and prejudice test for a state prisoner to obtain federal habeas review of a procedurally defaulted claim that was not presented before the state court, a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different if he had been allowed to raise the issue in state court.

[21] **Habeas Corpus** Ineffectiveness or want of counsel

Before a state prisoner can rely on an allegation of ineffective assistance of counsel to demonstrate cause to excuse a procedural default for the failure to raise the claim before the state court, in order to obtain federal habeas review, he must show that he properly raised the argument in state court, because ineffective assistance of counsel is itself a constitutional claim. U.S. Const. Amend. 6.

[22] **Habeas Corpus** Counsel

State prisoner's claim that counsel were ineffective for failure to raise claim on direct appeal that juror lied during voir dire when he stated that he would consider all alternatives to punishment, i.e., death, life without parole, and life, if prisoner were convicted of malice or felony murder, when juror posted on his social media page, at time jury sentenced prisoner to death, that "only just punishment was the death penalty," that "I pointed out to the jury that by giving [prisoner] life in prison ... we were giving him exactly what he wanted," and that "I myself could not sleep soundly at night knowing that I had given a man convicted of malice murder the exact sentence he wanted," was procedurally defaulted on federal habeas review, where it was not raised before state court. U.S. Const. Amend. 6.

[23] **Habeas Corpus** Exhaustion of State Remedies

General, conclusory statements are insufficient to preserve a claim for federal habeas review.

[24] **Habeas Corpus** Cause and prejudice in general

Because a cause and prejudice argument which is not presented in state court is itself procedurally defaulted, a state prisoner cannot raise it for the first time on federal habeas review unless he can show cause and prejudice for that particular default as well.

[25] **Habeas Corpus** Default, etc., precluding state court consideration

Habeas Corpus Exhaustion of State Remedies

Failing to raise an argument in state court is an exhaustion problem, not a procedural default, on federal habeas review, but a claim is procedurally defaulted for the purposes of federal habeas review where the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

[26] **Habeas Corpus** Ineffectiveness or want of counsel

State prisoner's general assertions to effect that appellate counsel failed to protect his rights with respect to general claims of juror misconduct, that counsel's performance "was unreasonably deficient," and that he "was prejudiced by these deficiencies," was insufficient to demonstrate cause and prejudice for procedural default of claim that appellate counsel was ineffective for failure to present evidence that juror lied during voir dire when he stated that he would consider all alternatives to punishment, i.e., death, life without parole, and life, if prisoner were convicted of malice or felony murder, as required to obtain federal habeas review claim not exhausted before state court; prisoner nowhere argued before state court that appellate counsel performed deficiently by failing to challenge specific juror's conduct, let alone how or why counsel were deficient in that respect. U.S. Const. Amend. 6.

[27] **Habeas Corpus** Discretion and necessity in general

When a habeas petitioner in state custody seeks a hearing in federal court, the court must first determine whether the petitioner was diligent in his efforts to develop the facts in state court.

1 Cases that cite this headnote

[28] **Habeas Corpus** Discretion and necessity in general

If a state prisoner was diligent in his efforts to develop the facts in state court, a federal court, on an applicable for federal habeas relief, must consider whether an evidentiary hearing could enable the prisoner to prove the petition's factual allegations, which, if true, would entitle the prisoner to federal habeas relief.

1 Cases that cite this headnote

[29] **Habeas Corpus** Discretion and necessity in general

Habeas Corpus Discretion of lower court

When a state prisoner asks for an evidentiary hearing to prove cause and prejudice for the failure to exhaust a claim in state court, neither the statute setting forth the requirements for habeas review in the event a prisoner was not diligent in his efforts to develop the facts in state court, nor the standard of cause and prejudice that the statute replaced, applies; rather, the reviewing court need ask only whether the district court abused its discretion when it denied an evidentiary hearing on that issue. 28 U.S.C.A. § 2254(e)(2).

[30] **Habeas Corpus** Counsel

State prisoner was not entitled to evidentiary hearing on procedurally barred habeas claim of ineffectiveness of appellate counsel in failing to raise claim on direct appeal that juror's posts on social media indicated that he had lied during voir dire when he said that he would consider all three sentencing alternatives, i.e., death, life without parole, and life, if prisoner was convicted of malice or felony murder; merits hearing would have been futile because prisoner could not prove petition's factual allegations, and cause and prejudice hearing would also have been futile, even though he requested hearing to show cause and prejudice on juror-misconduct claim, where he failed to request hearing to show cause and prejudice with respect to claim that appellate counsel was ineffective for failure to present claim of juror misconduct. U.S. Const. Amend. 6.

Attorneys and Law Firms

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Sabrina Graham, Clint Christopher Malcolm, Beth Attaway Burton, Christopher Michael Carr, Omotayo Popoola, Attorney General's Office, Atlanta, GA, for Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 4:17-cv-00211-MHC

Before WILLIAM PRYOR, Chief Judge, NEWSOM, and BRANCH, Circuit Judges.

Opinion

NEWSOM, Circuit Judge:

Michael Ledford was convicted by a Georgia jury of malice murder, felony murder, aggravated battery, aggravated sodomy, kidnapping with bodily injury, and aggravated assault. *Ledford v. State*, 289 Ga. 70, 709 S.E. 2d 239, 245 n* (2011). On appeal from the district court's denial of federal habeas corpus relief, Ledford does not contest his conviction—only the sentence of death imposed by the same jury. In challenging his death sentence, Ledford argues (1) that prosecutors exercised their peremptory challenges in a way that discriminated against women, (2) that his trial counsel rendered constitutionally ineffective assistance during the penalty phase of his trial, and (3) that one of the jurors in his trial lied during voir dire and thus deprived him of an impartial jury.

Having carefully reviewed the parties' briefs and heard oral argument, we hold that none of Ledford's arguments entitle him to relief.

I

A

The horrific facts of Ledford's crime are not presently disputed. The Georgia Supreme Court described them as follows:

> ***1151** The evidence presented at trial showed that, on July 25, 2006, Michael Ledford pretended to go to work but, instead, bought beer and drank it near the Silver Comet Trail, a recreational trail used for biking, running, and other activities. Ledford knocked Jennifer Ewing from her bicycle as she rode by his location. He dragged her a distance off the trail to a location shielded from view by vegetation. He stripped off all of her clothing from the waist down, and he pulled her shirt up part way, exposing her breasts. She suffered bruises throughout her body in the struggle. When Ledford forced his penis into her mouth, she bit his penis and severely wounded it. Enraged by her resistance, Ledford unleashed a shocking attack during which he stomped on her face and nose, her larynx, and her ribs. Ms. Ewing gradually succumbed to asphyxiation caused by her wounds and the resulting bleeding into her lungs.

Ledford, 709 S.E.2d 239 at 245.

B

1

The procedural history of Ledford's case is both exceedingly complicated and largely unnecessary to his appeal. We will focus on a few key points.

a

The first is jury selection. During voir dire, juror Harold Ridarick testified that, as a general matter, he was not

conscientiously opposed to a sentence of life with the possibility of parole as a penalty for murder. When asked if he would automatically vote for any one of the three possible penalties—life, life without parole, and death—he said that he would "equally consider" them. When the prosecutor asked, however, whether Ridarick "fit[s] into the category" of people who would not "consider life with the possibility of parole for somebody that's committed a malice or felony murder," Ridarick answered: "I would probably fit into that category." After the prosecutor asked him to clarify whether he was saying that "once [he] made that decision that they committed that malice or felony murder that life with the possibility of parole is really not an option," Ridarick clarified: "I'd still have to weigh the mitigating circumstances, factors, and you know, depending on those I think I could go with either of the three."

"Out of an abundance of caution," Ledford's trial counsel moved, unsuccessfully, to have Ridarick removed for cause based on his apparent reticence to "consider life with the possibility of parole for one that he found guilty of malice or felony murder." As we will explain later, Ledford now argues that Ridarick lied during voir dire and that, in fact, he was really only ever willing to consider the death penalty. Ledford's new objection is based on several of Ridarick's online postings from May 22 and 23, 2009—the day and the day after the jury sentenced Ledford to death—which Ledford's lawyers apparently discovered sometime in late 2013 or early 2014.

b

Also during voir dire, the state used nine of its twelve peremptory strikes to remove females, who made up 15 of the 36 (or 42% of) venire members. Ledford challenged these strikes as discriminatory, but the trial court determined that he had not made a prima facie showing of discrimination, and so denied the challenge without requiring the state to proffer non-discriminatory reasons for the strikes.

c

After jury selection came the trial, which was bifurcated into guilt and penalty ***1152** phases. At the close of the guilt phase, the jury convicted Ledford of malice murder for killing Ewing and of all other related charges. A few days later at the close of the penalty phase, the same jury imposed a death sentence. Ledford challenges his defense team's penalty-phase strategy, which he says amounted to constitutionally ineffective assistance of counsel. In particular, Ledford asserts that his lawyers erred in putting on evidence concerning antisocial personality disorder (ASPD) and psychopathy, which, he says, permitted prosecutors to argue those issues against him. With respect to Ledford's ineffective-assistance claim, some background is in order.

Defense counsel decided that the "primary sentencing phase strategy [would be] to show the jury that [Ledford] had voluntary and involuntary brain damage, which diminished his frontal lobe capacity and prevented him from controlling his impulses." To that end, they wanted to use experts to establish that Ledford had "psychiatric issues, based a lot on his upbringing and also his drug use and alcohol abuse," as well as eyewitness testimony to establish brain injury. Counsel planned to augment their brain-damage strategy with testimony from Ledford's family members designed to humanize him.

During opening statements at the penalty phase, defense counsel laid out their main theory to the jury. They described Ledford's upbringing as abusive and dysfunctional and said that he suffered brain damage when he was a child. Counsel emphasized that Ledford didn't choose to be brain-damaged; that he didn't choose to have an abusive upbringing; and that he didn't necessarily even choose to be an alcoholic—a condition that allegedly exacerbated the brain damage. Counsel didn't mention anything about Ledford having ASPD or psychopathy during opening arguments.

Defense counsel put on copious evidence in aid of their brain-damage theory. Especially important was the testimony of Ledford's brother Donald. He testified that when Ledford was about eight or nine he fell out of a tree, landed on a garage, rolled off, and hit the ground. Donald had initially thought the fall had killed Ledford, who wasn't moving. Ledford remained hospitalized for a month and had to wear an upper-body cast for another month. Donald explained that Ledford's behavior changed after this injury and that he began experiencing severe migraines.

Defense counsel also put on abundant expert testimony: from a mitigation investigator, a forensic psychiatrist, a psychopharmacologist, a clinical social worker, a neuropsychiatrist, an internist, and two more psychologists—all in aid of their overarching theory that childhood injury and substance abuse had damaged Ledford's brain and rendered

him mentally unwell and that this confluence of events was not his fault. It was during expert testimony—especially on cross-examination—that ASPD and psychopathy first came up. To provide some salient examples, defense expert Dr. Thomas Sachy testified that people with brain scans that show a pattern of damage like Ledford's have impaired moral judgment. He explained that "if you put these people in a high dilemma situation with this brain damage, they were more likely to do things that they would later think were amoral." On cross, Dr. Sachy allowed that the damage to Ledford's brain would leave him "prone to rage."

Defense expert Dr. Robert Shaffer similarly testified that someone with Ledford's pattern of brain damage "would not really have feelings about the consequences of what they were doing, the impact that it would have on someone else, the ability to ***1153** empathize with another person and feel a concern about what would happen to that other person." He also likened Ledford to "sexual sadists." Defense counsel asked Dr. Shaffer background questions about psychopathy generally, and specifically elicited testimony that psychopathy is not a choice. On cross, Dr. Shaffer observed that a rape of which Ledford had previously been convicted was consistent with "sexual sadism." He further testified that a previous breaking-and-entering conviction was "consistent with what we're seeing, which is an individual who has no sense of emotion regarding the impact of his actions on someone else." He also noted that Ledford's pattern of lying to cover his crimes was "very characteristic of what we call psychopathic behavior."

On rebuttal, the state called its own experts, who supported the conclusion that Ledford was either antisocial, a psychopath, or both, but who disputed the notion that his disorder was caused by brain damage.

Defense counsel's strategy failed; at the conclusion of the penalty phase, the jury sentenced Ledford to death.

2

Ledford moved unsuccessfully for a new trial and then appealed his conviction to the Georgia Supreme Court, which affirmed both his conviction and the death sentence. In so doing, that court considered and affirmed the trial judge's determination that Ledford failed to make a prima facie case that the prosecution discriminated on the basis of gender in exercising its peremptory strikes. Ledford didn't raise his juror misconduct or ineffective-assistance-of-trial-counsel claims before the Georgia Supreme Court—or at any time on direct appeal. *See generally* *Ledford*, 709 S.E.2d 239. Ledford filed a petition for certiorari in the United States Supreme Court, which was denied, ending his direct appeal.

3

Ledford then sought state habeas relief. Most importantly for our purposes, Ledford argued—for the first time—that Ridarick had lied in response to questions at voir dire. Ledford sought to subpoena Ridarick and other jurors to testify that Ridarick was unwilling to consider penalties other than death. In support of the subpoenas, Ledford proffered screenshots of Ridarick's May 2009 online postings, in which Ridarick had stated that "the only just punishment was the death penalty." [1] The posts clearly showed that Ridarick had expressed the belief that only the death penalty was appropriate for Ledford, but they did not make clear when he came to that conclusion. For instance, one stated: "So I pointed out to the jury that by giving life in prison to Ledford we were giving him exactly what he wanted." He continued: "I myself could not sleep soundly at night knowing that I had given a man convicted of malice murder the exact sentence he wanted and that the only just punishment was the death penalty." The state successfully moved to quash Ledford's subpoenas, contending that the juror testimony would be inadmissible under Georgia law. [2]

***1154** **[1]** **[2]** The state habeas court never decided on the merits whether Ledford was entitled to relief based on Ridarick's posts. The state argued that Ledford had forfeited any argument about Ridarick's supposed bias by virtue of his failure to raise it on direct appeal, and the state incorporated its procedural-default position into a proposed order denying Ledford's state habeas petition. The state habeas court adopted the state's proposed order, holding that Ledford had procedurally defaulted his juror-misconduct claim by failing to raise it on direct appeal. In the same order, the state habeas court considered and rejected on the merits Ledford's claim that his trial counsel were ineffective for offering evidence pertaining to ASPD and psychopathy. [3] The court held both that counsel's performance was not deficient and that Ledford suffered no resulting prejudice.

The Georgia Supreme Court declined to review the state habeas court's decision, summarily denying Ledford's application for a certificate of probable cause. Ledford

again unsuccessfully sought certiorari from the United States Supreme Court.

4

Ledford next initiated federal habeas corpus proceedings in the Northern District of Georgia. He brought all three claims at issue here—that the prosecutor had exercised his peremptory strikes in discriminatory fashion, that his trial counsel had provided ineffective assistance during the penalty phase, and that Ridarick had lied to conceal bias during voir dire. Ledford also sought an evidentiary hearing to develop additional evidence pertaining to his juror-misconduct claim. The district court denied both Ledford's request for a hearing and his petition. After the district court also denied his motion to alter or amend the judgment, Ledford appealed to this Court.

II

The state courts rejected two of Ledford's claims—that the prosecution exercised peremptory strikes in a discriminatory manner to exclude women and that his trial counsel rendered constitutionally ineffective assistance of counsel—on the merits, and one of his claims—that Ridarick lied during voir dire—on procedural grounds. These two different postures lead to two different standards of review in this Court.

[3] **[4]** **[5]** **[6]** The Antiterrorism and Effective Death Penalty Act (AEDPA) forbids us to grant relief on a "claim that was adjudicated on the merits in State court proceedings unless" the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

> A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a ***1155** question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." A state court decision involves an unreasonable application of federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1330–31 (11th Cir. 2019) (alterations in original) (citations omitted). Importantly, as used in § 2254(d), "unreasonable" means "more than simply incorrect." *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1354 (11th Cir. 2020). An "application of federal law is unreasonable only if no fairminded jurist could agree with the state court's determination or conclusion." *Id.* (quoting *Raulerson v. Warden*, 928 F.3d 987, 995–96 (11th Cir. 2019)). "This is a 'difficult to meet and highly deferential standard ..., which demands that state-court decisions be given the benefit of the doubt.' " *Id.* (quoting *Raulerson*, 928 F.3d at 996).

Because the Georgia courts considered and rejected Ledford's jury-selection and ineffective-assistance-of-counsel claims on the merits, AEDPA's deference regime applies to both. The Georgia courts did not consider Ledford's juror-misconduct claim on the merits but rather rejected it on procedural grounds. Accordingly, instead of AEDPA's deference regime, we will apply "cause-and-prejudice" analysis to determine whether Ledford can overcome his procedural default. We will explain the standards that govern that analysis below, in conjunction with our evaluation of that claim.

A

[7] **[8]** Ledford first challenges his conviction on the ground that the prosecution discriminated against women in selecting his jury in violation of the Fourteenth Amendment. Ordinarily, "[p]arties may ... exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review," but they may not exercise such strikes "solely because of race or"—as relevant here—"gender." *J.E.B. v. Alabama*, 511 U.S. 127, 143, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). "[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." *Id.* at 146, 114 S.Ct. 1419.

[9] A well-established burden-shifting framework governs claims that the prosecution exercised peremptory strikes in a discriminatory manner. As the Supreme Court has explained it:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the ... exclusion by offering permissible [gender]-neutral justifications for the strikes. Third, if a [gender]-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful ... discrimination.

Johnson v. California, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (quotations and quotation marks omitted); *see also* *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1343–44 (11th Cir. 2019) (applying the same burden shifting framework to a gender-discrimination ***1156** claim), *cert. denied sub nom. Smith v. Dunn*, No. 19-7745, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3578738 (U.S. July 2, 2020).

[10] Both the state courts and the district court rejected Ledford's jury-selection claim at the first step—they determined that he failed to make a prima facie case of gender discrimination. *Ledford*, 709 S.E.2d at 253. We agree, and we thus cannot conclude that "no fairminded jurist could agree with the state court's determination or conclusion." *Sealey*, 954 F.3d at 1354 (quotation omitted).

Ledford relied solely on statistical disparities in seeking to make out a prima facie case of discrimination; he did not present any additional facts. *Ledford*, 709 S.E.2d at 253. The state, he says, used 9 of its 12 peremptory strikes against female jurors, where females made up 15 of the 36 prospective jurors. Ledford further points out that while women made up 42% of the venire, the prosecution used 75% of its peremptory strikes against women. This resulted in a jury, he complains, with only two female jurors (17%). [4]

[11] But not just any statistical disparities will suffice to demonstrate a prima facie case of discrimination. *See* *United States v. Hill*, 643 F.3d 807, 838 (11th Cir. 2011) ("Under our precedent *these* statistics, without more, do not establish a prima facie case." (emphasis added)). And our precedent makes clear that statistical disparities of the magnitude present in Ledford's jury do not support a prima facie case. In *Hill*, for example, "[t]he government had, and it exercised, 14 peremptory strikes; it used 9 (64%) of them against black venire members," who represented 41% of the venire. *Id.* Nevertheless, we affirmed the district court's determination that the defendant had not made out a prima facie case of discrimination. *Id.* at 840.

In *Hill*, we also drew on our earlier decision in *United States v. Campa*, where "the government was allotted 11 peremptory strikes and used 9 of them," and "[s]even of those nine strikes (78%) were used against blacks." *Id.* at 838 (citing *Campa*, 529 F.3d 980, 989 (11th Cir. 2008)). If measured as a percentage of strikes actually used, rather than as a percentage of those allotted, the disparity in *Campa* was even starker than that here—78% as against 75%. And even if measured as a percentage of allotted challenges, this case involves an only slightly greater disparity—64% vs. 75%. Yet in *Campa*, despite numbers arguably more suggestive of discrimination than we face here, we *reversed* the district court's determination that the defendant had made out a prima facie case. *See Campa*, 529 F.3d at 998. In light of *Hill* and *Campa*, we are hard pressed to describe as unreasonable the state court's decision here that Ledford failed to demonstrate a prima facie case.

[12] Notably, the same precedents also make clear that the inference of discrimination is weakened where, as here, the state accepts jurors in the allegedly targeted group. That the state accepted female jurors, even in small numbers, where a different allocation of strikes could have reduced female participation even further, tends to undermine the inference that those women who were peremptorily excluded were targeted on account of their gender. *See* *Hill*, 643 F.3d at 838 (observing that "[t]he final jury of 18 (12 plus six alternates) included nine (50%) blacks" but could have included as few as "four (22%) ***1157** black[ ]" members "[i]f the government had exercised all of the strikes it could against black venire members"); *Campa*, 529 F.3d at 998 (noting that "the jury included three black

jurors and an alternate black juror," which demonstrated that "the government did not attempt to exclude as many black persons as it could"). Although fewer women—two female jurors with two female alternates—remained on Ledford's jury than black jurors in either *Hill* or *Campa*, the same principle applies because the floor on female jurors was lower here. If the prosecution had used all of its strikes against women, it could potentially have achieved an all-male jury. In total, the state accepted six female jurors and three female alternates, but the defense struck four and one, respectively, leaving the four who served (two jurors and two alternates). Moreover, the prosecution accepted the very first prospective female juror. Although none of these observations conclusively demonstrates the absence of discrimination, the overall pattern belies an intent to discriminate, and the burden to make out a prima facie case lies with the party claiming discrimination—here, Ledford.

Even if we were free to review the state courts' decisions de novo, our precedent would counsel affirmance. The proper disposition is even clearer under § 2254(d)'s exceedingly deferential standard. We cannot grant habeas relief unless the state court's application of the burden-shifting framework was "unreasonable"—that is, unless it was an application that "no fairminded jurist" could endorse. *Sealey*, 954 F.3d at 1354. Here, the Georgia Supreme Court correctly applied the well-established burden-shifting framework, noting—much as we have—that the statistical disparities to which Ledford pointed were insufficient to establish a prima facie case absent "additional facts which may give rise to an inference of discriminatory purpose." *Ledford*, 709 S.E.2d at 253 (quotation omitted). The Georgia court's determination that Ledford failed to make prima facie case is at the very least not unreasonable. [5]

Ledford is not entitled to habeas relief based on the prosecution's use of peremptory strikes.

B

[13] Ledford next argues that the state habeas court unreasonably applied clearly established federal law when it declined to find that his trial counsel rendered constitutionally ineffective assistance during the penalty phase of his trial. Ledford argues—and at the state evidentiary hearing presented expert testimony—that "no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment." If that proposition were correct as a matter of law, Ledford may well ***1158** have a viable ineffective-assistance claim under *Strickland*—because the record demonstrates as a matter of fact that defense counsel presented an ASPD diagnosis as part of their theory of defense. But the legal premise of Ledford's argument does not withstand scrutiny. [6]

[14] **[15]** "Under *Strickland*'s familiar two-part test, [a defendant] must show that counsel's performance (1) 'fell below an objective standard of reasonableness' and (2) 'prejudiced the defense.' " *Tharpe v. Warden*, 834 F.3d 1323, 1338 (11th Cir. 2016) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "When a habeas petitioner in state custody raises a *Strickland* claim in federal court, the commands of *Strickland* and § 2254(d) operate in tandem so that our review is 'doubly deferential.' " *Id.* (quoting *Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam)). We will thus grant relief only if the state habeas court *unreasonably* determined that trial counsel performed reasonably—*i.e.*, "where there is no possibility fairminded jurists could disagree," *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), that defense counsel acted "outside the range of professionally competent assistance," *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1270 (11th Cir. 2020) (quotation omitted).

[16] Insofar as Ledford argues for "a *per se* rule that a lawyer renders ineffective assistance by presenting evidence of an antisocial personality disorder for purposes of mitigation," his position is squarely foreclosed by *Morton v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1157, 1168 (11th Cir. 2012). Ledford's argument comes perilously close to asking us to overrule *Morton*, which of course we cannot do. [7]

[17] Although Ledford disclaims any reliance on a per se rule that presenting ASPD evidence in mitigation constitutes deficient performance, his expert squarely testified (as already noted) that "no competent capital defense attorney would ever pursue a diagnosis of ASPD or label his client a psychopath in mitigation of punishment." As a result, the thrust of his argument is in stark tension with *Morton*. There, we explained that whether to present such evidence

is "uniquely a matter of trial strategy" because "a diagnosis of antisocial personality disorder" is "a double-edged sword" that has the potential either to harm or to help the defendant. *Morton*, 684 F.3d at 1168; *see also* *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Accordingly, Ledford must do more than just point to his trial counsel's use of ASPD evidence; he must explain why presenting ASPD evidence was unreasonable based on the particular circumstances of his case.

Ledford attempts such an explanation, but his arguments come up short. He contends that his trial counsel could have provided all the mitigating evidence of his awful upbringing—in Ledford's view, the strongest mitigating evidence available—without introducing any evidence from psychological experts at all. And he insists that the only cost of avoiding psychological ***1159** experts would have been losing out on flimsy evidence of Ledford's childhood brain damage. He further argues, most importantly, that his preferred strategy would have prevented the prosecution from bringing up Ledford's psychological condition at all because Georgia law precludes such evidence unless the defendant first opens the door to it.

Even accepting Ledford's premises uncritically—*i.e.*, assuming (1) that trial counsel could have prevented any testimony about his psychological state by declining to put on the ASPD evidence and (2) that beyond the diagnosis itself, he would have sacrificed only the evidence of childhood brain injury—Ledford has failed to demonstrate that his trial counsel's preferred strategy "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Competent trial counsel could have reasonably concluded that presenting the theory that childhood brain injuries gave Ledford ASPD was worth opening the door to additional psychopathy evidence. Ledford's crime was heinous and shocking—the kind of thing that a troubled childhood alone, no matter how extreme, might not be enough to excuse in the minds of a jury. Defense counsel could have reasonably concluded that brain damage, no matter how proven, might provide an avenue for escape that no amount of childhood abuse or suffering could provide—an excuse that could, in the minds of jurors, eliminate Ledford's responsibility for his appalling crime.

Let us elaborate. Defense counsel could have reasonably concluded that it would be difficult for a jury to imagine that any amount of abuse or personal suffering could sufficiently explain what Ledford did—lie in wait to rape a stranger only to beat her to death when she resisted. Such conduct speaks to a dispassionate plan for personal gratification with no thought of the cost to be borne by the innocent who became his target—not the kind of crime that a troubled upbringing could satisfactorily explain. Counsel could also have reasonably concluded that Ledford's best (or only) hope to avoid the death penalty was an explanation of his crimes that undermined his *agency* in that heinous act, rather than merely partially undermining his culpability. Counsel could also have reasonably concluded that brain injury might offer this kind of excuse—if a childhood fall, possibly in combination with chronic alcoholism, somehow turned Ledford into a "psychopath" then his crimes could be seen as the product of a disability beyond his control. *Cf. Morton*, 684 F.3d at 1169 (explaining that counsel "could have reasonably decided that [expert] testimony was necessary to explain *why* Morton's childhood mitigated his moral culpability for the murders" (emphasis added)). Accordingly, even a purportedly flimsy case of brain damage might reasonably have attracted Ledford's counsel more than a straightforward troubled-childhood strategy.

And while it is true that ASPD can be aggravating rather than mitigating,[8] trial ***1160** counsel here could have reasonably concluded that linking ASPD to an injury sustained when the defendant was an innocent child could ameliorate any aggravating effect the diagnosis might have had and transform it into a mitigating factor. The defense did not present ASPD as mitigating on its own but emphasized its theory that Ledford's ASPD was the result of brain injury sustained through no fault of his own. This judgment, too, was reasonable.

Maybe Ledford is right, in retrospect, that his trial counsel's strategy was not the best one—and that the course he now outlines would have given him a better chance at avoiding a death sentence. Maybe not. But even if Ledford is right, trial counsel's strategy was not unreasonable, especially in light of our clear holding in *Morton* that ASPD evidence can be mitigating in certain circumstances. We would hesitate to hold that Ledford's counsel acted deficiently even if we were at liberty to review the state courts' decisions de novo. Once again, that outcome is even clearer considering the second layer of AEDPA deference—deference to the Georgia state habeas court. That court concluded that Ledford's

representation was sufficient after an extremely thorough examination of trial proceedings—indeed, its summary of the proceedings occupied half of the court's 70-page order. Moreover, that court diligently applied the *Strickland* standard and concluded that trial counsel's strategy was not deficient, relying heavily on *Morton*, which, as we have explained, provides the proper frame of analysis. We are certainly not prepared to call an analysis so similar to our own an "unreasonable application" of *Strickland* that "no fairminded jurist" could endorse. *Sealey*, 954 F.3d at 1354. We cannot, therefore, disturb the state habeas court's conclusion that trial counsel's performance was not deficient, and we have no need to consider whether counsel's actions prejudiced Ledford's defense. No relief is due to be granted on this point.

C

1

We now turn to Ledford's final claim for relief—Ridarick's alleged juror misconduct. For the first time before the state habeas court, Ledford proffered evidence of Ridarick's May 2009 online comments, which were posted soon after the verdict was returned, and argued that they contradicted Ridarick's sworn statements at voir dire. As Ledford reads the posts, they demonstrate Ridarick's belief that the death penalty is the only just sentence for malice murder. Ledford points out that at voir dire Ridarick stated that he could and would consider all possible sentencing options for a person convicted of malice murder. Accordingly, Ledford says, the posts prove that Ledford lied at voir dire and, in fact, was set on the death penalty from the outset—which, Ledford argues, violated his constitutional right to an impartial jury.

[18] The state habeas court didn't reach the merits of this claim but instead disposed of it on procedural grounds, concluding that Ledford had defaulted it by failing to raise it on direct appeal.[9] When a state court determines that a claim was defaulted on procedural grounds, we will ***1161** review it on the merits "only in two narrow circumstances." *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). A petitioner must show either (1) " 'cause' for the default and actual 'prejudice' resulting from the default" or (2) a "fundamental miscarriage of justice"—*i.e.*, that "a constitutional violation has resulted in the conviction of someone who is actually innocent." *Id.*

[19] **[20]** Ledford does not contend that he is actually innocent, so we focus here on cause and prejudice. "To show cause, the petitioner must demonstrate 'some objective factor external to the defense' that impeded his effort to raise the claim properly in state court." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). "We have ... determined that an ineffective-assistance-of-counsel claim ... may constitute cause"—but only, and importantly, as we explain below, if it is "both exhausted and not procedurally defaulted." *Ward*, 592 F.3d at 1157. "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different" if he had been allowed to raise the issue in state court. *Henderson*, 353 F.3d at 892.

Ledford argues that the ineffective assistance of his appellate counsel establishes cause for his default.[10] Specifically, he contends that his appellate counsel were deficient in failing to investigate Ridarick's social media activity during his direct appeal. Ledford's cause argument fails because he failed to timely raise it.

[21] **[22]** Before a habeas petitioner can rely on an allegation of ineffective assistance of counsel to demonstrate cause to excuse a procedural default, he must show that he properly raised the argument in state court, because ineffective assistance is itself a constitutional claim. *See* *Edwards v. Carpenter*, 529 U.S. 446, 452, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) ("A claim of ineffective assistance ... must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." (alteration adopted) (internal quotation marks omitted)); *see also* *Ward*, 592 F.3d at 1157 ("We have ... determined that an ineffective-assistance-of-counsel claim, *if both exhausted and not procedurally defaulted*, may constitute cause." (emphasis added)). Because Ledford did not properly raise his ineffective-assistance-of-appellate-counsel claim in state court, he has failed to exhaust (and thus cannot now press) his only argument for cause.

***1162** Before the state habeas court, Ledford provided only hints of the argument he now advances—insufficient to exhaust and preserve it. In two footnotes in his initial state

habeas petition, Ledford stated (1) that "[t]o the extent that Petitioner's counsel failed to protect Petitioner's rights in this regard, counsel's performance was unreasonably deficient, and Petitioner was prejudiced by the deficiencies," and (2) that "[t]o the extent that Petitioner's counsel failed to argue, develop, or present these issues, failed to adequately preserve objections thereto, or failed to effectively litigate these issues on direct appeal, Petitioner's counsel rendered ineffective assistance, and Petitioner was prejudiced thereby."

Both footnotes referred generally to a collection of vaguely worded allegations of jury misconduct in the body of the petition, all of which Ledford has since abandoned, save for his allegation that Ridarick lied at voir dire. But nowhere before the state habeas court did Ledford argue that his appellate counsel performed deficiently by failing to challenge Ridarick's conduct in particular, let alone how or why his appellate counsel were deficient in that connection. And in his application for a certificate of probable cause to the Supreme Court of Georgia, Ledford did not so much as mention an argument that his appellate counsel were ineffective. He just baldly asserted that he could prove cause and prejudice to overcome the default of his juror-misconduct claims if he were given an evidentiary hearing.

[23] **[24]** **[25]** Such general, conclusory statements are insufficient to preserve a claim for federal habeas review. *See Kelley v. Secretary for the Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004) ("[H]abeas petitioners cannot preserve otherwise unexhausted, specific claims of ineffective assistance merely by arguing that their lawyers were ineffective in a general and unspecified way."). We have held that "[t]he exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (quoting *Kelley*, 377 F.3d at 1345). Ledford's "references to federal law in his state habeas proceedings are exactly the type of needles in the haystack that we have previously held are insufficient to satisfy the exhaustion requirement." *Id.* And because "a cause and prejudice argument which is not presented in state court is itself procedurally defaulted," Ledford cannot raise it "for the first time on federal habeas" unless he can show "cause and prejudice for that particular default as well." *Fults v. GDCP Warden*, 764 F.3d 1311, 1317-18 (11th Cir. 2014). [11]

[26] But Ledford makes no argument that he can show cause and prejudice sufficient to excuse the default of his ineffective-assistance-of-appellate-counsel-based cause argument. Instead, he simply asserts—wrongly, ***1163** as we have explained—that he sufficiently preserved his ineffective-assistance-of-appellate-counsel claim by means of his passing mentions in state habeas filings. And because Ledford cannot establish cause or prejudice to excuse the default of his ineffective-assistance-of-appellate-counsel claim, that claim cannot serve as cause to excuse the default of his juror-misconduct claim. In short, Ledford has failed to exhaust—and thus has procedurally defaulted—his only argument for overcoming the original procedural default. Accordingly the district court did not err in denying his claim of juror misconduct.

2

Ledford's request for an evidentiary hearing fails as well, and for similar reasons. As already explained, Ledford requested a hearing for two reasons: (1) to further develop his juror-misconduct claim on the merits and (2) to allow him to present evidence of cause and prejudice. Before us, Ledford contends, as he argued to the district court, that his appellate counsel's deficient performance provides cause and that his claim is strong enough to establish prejudice, and, therefore, that he should have been allowed to present the evidence of juror misconduct that the state habeas court never heard —testimony that he says will establish that Ridarick lied at voir dire. Separately, he contends that even if the evidence currently in the record does not establish cause and prejudice for his default, he should have been allowed a hearing to produce additional evidence. The district court denied his requests.

[27] **[28]** When a habeas petitioner seeks a hearing in federal court, the court must first determine "whether the prisoner was diligent in his efforts" to develop the facts in state court. *Williams v. Taylor*, 529 U.S. 420, 435, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). If he was not diligent, he must satisfy the conditions of § 2254(e)(2). *Id.* That provision requires a showing that

> (A) the claim relies on, (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate

> that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). If, on the other hand, the petitioner was diligent, "a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).

[29] Separately, "[w]hen a petitioner asks for an evidentiary hearing" specifically on the issues of cause and prejudice, "neither section 2254(e)(2) nor the standard of cause and prejudice that it replaced apply." *Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1231–32 (11th Cir. 2014). Rather, "[w]hen a petitioner has requested an evidentiary hearing on the procedural default of a substantive claim, we need ask only whether the district court abused its discretion when it denied an evidentiary hearing on that issue." *Id.* at 1332. [12]

[30] Without deciding whether or not Ledford pursued his juror-misconduct ***1164** claim diligently below, we affirm the district court's refusal to conduct a hearing, either to develop the merits or to investigate cause and prejudice. Any merits hearing would have been futile because it is plain that Ledford could not prove the petition's factual allegations. *See* *Schriro*, 550 U.S. at 474, 127 S.Ct. 1933 ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether the hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). Specifically, there is no way an evidentiary hearing could allow Ledford to overcome procedural default—as the district court correctly held, he failed to exhaust his ineffective-assistance-of-appellate-counsel-based cause argument. As already explained, that argument was the only cause for default that Ledford has presented in federal court, and without it he cannot overcome the procedural bar on his juror-misconduct claim.

Ledford's requested cause and prejudice hearing would have been similarly futile. Although Ledford requested a hearing in part to show cause and prejudice as to his juror-misconduct claim, he failed to request a hearing to show cause and prejudice with respect to his ineffective-assistance-of-appellate-counsel-based cause argument—or, indeed, even argue that he could show cause and prejudice as to that claim. As we have explained, he merely argues, wrongly, that he exhausted the claim properly. With his only argument to show cause itself procedurally barred, a hearing on cause and prejudice would have been futile; both we and the district court would be procedurally barred from finding Ledford's appellate counsel ineffective, no matter what evidence he adduced at the hearing. Accordingly, vacating and remanding to the district court to allow it to apply the proper standards for evidentiary hearings would serve no purpose; Ledford cannot ultimately prevail, in any event.

III

The district court correctly concluded that Ledford is not entitled to federal habeas relief. We cannot say that the Georgia courts unreasonably decided Ledford's jury-selection and ineffective-assistance claims. And Ledford procedurally defaulted his juror-misconduct claim in state court, and he cannot show cause to excuse that default because his only cause argument—ineffective assistance of his appellate counsel—itself was not properly exhausted in state court. That failure precludes any relief, no matter what Ledford might have been able to prove in an evidentiary hearing. As result, we also affirm the district court's decision to deny the hearing.

AFFIRMED.

All Citations

975 F.3d 1145, 28 Fla. L. Weekly Fed. C 1882

Footnotes

1 Other than the online postings themselves, Ledford offers no evidence to show that any of the subpoenaed jurors would have, in fact, given testimony to contradict Ridarick's sworn statements at voir dire.

2 Because we ultimately hold Ledford's juror-misconduct claims to be procedurally barred, we need not and do not decide whether the testimony of the subpoenaed jurors would be admissible under either Georgia or federal law.

3 Ledford did not raise his juror-selection claim in state habeas proceedings, although he had raised it on direct appeal. The state notes this omission in its brief, but it does not argue that this claim is unexhausted. We conclude that the claim was properly exhausted because in Georgia "an issue actually litigated and decided on direct appeal is precluded from being relitigated on [state] habeas corpus," at least "[a]bsent compelling reasons, such as a miscarriage of justice." *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900, 909 (1997); *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010) ("[I]n order to exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review.").

4 Two out of four alternates were also women, bringing the total to four out of sixteen (25%).

5 At oral argument, Ledford relied heavily on the fact that the prosecution attempted to strike one additional woman from serving as an alternate. That may be a wrinkle not squarely addressed in our existing precedent, but it does not change the result here. Even if the prosecution had successfully struck another female juror, it would not make this case significantly different from our existing case law. It certainly does not change the circumstances enough to make the state court's application of *Batson* and *J.E.B.* (or any other Supreme Court precedent) unreasonable. Moreover, when the government realized that it had fewer strikes available for removing alternates at the time, it withdrew its attempt to strike the female alternate juror *in favor of striking the next alternate juror—a man*. If anything, this pattern of behavior indicates that the government was not trying to reduce the number of women on the jury. Had that been the government's intention, it would not have withdrawn a strike against the only woman that it knew the defendant had accepted.

6 Because the Supreme Court of Georgia summarily denied Ledford a certificate of probable cause on this claim, we "look through" to state habeas court's order. *See* *Wilson v. Sellers*, —— U.S. ——, 138 S. Ct. 1188, 1192, 200 L.Ed.2d 530 (2018).

7 "We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision." *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998).

8 We have often recognized, in the context of rejecting ineffective-assistance claims in which a defendant faulted his trial counsel for failing to present evidence of ASPD, that such evidence is often more aggravating than mitigating. *See* *Weeks v. Jones*, 26 F.3d 1030, 1035, n.4 (11th Cir. 1994) (noting, in dicta, based on out-of-court precedent, that "[a]ntisocial personality disorder has been held not to be mitigating as a matter of law"); *Reed v. Sec'y, Dep't of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2010) (holding that a "diagnosis—that Reed had an antisocial personality disorder and narcissistic personality disorder—was more harmful to Reed than mitigating"); *Cummings v. Sec'y, Fla. Dep't of Corr.*, 588 F.3d 1331, 1368 (11th Cir. 2009) (describing "a diagnosis of antisocial personality disorder" as "not mitigating but damaging"); *Evans v. Sec'y for the Dep't of Corr.*, 703 F.3d 1316, 1332 (11th Cir. 2013) (explaining that "we have held consistently" that evidence of "antisocial personality disorder" is "potentially aggravating" because it "is a trait most jurors tend to look disfavorably upon, that is not mitigating but damaging" (quotations omitted)); *see also* *Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1349 (11th Cir. 2010).

9 *See supra* at —— n.7.

10 At oral argument, Ledford's counsel expressly disclaimed any reliance on any cause argument of the type that the Supreme Court recognized in *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), and underscored that Ledford relies *solely* on ineffective assistance of appellate counsel to show cause to excuse his default. 529 U.S. at 442, 120 S.Ct. 1479 (indicating that a "trial record" that "contains no evidence which would have put a reasonable attorney on notice that" a juror had answered dishonestly at voir dire can "establish cause" for a procedural default committed by failing to timely object to the juror dishonesty). With respect to *Williams*, Ledford argues only that it shows why any failure to develop the record in the state habeas court was not due to lack of diligence on his part and why he should therefore have been given an evidentiary hearing, an issue that we address below. Even if Ledford hadn't disclaimed any reliance on the kind of cause identified in *Williams*, Ledford failed to argue that particular cause argument before the district court, and we needn't allow him to raise the argument now. *See* *Ochran v. United States*, 117 F.3d 495, 502–03 (11th Cir. 1997) (explaining that we may hold a position forfeited before the district court even where the opposing party fails to raise the forfeiture argument to us).

11 Strictly speaking, failing to raise an argument in state court is an exhaustion problem, not a procedural default. But "[a] claim is procedurally defaulted for the purposes of federal habeas review where 'the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Henderson*, 353 F.3d at 898–99 (quoting *Coleman v. Thompson,* 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). Georgia law generally bars successive habeas petitions, treating claims not raised in an initial petition as procedurally defaulted. *See Gibson v. Head*, 282 Ga. 156, 646 S.E.2d 257, 259 (2007); *see also* Ga. Code Ann. § 9-14-51 ("All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived ....").

12 The district court here seemingly denied Ledford a merits hearing based on a mistaken understanding of the law, requiring *both* a showing of diligence under *Williams* and satisfaction of the 28 U.S.C. § 2254(e)(2) test, whereas *Williams* actually allows a *diligent* litigant to bypass (e)(2) when seeking a merits hearing. And although the district court did not separately address the propriety of a cause-and-prejudice hearing as opposed to a merits hearing, it ultimately concluded that Ledford was "not entitled to an evidentiary hearing under the standard discussed above"—apparently applying the same standard to both types of hearing. The district court thus applied the wrong standard with respect to both merits and cause-and-prejudice hearings. Because the district court made an error of law, we cannot defer to its decision under the abuseof-discretion standard as we ordinarily would when reviewing a decision to deny a hearing. *See* *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008) ("An error of law is *per se* abuse of discretion.").

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11090-P

MICHAEL WILLIAM LEDFORD,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

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

BEFORE: WILLIAM PRYOR, Chief Judge, NEWSOM, and BRANCH, 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 Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX 3

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

MICHAEL WILLIAM LEDFORD,	:	
	:	CIVIL ACTION NO.
Petitioner,	:	4:17-CV-0211-MHC
	:	
v.	:	
	:	DEATH PENALTY
ERIC SELLERS, Warden, Georgia	:	HABEAS CORPUS
Diagnostic and Classification Prison,	:	28 U.S.C. § 2254
	:	
Respondent.	:	

ORDER

This matter is before the Court for the final merits consideration of Petitioner Michael William Ledford ("Petitioner" or "Ledford")'s habeas corpus petition brought pursuant to 28 U.S.C. § 2254.

I. BACKGROUND AND FACTUAL SUMMARY

A. Procedural History

On September 25, 2007, a jury sitting in the Superior Court of Paulding County, Goergia, found Petitioner guilty of one count of malice murder, two counts of felony murder, three counts of aggravated battery, one count of aggravated sodomy, two counts of kidnaping with bodily injury, and one count of aggravated assault. On September 30, 2007, after a sentencing trial, that same jury found that

the prosecution had proven beyond a reasonable doubt the presence of five statutory aggravating circumstances in connection with the murder of Jennifer Ewing and recommended that Petitioner be sentenced to death. The trial court imposed a death sentence along with two life without parole sentences and four twenty-year sentences, all to run consecutively.

The trial court denied Petitioner's motion for new trial on May 25, 2010. Petitioner appealed and, in an opinion issued March 25, 2011, the Georgia Supreme Court held that Petitioner's convictions for aggravated battery merged with the conviction for malice murder that arose from same course of conduct but otherwise affirmed Petitioner's convictions and sentences. Ledford v. State, 289 Ga. 70 (2011). The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on November 7, 2011. Ledford v. Ga., 565 U.S. 1017 (2011).

Petitioner next filed a petition for a writ of habeas corpus in state court, and, after holding an evidentiary hearing, the Superior Court of Butts County, Georgia, denied the petition on August 24, 2016. Ledford v. Chatman, No. 2012-v-907, Superior Court of Butts Cty., Ga. (August 24, 2016) [Doc. 28-21] ("State HC Order"). The Georgia Supreme Court summarily denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief on

August 14, 2017. Order of the Georgia Supreme Court dated Aug. 14, 2017 [Doc. 28-29] denying application of probable cause to appeal the denial of habeas corpus relief. This action followed.

B. Factual Summary

In affirming Petitioner's convictions and sentences, the Georgia Supreme Court held that, based on the evidence presented at Petitioner's trial, the jury was authorized to find that

> on July 25, 2006, Michael Ledford pretended to go to work but, instead, bought beer and drank it near the Silver Comet Trail, a recreational trail used for biking, running, and other activities. Ledford knocked Jennifer Ewing from her bicycle as she rode by his location. He dragged her a distance off the trail to a location shielded from view by vegetation. He stripped off all of her clothing from the waist down, and he pulled her shirt up part way, exposing her breasts. She suffered bruises throughout her body in the struggle. When Ledford forced his penis into her mouth, she bit his penis and severely wounded it. Enraged by her resistance, Ledford unleashed a shocking attack during which he stomped on her face and nose, her larynx, and her ribs. Ms. Ewing gradually succumbed to asphyxiation caused by her wounds and the resulting bleeding into her lungs.

Ledford, 289 Ga. at 70.

II. LEGAL STANDARDS APPLICABLE TO PETITIONER'S CLAIMS

A. Review Under 28 U.S.C. § 2254(d)

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

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

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

(2011) (citing Visciotti, 537 U.S. at 25). In Pinholster, the Supreme Court further noted that

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

Id. at 181-82. Similarly, the Supreme Court has held that state court decisions are measured under § 2254(d)(1) against Supreme Court precedent at "the time the state court [rendered] its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405-06. If the state court decision "identifies the correct governing legal principle," this Court determines whether the decision "unreasonably applies that principle to the facts of

the prisoner's case." Id. at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 101 (2011) (internal quotation marks omitted); see also Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015) (holding that the state court's determination must be "objectively unreasonable."). In order to obtain habeas corpus relief in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

B. Entitlement to a Hearing or Discovery

Petitioner seeks evidentiary development with respect to two of his claims. "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course," Bracy v. Gramley, 520 U.S. 899, 904 (1997), and discovery and/or hearings are rarely permitted, Pinholster, 563 U.S. at 186 ("Although state prisoners may sometimes submit new evidence in federal court, [§ 2254]'s statutory scheme is designed to strongly discourage them from doing so.").

As mentioned above, when this Court reviews claims that have been decided on the merits in state court, the Supreme Court has decreed that this Court's review under § 2254 is limited to the record before the state court at the time that it reviewed the case. Pinholster, 563 U.S. at 182. Because of this limitation, this Court is prevented from holding an evidentiary hearing or permitting discovery in which new evidence is introduced to support a claim that a state court has denied unless Petitioner establishes that the state court's decision was unreasonable under the § 2254(d) test discussed above. In other words, "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, 776 F.3d at 1295; see also Pinholster, 563 U.S. at 183 ("[W]hen the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing.") (internal quotation marks and citation omitted).

Because of the exhaustion requirement in § 2254(b)(1)(A), this Court generally cannot consider claims that have not been decided on the merits in state court. The exceptions to that rule are (1) claims that the petitioner raised in state court but on which the state court failed to rule, see Cone v. Bell, 556 U.S. 449, 472 (2009) (noting that claims ignored by state court are subject to "*de novo* review" in federal habeas corpus review), and (2) claims that the state court deemed procedurally defaulted but where the petitioner can demonstrate cause and prejudice to lift the resulting procedural bar in this Court, Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000). With respect to those types of claims, as well as claims where the petitioner can demonstrate error under § 2254(d), the petitioner must further satisfy the requirements of § 2254(e)(2) before he is entitled to a hearing or discovery. Under that subsection, a hearing may not be held unless Petitioner shows diligence in developing the factual basis of his claim in state

court. Williams v. Taylor, 529 U.S. 420, 433 (2000). He must further demonstrate that

> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

C. Procedurally Defaulted Claims

As discussed below, Respondent contends that one of Petitioner's claims is procedurally defaulted. Section 2254(b)(1)(A) requires that a petitioner exhaust all state remedies before seeking relief on a federal claim.

> Exhaustion requires a state petitioner to "fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Duncan v. Henry, 513 U.S. 364, 365 (1995) (quotations omitted, alteration adopted). Exhaustion is a "serious and meaningful" requirement. Keeney v. Tamayo–Reyes, 504 U.S. 1, 10 (1992). The petitioner must have presented the claim in a manner that affords "the State a full and

> fair opportunity to address and resolve the claim on the merits." Id. A claim is procedurally defaulted for purposes of federal habeas review "if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present [the claim] in order to meet the exhaustion requirement would now find the claim[ ] procedurally barred." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

Raleigh v. Sec'y, Fla. Dep't of Corr., 827 F.3d 938, 956-57 (11th Cir. 2016).

A claim likewise is procedurally defaulted if it was raised in state court but rejected by a state court pursuant to an independent and adequate state rule as procedurally barred. See Maples v. Thomas, 565 U.S. 266, 280 (2012) ("As a rule, a state prisoner's habeas claims may not be entertained by a federal court when (1) a state court has declined to address those claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds.") (internal alterations, quotation marks, and citations omitted); Caniff v. Moore, 269 F.3d 1245, 1247 (11th Cir. 2001) (holding that § 2254 "claims that have been held to be procedurally defaulted under state law cannot be addressed by federal courts.").

Adequacy of a state procedural rule is shown when it is "firmly established and regularly followed," Siebert v. Allen, 455 F.3d 1269, 1271 (11th Cir. 2006) (citation omitted), that is, not applied in an "arbitrary or unprecedented fashion,"

Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001), or in an unfair manner, Ford v. Georgia, 498 U.S. 411, 424-25 (1991). The Eleventh Circuit has concluded that "Georgia's procedural default rule [is] firmly established and consistently followed" and is thus an "adequate state law ground" for denying relief. Ward v. Hall, 592 F.3d 1144, 1176 (11th Cir. 2010).

In order to overcome a procedural default, Petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). "For cause to exist, the external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim." McCleskey v. Zant, 499 U.S. 467, 497 (1991). Cause may also be demonstrated by establishing that trial or appellate counsel was ineffective in failing to properly present the claim in state court. Martinez v. Ryan, 566 U.S. 1, 11 (2012). In order to demonstrate prejudice, a petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting

his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982).

A miscarriage of justice is shown when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995) (citation omitted). This standard is very difficult to meet:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.

Id. at 324 (citation omitted). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him . . . ." Id. at 327.

III. DISCUSSION OF PETITIONER'S CLAIMS FOR RELIEF

A. Abandoned Claims

In the scheduling order entered on October 20, 2017, this Court required that, in his final brief (denoted as the "Omnibus Brief"), "Petitioner must raise all claims, issues, and arguments he wishes the Court to consider. If a matter is not in

the Omnibus Brief, the Court will not consider it." Order of Oct. 20, 2017 [Doc. 34] at 2. Petitioner's Omnibus Brief was filed on March 30, 2018. Pet'r's Br. in Supp. of His Pet. For Writ of Habeas Corpus [Doc. 45] ("Pet'r's Br."). As pointed out by Respondent (and not disputed by Petitioner) the Omnibus Brief failed to argue or otherwise discuss the following claims raised in the petition:

- Claim 2 (that his trial counsel rendered ineffective assistance for failing to hire a prison adaptation expert);
- Claim 5 (that the death penalty in Georgia is imposed in an arbitrary, capricious, and disproportionate manner);
- Claim 6 (that his trial counsel was generally ineffective);
- Claim 7 (that the trial court's malice murder instructions violated his rights);
- Claim 8 (that the trial court erred in excusing certain members of the jury panel for cause);
- Claim 9 (that the trial court erred in failing to excuse several jury panel members on Petitioner's motion);
- Claim 10 (that the trial court erred in restricting voir dire);

- Claim 11 (that the prosecution violated Petitioner's rights as described in Batson v. Kentucky, 476 U.S. 79, 85 (1986), by striking the sole African-American member of the jury panel);
- Claim 13 (that the prosecution's closing argument was excessive and prejudicial); and
- Claim 14 (that the trial court erred allowing the prosecution to present certain victim impact evidence).

In addition, Petitioner has withdrawn his Claim 3 (that lethal injection as practiced in Georgia violates the Eighth Amendment). Because Petitioner failed to argue in support of these claims in his brief, this Court deems Petitioner to have abandoned them and denies relief. At Petitioner's request, however, the denial of relief with respect to his Claim 3 is without prejudice.

B. Claim that the State Improperly Struck Females from the Jury

In the first claim discussed in his Omnibus Brief, Petitioner contends that the prosecution improperly exercised its peremptory strikes to remove females based on their gender. Pet'r's Br. at 30-47. The pool of thirty-six potential jurors from which the jury was selected contained fifteen women. The state used nine of its twelve strikes to remove women, but accepted six women that it could have

removed. At the conclusion of jury selection, trial counsel raised a challenge under Batson, 476 U.S. at 85 (holding that criminal defendants have a right to a "jury whose members are selected pursuant to nondiscriminatory criteria"), and J.E.B. v. Ala., 511 U.S. 127 (1994) (extending Batson to include gender-based discrimination). The trial court denied the challenge regarding the removal of female panel members after making the following observations:

> [O]f the 36 jurors who were on the first page, we had a total of 21 men and 15 women. If my math is correct, the state struck nine women and accepted six . . . which of course on a pure percentage basis I believe that's about 41 percent of the available jurors were women out of the first 36.
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> . . . .
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> Considering the number of women available, the number of women that the state accepted, I will not find that there is a prima facie case that has been made out to satisfy the court that there was intentional discrimination based on my looking at the available number of women and men and the number of strikes the state made versus the number of accepted jurors. So I will deny the Batson challenge or the equivalent challenge based on gender as well.

Trial Tr. Vol. XVII [Doc. 15-12] ("Trial Tr.") at 59-60.

Petitioner raised this issue in his direct appeal, and the Georgia Supreme Court affirmed the trial court:

> [Petitioner] also argues that the State engaged in gender-based discrimination in its use of peremptory strikes. See J.E.B. v. Ala., 511 U.S. 127 (1994). The record shows that, during the selection of the panel of 12 jurors, the State used 75 percent of the peremptory strikes it exercised to strike women. The trial court found that [Petitioner] failed to make a prima facie showing of discrimination and, therefore, did not require the State to offer gender-neutral reasons for its strikes. In light of [Petitioner]'s failure to present any "additional facts which may give rise to an inference of discriminatory purpose," we hold that the trial court did not err in concluding that [Petitioner] had failed to carry his burden of establishing a prima facie case of discrimination. Whitaker v. State, 499 S.E.2d 888 (1998) (addressing the State's use of 66 percent of its peremptory strikes to strike women).

Ledford, 289 Ga. at 83.

"The [United States] Supreme Court has clearly established a three-step process for deciding whether a Batson violation has occurred." Madison v. Comm'r, Ala. Dept. Corr., 761 F.3d 1240, 1242 (11th Cir. 2014). That three-part test is:

> First, the defendant must make out a prima facie case by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the [gender based] exclusion by offering permissible [gender]-neutral justifications for the strikes. Third, if a [gender]-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful [] discrimination.

Johnson v. Cal., 545 U.S. 162, 168 (2005) (internal quotation marks and citations omitted).

Petitioner contends that the Georgia Supreme Court's holding was contrary to or an unreasonable application of Batson and J.E.B. because the state court required that, in order to establish an inference of discriminatory purpose, Petitioner had to do more than point to the pattern of strikes and present additional facts which may give rise to an inference of a discriminatory purpose. Petitioner further asserts that he is entitled to a hearing to further develop the evidentiary basis of this claim. This Court disagrees.

According to the Eleventh Circuit, "statistics, without more, do not establish a prima facie case" of discrimination in the use of peremptory strikes. United States v. Hill, 643 F.3d 807, 838 (11th Cir. 2011). In United States v. Campa, 529 F.3d 980 (11th Cir. 2008), the Eleventh Circuit confronted a case in which the government used seven of nine strikes (seventy-eight percent) to remove black jurors. Id. at 989. However, the sixteen members of the jury that was seated (including four alternates)[1] included four blacks (twenty-five percent). Id. The

[1] The trial court initially selected four alternates, but one juror was excused prior to the trial. United States v. Campa, En Banc Br. for the United States at 15 & n.19, 2001 WL 35796651 (11th Cir. 2001).

district court "ruled implicitly" that the defendants had established a prima facie case of racial discrimination, but the Eleventh Circuit concluded that the defendants did not establish a prima facie case because "the government did not attempt to exclude as many black persons as it could from the jury," and the jury – including alternates – included four blacks. Id. at 998.[2] See also Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., 236 F.3d 629, 638 (11th Cir. 2000) ("[T]he unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a *prima facie* case of discrimination in the peremptory striking of jurors of that race."); United States v. Puentes, 50 F.3d 1567, 1578 (11th Cir. 1995) ("Although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim."); United States v. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990) ("[T]he unchallenged presence of three blacks on the jury undercuts any inference of impermissible discrimination that might arise simply by the striking of other blacks.").

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[2] In United States v. Ochoa-Vasquez, 428 F.3d 1015, 1046 n.41 (11th Cir. 2005), the Eleventh Circuit noted that, in considering a Batson/J.E.B. claim, alternate jurors must also be considered.

In Petitioner's case, the state did not strike six of the women that it could have, and, including alternates, four women served on the jury of fourteen (twenty-nine percent). Accordingly, based upon the Eleventh Circuit's decision in Campa, this Court does not find that the Georgia Supreme Court was unreasonable in its application of the United States Supreme Court's Batson and J.E.B. decisions in concluding that Petitioner had failed to establish a prima facie case of gender discrimination.

Moreover, the Eleventh Circuit has held that, when it reviews a Batson challenge, it gives "great deference to a district court's finding as to the existence of a *prima facie* case." United States v. Allen-Brown, 243 F.3d 1293, 1296 (11th Cir. 2001) (internal quotation marks and citation omitted). Given the deference afforded to the Georgia Supreme Court's determination under § 2254(d), this Court concludes that Petitioner is not entitled to relief because "fairminded jurists could disagree on the correctness of the state court's decision." Richter, 562 U.S. at 101 (2011) (internal quotation and citation omtited). As discussed above, because Petitioner has failed to establish that he is entitled to relief under § 2254(d), this Court is prevented from holding a hearing or permitting discovery related to this claim. Pinholster, 563 U.S. at 182.

C. Petitioner's Claim of Ineffective Assistance of Trial Counsel

1. Legal Standard

Petitioner next contends that his trial counsel rendered ineffective assistance by presenting evidence of Petitioner's antisocial personality disorder/psychopathy during the penalty phase of his trial. Pet'r's Br. at 48-117. The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the court may "dispose of ineffectiveness claims on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see also Strickland, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffectiveness assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Petitioner must first "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment" and show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential" to counsel's performance and must "indulge a strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance . . . ." Id. at 689. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion–though the presumption is not insurmountable –is a heavy one." Fugate v. Head, 261 F.3d 1206, 1217 (11th Cir. 2001) (citation omitted). As the Eleventh Circuit has stated,

> The 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 at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. Strickland encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992) (citation omitted).

Rather, the inquiry is whether counsel's action was "so patently unreasonable that no competent attorney would have chosen it." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987) (citation omitted). Courts must "allow lawyers broad discretion to represent their clients by pursuing their own strategy," White, 972 F.2d at 1221, and must give "great deference" to reasonable strategic decisions, Dingle v. Sec'y for Dep't of Corr., 480 F.3d 1092, 1099 (11th Cir. 2007). "When courts are examining the performance of an experienced trial

counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (footnote and citation omitted).

As discussed below, the state habeas corpus court determined that Petitioner's trial counsel was not deficient in presenting expert mental health testimony during the penalty phase of Petitioner's trial. The Court's review of that conclusion by the state court is "thus doubly deferential," under which this Court takes a "highly deferential look at counsel's performance [under] Strickland . . . through the deferential lens of § 2254(d)." Pinholster, 563 U.S. at 190 (internal quotation marks and citation omitted).

To meet the second prong of the Strickland test, Petitioner must demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 691-92. That is, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," id. at 694, requiring "a substantial, not just conceivable, likelihood of a different result." Pinholster, 563 U.S. at 189 (internal quotation marks and citation omitted).

2. Discussion of Petitioner's Ineffective Assistance Claim

According to Petitioner, trial counsel presented mental health expert testimony that characterized Petitioner as antisocial and a psychopath, which allowed the prosecutors to present their own mental health experts "whose testimony methodically attributed each and every aggravating characteristic of these disorders to" Petitioner. Pet'r's Br. at 48. Petitioner contends that trial counsel could have presented evidence of Petitioner's "abusive and harrowing upbringing" through witnesses other than mental health experts – such as a forensic social worker – without opening the door to the evidence that the State would exploit in portraying him as a "relentless predator incapable of remorse or penance." Id. at 49.

Petitioner contends that the testimony of two mental health experts presented by trial counsel was particularly damaging. Dr. Thomas Sachy, a forensic neuropsychiatrist, examined a magnetic resonance image of Petitioner's brain and testified that Petitioner's frontal and temporal lobes had suffered damage, presumably when he fell from a tree as a child. Trial Tr. Vol. XXVI [Doc. 16-7] at 250-60. Sachy informed the jury that Petitioner's brain damage left him unable to control his anger, prone to violence, and lacking empathy. Id. at 254-56. Dr.

Robert Shaffer, a neuropsychologist, administered psychological tests that confirmed Sachy's finding of damage to the frontal and temporal lobes of Petitioner's brain. He further concluded that Petitioner was a "sexual sadist" and a psychopath. Trial Tr. Vol. XXVII [Doc. No. 16-8] at 94, 101. Shaffer also described psychopaths as individuals who lack emotional reactions. Id. at 101.

The prosecution presented mental health experts who disagreed with Sachy's and Shaffer's diagnosis of brain damage, id. at 282-85, and testified that Petitioner was a psychopath who is driven to meet his own needs and satisfy his desires without attempting to conform to societal rules or norms or the rights and feelings of others. Id. at 218. The prosecution experts further testified that psychopathy does not influence the ability of the psychopath to make choices; psychopaths are controlled and able to change their behavior as needed in order to avoid getting caught. Id. at 222-23.

Petitioner's psychopathy was a recurring theme of the prosecutor's closing argument at the conclusion of the penalty phase of the trial. The prosecutor repeatedly argued that, because Petitioner is a dangerous psychopath, the jury should not impose a life sentence. See, e.g., Trial Tr. Vol. XXVII [Doc. 16-9] at 41-42.

In denying relief with respect to Petitioner's claim that trial counsel was deficient in presenting evidence of Petitioner's psychopathy, the state habeas corpus court first provided an extensive and thorough review of trial counsel's extensive investigation, State HC Order [Doc. 28-21] at 15-21, and the evidence presented during the penalty phase of the trial, id. at 26-58. This Court will not repeat that entire discussion here, but significant to this Court's analysis is the evidence of aggravating circumstances presented by the state.

During the guilt phase of the trial, the medical examiner testified that Jennifer Ewing was savagely beaten, leaving her face disfigured. Petitioner landed five to ten blows to Ms. Ewing's face that caused both of her eyes to swell shut and lacerated the skin of her face in three places down to the bone. Trial Tr. Vol. XX [Doc. 16-1] at 143-44. Petitioner crushed her nose, id. at 144, and struck the top and sides of her head at least eighteen to twenty times, id. at 187, causing several hemorrhages in her brain, id. at 188-90. Petitioner also crushed her larynx when he hit or kicked her on the side of the neck. Id. at 196-200. Ms. Ewing's arms were extensively bruised, indicating that she tried to shield her head as Petitioner repeatedly beat or kicked at her head. Id. at 157-58.

The medical examiner also testified that he discovered extensive bruising on Ms. Ewing's legs from where Petitioner repeatedly stomped on her. Id. at 165-67. Her most extensive injuries were the result of Petitioner's stomping on her abdomen and chest several times, likely when she was lying on the ground, breaking nine of her ribs and causing a tear in her liver as well has puncturing and collapsing her lung, id. at 147-51, 205-07. Ms. Ewing was still alive when all of these injuries occurred.

Because of her broken nose – which would have caused bleeding down her throat – her crushed larynx, her crushed chest, and her collapsed lung, Ms. Ewing had a great deal of trouble breathing. Id. at 214. The medical examiner estimated that, after Petitioner finished beating her, she survived for fifteen to thirty minutes until she died from asphyxiation because of her inability to properly inhale. Id. at 214-15.

During the penalty phase, the prosecution also presented evidence that Petitioner preyed on women throughout his life. In 1980, Petitioner, wielding a gun, approached a woman who was sitting in her car at a convenience store and, along with two other men, kidnaped and robbed her. Trial Tr. Vol. XXIV [Doc. 16-5] at 46. In 1985, Petitioner had tried to force his way into a woman's home,

and when she would not let him in, he threw a rock through her window; the police arrived before he could enter the home. Id. at 78-80. In 1991, he accosted a woman in the woods and raped her. Trial Tr. Vol. XXII [Doc. 16-3] at 88-91.

In 2002, when Petitioner was living with his brother and sister-in-law, he entered a neighbor's house and attacked the woman who lived there. Trial Tr. Vol. XXIV [Doc. 16-5] at 69. He grabbed her and told her not to scream or he would hurt her children. Id.. She screamed anyway, and Petitioner's sister-in-law, who had heard the screams, entered the house and convinced Petitioner to leave. Id. at 69-70. Other witnesses recounted Petitioner's improper sexual behavior towards women and children, and prosecutors played recordings of sexually explicit telephone discussions that Petitioner had with his fourteen-year-old niece while Petitioner was in jail awaiting his murder trial. Id. at 89-90.

Based on its analysis of trial counsel's case in mitigation in comparison to the case in aggravation presented by the state, the state habeas corpus court concluded that trial counsel was not deficient:

> This Court finds that trial counsel's presentation of evidence in mitigation was reasonable, particularly in light of counsel's thorough investigation of Petitioner's background, including his mental health, sexual abuse, and substance abuse. Based on that investigation, counsel made reasonable strategic choices. "It is well established that the

decision as to which defense witnesses to call is a matter of trial strategy and tactics." Humphrey v. Nance, 293 Ga. 189, 220 (2013) (citation omitted). Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

. . . .

Petitioner claims that trial counsel's strategic decision to elicit testimony that Petitioner was antisocial and a psychopath was not reasonable because it "effectively provided evidence in aggravation rather than mitigation." Petitioner argues that trial counsel should have presented the testimony of a forensic social worker such as Mary McLaughlin instead to prevent the testimony that Petitioner is antisocial and/or a psychopath from being introduced. At the evidentiary hearing Petitioner presented Ms. McLaughlin, who testified that she completed an assessment of Petitioner during habeas proceedings. . . . This Court finds that the majority of Ms. McLaughlin's testimony is cumulative of the testimony presented at Petitioner's trial.

Furthermore, trial counsel's decision to elicit testimony from Petitioner's mental health experts that Petitioner was antisocial and a psychopath *before* the State's mental health experts presented those same conclusions to the jury during their rebuttal testimony was reasonable. Although [trial counsel] could not specifically recall why he questioned Dr. Shaffer about psychopathy, he stated "I'm sure there was a reason at that particular point in time, but maybe because of the fact that the State was going to argue that, so we wanted to try to get that out . . . and let the doctor explain that's not something that you wake up and decide you want to be." This demonstrates counsel's reasonable decision to "preempt any effort by the prosecution to prove the same thing." Morton v. Sec'y, Fla. Dep't of Corr., 654 F.3d 1157, 1169 (11th Cir. 2012) (citation omitted). This is "the sort of calculated risk that lies at the heart of an advocate's discretion." Yarborough v. Gentry, 540 U.S. 1, 9 (2003).

. . . .

Counsel knew that the State would present highly aggravating evidence of the victim's murder to the jury. Counsel was also aware that despite attempts to limit the introduction of similar transactions, the jury would learn about Petitioner's numerous attacks against women, in some instances through the testimony of the victims themselves. Additionally, despite vigorously challenging the introduction of Petitioner's recorded telephone calls from the prison, the trial court ruled during the State's presentation of aggravation at sentencing that the tapes would be admitted and played to the jury. In light of this aggravating evidence, counsel chose to present expert mental health witnesses to support counsel's argument that Petitioner's behavior was so uncontrollable that it must be involuntary and the result of brain damage, and attempt to counter the State's experts' testimony by presenting the worst of the diagnoses themselves.

Counsel's investigation had revealed a wealth of mitigating evidence. [Lead counsel] instructed the defense team to focus on documents and witnesses that would explain Petitioner's mental, alcohol, and sexual issues. However, in addition to the lay witness and fact witness testimony about Petitioner's social history and his history of physical, emotional, sexual, and substance abuse, counsel could have reasonably decided that the additional presentation of expert mental health evidence provided their client's best chance to avoid a death sentence. Different lawyers will evaluate these risks differently as "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland. 466 U.S. at 689.

. . . .

Counsel representing defendants convicted of capital murder, like counsel here, face difficult sentencing decisions. Here, trial counsel's strategy was to "explain how someone could do what [Petitioner] did[,]" which they thought could best be done through expert mental health

> testimony. Unfortunately, as is often the case with individuals who have committed crimes like those of Petitioner, this mental health evidence will almost certainly have aggravating components. However, counsel considered their options and felt that the testimony of mental health experts could be more mitigating than aggravating.
>
> When the record is viewed as a whole, trial counsel's decision to present expert mental health testimony, including evidence of antisocial personality disorder and psychopathy, was reasonable, and Petitioner has not demonstrated any deficient performance.

State HC Order [Doc. 28-21] at 59-64 (footnotes and citations to the court record omitted).

In response to Petitioner's contention that presenting evidence of psychopathy is deficient as a matter of law, the state court relied upon Morton where the Eleventh Circuit considered the very question presented here by Petitioner – whether counsel is deficient for presenting expert testimony that the defendant is a psychopath during the penalty phase of a capital trial:

> Morton argues that [his trial counsel] rendered deficient performance when they called [a mental health expert] to testify at the retrial of the penalty phase because antisocial personality disorder "is no more mitigating than being 'evil' is mitigating," but we disagree. Habeas petitioners routinely ask us to rule that they received ineffective assistance when their trial lawyers failed to present evidence of an antisocial personality disorder, so [trial counsel] chose a mitigation strategy that many postconviction lawyers contend can be effective. Although we have stated that evidence of antisocial personality disorder is "not 'good' mitigation," Reed [v. Sec'y, Fla. Dept. of Corr.], 593 F.3d

> [1217,] 1246 [(11th Cir. 2010)], we have never ruled that a capital defense lawyer renders ineffective assistance as a matter of law when he introduces evidence of antisocial personality disorder for mitigation purposes. And for good reason. In Eddings v. Oklahoma, the Supreme Court of the United States explained that "the Eighth and Fourteenth Amendments require that the sentencer . . . *not* be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (alteration and emphasis in original) (internal quotation marks omitted). And the Supreme Court ruled that a sentencing court violated the constitutional rights of the defendant by failing to consider expert testimony that the defendant had an "antisocial personality." Id. at 107-08.
>
> In the light of Eddings, there cannot be a *per se* rule that a lawyer renders ineffective assistance by presenting evidence of an antisocial personality disorder for purposes of mitigation. . . . That a diagnosis of antisocial personality disorder has negative characteristics or presents a double-edged sword renders it uniquely a matter of trial strategy that a defense lawyer may, or may not, decide to present as mitigating evidence.

Morton, 684 F.3d at 1167-68 (citations omitted).

In arguing that the state court order is not entitled to deference under § 2254(d), Petitioner first contends that the state court "misapprehended" his claim. Pet'r's Br. at 96. Petitioner's claim is that trial counsel was deficient in presenting evidence of Petitioner's mental health and in opening the door to the prosecution to present its own expert mental health testimony. This claim is premised on his

erroneous contention that evidence of antisocial personality disorder or psychopathy can never be mitigating.

Petitioner contends that the state court missed the mark by devoting "the bulk of its analysis to detailing the investigation undertaken by trial counsel and the mental health testimony presented by trial counsel at trial, as if to rebut a contention – never made – that each was wanting." Id. This Court disagrees with Petitioner's characterization of the state court's analysis. As the state court pointed out, the United States Supreme Court stated in Strickland that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. The state habeas corpus court, in its thorough review of trial counsel's investigation of mitigating evidence, established that the investigation was reasonable and that trial counsel's strategic decisions made based on that investigation were also reasonable.

Petitioner next argues that the state court opinion improperly requires a nexus between mitigation evidence and the offense. According to Petitioner, the state court's

> Order holds that if trial counsel had "foregone the expert testimony of Petitioner's mental health issues," Mr. Ledford's jury "would not have heard any plausible explanation for Petitioner's crimes, or for his deviant

> behavior . . . ." The Order concludes that "[w]ithout Dr. Morton's testimony about Petitioner's alcohol abuse, Dr. Morris' testimony about Petitioner's sexual abuse, and the testimony of Drs. Sachy and Shaffer about Petitioner's brain damage, the jury would have been left even more puzzled." The foundational error in this analysis is that mitigating evidence is not truly mitigating unless a line can be drawn between it and the crime. This contravenes Supreme Court precedent holding precisely to the contrary. Tennard v. Dretke, 524 U.S. 274, 287 (2004) (mitigating evidence need not have to have a nexus to the crime). It also fails to grapple with the deficiencies of the testimony claiming that Mr. Ledford suffered brain damage – which was suspect, unsupported by the medical records of the accident that supposedly caused Mr. Ledford's head injury, and flatly contradicted by the State's experts. Nor does it contend with the aggravating impact of Mr. Ledford's purported brain damage, which the defense experts testified would make him "more likely . . . to do bad things compared to normal people," Doc. No. 16-7 at 264, and to exhibit "impulsive, explosive behavior that violates the rights of other people without seeming to have much regard for those people," Doc. No. 16-8 at 102. In sum, there is no reasonable basis for finding no deficiency or no prejudice in trial counsel's presentation of mental health testimony that was unsupported by the evidence and affirmatively harmful.

Pet'r's. Br. at 98-99 (footnote and citations omitted).

Petitioner has again mischaracterized the state court order. Rather than requiring that there be a nexus between the mitigation evidence and the crime, the state court merely pointed out that the mental health evidence enabled trial counsel to argue to the jury that there were reasons behind Petitioner's crimes and his other deviant behavior and that those reasons were beyond Petitioner's control. Trial counsel testified at the state habeas corpus hearing that they realized that evidence

of Petitioner's antisocial personality disorder was "not really mitigating," indeed that it was "a pretty negative thing." State Habeas Corpus Hr'g Tr. [Doc. 20-38] at 163. Nevertheless, trial counsel made the strategic decision to present the evidence because it explained Petitioner's conduct and hopefully lessened his culpability in the opinion of the jury because Petitioner's mental disorder was not something that he chose to have. Id. at 163-64.

This Court further disagrees with Petitioner's argument that there was no support for the mental health experts' diagnosis of a head injury. The evidence presented at the trial was that in 1972 Petitioner fell from a tree that Petitioner's brother estimated was fifty feet high. Trial Tr. Vol. XXV [Doc. 16-6] at 168. When Petitioner landed, he was not moving and appeared unconscious. Id. at 169. Petitioner remained in the hospital for a month and, after the accident, Petitioner's behavior had changed. Id. at 173.

This Court acknowledges that Petitioner's medical records from the incident do not include a diagnosis of a head injury and that the prosecution argued that fact to the jury. However, those records reflect that Petitioner was given anti-seizure medication and was speaking incoherently for several days. As one of Petitioner's

experts testified, Petitioner "obviously suffered from some form of brain damage" as a result of the fall. Trial Tr. Vol. XXVI [Doc. 16-7] at 260-61.

Petitioner is simply wrong in contending that the state habeas corpus court applied the wrong prejudice standard under Strickland. See Pet'r's Br. at 100. The state court correctly identified the "reasonable probability" standard described in Strickland, State HC Order [Doc. 21-28] at 13, and then applied that standard in concluding that Petitioner had failed to demonstrate prejudice, id. at 14, 66, 68, 69.

Petitioner also contends that the Eleventh Circuit's opinion in Morton does not foreclose relief. As discussed above, the Eleventh Circuit held in Morton that there is no *per se* rule that evidence of an antisocial personality disorder is always aggravating and that Morton's trial counsel's decision to present such evidence was a matter of reasonable trial strategy. See Morton, 684 F.3d at 1167-68. Petitioner first argues that the United States Supreme Court's opinion in Buck v. Davis, 137 S. Ct. 759 (2017), which was issued after Morton, "underscored the damage cause [sic] by the introduction of aggravating evidence from the defendant's own counsel." Pet'r's Br. at 110. In Buck, the Court held that trial counsel was ineffective for eliciting testimony from an expert witness on future dangerousness that Buck's race (African-American) would make him more likely

to commit violent acts. Buck, 137 S. Ct. at 775. Petitioner contends that his antisocial personality disorder is an immutable characteristic akin to Buck's race and that his trial counsel was equally ineffective for presenting evidence of the disorder to the jury during his trial. However, the racial distinction in Buck – that African-Americans are more likely to be violent – is inherently suspect and clearly antagonistic to decades of constitutional jurisprudence. Evidence of Petitioner's mental state at the time he committed his crimes does not implicate similar concerns.

As to Petitioner's criticism of the Eleventh Circuit's analysis in Morton, including the Eleventh Circuit's reliance on the United States Supreme Court's opinion in Eddings v. Oklahoma for the proposition that "there cannot be a *per se* rule that a lawyer renders ineffective assistance by presenting evidence of an antisocial personality disorder for purposes of mitigation," Pet'r's Br. at 110-14, this Court is in no position to "overrule" a holding of the Eleventh Circuit. "The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision." Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997) (citation omitted).

Petitioner also distinguishes Morton by noting that Morton was challenging his trial counsel's presentation of evidence of his antisocial personality disorder at a resentencing hearing after the mental health expert had already testified about it during the original penalty phase of Morton's first trial. Pet'r's Br. at 115-16. Accordingly, Morton's prosecutors already knew about the diagnosis and would have brought it up regardless of whether Morton's trial counsel presented the evidence. While this *might* be a material distinction if the Eleventh Circuit had relied solely on that fact in denying relief, it is clear that the court also held more broadly that trial counsel can, as a matter of reasonable trial strategy, present evidence of their client's antisocial personalty disorder during the penalty phase of a capital trial without running afoul of Strickland.

This Court agrees with Petitioner that the Eleventh Circuit's holding in Morton does not entirely preclude relief. Pet'r's Br. at 116. Certainly there could be circumstances in which a trial counsel could be adjudged ineffective for presenting evidence of psychopathy or antisocial personality disorder during the penalty phase of the trial, but in this case this Court agrees with the state court that Petitioner's trial counsel was not constitutionally ineffective during the penalty phase of his trial. It is undisputed that trial counsel's investigation into Petitioner's

background was thorough. Based on that investigation and in light of the substantial aggravating evidence that trial counsel knew that the prosecution was planning to present to the jury, as well as the truly horrific circumstances of the murder that the jury already knew about, trial counsel reasonably determined that they needed to present evidence to the jury that might explain why Petitioner committed such horrible acts. They knew that the evidence was not necessarily good evidence, but they believed that it presented their best chance at securing a life sentence for Petitioner. Trial counsel made a reasonable strategic decision when presented with the nearly insurmountable task of evoking sympathy for their very unsympathetic client.

As the Eleventh Circuit noted in Morton, post conviction counsel routinely argue that such evidence can be effective mitigation. Morton, 684 F.3d at 1168. As a result, it cannot be said that no competent counsel would have presented such evidence, Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987), especially considering the circumstances at Petitioner's trial.

Although it is not necessary to the resolution of Petitioner's claim, this Court deems it worthwhile to briefly discuss the evidence Petitioner presented at the state habeas corpus hearing regarding Petitioner's background. In his Omnibus Brief,

Petitioner discusses this evidence at length. Pet'r's Br. at 81-93. Briefly describing the evidence, when Petitioner was a child, his family was poor, and moved frequently – so much so, that he attended at least ten different schools before he dropped out in the ninth grade. Most of Petitioner's family abused alcohol or other substances, Petitioner began drinking at age twelve, and Petitioner's parents tolerated and even enabled his alcohol consumption at a young age.

Members of Petitioner's family sexually molested Petitioner's siblings.[3] Petitioner's mother frequently struggled to provide adequate food for her children. On at least three occasions, Petitioner and his siblings were placed in foster homes for brief periods, once when Petitioner's mother had a nervous breakdown and on other occasions when Petitioner's mother could not afford to properly care for the children. Petitioner's mother and the various men in Petitioner's childhood life frequently beat Petitioner.

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[3] According to Petitioner, he related "incidents of sexual abuse" as a child, but that may be limited to his contention that his grandfather "would make him take naps with him in the nude." Pet'r's Br. at 82. Apparently, Petitioner engaged in acts of incest with his siblings, and Petitioner's sister was repeatedly raped for a period of years by her uncle.

This Court stresses however, that Petitioner does not assert that trial counsel missed this evidence. See Pet'r's Br. at 97. Indeed, as the state habeas corpus court found, the jury heard the evidence through the testimony of Petitioner's siblings and mental health experts. See State HC Order [Doc. 28-21] at 61 (finding that the evidence of Petitioner's background presented at the state habeas corpus hearing was "cumulative of the testimony presented at Petitioner's trial."). Rather, Petitioner discusses the evidence of his background in relation to his claim that trial counsel could have presented it without calling mental health experts and opening the door to testimony regarding Petitioner's psychopathy. Because this Court has already determined that trial counsel was not deficient in presenting the mental health expert testimony, Petitioner's argument is unpersuasive.

Accordingly, this Court concludes that Petitioner has failed to establish that he is entitled to relief with respect to his claim of ineffective assistance of counsel.

D. Petitioner's Claim of Juror Misconduct

Sometime after Petitioner's trial, H.R., a member of the jury that convicted and sentenced Petitioner, wrote about his experiences as a juror on what appears to be an internet discussion forum. A printed version of what H.R. said on that forum is an exhibit from the state habeas corpus proceeding. App. A to Pet'r's Resp. to

Resp't's Mot. to Quash Juror Subpoenas in Butts Cty. Superior Ct. [Doc. 20-34] at 8-12. It appears, but is impossible for this Court to know with certainty, that the exhibit contains only selected excerpts from the discussion. In the exhibit, there are comments from other participants in the forum, but whoever assembled the exhibit may have removed some of the comments from other participants. This Court further does not know whether all or only some of H.R.'s statements from the forum appear in the exhibit.

As best as this Court can determine, H.R. wrote the following comments that appear in the exhibit:

> OK . . . as I explained to my fellow jurors . . . we had two choices . . . either life In [sic] prison without parole, or death. Michael's attorneys admitted that he did the murder but that he should be sentenced to life in prison. That is what Michael wanted.
>
> Michael Ledford had spent about one half of his life in prison or jail . . . he knew how to play the system . . . he was an alcoholic and had admitted in written testimony that he could easily get alcohol and drugs while in prison.
>
> I told the jurors if sentenced to life in prison he'd be put in the general population and given the following:
> 3 meals a day
> TV
> Access to an exercise facility
> Access to a prison store
> Access to a library

> Access to a computer and internet access
> and several other things.
>
> He even admitted in a taped interview that he'd have no problem 'going gay'.
>
> It's a proven fact that many people who have been incarcerated for long periods actually prefer life in prison to life on the 'outside'. This may well be the case for Ledford.
>
> Ledford knew that he was facing either life in prison or death . . . after the trial the DA told us he had tried to plea bargain for life in prison but the DA wouldn't do it on behalf of the Ewing family.
>
> So I pointed out to the jury that by giving life in prison to Ledford we were giving him exactly what he wanted . . . and that I myself could not sleep soundly at night knowing that I had given a man convicted of malice murder the exact sentence he wanted and that the only just punishment was the death penalty.

Id. at 8-9 (ellipses[4] in original).

> In a later comment, H.R. wrote:
>
> One thing I will say that did bug me about the jury deliberations is that there were several Christians on the jury including a Deacon. They seemed to take it for granted that we were all Christians and pretty much demanded that we all participate in a prayer before we started either deliberations . . . I find that kind of offensive.

Id. at 10 (ellipses in original).

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[4] H.R.'s internet forum writing style employs ellipses as a form of punctuation.

Still later, in response to a question regarding whether he was able to gauge how the other jurors felt about the case, H.R. wrote:

> No, I didn't event try to gauge them . . . it's funny, the young guy and the woman who voted for life in prison were probably the two jurors I grew closest to during the trial . . . he's an EMT . . . very liberal . . . hated Bush, but we got along great . . . she's a school teacher at a Christian Academy, never found out about her politics, but for some reason we just hit it off; but I never did try to find out how they felt about the death penalty, I didn't know until they let us know they were the two who voted for life in prison.

Id. at 11 (ellipses in original). In response to a question regarding how much he had thought and read about the death penalty before or during the trial, H.R. wrote:

> Before the trial I had read articles that are both pro and anti-death penalty . . . I was prohibited from doing so during the trial . . . though as a juror who had the responsibility of either sentencing a man to life in prison or death, I gave it considerable thought and any prudent juror should.

Id. at 12 (ellipses in original).

According to Petitioner, these comments – in particular, H.R.'s comment that "the only just punishment was the death penalty" – demonstrate that (1) H.R. lied during *voir dire* when he said that he could consider all possible sentences, and (2) H.R. was not impartial. Pet'r's Br. at 123. Petitioner also seeks a hearing to further develop the evidentiary basis of this claim. Id. at 124. The state habeas corpus court concluded that this claim was procedurally defaulted under state law because

Petitioner had failed to raise it at trial or on appeal and he failed to demonstrate cause and prejudice to lift the procedural bar or a fundamental miscarriage of justice. State HC Order [Doc. 28-21] at 7-8.

Petitioner contends that his trial counsel's ineffectiveness in failing to discover H.R.'s forum post and raise the claim in his motion for a new trial constitutes cause. However, as Respondent points out, Petitioner's ineffectiveness of trial counsel claim is likewise procedurally defaulted because Petitioner failed to raise that claim in state court, and "a cause and prejudice argument which is not presented in state court is itself procedurally defaulted and cannot be raised for the first time on federal habeas (unless, of course, there is cause and prejudice for that particular default as well)." Fults v. GDCP Warden, 764 F.3d 1311, 1317-18 (11th Cir. 2014) (citations omitted).

Moreover, this Court concludes that, other than his conclusory allegation of ineffectiveness, Petitioner has failed to develop his claim that trial counsel was deficient for failing to raise a claim regarding Juror H.R.'s post-trial comments. In Henry v. Warden, Ga. Diagnostic Prison, 750 F.3d 1226, 1230-31 (11th Cir. 2014), the Eleventh Circuit held that, "[i]n the absence of evidence to suggest that anything improper took place, a failure to investigate and raise a claim of juror

misconduct does not fall 'outside the wide range of professionally competent assistance'" (quoting Strickland, 466 U.S. at 690). Petitioner has failed to point to anything that should have alerted trial counsel to the fact that a viable misconduct claim existed.

Finally, notwithstanding Petitioner's arguments to the contrary, H.R.'s internet forum posts do not indicate that H.R. engaged in misconduct. There is nothing in H.R.'s statements, quoted above, that indicate that he had any preconceived opinion prior to hearing the evidence that Petitioner should receive the death penalty. It is clear from the context of H.R.'s statements that he based his opinion that "that the only just punishment was the death penalty" on the evidence, specific to Petitioner, presented at the trial. H.R. also stated that he had considered the issue of whether the death penalty was a proper punishment and, "as a juror who had the responsibility of either sentencing a man to life in prison or death, I gave it considerable thought and any prudent juror should." As found by the state habeas corpus court, H.R.'s statements do not indicate that H.R. was not open to considering a life sentence prior to hearing the evidence. Ledford v. Chatman, No. 2012-v-907, Superior Ct. of Butts Cty., Ga. (March 11, 2014) [Doc. 20-37] at 3.

This Court thus concludes that there is no indication that misconduct occurred, and Petitioner cannot establish prejudice to excuse the procedural default of this claim.

As Petitioner has demonstrated neither cause nor prejudice to overcome the default of his claim, this Court further concludes that he is not entitled to an evidentiary hearing under the standard discussed above.

IV. CONCLUSION

For the foregoing reasons, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief. Accordingly, it is hereby **ORDERED** that the petition for a writ of habeas corpus [Doc. 1] is **DENIED WITH PREJUDICE**, with the exception of Petitioner's Claim 3, regarding Petitioner's challenge to Georgia's lethal injection protocols, which is **DENIED WITHOUT PREJUDICE**.

Pursuant to Rule 11 of the Rules Governing § 2254 Cases this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."

After review, the Court concludes that a Certificate of Appealability shall issue as to Petitioner's Claim 1 (regarding Petitioner's contention that trial counsel was ineffective for introducing evidence regarding Petitioner's antisocial personality disorder), Claim 4 (regarding Petitioner' claim that Juror H.R. engaged in misconduct), and Claim 12 (regarding Petitioner's claim that prosecutors violated his rights under J.E.B. v. Alabama in the exercise of peremptory strikes to exclude women).

IT IS SO ORDERED this 31st day of December, 2018.

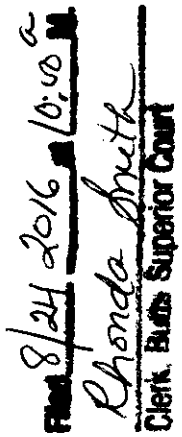
Mark H. Cohen

MARK H. COHEN
UNITED STATES DISTRICT JUDGE

APPENDIX 4

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

MICHAEL LEDFORD,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2012-V-907**
	*	
v.	*	**HABEAS CORPUS**
	*	
BRUCE CHATMAN, WARDEN,	*	
	*	
Georgia Diagnostic and Classification Prison,	*	
	*	
Respondent.	*	



FINAL ORDER

COMES NOW before the Court Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Paulding County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "amended petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter March 17-18, 2014, 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. As explained in detail in this Order, this Court DENIES the petition for writ of habeas corpus.

I. PROCEDURAL HISTORY

Petitioner, Michael Ledford, was convicted by a jury of malice murder, two counts of felony murder, three counts of aggravated battery, one count of aggravated sodomy, two counts of kidnapping with bodily injury, and one count of aggravated assault. On May 22, 2009,

Petitioner was sentenced to death for malice murder. The trial court also sentenced Petitioner to twenty years each for the three aggravated batteries; life without parole for the aggravated sodomy; life without parole for the first count of kidnapping with bodily injury; and twenty years for the aggravated assault, all to run consecutive to each other and the death sentence.[1] Petitioner's motion for new trial, as amended, was denied on May 25, 2010. The Georgia Supreme Court affirmed Petitioner's convictions and sentence of death on March 25, 2011.[2] Ledford v. State, 289 Ga. 70 (2011). His petition for writ of certiorari was denied by the United States Supreme Court on November 7, 2011. Ledford v. Georgia, 132 S. Ct. 556 (2011).

On October 9, 2012, Petitioner filed the above-styled habeas corpus petition, and an amended petition on December 2, 2013. An evidentiary hearing was held on March 17-18, 2014. The parties were given a subsequent briefing period and this Order follows review of all pleadings.

II. STATEMENT OF FACTS

The Georgia Supreme Court summarized the facts of Petitioner's crime as follows:

> [O]n July 25, 2006, Michael Ledford pretended to go to work but, instead, bought beer and drank it near the Silver Comet Trail, a recreational trail used for biking, running, and other activities. Ledford knocked Jennifer Ewing from her bicycle as she rode by his location. He dragged her a distance off the trail to a location shielded from view by vegetation. He stripped off all of her clothing from the waist down, and he pulled her shirt up part way, exposing her breasts. She suffered bruises throughout her body in the struggle. When Ledford forced his penis into her mouth, she bit his penis and severely wounded it. Enraged by her resistance, Ledford unleashed a shocking attack during which he stomped on her face and nose, her larynx, and her ribs. Ms. Ewing gradually succumbed to asphyxiation caused by her wounds and the resulting bleeding into her lungs.

[1] The felony murder convictions were vacated by operation of law. Malcolm v. State, 263 Ga. 369, 371-372 (4) (1993).

[2] The Georgia Supreme Court vacated the convictions and sentences on the three counts of aggravated battery because they were established by the same conduct as the murder convictions. Ledford, 289 Ga. at 71-74.

Ledford v. State, 289 Ga. 70, 71 (2011).

III. INITIAL MATTERS

As an initial matter, Petitioner, citing Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398-1399 (2011), claims in his Amended Petition that the time permitted by this Court was insufficient for Petitioner to investigate his substantive claims. Rule 44 of the Georgia Uniform Superior Court Rules ("USCR") applies "to all petitions seeking, for the first time, a writ of habeas corpus in state court proceedings for those cases in which the petitioner has received a sentence of death." USCR 44.1 (citing O.C.G.A. § 9-14-47.1). USCR 44.7 provides that "[n]o later than 120 days after the filing of the petition, the petitioner may amend the petition, and if discovery is allowed pursuant to O.C.G.A. § 9-14-48 it shall be completed." The Georgia Supreme Court has "urge[d] the habeas courts to make every reasonable effort in death penalty cases to adhere to the time limitations imposed under Uniform Superior Court Rule 44." Humphrey v. Morrow, 289 Ga. 864, 864 n.1 (2011).

Nonetheless, in an exercise of its discretion, the Court provided Petitioner with over twice the amount of time contemplated by the Rule to conduct discovery and to file an amended habeas petition.[3] The Court finds that Petitioner was provided "a reasonably adequate opportunity to present [his] claimed violations of fundamental constitutional rights to the courts." Gibson v. Turpin, 270 Ga. 855, 858 (1999) (quoting Lewis v. Casey, 518 U.S. 343, 351 (1996) (internal quotation omitted)). Accordingly, Petitioner's claim that he was not provided sufficient time to complete the investigation of his claims is DENIED.

IV. SUMMARY OF FINDINGS

[3] Petitioner's discovery period was extended for good cause shown including the appearance of new counsel on Petitioner's case. Additionally, the Court notes that Respondent requested, and received, extensions of their discovery period for scheduling conflicts and inclement weather.

Petitioner's Amended Petition enumerates fourteen (14) claims for relief. As stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are non-cognizable; and, (4) some claims are neither procedurally barred nor procedurally defaulted and are therefore, properly before this Court for habeas review. To the extent Petitioner failed to brief his claims for relief, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are DENIED.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE *RES JUDICATA*

The Court finds that the following claims are not reviewable based on the doctrine of *res judicata*, as the claims were raised and litigated adversely to Petitioner in his direct appeal to the Georgia Supreme Court. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. Elrod v. Ault, 231 Ga. 750 (1974); Gunter v Hickman, 256 Ga. 315 (1986); Hance v. Kemp, 258 Ga. 649(6) (1988); Roulain v. Martin, 266 Ga. 353 (1996). Specifically, the Court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in Ledford v. State, 289 Ga. 70 (2011):

> That **portion of Claim II**, wherein Petitioner alleges that the prosecution made improper and prejudicial remarks during its argument at the guilt-innocence and sentencing phases of the trial. Ledford, 289 Ga. at 85-88(15)(16)(17) and (22);[4]

[4] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in excusing unspecified potential jurors for improper reasons. Ledford, 289 Ga. at 76-77(6);[5]

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in restricting voir dire relating to several unspecified areas of inquiry. Ledford, 289 Ga. at 81-82(9);[6]

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in admitting various items of unspecified prejudicial, unreliable, unsubstantiated and irrelevant evidence tendered or elicited by the State at either phase of the trial. Ledford, 289 Ga. at 83-84, 87(12)(20) and (21);[7]

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in admitting prejudicial and irrelevant photographs into evidence. Ledford, 289 Ga. at 87(20);[8]

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in refusing to strike unspecified prospective jurors who were unqualified for reasons including but not limited to bias against the defense. Ledford, 289 Ga. at 75-81(5)(7) and (8);[9]

That **portion of Claim V**, wherein Petitioner alleges that the trial court erred in allowing the State to make improper and prejudicial arguments. Ledford, 289 Ga. at 85-88(15)(16)(17) and (22);[10]

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[5] To the extent this claim refers to jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[6] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[7] To the extent this claim refers to evidence not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[8] To the extent this claim refers to photographs not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[9] To the extent this claim refers to jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[10] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

That **portion of Claim V**, wherein Petitioner alleges that the trial court improperly restricted the scope of voir dire. Ledford, 289 Ga. at 81-82(9);[11]

Claim VI, that the proportionality review performed by the Georgia Supreme Court is unconstitutional. Ledford, 289 Ga. at 75(3)(d);[12]

That **portion of Claim VII**, wherein Petitioner alleges that the Georgia statutory death penalty procedures do not result in the fair and non-discriminatory imposition of death sentences. Ledford, 289 Ga. at 75(3);

That **portion of Claim VII**, wherein Petitioner alleges that his death sentence was imposed arbitrarily, capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia. Ledford, 289 Ga. at 88(23);

That **portion of Claim VII**, wherein Petitioner alleges that his death sentence is disproportionate. Ledford, 289 Ga. at 90-91(25);

That **portion of Claim VIII**, wherein Petitioner alleges that the evidence does not support the jury's final determinations as to conviction and sentence. Ledford, 289 Ga. at 71, 89-90; and

That **portion of Claim XXII**[13], wherein Petitioner alleges that the trial court erred in permitting the prosecution to introduce substantial inflammatory and prejudicial victim impact testimony. Ledford, 289 Ga. at 87(20).[14]

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

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[11] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

[12] In his post-hearing brief, Petitioner argues that by examining only those cases in which a death sentence was imposed, the Georgia Supreme Court's proportionality review does not satisfy the requirements set forth in O.C.G.A. § 17-10-35(e). (Petitioner's post-hearing brief p 89). Petitioner also argues that the Georgia Supreme Court failed to adequately explain why his death sentence was proportionate to the other crimes and defendants that it compared. Id. at 90. To the extent that these claims were not squarely rejected on their merits by the Georgia Supreme Court, Petitioner has not argued cause and prejudice to permit their consideration. Accordingly, these claims are denied.

[13] The Court notes that this claim is numbered Claim XXII in Petitioner's Amended Petition; however, Petitioner only has fourteen claims in his petition.

[14] To the extent this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4) (1988); White v. Kelso, 261 Ga. 32 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. See Earp v. Angel, 257 Ga. 333, 357 S.E.2d 596 (1987). See also Turpin v. Todd, 268 Ga. 820, 493 S.E.2d 900 (1997)(a procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleges error or errors. A habeas petitioner who meets both prongs of the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

This Court concludes that the following claims, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted. This Court is barred from considering any of these claims on their merits due to the fact that Petitioner has failed to demonstrate cause and prejudice, or a fundamental miscarriage of justice sufficient to excuse his failure to raise these grounds:

> That **portion of Claim II**, wherein Petitioner alleges misconduct by the prosecution and other state agents in that:
>
> a) the jury bailiffs and/or sheriff's deputies and/or other State agents who interacted with jurors engaged in improper communications with the jurors;
>
> b) the State suppressed unspecified, favorable information from the defense at both phases of trial;

c) the State took advantage of Petitioner's ignorance of undisclosed favorable information by arguing to the jury that which it knew or should have known was false and/or misleading;

d) the State allowed its witnesses to convey a false impression to the jury; and

e) the State knowingly or negligently presented false testimony in pretrial and trial proceedings;

That **portion of Claim II**, wherein Petitioner alleges trial court error in that the trial court attempted to cure improper prosecutorial comments but failed to cure error and actually exacerbated it by drawing the jury's attention to the improper comments, and failed to correct these errors on its own motion;

That **portion of Claim III**, wherein Petitioner alleges State misconduct in that the State was implicated in or aware of any jury misconduct, and acted or failed to act;

That **portion of Claim III**, wherein Petitioner alleges trial court error in that the trial court was implicated in or aware of any jury misconduct, and failed to advise Petitioner or correct the misconduct;

That **portion of Claim III**, wherein Petitioner alleges that the jurors engaged in misconduct, including:

a) improper consideration of matters extraneous to trial;

b) improper racial attitudes which infected their deliberations;

c) false or misleading responses on voir dire;

d) improper biases which infected their deliberations;

e) improper exposure to prejudicial opinions of third parties;

f) improper communications with third parties;

g) improper communications with jury bailiffs;

h) improper *ex parte* communications with the trial judge; and

i) improper prejudgment of the guilt-innocence and penalty phases of Petitioner's trial;

That **portion of Claim V**, wherein Petitioner alleges trial court error, in that the trial court:

a) failed to inquire into the possibility of juror misconduct and remedy such misconduct;

b) refused to give proper jury instructions;

c) failed to curtail the improper and prejudicial arguments by the State;

d) allowed irrelevant and prejudicial testimony from State witnesses;

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

f) declined to administer adequate curative instructions;

g) admitted privileged material into evidence;

h) excluded relevant and material evidence as hearsay;

i) allowed the State to present false and misleading testimony;

j) injected comments during witness testimony;

k) relied on misunderstandings of the law in its rulings, report and findings;

l) allowed the State to present prejudicial and irrelevant live testimony;

m) gave the jury erroneous and misleading instructions;

n) permitted the jurors to interact with alternate jurors during deliberations;

o) failed to declare a mistrial when the jury was deadlocked;

p) allowed the prosecution to introduce improper, unreliable, and irrelevant evidence which had been concealed from the defense or for which the defense had not been provided adequate notice;

That **portion of Claim VIII**, wherein Petitioner alleges that under any sub-set of all of his claims, Petitioner was deprived of a fundamentally fair trial, motion for new trial, or direct appeal, and the verdicts must be set aside because they were reached unconstitutionally;

That **portion of Claim VIII**, wherein Petitioner alleges that that the habeas court is required by O.C.G.A. § 17-10-35(b), as well as under a State and federal constitutional duty to review the entire record for error;

Claim IX, that the Unified Appeal Procedure is unconstitutional;

Claim X, that the death qualification process is unconstitutional;

That **portion of Claim XI**, wherein Petitioner alleges that the trial court erred in admitting gruesome and prejudicial photographs of the crime scene and the victim;

That **portion of Claim XI**, wherein Petitioner alleges that the prosecution's introduction of gruesome and prejudicial photographs was improper;

That **portion of Claim XXII**[15], wherein Petitioner alleges that the prosecution's reliance upon victim impact testimony was improper and affected the outcome of all stages of the proceedings; and

Claim XIII, that the trial court's guilt phase instructions to the jury were erroneous, insufficient, and confusing, and that the trial court's instruction regarding intent allowed the jurors to resolve facts through presumptions and inferences.

C. CLAIMS THAT ARE NON-COGNIZABLE

This Court finds the following claims raised by Petitioner fail to allege grounds which would constitute a constitutional violation in the proceedings that resulted in Petitioner's convictions and sentences, and are therefore barred from review by this Court as non-cognizable under O.C.G.A. § 9-14-42(a).

Claim IV, wherein Petitioner alleges that lethal injection is cruel and unusual punishment, in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § 1, ¶¶ 1, 2, and 17 of the Georgia Constitution; and

Claim VIII, wherein Petitioner alleges cumulative error.[16]

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[15] The Court notes that this claim is numbered Claim XXII in Petitioner's Amended Petition; however, Petitioner only has fourteen claims in his petition.

[16] Alternatively, this claim is without merit as there is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga. 69, 70 (2000). However, the Court has considered the combined effects of trial counsel's alleged errors in evaluating Petitioner's claims of ineffective assistance of counsel. Schofield v. Holsey, 281 Ga. 809, 812 (2007).

Lethal Injection Claim

In **Claim IV** of his amended petition, Petitioner alleges that lethal injection, both on its face and as carried out in Georgia, is cruel and unusual punishment. The Georgia Supreme Court recently addressed whether this claim was properly brought in a habeas action, holding:

> A habeas petition may only allege constitutional defects in a conviction or sentence itself, not defects in the manner in which a sentence is carried out by various state officers. See OCGA § 9-14-42 (a) ("Any person imprisoned by virtue of a sentence imposed by a state court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of this state may institute a proceeding under this article [governing habeas petitions]."). Accordingly, we hold that challenges to the choice of drug or drugs to be used to carry out death sentences, which choice again is the responsibility of the Department of Corrections, along with related claims concerning the manner in which such drugs are procured and how information about the procurement process is managed, should be raised against the state officers responsible for such matters in the superior court where venue is appropriate for suit against them, rather than in a habeas court. See Hill v. McDonough, 547 U. S. 573, 580 (II) (126 SCt 2096, 165 LE2d 44) (2006) (holding that federal lethal injection claims should be brought in a civil rights action rather than as a habeas claim).

Owens v. Hill, 295 Ga. 302, 306 (2014).

Accordingly, Petitioner's claim challenging the constitutionality of his execution by lethal injection should be brought in an action against the state officers responsible for such matters in a superior court where venue is appropriate, and not in a habeas corpus action.

D. CLAIMS THAT ARE PROPERLY BEFORE THIS COURT FOR REVIEW

1. Ineffective Assistance of Counsel

Petitioner alleges in **Claim I**, various other claims, and in various footnotes to claims, that he received ineffective assistance of counsel at the sentencing phase of his trial, at his motion for new trial, and on appeal.[17] Petitioner was represented at trial and on direct appeal by Jimmy Berry and Thomas West. Therefore, Petitioner's allegations of ineffective assistance of

[17] Petitioner failed to brief or present evidence of his claims of ineffective assistance of counsel on motion for new trial or direct appeal. Accordingly, these claims are denied.

trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal, nor procedurally defaulted, are properly before this Court for review on their merits. Additionally, Petitioner's allegations of ineffective assistance of appellate counsel are properly before this Court for review on their merits.

Standard of Review

In Strickland v. Washington, the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

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

466 U.S. 668, 687 (1984). See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming Strickland as governing ineffective assistance of counsel claims). The Strickland standard, which requires that a petitioner satisfy both the performance and prejudice prongs to demonstrate ineffectiveness, was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783 (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 of counsel claims.

As to the first prong, Petitioner must show that counsel's representation "fell below an objective standard of reasonableness," which is defined in terms of "prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing Strickland, 466 U.S. at 688). In

Strickland, the Court established a deferential standard of review for judging ineffective assistance claims by directing that "judicial scrutiny of counsel's performance must be highly deferential....[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

The prejudice prong requires that Petitioner establish that the outcome of the proceedings would have been different, but for counsel's errors. Smith v. Francis, 253 Ga. 782, 783. The Georgia Supreme Court has relied on the Strickland test for establishing actual prejudice which requires Petitioner to "demonstrate that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith, 253 Ga. at 783. See also Head v. Carr, 273 Ga. 613, 616 (2001). With particular regard to death sentences, "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 782, 783-784. See also Sears v. Humphrey, 294 Ga. 117, 131 (2013) (explaining in determining Strickland prejudice in a case challenging a death sentence, "this Court must consider the totality of the available mitigating evidence in reweighing it against the evidence in aggravation, while being mindful that a verdict or conclusion with overwhelming record support is less likely to have been affected by errors than one that is only weakly supported by the record").

As explained in detail below, this Court has applied the guiding principles set forth in Strickland and its progeny, as adopted by the Georgia Supreme Court, and finds that Petitioner

failed to establish that trial 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.

Qualifications of the Defense Team

In reviewing claims of ineffective assistance of counsel, the United States Supreme Court has held that "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." Strickland, 466 U.S. at 681. The presumption that trial counsel rendered adequate assistance is therefore, "even greater" when trial counsel are experienced criminal defense attorneys. Williams v. Head, 185 F.3d 1223, 1228-1229 (11th Cir. 1999) (citing Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998)).

Petitioner was represented at trial by Thomas West and Jimmy Berry. Both attorneys had over thirty years of experience at the time of Petitioner's trial. (HT 1:122; 2:216; 12:2937, 3017)[18]. Additionally, Mr. West and Mr. Berry both possessed extensive experience trying death penalty cases. At the time he represented Petitioner, Mr. West had handled approximately twenty capital cases, of which six had proceeded to trial. (HT 1:123-124; 12:2938-2939). At

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[18] The following abbreviations are used in citations throughout this order:

Pretrial Hearing –([date] T [page])
Record on Direct Appeal –(R [page])
Trial Transcript –(T[page])
Habeas Corpus Transcript –(HT [volume]:[page])
Petitioner's Post-Hearing Brief –(PHB [page])
Petitioner's exhibits in the habeas hearing –(PX [exhibit number], HT [habeas transcript volume number]:[habeas transcript page number]); and
Respondent's exhibits in the habeas hearing –(RX [exhibit number], HT [habeas transcript volume number]:[habeas transcript page number])

least half of Mr. Berry's fifty death penalty cases proceeded to trial. (HT 2:217). Both attorneys also attended death penalty seminars and taught seminars for other attorneys representing capital defendants. (HT 1:124-125; 2:219; 12:3020-3021). This Court finds trial counsel were experienced criminal defense attorneys and has given their investigation and presentation the appropriate deference.

Reasonable Investigation

In **Claim I** of his Amended Petition, Petitioner alleges that the pre-trial investigation conducted by his trial counsel was deficient. An attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and what investigations are reasonable "may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 466 U.S. at 691. As explained below, this Court finds trial counsel conducted a reasonable and competent investigation of Petitioner's case.[19]

Mr. West served as lead counsel on Petitioner's case although there was no formal delineation of responsibilities between trial counsel. (HT 1:126-127; 2:219; 12:2948, 3020). Mr. West testified that he asked Mr. Berry to serve as second chair due to Mr. Berry's experience both as a criminal defense attorney and in Paulding County specifically. (HT 1:126). Trial counsel maintained a good working relationship and worked well together. (HT 1:126; 2:219; 12:2948, 3023).

Trial counsel began their mitigation investigation almost immediately after their appointment to Petitioner's case. (HT 2:242). Both Mr. West and Mr. Berry met with Petitioner numerous times and discussed his background, family, and social history with him. (HT 1:128-

[19] Although Petitioner's brief focuses on trial counsel's presentation during the sentencing phase of trial, the Court has also considered the pre-trial investigation conducted by trial counsel in evaluating their strategy and performance at trial.

129, 132; 2:221; RX 13, HT 12:2950-2951). Trial counsel spoke with Petitioner about his current case, including the State's evidence against him. (HT 1:129; 2:226-227, 234; RX 14, HT 3026). Additionally, trial counsel discussed the crimes that the State intended to introduce as similar transactions with Petitioner. (HT 2:223-224; RX 14, HT:3026-3029).

Petitioner was cooperative and respectful, though reluctant to involve his family. (HT 1:134-135; RX 13, HT 12:2951). Petitioner provided the names of witnesses, many of which trial counsel interviewed, including Petitioner's family members. (HT 2:222; RX 13, HT 12:2953-2955, 2959-2960). Discussions with Petitioner and his family revealed Petitioner's mental health history; and physical, sexual, drug, and alcohol abuse within the Ledford family. (HT 2:233-234, 254-256).

A. Investigators

In addition to the investigation conducted by trial counsel, experienced private investigators, David Basham and Debra Mulder, were retained to assist with the investigation.[20] (HT 2:237; RX 13, HT 12:2957; RX 24, HT 17: 4772-75; RX 116, 67:17340-83). Mr. Basham and Ms. Mulder investigated Petitioner's background, family, and upbringing; as well as his medical, mental health, drug, and alcohol abuse history. (RX 116, HT 67:17340-17383; RX 134, HT 71-72:18156-18707). The investigators located and interviewed witnesses, obtained records, and organized the information collected by the defense team. (HT, 71:18228, 18232, 18276-18277, 18303). The record shows that Mr. Basham and Ms. Mulder maintained consistent contact with trial counsel and Petitioner throughout their investigation. (HT 70:18136-18154; 71:18156-18412; 72:18413-18707).

[20] The record shows that Mr. Basham and Ms. Mulder were also assisted by Andy Dillon, a mitigation investigator. (RX 204, HT 119:29105-29107).

Additionally, Sandra Michaels, an experienced criminal defense attorney, assisted counsel as a mitigation investigator. Ms. Michaels graduated from Georgia State University School of Law in 1987. (RX 204, HT 119:29097; T 26:68338). Subsequently, Ms. Michaels was employed for several years at the Federal Defender Program, Inc. where she practiced criminal defense. (T 26:6837-38; RX 204, HT 119:29098-29100). At the time of Petitioner's trial, Ms. Michaels had been practicing criminal defense for twenty-two years. (T 26:6837-6838).

Ms. Michaels testified during habeas proceedings that she was hired by trial counsel to locate and interview witnesses who knew Petitioner, to meet with Petitioner and develop a relationship with him and his family, and to obtain documents. (RX 204, HT 119:29104). The record shows that trial counsel introduced Ms. Michaels to Petitioner and instructed him to discuss his case with her. (RX 138, HT 73:18841). Ms. Michaels understood that her role was to:

> [G]ather everything I think I can find, everything I can get my hands on or can think about, and present to the defense team as things that might be possible to use as an explanation for the client's behavior or the criminal behavior they have now been convicted of.

(T 26:6849).

Ms. Michaels attempted "to interview as many people as possible[,]" (T 26:6841), for information regarding "mental health, alcohol, poverty, abuse, what it was like growing up, ... any family members that may have information about the client." (RX 204, HT 119:29151). The record shows that she interviewed Petitioner, his friends, family, and former employers; and, spoke with them about Petitioner's upbringing, medical, and mental health history, and his family's history with drugs, alcohol, physical, and sexual abuse. (RX 188, HT 102:25427-25456, 25485-25487; RX 188, HT 103:25499-25528, 25568-25574, 25591-25603, 25612-25704; RX

188, HT 104:25707-25824, 25839-25892; RX 188, HT 105:25895-26038; RX 204, HT 119:29151-29153, 29160-29161). However, Petitioner's family members were uncooperative. (RX 204, HT 119:29150, 29171-29172). The Ledford family was "extremely leery" of people coming to their home due to the attention Petitioner's case received, and they avoided the defense team because of media coverage. (RX 204, HT 119:29150, 29171).

Additionally, Ms. Michaels created a timeline of Petitioner's life, constructed a genogram[21] regarding mental, physical, and substance abuse issues within Petitioner's family, and summarized witness interviews for counsel. (RX 144, HT 74:19099-19238; RX 188, HT 104:25840-25875). She also worked closely with the mental health experts retained by trial counsel. (RX 25, HT 18:5065, 5069-5073; RX 188, HT 104:25713-25716, 25883-25887; RX 188, HT 105:26039-26079). Furthermore, Ms. Michaels discussed Petitioner's case with several prominent death penalty attorneys. (RX 134, HT 71:18204; RX 204, HT 119:29114).

B. Mental Health Experts

During their investigation, trial counsel discovered an incident in which Petitioner fell from the top of a tree at the age of nine and suffered brain damage. (HT 1:153). Based on the information revealed during their investigation, trial counsel's primary mitigation theory was that brain damage resulting from that incident explained his diminished frontal lobe capacity and inability to control his impulses. (HT 1:153). Mr. Berry testified that counsel attempted:

> [T]o bring in as many people as we could that fit in to what we thought the mental issues would be. I think with a jury and that kind of situation, if you've got a number of experts, then hopefully the jury starts thinking, well, they're just not throwing stuff up here, that there's actually something to his mental health problems.

[21] Genogram: "[A] multi-generational chart of Defendant's family, including comments about features of various family members which she deemed to be important." United States v. Battle, 264 F. Supp. 2d 1088, 1139 (N.D.Ga. 2003); see also "biopsychosocial" assessment: "a 'method of collecting extensive information on an individual and/or his family. Typically [the report] covers at least three or four generations' of a family." LeCroy v. United States, 739 F.3d 1297, 1309, n.10 (11th Cir. 2014) (alteration in original).

(RX 14, HT 12:3054). Trial counsel consulted, and ultimately hired, Drs. Thomas Sachy, Robert Shaffer, Larry Morris, and William Morton to assist with the development and presentation of their mitigation theory.

Counsel provided their mental health experts with numerous records relating to Petitioner and his family. (HT 1:173-174; 2:249; RX 17; RX 18; RX 119, HT 68:17498-17507, 17510-17514, 17537-17538, 17572, 17590; RX 120, HT 68:17619-17625, 17629-17630, 17632-17634, 17642, 17645, 17627, 17666-17670, 17677; RX 121, HT 68:17692-17704, 17706-17707, 17711, 17723, 17725, 17734, 17737, 17813). The record shows that the mental health experts reviewed the voluminous documents provided by trial counsel. (RX 119, HT 68:17575-17576; RX 120, HT 68:17666-17670; RX 121, HT 68:17721, 17736l). Counsel also arranged for interviews with Petitioner's family members as requested by the experts. (RX 120, HT 68:17641, 17654; RX 121, HT 68:17733).

i. <u>Dr. Thomas Sachy</u>

Trial counsel retained Dr. Thomas Sachy, a forensic psychiatrist, to assist with their defense of Petitioner's case. (RX 9, HT 11:2844, 2846; RX 13, HT 12:2969; RX 14, HT 12:3049). Counsel requested Dr. Sachy perform a neuropsychiatric forensic evaluation of Petitioner to ascertain whether there were any neurological or psychological conditions that might explain his behavior. (RX 9, HT 11:2846). Dr. Sachy interviewed Petitioner about the crime, his development, psychiatric and neurological history, medical history, use of alcohol, sexual abuse, and history of hepatitis C. (RX 9, HT 11:2850-2852; RX 19). Additionally, Dr. Sachy performed a Folstein Mini Mental Status Examination (MMSE) and a physical examination of Petitioner; and reviewed the report of a radiologist who conducted a brain MRI on Petitioner. (RX 9, HT 11:2850-2852, 2854-2855; RX 19; RX 119, HT 68:17515-17516).

ii. Dr. Robert Shaffer

Trial counsel also retained Dr. Robert Shaffer, a forensic psychologist specializing in neuropsychology. (HT 1:168; RX 12, HT 11:2908). Dr. Shaffer, who had been presented as an expert in death penalty cases since 1992, had worked with trial counsel prior to Petitioner's case. (HT 2:243; RX 12, HT 11:2908-2909). Counsel asked Dr. Shaffer to perform a psychological evaluation of Petitioner's mental condition at the time of the crime. (RX 12, HT 11:2909). Trial counsel anticipated Dr. Shaffer's findings would bolster their sentencing phase theory that Petitioner's brain damage caused him to commit the crime. (RX 13, HT 12:2970).

Dr. Shaffer performed a clinical interview with Petitioner, and questioned him regarding various symptoms in his history and his mental state at the time of the incident. (RX 12, HT 11:2910-2911, 2915). Dr. Shaffer discussed his findings with counsel, specifically the "test results showing frontal lobe injury of a specific type that relates to aggression and appreciation for the consequences of actions and things pertaining to the impact of brain functioning on one's conscience." (RX 12, HT 11:2917-2918).

iii. Dr. Larry Morris

Dr. Larry Morris, a clinical psychologist with extensive experience as an expert in several death penalty cases, was also retained by trial counsel. (RX 11, HT 11:2885-2886). Counsel asked Dr. Morris to evaluate the possibility of child sexual abuse and any impact that may have had on Petitioner. (RX 11, HT 11:2888). Dr. Morris interviewed Petitioner, his mother, his stepfather, his brothers Billy and Donald, and his sister. (RX 11, HT 11:2889; RX 14, HT 12:3250-3270; RX 120, HT 68:17654; T 27:7129-7130). The primary theme during these interviews was Petitioner's childhood experiences. (RX 11, HT 11:2890). Dr. Morris inquired "about all kinds of experiences, including abusive experiences," such as sexual, verbal,

emotional, drug, and alcohol abuse. (RX 11, HT 11:2890-2891). Dr. Morris also spoke with Petitioner about the events on the day of the crime. (RX 11, HT 11:2893-2895). Dr. Morris reviewed his findings and discussed his testimony with counsel before trial. (RX 11, HT 11:2898-2899).

iv. Dr. William Morton

Additionally, because there was evidence that Petitioner was intoxicated on the day of the crime, counsel retained Dr. William Morton, a psychopharmacologist and expert on the effects of alcohol. (RX 10, HT 11:2865, 2867-68; RX 13, HT 12:2971-2972). Both Mr. West and Mr. Berry had previously worked with Dr. Morton, who had testified in approximately sixty death penalty trials. (RX 10, HT 11:2865; RX 13, HT 12:2964; RX 14, HT 12:3052). Counsel requested Dr. Morton review Petitioner's records and meet with Petitioner to determine whether alcohol was an issue in the crime. (RX 10, HT 11:2868). Trial counsel also advised Dr. Morton to be able to discuss aspects of alcoholism to educate the jury at sentencing. (RX 10, HT 11:2868).

Trial counsel provided Dr. Morton with "a tremendous amount of information regarding [Petitioner's] past, as well as present history." (RX 10, HT 11:2870). In addition to the materials provided by trial counsel, Dr. Morton requested and received additional information from Ms. Michaels regarding Petitioner's family, Petitioner's medical treatment, and the evaluations conducted by the other experts. (RX 10, HT 11:2869). Dr. Morton reviewed Petitioner's complete substance history and spoke with Petitioner about:

> [H]is whole substance use history, his treatment history, his family history, specifically around alcohol, and then any other substances that he may have taken, and specifically ... his alcohol or drug use during the week of the crime, and specifically ... any substances used the day of the crime.

(RX 10, HT 11:2871). Dr. Morton also discussed his findings and trial testimony with Petitioner's defense team. (RX 10, HT 11:2874-2875).

Reasonable Strategy

Trial counsel's strategy for the guilt-innocence phase of Petitioner's trial was to "front load" their mitigation evidence. (HT 2:236). As Mr. West testified during habeas proceedings, "there was a lot of evidence that [Petitioner] did commit the crime, and I didn't think that we'd be successful in prevailing on a not guilty verdict." (HT 1:142). Mr. West explained that "it was a real difficult guilt innocence defense," because the State "had eyewitnesses – they had the previous woman who was attacked by him under identical circumstances. They had his blood, her blood, the victim's blood on him; the fact that his penis had been bitten. It was difficult to refute that." (RX 13, HT 12:2957). In order to minimize the impact of the similar transactions, trial counsel intended to show that Petitioner was cooperative, was not violent, and was intoxicated at the time of the previous crimes.[22] (HT 2:226, 236-237).

Trial counsel's primary sentencing phase strategy was to show the jury that Petitioner had voluntary and involuntary brain damage, which diminished his frontal lobe capacity and prevented him from controlling his impulses. (HT 1:153-154). Additionally, trial counsel intended to use their expert witnesses to show that Petitioner had "psychiatric issues, based a lot on his upbringing and also his drug and alcohol abuse." (HT 2:241). Trial counsel also planned to have Petitioner's family members testify at sentencing to let the jury "know that there are people out there that are going to miss [Petitioner], that care about [Petitioner], that will be there for [Petitioner]." (RX 14, HT 12:3055).

[22] Counsel considered but ultimately rejected presenting Petitioner's voluntary intoxication as a guilt-innocence phase defense. (HT 1:141; RX 134, HT 71:18169, 18279).

This Court finds that trial counsel formulated a reasonable strategy after completing their investigation and, as explained in detail below, presented evidence consistent with this theory at Petitioner's trial.

Guilt-Innocence Phase Presentation

As previously discussed, trial counsel's guilt-innocence phase strategy involved the presentation of mitigation as the evidence of Petitioner's guilt was overwhelming. Trial counsel also attempted to build their own credibility with the jury from the beginning of the trial. When the district attorney addressed Petitioner's rape of RC and attack of VP during the State's opening argument, counsel interrupted to request that the trial court read the charge regarding the purpose of similar transaction evidence, which the trial court subsequently read to the jury. (T 18:4728-4730). Additionally, in the defense's own opening argument, Mr. West informed the jury about numerous crimes that counsel kept the State from mentioning in its opening statement:

> [Petitioner]'s been in trouble pretty much all of his life. He has been in prison or jail probably half of his life. He's 47 now. He's been convicted of crimes beginning as a juvenile up until this case.
>
> And I want you to know that there'll be evidence that he has been convicted of armed robbery down in Florida, criminal damage to property in Florida, this is back in the '80's, probation violation in Florida, larceny up in Gratiot County, Michigan, felonious assault up in Michigan, a DUI here in Marietta, a DUI in Cobb County, aggravated battery, a burglary in Cobb County, felon[] in possession of a firearm in Dallas, possession of stolen property, breaking and entering an unoccupied building, and you heard about the rape conviction here in Paulding County.

(T 18:4735-4736).

The State presented evidence that on the morning of the crime, Petitioner told his family he was going to work, but instead he purchased beer and consumed it near the Silver Comet Trail; knocked the victim from her bicycle and dragged her off the trail into the woods; stripped her from her waist down and pulled her shirt to expose her breasts; forced his penis into the

victim's mouth; and then beat her to death by stomping on her face, neck, and chest. Ledford, 289 Ga. at 71.

The similar transaction evidence during the guilt-innocence phase showed that Petitioner raped RC in Paulding County in 1991 and attempted to attack a woman, VP, who was riding her bicycle on the Silver Comet Trail prior to the victim's murder. See Ledford, 289 Ga. at 83-84. Mr. West recalled the powerful testimony of RC, who cried and pointed from the stand at Petitioner during her testimony to identify Petitioner as the man who raped her. (HT 1:149-150). As the Georgia Supreme Court noted, the lapse in time between Petitioner's rape of RC and the victim's murder did not erode the relevance of RC's rape during the guilt phase, "especially because that lapse is explained by Ledford's ten-year incarceration for the rape." Ledford, 289 Ga. at 83.

In their closing argument, Mr. Berry challenged the State's case, pointing out omissions that had been made during the investigation, including the State's failure to recover any testable DNA from the victim's decomposed body. (T 23:6271). Counsel also questioned the credibility of VP, and argued that if Petitioner struck the victim simply to force her to release his penis from her clenched jaw, Petitioner lacked the intent to commit malice murder. (T 23:6260-6279).

Reasonable Sentencing Phase Presentation

This Court finds that trial counsel made a reasonable presentation during the sentencing phase of Petitioner's trial based on their strategy and the information discovered during their investigation. As Mr. West explained during the proceedings before this Court, trial counsel's primary mitigation strategy was to present evidence that Petitioner was unable to control his impulses due to brain damage that Petitioner had suffered which resulted in "diminished frontal lobe capacity...[a]nd perhaps the jury would not want to kill someone that had done things that

were not his active volition but was a result of brain damage." (HT 1:153). The record reflects that trial counsel also met with the witnesses prior to trial and prepared them for their testimony. (PX 69, HT 10:2498, 2499, 2510-2511, 2526-2531; RX 10, HT 11:2874-2875; RX 11, HT 11:2898-2899).

During their sentencing phase opening statement, Mr. West told the jury that Petitioner was a product of his dysfunctional upbringing, which included sexual and alcohol abuse. (T 24:6403-6408). Mr. West explained to the jury that counsel would present evidence that Petitioner suffered from brain damage after he fell out of a tree at a young age, along with evidence of Petitioner's dysfunctional upbringing and alcoholism. (T 24:6404-6408). Mr. West emphasized that all of these issues impaired Petitioner's decision making processes. (T 24:6405-6410). Mr. West assured the jury that this evidence was not presented to garner sympathy for Petitioner, but rather to show that Petitioner did not choose to have issues with mental health, women, sex, and alcoholism. (T 24:6405-6410). Mr. West informed the jury that they would hear from medical experts who had examined Petitioner in an attempt to explain why he committed the crime, "[a]nd the conclusion will be that he's damaged." (T 24:6405). Mr. West told the jury:

> [Petitioner's] brain is damaged. And he did not choose to have brain damage. He didn't choose to have lesions on the frontal lobe of his brain which affect the way he processes information, which affects choices he makes, judgments that he makes.

(T 24:6405-6406).

After summarizing the evidence that their mental health experts would present, (T 24:6406-6408), Mr. West told the jurors that they would hear evidence of counsel's study of Petitioner's entire family, which included a genogram demonstrating Petitioner's family's mental illness, alcoholism, and drug use. (T 24:6409-6410). Finally, Mr. West admitted to the jurors

that after the presentation of the evidence, the defense would ask for a life sentence for Petitioner to "go to prison and get the kind of treatment that he hasn't had." (T 24:6411).

The State's Aggravation At Sentencing

The State presented the testimony of fifteen witnesses at sentencing. (T 24:6412-6485; 25:6580-6662). Evidence was presented that Petitioner preyed on women throughout his life, including the testimony of TC, who Petitioner had abducted in 1980; FH, into whose home Petitioner had attempted to force his way in 1985; and LM, who Petitioner attacked after breaking into her house in 2002. (T 24:6412-6455). The State also presented the testimony of other witnesses regarding Petitioner's improper sexual behavior towards women and children and played for the jury recordings of sexually explicit telephone calls Petitioner placed from the jail to his fourteen-year-old niece while awaiting trial. (T 24:6457-6458, 6480-6481; 25:6580-6583, 6656-6657).

Additionally, the State presented the victim impact testimony of the victim's husband, (T 25:6596-6602), her sons, (T 25:6603-6607, 6615-6619), her daughter, (T 25:6607-6613), the victim's mother, (T 25:6619-6623), and her sister. (T 25:6623-6628). The record reflects that after the victim's daughter testified, counsel approached the bench and indicated that she had cried during most of her testimony. (T 25:6613). Mr. Berry also approached the bench after the victim's sister testified to note the number of jurors crying during the testimony of the victim's mother and sister. (T 25:6629).

Trial Counsel's Sentencing Phase Presentation

Following the State's presentation of aggravation at the sentencing phase, trial counsel presented fifteen witnesses in mitigation, including eight of Petitioner's family members. The first witness presented by trial counsel was Donald Ledford (hereinafter "Donald"), Petitioner's

oldest brother. (T 25:6666-6667). Donald testified that the family moved frequently when he and Petitioner were children, and he attended more than ten different elementary schools between first and sixth grade, often moving mid-school year. Id. at 6671-6676. The family moved several times both around Michigan and also to Pennsylvania, Ohio, Florida, and Tennessee. Id. at 6677-6678. He testified that the family would pack all of the belongings into a U-Haul, "usually the kind you pull behind a car," and move to another house. Id. at 6678-6679. Donald's mother and the children lived off and on with the children's grandparents. Id. at 6692-6693.

Donald's biological father "used to get drunk and beat everybody up, threaten people." (T 25:6681). Donald testified that one night when he was nine years old, he awoke and his father was holding a knife to his throat. Id. at 6694-6696. His father then threatened to kill him. Id. Afterward his father left the family. Id. at 6696.

Subsequently, the children's mother was placed in a mental hospital for mental health issues, and the children were placed in an institution in state care. (T 25:6698-6700). Donald and Petitioner were placed together in one institution, but did not know where the other siblings were. Id. at 6702-03. When their mother was released from the hospital, she regained custody of the children; however, about a year later Donald and his siblings were returned to foster care because their mother could not provide for them. Id. at 6703-05. The children were separated again; however, their mother regained custody approximately one month later. Id. at 6704-6705.

According to Donald, around the age of eight or nine, Petitioner fell out of a tall tree at their grandparents' farm and landed atop a garage, rolled off, and eventually landed on the ground. (T 25:6682-6684). Donald thought Petitioner was dead because he was not moving. Id.

at 6685-6686. Petitioner was taken to the hospital and remained there for approximately one month, and wore an upper body cast for another month. Id. at 6686-6688.

Donald testified that, prior to Petitioner's fall from the tree, Petitioner "used to play with us. You know, we'd run around, especially at the farm. We were all happy there. We'd play in the barn." (T 25:6690). However, after Petitioner's injury, "[h]e just wasn't the same. He didn't talk to us the same way. He didn't talk that much. He was more withdrawn, timid kind of." Id. at 6689. "He wanted to be by himself all the time, or it just seemed to me that he couldn't fit in with us or he couldn't feel comfortable." Id. at 6690. Donald testified that after the injury Petitioner had severe migraine headaches and frequently wet the bed. Id. at 6689-6690.

When Donald was around twelve years old, their mother divorced their biological father, remarried, and moved the family to Florida. (T 25:6707-6709). Shortly afterwards the children's mother divorced and married her ex-husband's brother, Leo, and the family moved back to Michigan. Id. at 6710-6713. Subsequently, when Donald was 16, he dropped out of school and moved to Tennessee to live with his biological father. Id. at 6713-6714

Donald and his brothers all drank, and both he and Petitioner began drinking in their early teens. (T 25:6691). Donald agreed that they had drinking problems. Id. at 6714, 6716. Donald said "it seemed like [Petitioner] was drinking for a different reason. To me it always seemed like he was medicating himself." Id. at 6716-6717. Donald testified that when Petitioner drank he became angry and violent. Id. at 6692. "He just gets evil, mean, fights. You can't talk no reason to him. It's just like he's out of his head or something." Id. at 6717. Donald testified that Petitioner would get into trouble when he drank. Id. at 6716. Donald explained that he and Petitioner were involved in an alcohol-influenced robbery and kidnapping in Florida. Id. at 6715-6716.

Donald further told the jury that Petitioner had a problem with women and that "he don't know how to be around them." (T 25:6719). Donald asked the jury to spare Petitioner's life and stated "I think being in prison the rest of his life with never a chance to get out would be better than taking his life. I don't believe he intentionally took Ms. Ewing's life. I don't believe he went there with that on his mind." Id. at 6719-6720.

Trial counsel then called Petitioner's younger brother, William Ray Ledford, Jr. (hereinafter "Billy"). (T 25:6730-6731). Billy testified that he was born in Pontiac, Michigan and that his earliest memory was living with his grandparents, mother, brothers, and sisters in a small farm house. Id. at 6733-6734. Their home life lacked structure and Billy described their house as crowded and chaotic. Id. at 6734, 6736-6737, 6745, 6758, 6760. Billy recalled being separated from his siblings and placed in foster care when he was young. Id. at 6735.

Billy testified that he did not have childhood memories of his biological father and he never lived with his biological father. (T 25:6734). However, Billy did spend some time with his biological father when he was older. Id. at 6745, 6748, 6753. Billy described his biological father as a violent alcoholic. Id. at 6745, 6754-6757. Billy explained that his biological father:

> [W]as okay to be around while he was drinking. But my dad, if he was around another woman, like his wife or a girlfriend, he was mean. He was mean to her. And he could be very mean to me if I said anything to him about the way he was talking or treating whoever he was around. But as far as just me and him, he was fine. It's when he got around other people while he was drinking my dad could get very mean.

Id. at 6754. Billy described a physical altercation between his father and his step-mother. Id. at 6754-6755. Billy's mother also told him that his biological father was violent towards her. Id. at 6755. Billy's maternal uncles also had drinking problems. Id. at 6757-6758.

Billy could not remember when he first started drinking, but testified that his first alcohol-related trouble occurred at the age of eleven or twelve, when he ran away with Donald

and Petitioner, committed automobile theft, and was placed in a juvenile detention center. (T 25:6737-6738). Billy testified that each incident with Donald and Petitioner involved alcohol, including the robbery and kidnapping in which Billy participated. Id. at 6740, 6742-6743. Petitioner was "a real good guy when he ain't drinking. Drinking affects him like nobody I've ever seen." Id. at 6746. "It just changes him. It makes him more mysterious. It makes it like he's thinking about something all the time." Id.

Billy and his brothers often skipped school. (T 25:6738). Billy could not remember how many different schools he attended:

> I went to three different schools in Alma [Michigan]. It was elementary. But see, it was scattered out in our life span. But we'd move back and forth from Florida, and I'd go to Tennessee. And in Florida we went to several different schools, because when we'd move we'd go to a different district.

Id. at 6739. Billy believed that the family moved because, "I don't think mom had the money or my dad didn't have work, my step-dad. And rent would come due and we'd have to move." Id. at 6739-6740. Billy testified that the family would stay at a house "[u]ntil work run out or until we got in trouble or something caused use to leave." Id. at 6740.

Billy recalled Petitioner falling from a tree in Michigan. (T 25:6740-6741). He testified that "[i]t broke him up and put him in some kind of body cast or something." Id. at 6741. Billy remembered Petitioner's lengthy hospitalization, but he could not recall whether Petitioner's personality changed after the accident because his memory of the event was vague. Id. at 6741-6742. Finally, Billy asked the jury to spare Petitioner's life:

> I would just ask that you wouldn't put him to death. I mean, I know Mike has been in jail pretty much his whole life. The way I figure it, that's all he knows. He could do more good by being alive if he shows everybody that he'd change – or not change but try to make something good out of his life from here on out.

Id. at 6747.

Trial counsel next called Petitioner's younger sister, Sherri Byess. (T 25:6763-6764). Ms. Byess did not remember living with her biological father, and her first memory of a father was her step-father. Id. at 6765, 6770-6771. She did not remember Petitioner's fall from a tree at the farmhouse in Michigan, but she recalled seeing him in a cast. Id. at 6767-6768.

Ms. Byess remembered three separate occasions where she was placed in state care as a child. (T 25:6769). The first time she was placed in a group home with all of her brothers was in Pontiac, Michigan, and they stayed there approximately three weeks. Id. at 6769-6770, 6774. She did not know why they were placed in the group home, but she knew her mother experienced hardship attempting to raise six kids on her own. Id. at 6770. The second and third times she was placed in foster care with her youngest brother, Daniel, and the four other brothers were placed in a different home. Id. at 6772. She described her foster parents as "absolutely wonderful to me and my brothers." Id.

Ms. Byess testified that the family moved around a lot when she was a child, "especially when the landlord would find out how many kids [her mother] had in the house." (T 25:6775). Ms. Byess explained that, because they moved so many times, she could not remember the names of the elementary schools she attended because she "was never there long enough to even know the name of the school." Id. at 6776.

Ms. Byess testified that everyone drank within her family, and she recalled that "every time there was a get together they were drinking." Id. at 6768. This would lead to fights between her uncles, a fairly common occurrence. Id. at 6768-6769. Ms. Byess testified that all of her brothers had drinking problems. (T 25:6776-6777). Ms. Byess was concerned about Petitioner being at her house because of his drinking. Id. at 6779-6780. Alcohol "makes him crazy. I mean, like now he's – that's the Mike I know right there. And when Mike is drinking, if

you'll look at the pictures the day he got locked up, that's the Mike drinking. That's the Mike that you just don't know who he is." Id. at 6781-6782.

From age four to age fifteen Ms. Byess was sexually assaulted by her maternal uncle, Bill Dougherty. (T 25:6833-6836). She testified that the assaults happened in "different places, wherever we lived," and that "he just always – he was the one that always wanted to babysit us kids, so my mother would leave us with him if she went to work. He just – everywhere we ever went, he was always there." (T 26:6834). Ms. Byess testified that her uncle raped her, stating "I mean, that's all I remember of my childhood is just him. I hate him." Id. This continued until she was eight years old when she reported him to her school, after which Dougherty was imprisoned. Id. at 6834-6835. However, "when he got out it was like he's still part of the family and, you know, he would come around. He would stay at our house," and the sexual abuse continued until Ms. Byess was fifteen. Id. at 6835. No one protected her from her uncle. Id.

Prior to the crime, Ms. Byess knew Petitioner was on probation and attempted to contact Petitioner's probation officer on three separate occasions. (T 25:6781). Ms. Byess testified that she was concerned because Petitioner "was drinking excessively." Id. Ms. Byess believed by calling Petitioner's probation officer, she could "help him by getting them to get him, to lock him back up, to get him help, because when he was locked up he wasn't drinking." Id.

Ms. Byess testified that she was never afraid of Petitioner and that she loved him. (T 25:6782). She told the jury that she wished that she could take back Petitioner's actions and apologized for them. Id. Finally, Ms. Byess told the jury "I just pray that y'all can find it in your heart not to kill him." Id.

Trial counsel then called their mitigation investigator, Sandra Michaels, to testify and present evidence to the jury that she uncovered during her background investigation. (RX 13, HT 12:2969-2970). Ms. Michaels explained the role of a mitigation specialist for the jury:

> A mitigation specialist is a person, it can be either an attorney or someone that has some kind of specialized training, that helps prepare a life history of the person that's accused of the crime, in this case Mr. Ledford. What you do is you gather up as much information as possible about the person and their family. You gather records, documents, family medical history, family mental health history, and you work with mental health professionals or other professionals to prepare the mental health case.
>
> And the purpose of the mitigation person is to present a picture of the individual accused of the crime and, in this case, convicted of the crime, and to present not an excuse for their behavior but an explanation for their behavior. And the explanation for the behavior encompasses every facet of their life and their family's life, where they came from, and all sorts of external factors that brought them to that point in their life where the crime occurred.

(T 26:6839).

Ms. Michaels obtained a large number of records, including medical and criminal history records, and emphasized "every record I could obtain, I did." (T 26:6841, 6843). She located and interviewed Petitioner's family members and added that, as a mitigation specialist, "[y]ou have to interview as many people as possible. It's not just the people that come into court. You try to interview as many individuals as you can." Id. at 6841-6842. Ms. Michaels interviewed Petitioner's biological father and described him as a "lying drunk, lotto drunk" living in government housing,[23] who "can't walk, can't move, can't move from a chair, is about to lose his legs from diabetes." Id. at 6902. Many of the people who Ms. Michaels interviewed could not attend court for health reasons. Id. at 6842.

Ms. Michaels also created a genogram during her investigation and explained:

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[23] Id. at 6842

> A genogram is basically a fancy word for family tree. It's the family tree or the history of the person that's – the individual you're talking about. Here, of course, Mr. Ledford. And what you do is you try to go back not too far, because it gets confusing, but as many generations as you can back and if it's appropriate in the circumstances, and it was in this case, a generation forward to look for patterns of behavior or patterns of hereditary situations to show or explain the history of the individual.

(T 26:6844). She testified that the significant factors in Petitioner's family history were "alcoholism, drug addiction, mental health issues, and health issues related to the alcohol or drugs or the mental health." Id. at 6900. Counsel tendered the genogram into evidence. Id. at 6896-6898.

Based on her investigation, Ms. Michaels determined that Petitioner's family had "a long history of alcoholism and debilitating alcoholism" in addition to mental health problems. (T 26:6843). Regarding the mental health history of Petitioner's family, "the initial overwhelming factor that came out was there was severe alcoholism that ran on both sides, both paternal and the maternal side." Id. at 6894-6895. Ms. Michaels noted that "the younger generation became more addicted to drugs, as opposed to the older generation it was alcohol. Based on both the drug and the alcohol issues, there was a lot of criminal convictions and activity related to theft, DUIs, open containers." Id. at 6895.

Ms. Michaels told the jury that Petitioner and his siblings have hepatitis C, "which is related to abuse issues, substance and alcohol." (T 26:6900- 6901). She testified that Petitioner's mother "has severe health issues not related to substance abuse but severe issues related to the mental health issues surrounding the family," noting that Petitioner's mother has a history of "nervous breakdowns and agoraphobia" for which she received treatment. Id. at 6901. Petitioner suffered from mental health and drug issues, his brother Mark had problems with

drugs and alcohol, and his brothers Billy and Daniel had mental health, alcohol, and drug issues. Id. at 6901-6902.

During Ms. Michaels's testimony, counsel authenticated and tendered numerous records, including Petitioner's juvenile records from Alma, Michigan; Petitioner's medical records concerning his fall from a tree; Petitioner's mental health and competency records relating to his guilty plea in Tennessee to criminal trespass; and criminal records from Michigan regarding Petitioner, his maternal uncles, and cousins. (T 26:6866-6884). In addition to describing the records, Ms. Michaels shared pictures with the jury of the areas where Petitioner's family lived, as well as pictures of a company where Petitioner once worked. Id. at 6884-6893.

Following Ms. Michaels, counsel presented Dr. Rokeya Farooque, a forensic psychiatrist at Middle Tennessee Mental Health Institute who evaluated Petitioner pursuant to court order in August, 2002. (T 26:6928-6930). At the time of that evaluation, Petitioner was charged with aggravated kidnapping and aggravated burglary;[24] and, the trial court requested that Petitioner be evaluated concerning his state of mind at the time of the crimes and whether he had diminished capacity. Id. at 6930. Dr. Farooque testified that at that time of her evaluation, Petitioner had been found competent to stand trial and that there was no support for a defense of insanity. Id.

Dr. Farooque testified that, under Tennessee law, diminished capacity is a defense concerning a defendant's state of mind at the time of the crime. (T 26:6930). She explained that diminished capacity means whether, at the time of the offense, a defendant's "mental condition was such that they were not able to form the mental capacity needed for that specific crime." Id. She testified that diminished capacity can be caused by mental illness, mental retardation, or intoxication. Id. Dr. Farooque had to determine:

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[24] The victim in this case was LM, who was called as a State's witness during the sentencing phase to provide the jury with details about Petitioner's attack. (T 26:6936; 24:6432-6445).

> [W]hether Mr. Ledford was either suffering from any mental illness, mental retardation, or any other kind of mental impairment, or he was having any problem with drugs and alcohol that at the time of the crime he was either not able to or able to form the accused mental condition to commit that specific crime and that was intentional and knowingly.

(T 26:6931).

Dr. Farooque opined that in August 2002, Petitioner "did not have any diminished capacity for any mental illness or mental retardation or any other kind of mental impairment." (T 26:6931). However, Petitioner's mental capacity for his crimes in August 2002 was diminished based on alcohol intoxication. Id. at 6931-6932. Counsel authenticated and tendered Dr. Farooque's entire file from August 2002, which included the evaluative history she took from Petitioner and his family members. Id. at 6932-6933.

On re-cross examination, Dr. Farooque testified that she diagnosed Petitioner with alcohol dependence. (T 26:6942-6943). As she explained, a person suffering from alcohol dependence:

> [I]s heavily dependent on alcohol, that they just don't drink it for recreation, they drink it – they cannot control their drinking. They drink heavily, and they get into trouble with the law. While they're drinking, they get into trouble with the family interaction, family relationships. Still they continue to drink, and they cannot stop drinking.

Id. at 6943.

Trial counsel then presented testimony from Dr. Morton, an expert in the field of psychopharmacology. (T 26:6949). Dr. Morton explained that a psychopharmacologist studies both positive and negative effects of any substance that would affect the brain, including prescription medicines, over-the-counter medicines "like alcohol and nicotine," and illicit drugs. Id. Trial counsel requested Dr. Morton's assistance in determining whether there were any

issues regarding substance use or alcohol that might have affected Petitioner's behavior. Id. at 6950, 6961.

Dr. Morton testified that a person with alcohol or substance abuse has a different biochemistry and behavior than a person without addictions. Id. at 6969. He explained that alcohol had "incredible effects, negative effects, on [Petitioner's] brain and his behavior. Ethyl alcohol ... essentially affects every cell in the body. There's hardly a cell that it doesn't affect. So consequently it would affect almost every cell in the brain." Id. at 6970. Dr. Morton defined alcoholism as "a chronic relapsing brain disease characterized – what you see is people compulsively use; they compulsively think about it; they compulsively crave alcohol." Id. at 6970-6971.

Dr. Morton analyzed Petitioner's medical history:

> Michael's brain, when I looked at it to help me understand some of the behavior, looking at if I was developing a treatment plan for Michael, I looked in his history. And I knew he fell from a tree and he broke some arms. I know that he hit his head. I know in 1972 he probably got the standard of care which was a CAT scan and didn't show anything there, did not show that there was anything broken, although I imagine a close-head injury did juggle his head a little.
>
> He has Hepatitis C virus, and while it affects the liver, mostly inflaming the liver, it can also affect other parts of the body. And there's a fair amount of information coming out that shows how Hepatitis C, this virus, can affect different aspects of the brain in terms of thinking and cognitive ability.
>
> And alcohol, his long history of alcohol, what we know and what I know with him is that it does cause people to lose inhibitions. In general, people have learned or been taught to not act a certain way. And when they drink, alcohol has a tendency to reduce those inhibitions. So people say things, they talk louder, they do things that they normally would not have ever done because those inhibitions are kind of dissolved away.

(T 26:6971-6972).

Dr. Morton looked at Petitioner's psychiatric effects, and found "tremendous sedation." Id. at 6973. He testified that Petitioner "basically drinks until he falls asleep. That's his general

ways of drinking. He has irritability and restlessness when he drinks. There's a long history of violence when he drinks." Id. According to Dr. Morton, Petitioner began drinking regularly between age twelve and thirteen, and by age fifteen Petitioner was drinking every day on a regular basis. Id. at 6984. Dr. Morton testified that by age fifteen, Petitioner was "able to either steal or get someone to buy alcohol for him. His mother doesn't want him to steal, so she buys alcohol for him just so he won't steal," noting that it "increase[d] to a point that he's drinking about 24 cans a day, a case a day." Id. at 6984, 6975. Dr. Morton explained that Petitioner's family enabled his drinking habits by creating a program for him to drink in an attempt to control his drinking. Id. at 6985.

Petitioner smoked marijuana "daily at some point growing up, and then it diminished off. It was not something he could afford," (T 26:6984-6985), and Petitioner tried cocaine and LSD but did not continue to use either, because Petitioner preferred alcohol. Id. at 6985. Regarding Petitioner's alcohol abuse, Dr. Morton believed:

> [T]here wasn't a part of his life that really wasn't affected. I couldn't find anything that really wasn't affected by his alcohol .... He has problems at work, keeping a job, his family. There were problems. And basically I could not see any evidence that he has any friends. And part of that had to do with his alcohol use, and possibly some of it was why he drank, not having any friends. So it's hard to know which came first sometimes. Financial and legal problems were almost always present.

Id. at 6974.

Dr. Morton discussed the symptoms of alcoholism, such as struggling with how much and how long a person drinks; struggling with cutting down alcohol intake; constantly seeking, using, and recovering from alcohol use; decreasing activities with family and friends; continuing to drink despite medical or mental health problems; and increasing tolerance of alcohol consumption. (T 26:6974-6975). Although Petitioner did not have any major psychiatric

problems and never sought treatment, Petitioner suffered from other symptoms. Id. at 6975-6976. Dr. Morton noted Petitioner:

> [S]truggled with trying to cut down. He has significant denial that he even has this disorder. He would frequently think, "Well, that's not me. I can control it." I think he might still believe he could control it. I think that might still be going through his head that, "if I got some alcohol, I could control it."

(T 26:6976).

Dr. Morton testified that no one has determined the cause of alcoholism, but he noted that a number of factors relate to the disease such as genetics, developmental history, stressors including physical abuse or an untreated psychiatric condition, and drug use. (T 26:6977-6978). A number of these factors were present in Petitioner's history. Id. at 6978, 6988-6999. According to Dr. Morton:

> He has a father that clearly has alcoholism. He has uncles on his father's side that clearly have alcoholism that have been treated. He has a mother who has abused alcohol and maybe other substances from 1976 records. It was not clear. She doesn't abuse it now. She rarely drinks now. So maybe she didn't have the disease after all. But he has four brothers that all have this disease. Some of them have alcoholism and other substances. And sometimes their alcoholism has diminished as they've used other substances. His sister escaped this. He has cousins that are alcoholics. He has some genetic material to his two sons.

(T 26:6978).

> Developmentally, I know that he had access to alcohol early from three sources I saw, that he drank a bottle – not a bottle but he drank a half a glass of vodka. And essentially people cheered him on, "[Y]ea! You can do it Michael." Basically he's three to four years old. His remembrance is somewhere around six years old of that. But it's documented that, "You can do it. That's cool, Michael. Yeah, the little boy can hold his liquor." So he also had exposure as early as nine years old. And six years old he would steal a beer, and it probably wasn't until age 13 that he started drinking on a regular basis. But developmentally he had some factors there that I considered worth looking at.
>
> Environmentally, he grew up in what was described as a chaotic household. That was described by DHS workers. Environment was of excessive drinking. Violence was kind of glorified. That's not my word. That's how I saw alcohol and

drinking. If you beat up people, that was cool. And if it happened to involve women, that was okay, too. It was okay if you were a little rough with women.

Environmentally, there are a number of things going on, constant moving. One brother said he had probably moved about 100 times. When you're young it's helpful to have a house with a room that you can kind of count on being in. Environmentally, there were a lot of factors going on. It helps me understand later on why alcohol might be comforting to this man.

Sometimes he would find as many as 14 people living in his house, a small house, which sounds crowded to me. It sounds chaotic to me. His father was not there after about age seven. So you could say that was either good or bad, but I think everyone wants to have a father whether they're good or bad. You want to have your father there. Well, his father wasn't there because he divorced, and secondary to his alcoholism, and probably did not inflict the pain that he was inflicting on Michael.

Stressors, when I look at stressors I look at lack of structure in his house, lack of role models, lack of seeing people handling themselves. Insults, stressors, there was physical abuse sometimes from his mom, sometimes certainly from his father. There was psychological abuse from his mother and from his father. And there was one incident of sexual abuse. And you might say well, just one. Well, I've learned working on the unit, on an alcohol and drug treatment program, probably 50 to 70 percent of the people that come on my unit have a history. And sometimes it's continuous; sometimes it's just once. So it's really different for each individual how that response is of sexual abuse. Personality – another insult I had to look at was when he fell, yes, he broke his arms. What did it do to his brain? It's not clear. But falling and hitting your head is not good for you.

Personality-wise, Michael is a loner. I'm not sure exactly why. He doesn't feel comfortable around people. I don't know if it's overly anxious or overly anxious about not knowing how to react and interact with people ... So personality, there's certain factors there that catch my attention.

Psychiatric symptoms, he doesn't have as many as I might expect. I know his mother has panic disorder and agoraphobia....

(T 26:6979-6981).

Dr. Morton noted that on the day Petitioner was arrested, "he had alcohol in his blood, .014. Drug use that day, somewhere between three and five of these 22-ounce cans of Bud Ice" which contained 6.9 percent alcohol. (T 26:6994). Dr. Morton believed that alcohol use affected Petitioner's brain function. Id. at 6994-6996. Counsel asked Dr. Morton whether Petitioner's

alcoholism played any role with the sexually inappropriate phone calls Petitioner made from the detention center to his fourteen year old niece; according to Dr. Morton, the phone calls were:

> [A]n example of the effects of alcohol on the brain affecting the executive parts of the brain, the cortex areas of the brain, such that people don't think through logically. What would be the consequences of me saying something inappropriate on a recorded phone call, could this hurt me later, doesn't see that, doesn't think that through, doesn't see the consequences, doesn't see that that's something he should not do. And that's part of what you see with alcohol affecting that part of the brain, essentially puts that part of the brain [to sleep]. And you might see that – even though alcohol is out of your body in about eight or nine hours totally, it's gone totally, but you're seeing the effects of alcohol which some could be permanent and some could resolve and get better over time.

Id. at 6998-6999.

Finally, Dr. Morton summarized his testimony for the jury:

> Again, these were some of the issues that I saw with Michael's brain. And I think of these factors as almost having a domino effect. Again, there's not one factor that helps totally explain his or anyone's alcohol use. But I think this domino-type effect where one thing leads to another is something to consider. I see Michael as someone not making decisions. When he does make them, they're poor. He does not think in making good judgment. He's very aggressive when he drinks, and there's a tremendous amount of violence. It's been there for a while, and it's only getting worse. When I see what he does, his behavior is almost like an angry 12 year old. So it's very much out of character for most human beings. When he doesn't drink, his behavior is significantly different.

(T 26:6996).

Following Dr. Morton, counsel presented Alice Romanek, a licensed clinical social worker from Highland Rivers in Paulding County, Georgia. (T 26:7018-7019). Ms. Romanek testified that Petitioner was referred to Highland Rivers by his parole officer for a substance abuse assessment, and that on October 8, 2003, Petitioner came to the facility for a diagnostic assessment. Id. at 7019, 7021-7022. In his diagnostic assessment, Petitioner informed Ms. Romanek:

> [H]e had been divorced for the past 18 years, that he had two children, that he had been living with family for the past three years and he was satisfied with that, that

> he had a close relationship with his mother, children, brother, and sisters, and that most of his free time was spent with his family; that in his lifetime he had experienced serious problems getting along with his father, brother, sister, spouse, children, sexual partner. Also said that alcohol or drugs had negatively impacted his relationships with father, brother, sister, sexual partner, spouse, children. He said that during his lifetime he had been abused emotionally by his father and physically by his father, that he had no serious conflicts with family members in the last 30 days.

Id. at 7022. Petitioner also reported being the victim of sexual abuse. Id. at 7019-7020.

A recommendation was made that Petitioner attend a day treatment program; however, none were offered in Paulding County at the time. (T 26:7023). Because Petitioner said he needed to seek work, weekly substance abuse group attendance was recommended instead. Id. Petitioner was diagnosed with alcohol dependence. Id. Ms. Romanek testified that she scheduled a follow-up appointment with Petitioner, but Petitioner failed to return. Id. at 7019. Petitioner also failed to attend the recommended substance abuse groups. Id. at 7023.

Trial counsel then presented the testimony of Dr. Thomas Sachy, an expert in the field of neuropsychiatry, behavioral neurology, and the interpretation of MRI scans. (T 26:7028-7034). Dr. Sachy interviewed Petitioner in March 2009, and based upon abnormalities that appeared during his neuropsychiatric and physical exams of Petitioner, Dr. Sachy requested an MRI. Id. at 7033, 7052-7054. Dr. Sachy explained that an MRI, or magnetic resonance imaging, is "the best way to get a crystal clear view of the structure of a person's brain without actually ... going in there and looking physically." Id. at 7039.

Dr. Sachy testified that Petitioner's MRI scans showed part of Petitioner's cerebellum, the part of the brain that controls physical coordination, cognitive coordination, and flexibility in social situations, had shrunk. (T 26:7038-7039). Dr. Sachy explained that "this is typical of long term damage from alcohol or some other toxin." Id. at 7039. Dr. Sachy also noted that the MRI demonstrated mesial temporal sclerosis. Id. at 7040. Dr. Sachy explained:

> Mesial temporal sclerosis is damage to the temporal lobes, and it is connected with subtle impairments in memory, in behavior, in control of impulses. But most importantly with Mr. Ledford where these two bright areas are right there (indicating), that part of the temporal lobe, these two portions, are called the amygdala. And we have an amygdala on one side and an amygdala on the other. And what the amygdala does is it controls or is responsible for rage. It controls or is responsible for the production of anger and violence and the tagging of information with kind of violent negative information. That's what the amygdala does. And people who have damage to the amygdala can be sometimes prone to rages and have impaired control of rage reactions, etc. So he has mesial temporal sclerosis.

Id. at 7040-7041.

Petitioner's MRI also revealed scar tissue, or damaged neurons, in the front of Petitioner's brain. (T 26:7041-7042). Specifically, Petitioner had frontal horn capping, or leucoariosis, which damaged fibers that traverse from different parts of the brain, especially within the front of the brain, and "[w]hen those channels are damaged we have problems with cognition." Id. at 7043. Dr. Sachy noted that the front of the brain is the most important part of the brain, and is responsible for a person's personality, empathy, and humanity. Id.

Damage to the frontal horn, leucoariosis, impacts cognition, causes problems with judgment and morality, and causes one to behave poorly in highly charged conflict situations. (T 26:7044-7048). Petitioner's brain damage was close to the worst area possible, the right medial. Id. at 7046. Individuals with this type of brain damage find personal moral violations to be acceptable in dilemma situations. Id. "In other words, if you put these people in a high dilemma situation with this brain damage, they were more likely to do things that they would later think were amoral," because "[t]hey didn't realize they were being amoral until it was shown to them afterwards and they had calmed down." Id.

Dr. Sachy described Petitioner's brain functioning:

> Well, Mr. Ledford, just plainly speaking by his MRI, has several regions of brain damage that stand out crystal clear, and I'll be able to show it here shortly. They

> correspond to the areas where he showed deficit in his neuropsychiatric examination from me and his neuropsychological examination which I didn't do.
>
> But he has damage to the frontal portion of his brain, the part of the brain that controls our kind of moral decision making in high conflict, high emotion dilemma situations. He has damage in that area. He also has damage – and that area is in the front, behind a person's eyes, just above their nose.
>
> He has damage in his temporal lobes. At the side here are scarring (indicating), which I'll show, which if he had seizures it would clearly correspond. It would go hand-in-hand with that, but he doesn't have to have had seizures. Also, he shows signs of probable long term damage from alcohol intake.

(T 26:7036). When asked whether he had reached any diagnosis, Dr. Sachy replied:

> Mr. Ledford, obviously, has a diagnosis, but I can say he has a diagnosis of Leucoariosis; I can say he has a diagnosis of Mesial Temporal Sclerosis; I can say he has an impulse control disorder not otherwise specified in the old fashioned psychiatric way. We can say he has alcohol abuse, significant long history of; probably could say he has a history of alcohol-related brain damage. We know one thing important. At age nine he fell out of a tree and broke his arms, I think severely injured his shoulder, and was hospitalized. He fell from a great height, and he was hospitalized and treated with anti-seizure medications for uncontrollable urination and uncontrollable behavior. And, in fact, they had to consult the urologist to see if he was somehow torn up inside, where his bladder connects to his urethra and everything, to see if there was some physical damage because he had uncontrollable urination and he was speaking incoherently for several days. And they obviously felt that he needed anti-seizure medication to control him. And it's clear from the medical record that he obviously suffered some form of brain damage. And there's no way you fall from a tree and break your arms with that kind of force and impulse and not give your head a real good knocking.

Id. at 7050-7051.

Dr. Sachy summarized his conclusions for the jury: "[p]eople like Mr. Ledford in very unusual or unfortunate circumstances, if their brains aren't working right and there's something wrong they're more likely ... to do bad things compared to healthy people." (T 26:7054).

Furthermore:

> [T]hose who do these things tend to have evidence of psychiatric and neurological damage that is not responsible as much for the act but it's responsible for the inability to act properly.

> Again, these people, if you ask them what is right and wrong, they can tell you. Even the worst schizophrenic in the world knows murder is wrong. But, you know, when they do something wrong in a high conflict situation, they're not thinking and they're not timing it out. They're not appreciating consequences. They're working in milliseconds. Heart rate, adrenaline, everything is going, and they tend to make the wrong decisions in spite of intact moral knowledge in a non-conflict situation.

Id. at 7054.

Counsel next called Dr. David Gose, a medical doctor specializing in internal medicine at Wellstar East Paulding Primary Care in Paulding County. (T 26:7076-7077). Dr. Gose testified that on June 30, 2006, he saw Petitioner concerning a sore throat. Id. at 7077. Dr. Gose took Petitioner's history, in which Petitioner admitted having approximately nine alcoholic drinks a day. Id. at 7078. Dr. Gose treated Petitioner for thrush, instructed Petitioner to reduce drinking, offered him a prescription for a medicine to help him stop drinking, and discussed alcohol cessation with Petitioner. Id. at 7079-7080.

Additionally, Petitioner "had a positive Hepatitis C screening test on his blood, and he had a slight elevation of his liver tests." (T 26:7084). Dr. Gose recommended Petitioner return for a second blood test to confirm that he had hepatitis C as the test showed that he had been exposed to hepatitis C, but did not show whether he had an active infection. Id. Dr. Gose scheduled a follow up appointment with Petitioner, but Petitioner never returned. Id. at 7081. Dr. Gose told the jury that he believed Petitioner had a drinking problem. Id. at 7081-7082.

Trial counsel also presented the testimony of Dr. Larry Morris, an expert in the field of interpersonal violence and developmental psychology.[25] (T 27:7118-7130). Dr. Morris explained to the jury that he was not looking to excuse Petitioner's actions, but instead looked

[25] Dr. Morris authored books on child sexual abuse and child molestation. (T 27:7122).

for "an understanding of how a person gets from being born to where they end up in court before you." Id. at 7132. Dr. Morris instructed:

> [L]ook at this situation from a child's standpoint, not an adult's standpoint but a child's standpoint. What is a child going through as they're being raised; what happens to them; why do they end up feeling the way they do about themselves; why do they end up feeling the way they do about society; why do they end up feeling the way they do about anything.

Id.

Dr. Morris emphasized, Petitioner "is the sum total of all of his experiences up to date, especially those that occurred between birth and 12 years old." (T 27:7131). Dr. Morris believed that Petitioner's experiences growing up "made him into what I would consider a very frightened, anxious ten year old who acts more like a very angry twelve year old." Id. Dr. Morris based his conclusion on Petitioner's records he had reviewed, along with corroboration provided by Petitioner's family. Id. Petitioner's background "affects him in a way that is very negative, that there's a very negative self image of himself," and Dr. Morris emphasized that Petitioner acted out inappropriately over time. Id.

Dr. Morris discussed the difference between good parenting and primitive parenting, and explained how these concepts applied to Petitioner. Id. at 7132-7146. Although there are no perfect parents, "pretty good parenting usually does a pretty good job of teaching kids from birth," while primitive parents "are parents who may be trying to do something or may not be trying to do something, but their approach to parenting is so primitive that it has a different kind of effect on a child than pretty good parenting." Id. at 7132-7133. Parents who fit into the "pretty good parenting" category:

> [N]urture the child. They'd start out with love, first of all. There would be love, and it would be unconditional love. And then they would begin to try to show the child what the world is like. And they do what is called socialization. Socialization only means one thing is that we have a social culture and we want to

> transmit that to the child. So we try to teach that to the child through a lot of different ways. We tell them; we show them things; we model their behavior. We do a lot of things of that nature so that they learn what the rules are, and they learn how to interact appropriately.

(T 27:7133).

Children reared in a "pretty good parenting" home tend to do well as adults. Id. at 7134. However, primitive parenting practices are toxic for children. (T 27:7135). According to Dr. Morris, primitive parenting can escalate into strong and repeated physical abuse to the child and other family members. Id. at 7134-7135. Further, a child raised with primitive parenting practices is more likely to be a high risk adult. Id. at 7135-7136. Dr. Morris explained:

> [T]hey're at high risk to engage in all kinds of things that are not really good. But they're going to have emotional problems, and that means anxiety, depression, fear, things of this nature. And they'll end up having behavioral problems, and behavioral problems are acting out inappropriately not attending school, not doing things of that nature. They have relationship problems. If they don't have a model of what an appropriate relationship is they're going to have a very difficult time establishing one themselves. They're going to have poor self image. They're going to have a lot of things that are going to counter what the rules of the culture, the main culture are. They learned other ways of getting through life. They don't usually work very well, because they end up in a lot of criminal behavior, too. And sometimes the criminal behavior is pretty aggressive and pretty mean.

Id. at 7136.

> [W]hat we usually find out is that there's a lot of acting out in the ages of about ten to twelve or so. And then when the testosterone starts kicking in, then that acting out usually escalates. And if there's a lot of anger in the individual, it very often goes into violence. And if there's been a lot of violence in the family, in the primitive parenting family, then that's a model that they use to handle their anxiety, to handle their problems, is to act out in that way.
>
> So you see a lot of criminal behavior begin early on, and these are what we call high-risk juveniles with that kind of a background. And by about eleven or twelve or thirteen, they start escalating what they're doing. And then by the time they become an adult they're pretty well enmeshed into some pretty violent aggressive criminal kinds of activities.

(T 27:7143).

Dr. Morris believed Petitioner was raised in a primitive parenting culture that became "extremely abusive in a variety of ways." (T 27:7136). Petitioner's father, who lived with Petitioner until Petitioner was about seven, was alcoholic, severely abusive to their mother, and began to abuse the children. Id. at 7137. Dr. Morris testified about stories from the family in which Petitioner, his mother, and siblings would hide in a closet when his father came back from a "big drinking binge" in order to avoid beatings. Id. Dr. Morris testified that Petitioner's mother was much more loving than Petitioner's father, but had a number of children in a very short period of time and only had limited resources with which to take care of the children. Id.

Alcoholism in the family also led to primitive parenting within Petitioner's family culture. Id. at 7138-7139. There were alcoholics on both sides of the family and the family members "would engage in really heavy substance abuse and violent behavior among themselves and others" as well as criminal activity. Id. at 7138. According to Dr. Morris "[t]hat's the kind of modeling that primitive parenting provides that gives a negative message about society and teaches them to deal with their feelings in a much different way." Id. As an example, when Petitioner was in diapers he drank a glass of vodka while his family members watched and perhaps even encouraged him to drink. Id. After this incident, Petitioner "went into a coma, threw up, and had a lot of problems." Id. at 7138-7139.

When Petitioner fell from a tree, "he was already experiencing the negative effects of primitive parenting," and the tree fall had a layering effect. (T 27:7139-7140). Petitioner's possible brain injury on top of his primitive parenting upbringing did "not allow him then to really sort things out and make better decisions about what he's being shown within the family." Id.

During his interview with Petitioner, Petitioner disclosed to Dr. Morris that he had been sexually abused as a child. (T 27:7143-7144). Dr. Morris testified:

> And a lot of males will go for years and never, ever disclose that they were sexually abused, especially by another male, because that's so shaming that they don't want anybody to know it because it really looks bad for anybody to know that they've been sexually abused or had sex with another male. So they'll go for years. I've had a number of men in therapy who have gone for 20 years or more and never, ever disclosed that they were sexually abused by someone, particularly a male, because it's so shaming and so damning.

Id. at 7142. Petitioner's family members confirmed that Petitioner only told them about his childhood sexual abuse once he was an adult. Id. at 7143.

The sexual abuse within Petitioner's family was "another one of the piling on things," because Petitioner was already "down, beaten, abused," and "it's very difficult to overcome that." (T 27:7140, 7142). Dr. Morris theorized that this abuse contributed to Petitioner's issues:

> You have someone who is already struggling trying to find a positive self-identity, has a lot of anxiety, was already a bed wetter, had been a bed wetter for years, not doing very well, backing off from interpersonal relationships, not having any real friends, any real pals, only the brothers and the family. And then someone sexually abused that individual. They're already damaged to begin with. They're really on shaky ground to begin with. And remember, we're taking a look at this through the child's eyes. You know, you're not looking at it through the adult's eyes. It's the child who is having difficulty. And now somebody takes advantage, an adult takes advantage.
>
> And what that usually does is exacerbate everything else that has been happening before that. It makes the positive self image even worse. It raises the anxiety level. It creates all kinds of fear. And if it's a male who is sexually abused by another male, then we have a cultural kind of thing that happens because men are never supposed to have sex with men. That's not supposed to happen in this culture. So that's what the child thinks, so now they begin to wonder about their own sexuality; they begin to wonder, you know, "what's going on with me? What's wrong with me that this happened?" But that was a child and an adult. They don't see the differential between the adult power and the child power. Males typically don't. So they incorporate all this in a negative way.

Id. at 7140-7141.

Dr. Morris noted that not everyone brought up with primitive parenting would become a murderer, and that there are "super kids" who are more resilient than other children brought up in similar, negative circumstances. (T 27:7144-7145). He knew of no explanation why this occurred, but noted that the sooner a child receives therapy, the more effective. Id. at 7145-7146. He testified that "children who do not have the support of the family, support of therapy, and support of the community in general, they do much worse over a long period of time than children who get into the kinds of support system that they need." Id. at 7146. Dr. Morris noted that Petitioner never received any therapy or support as a child. Id.

Trial counsel also presented the testimony of Dr. Robert Shaffer, a clinical psychologist and expert in neuropsychological evaluations. (T 27:7166-7170). Dr. Shaffer administered a complete neuropsychological evaluation of Petitioner. Id. at 7171. He explained:

> Neuropsychological tests are a form of tests that have been developed for their sensitivity to various types of brain injury, and each test assesses a different kind of brain function, some of which are located in specific areas of the brain. They're different from IQ tests, and they measure different aspects.
>
> An individual can have a pretty good IQ and be fairly intelligent, have good reasoning and so on, but still have an impaired brain and function in ways that are revealed by this type of neuropsychological test. The tests have more to do with actions in real life situations where decisions are made and where choices occur rather than just matters of academic intelligence.

Id. at 7171.

The first test that Dr. Shaffer administered was the Halstead-Reitan Test Battery. (T 27:7172). The results of the Halstead-Reitan showed that Petitioner scored in the impaired range on the Iowa Gambling Task, Booklet Category Test, Cancellation Task, Speech Perception Tests, Dichotic Listening Tests, Boston Naming Test, Aphasia Screening Test, and the Seashore Rhythm Test. Id. at 7177-7180. Petitioner's scores on the Halstead-Reitan were indicative of brain impairment in Petitioner's frontal and temporal lobes. Id.

In Dr. Shaffer's opinion, Petitioner showed significant impairment in frontal lobe functioning, specifically "around the ventromedial portion of the prefrontal cortex." (T 27:7177-7178, 7180). This area of the frontal lobe "is very active in making moral judgments, the appreciation that if I do something there is going to be a horrible consequence." Id. at 7180. Dr. Shaffer told the jury that Petitioner had deficits in the frontal lobe that impaired his ability "to stop a course of action once it's in sequence and change to a safer or more appropriate course of action, the ability to inhibit one's plans and one's intentions once they're in process based on new information that comes in." Id. at 7181.

Petitioner also had speech and language difficulties which were indicative of temporal lobe deficiencies. (T 27:7181). Specifically, Dr. Shaffer believed Petitioner had moderate brain impairment in his left temporal lobe. Id. at 7184-7185. The temporal lobes have a variety of functions, including controlling "emotion centers that involve rage and sexuality." Id. at 7181. The temporal lobe is associated with certain kinds of psychopathology, and "sexual sadists tend to reveal difficulty with the temporal lobes." (T 27:7181). Temporal lobe impairment affects moral judgment and reasoning "so that somebody would not really have feelings about the consequences of what they were doing, the impact that it would have on someone else, the ability to empathize with another person and feel a concern about what would happen to that other person." Id. at 7182.

According to Dr. Shaffer, alcohol would exacerbate these problems:

> [F]rom two vantage points. One is that people that have brain injuries very often turn to alcohol to alleviate the anxiety and the stress that comes from making such poor decisions. Because when they're constantly discovering they're a screw-up, that creates a lot of anxiety. And they tend to withdraw from other people, but the alcohol takes the edge off of the anxiety. And then it masks the problem because everybody just assumes they're a drunk and misses the fact that they've got a damaged brain.

> The second difficulty with alcoholism is that the alcohol intoxication interacts with a damaged brain in a way that is explosive and unpredictable. A normal alcoholic with an intact brain might do some things that are stupid, but somebody with damage to these areas of the brain that's drinking heavily might do something that's lethal.

(T 27:7182-7183). Petitioner's test results indicated "that there's a lot of misfiring going on in the brain creating a lot of noise, you might say." Id. at 7183. He concluded that such deficits indicated Petitioner had suffered a head injury. Id. at 7183-7184.

Dr. Shaffer reviewed Dr. Sachy's report and found that his findings were consistent with those of Dr. Sachy. (T 27:7189). Dr. Shaffer stated "[i]t's the same brain location that I found through my psychological testing." Id. at 7189. Damage to this portion of the brain was associated with:

> [T]he kinds of behaviors we're talking about here that have to do with moral judgment, controlling impulses, and the ability to have a feeling of empathy for what might happen after one makes a certain action and the ability to interrupt that action and redirect in a more healthy direction.

Id.

Mr. Berry then asked Dr. Shaffer to define psychopathy for the jury. (T 27:7189). Dr. Shaffer stated "[p]sychopathy is a condition that's used to describe individuals who seem not to have any emotional reaction in response to other people." Id. Dr. Shaffer denied that psychopathy was a deliberate choice, and he believed that it was important to know why an individual became a psychopath. Id. at 7189-7190. Dr. Shaffer went on to explain, "[w]hen there's damage to that area of the brain, there tends to be an impulsive, explosive behavior that violates the rights of other people without seeming to have much regard for those people." Id. at 7190.

Dr. Shaffer also discussed the results of the two tests administered by the State mental health expert, Dr. Kevin Richards. (T 27:7190-7193). The Harris Psychopathy Scale

accumulates information about an individual's background, such as prior arrests, illegal behavior, and childhood conduct disorders. Id. at 7191. The test then "ties that together with known information about relationships as adults[,]" which Dr. Shaffer indicated would depend on what information could be gathered from a defendant or the family of a defendant. Id.

Dr. Shaffer described the Minnesota Multiphasic Personality Inventory (MMPI) as a self-report questionnaire which contained 566 questions. (T 27:7191-7192). In contrast to the Harris Psychopathy Scale, the MMPI did not rely on any gathering of background information from a defendant's family. Id. at 7192. However, the MMPI used "ten or eleven different scales" that demonstrated "different kinds of mental problems, mental disorders, and mental illness." Id.

Dr. Shaffer concluded that Petitioner demonstrated injuries to the portions of the brain "that have to do with appreciating the consequences of actions and areas that have to do with moral reasoning and the ability to interrupt a course of action once it's in process with new information and redirect one's behavior to a safer, more appropriate course." (T 27:7193).[26]

On cross-examination, Dr. Shaffer admitted that he had not read any of the circumstances surrounding the first rape with which Petitioner was convicted. (T 27:7200-7201). However, Dr. Shaffer stated that such information "goes to the classification that [he] talked about earlier, sexual sadism. A rape is involved with overpowering a person in order to obtain sexual gratification." Id. at 7201. As Dr. Shaffer told the jury, "that type of behavior is related to temporal lobe damage that's consistent with the findings from my neuropsychological testing with [Petitioner]." Id.

Confronted with answers Petitioner had provided in a 2002 prison observation questionnaire, including Petitioner's denial that he had any problems controlling his temper, (T

[26] On redirect, Mr. Berry asked whether Petitioner ever indicated that he wanted Dr. Shaffer to find that he suffered from a mental disorder. (T 27:7216). Dr. Shaffer answered, "No, to the contrary. He seemed to minimize any problems that he has." Id. at 7216-7217.

27:7201-7202), Dr. Shaffer replied that such behavior was "not surprising" because "brain injury patients often have very little insight into their condition, which means that they can't describe their problems or their abilities at all." Id. at 27:7202. Furthermore, "the way [Petitioner] would respond to those questions may be conditioned by the fact that he's sitting in a room with correctional officers, and the way he presents himself is extremely important in that environment in a strategic manner that he's got to make the response that's going to help him out and gain him the most security and the most advantage in that situation." Id. at 7203-7204.

Counsel called Petitioner's oldest son, Tony Ledford (hereinafter "Tony"), as their next mitigation witness. (T 27:7220-7222). Tony testified that he was married with two children. Id. at 7220-7221. Petitioner is his biological father, and Petitioner and Tony's mother divorced when Tony was around two years old. Id. at 7221. Tony lived "all over" growing up, moving back and forth between Michigan and Georgia. Id. at 7222. Tony identified a photograph of himself, his younger brother, and Petitioner standing outside a house when Tony was approximately four years old. Id. at 7222-7223. After his parents divorced, Tony saw his father several times and visited him while he was incarcerated. Id. at 7223-7224. Tony asked the jury to return a life sentence. Id. at 7225.

Trial counsel then presented Michael Campbell, (hereinafter "Michael"), Petitioner's son. Michael testified that Petitioner is his biological father. (T 27:7227). Michael testified that he had spoken on the phone with his father once or twice, visited his father while he was incarcerated, and that Petitioner sent him drawings and letters. Id. at 7227-7229. Michael described Petitioner as a talented artist and he asked the jury to return a life sentence. Id. at 7229-7230.[27]

[27] During habeas proceedings, Mr. West recalled, "[o]ne of his sons who testified, didn't want to testify and he didn't make a very good impression on the jury on the stand....we wanted him to testify just to ask the jury not to

The next witness trial counsel called was Mark Ledford, (hereinafter "Mark"), Petitioner's brother. Counsel introduced numerous pieces of art that Petitioner created while incarcerated and sent to his family members. (T 27:7231-7236). Mark testified that he and Petitioner "were the closest of the brothers." Id. at 7236. Petitioner lived with him and his wife during times when Petitioner was not incarcerated, and Mark explained that Petitioner "demanded supervision constantly." Id. at 7236-7237. Petitioner was an unhappy and tormented person who did not have many friends and expressed feelings of being unable to fit in. Id. at 7237. Mark testified that Petitioner felt that "everything he touched he screwed up." Id. Once, Mark bought a new chainsaw which Petitioner took apart because he couldn't get it started, and "[t]hat was the case with anything." Id. at 7238. Mark testified that both sides of his family had issues with alcohol. Id. Mark asked the jury to spare Petitioner's life, noting "I want to say good things about Mike, but it's hard. He's had a terrible life. I hate to see him go out this way." Id.

Petitioner's mother, Shirley Mihalek, was counsel's final witness. Ms. Mihalek testified that she met Petitioner's biological father when she was sixteen years old, noting that her father did not like him because he was "a drunk." (T 27:7240). She testified that she became pregnant with Donald a year and a half into the relationship. Id. at 7240-7241. After Donald, Ms. Mihalek gave birth to a child every year for six years. Id. at 7241. She testified that Petitioner's father, Bill Ledford, Sr., was "very abusive when he was drinking, which was most of the time," and that he beat her "[m]any, many times." Id. at 7241. She explained that there were many instances in which she and the children would hide in a large walk-in closet from Bill Ledford, Sr., until he "would pass out." Id. at 7241.

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kill their dad. We called him in the penalty phase. He testified, but you could tell he didn't really give a shit about his dad. I'm sure the jury picked up on that too." (HT 12:2961).

There were times when she had to place her children in foster care "because [she] would have no house or food for them, and [she] would make sure they were taken care of." Id. at 7242. Ms. Mihalek finally divorced Bill Ledford, Sr., after he tried to beat up Donald. Id. at 7241. After they divorced, Ms. Mihalek was hospitalized "because [she] took some pills." Id. at 7242. Ms. Mihalek testified that it was hard to remember a lot of the family history because she had suffered "quite a few strokes" which affected her memory. Id. at 7243.

She recalled that Petitioner fell from a tree at age nine and was hurt badly. (T 27:7243-7244). Petitioner wore a cast that covered his upper body and the family "had to get a hospital bed for him because [they] had an upstairs bedroom and he couldn't manage." Id. at 7244. After Petitioner's fall, he suffered kidney damage and severe headaches. Id. Ms. Mihalek testified that all of her sons had drinking problems and that Petitioner did not have many friends growing up. Id. at 7242, 7244. Ms. Mihalek asked the jury to spare Petitioner's life, stating "I cannot change what happened, none of us can, but I don't believe that killing Mike is going to change it either. He deserves to live if that's what he wants to do." Id. at 7250.

State's Mental Health Expert Testimony In Rebuttal

In rebuttal, the State called Dr. Kevin Richards, Ph.D., (T 27:7252-7353), and Dr. David Walker, M.D., (T 27:7354-7414). Dr. Richards, a forensic psychologist, testified about his forensic evaluation of Petitioner. Id. at 7252, 7261. Dr. Richards met with Petitioner for approximately four hours at the Paulding County Detention Center. Id. at 7262. Dr. Richards conducted his evaluation of Petitioner with Dr. Walker, who is a forensic psychiatrist and a medical doctor. Id. at 7263. Dr. Richards listed the records that he had reviewed, including the reports of defense mental health experts Drs. Sachy, Morton, Morris, and Shaffer. Id. at 7264-7267.

In the course of his evaluation, Dr. Richards interviewed Petitioner and administered two tests: the Minnesota Multiphasic Personality Inventory (MMPI-2) and a Psychopathy Checklist. (T 27:7267-7277). Petitioner told Dr. Richards that at the time of the crime, Petitioner:

> [R]emembered around that period of time being upset. He had had to move back in with his mom because his brother and sister-in-law were having some marital problems. He didn't really want to be living there, so he was not happy about that. He was drinking quite a bit around the time and told us that he had been trying to get fired from his job so that he could get on unemployment and stay home and drink instead of having to pretend he was going to work and getting beer and going out and drinking in the woods.

Id. at 7269. Petitioner stated that on the day of the murder, he drank three beers on the trail, and then went to a gas station and bought two more beers, and returned to the trail and drank those beers as well. Id. at 7270-7271. Petitioner claimed that he did not remember much that happened afterwards. Id. at 7271. Dr. Richards testified that Petitioner explained to him during the evaluation:

> "You know, I don't plan to do any of these things....You know, sometimes I'll just be standing at a convenience store buying a beer, and all of a sudden I'll have a gun in my hand and I'll be robbing the place. And I won't even know what happened."

Id. at 7283.

Dr. Richards reached four diagnoses for Petitioner: alcohol dependence, (T 27:7290), cannabis abuse, (T 27:7295), psychopathy, (T 27:7296), and antisocial personality disorder. (T 27:7303). Dr. Richards explained that psychopathy is a personality disorder:

> [M]arked primarily by people who are not particularly concerned with society, societal rules, societal norms, the rights and feelings of others. Their behavior is primarily driven in the interest of meeting their own needs or satisfying their own desires. And the thing that you notice if you look at the course of the lifetime of an individual who has this particular personality organization, you'll find lots of examples of times when they did things because they wanted something or wanted to do something and they were willing to violate a societal norm, a law, or the rights and feelings of another person without any particular regard for the

> impact that behavior might have on them. So these folks are sort of callous. They lack empathy.

(T 27:7284). Regarding his diagnosis of antisocial personality disorder, Dr. Richards stated: "[i]t's similar to psychopathy in a way....But it's different in that it focuses mostly on the behaviors. It focuses primarily on a pattern of behavior that violates social norms, a pattern of behavior that shows irresponsibility or disregard." Id. at 7306. Dr. Richards also explained "pretty much everybody, that meets criteria for psychopathy will meet criteria for antisocial personality disorder. But only a subset of people that meet criteria for antisocial personality disorder would also meet the diagnostic criteria for psychopathy." Id. at 7306-7607.

The State then called Dr. David Walker, M.D, in rebuttal. (T 27:7354-7414). Dr. Walker spent three hours and forty minutes interviewing Petitioner in the Paulding County Detention Center. (T 27:7363). Dr. Walker reviewed numerous records, including Petitioner's MRI. Id. Dr. Walker diagnosed Petitioner with alcohol dependence, cannabis abuse, antisocial personality disorder, and hepatitis C. (T 27:7364). Dr. Walker did not see the white matter lesions that Dr. Sachy identified in Petitioner's MRI, and although he did notice some atrophy in Petitioner's brain, he did not find that this shrinkage was clinically significant.[28] (T 27:7370-7373).

Closing Argument

During closing argument, Mr. West acknowledged that the jury had found to its satisfaction that the State proved its case beyond a reasonable doubt at the guilt phase. (T 29:7510). Mr. West again told the jury:

> You have not heard us present any evidence that excuses or says that Michael is not guilty of these offenses. You have not heard one bit of evidence from the defense that says he's not guilty because he's crazy, that he's not guilty because of any mental aberration. What you have heard is that there is evidence that he has brain damage that he did not choose. You have heard that he's got evidence of a

[28] On redirect, Dr. Walker repeated that he had seen no evidence of a brain injury that would have caused Petitioner to commit the crime. (T 27:7413).

> horrific upbringing that even the State's psychiatrist, Dr. Walker, described as having lived in abject poverty during his youth.

(T 29:7511). Mr. West then summarized the testimony of Drs. Morris, Sachy, Morton, and Shaffer. (T 29:7511-7521). Mr. West discounted Dr. Walker's diagnosis of psychopathy, which he indicated "isn't even any such thing in the DSM-IV that is the leading authority in these areas. So I think we can kind of discount what Dr. Richards said because he's not basing it on a recognized source." (T 29:7521-7522). Mr. West argued that Petitioner's antisocial personality disorder was the result, and not the cause, of his troubled history and brain damage. (T 29:7511-7512). Finally, Mr. West argued that Petitioner's family should not be punished by a death sentence, especially because they had acted correctly in turning in Petitioner after he committed the crime. (T 29:7528-7529).

A. No Deficiency

This Court finds that trial counsel's presentation of evidence in mitigation was reasonable, particularly in light of counsel's thorough investigation of Petitioner's background, including his mental health, sexual abuse, and substance abuse. Based on that investigation, counsel made reasonable strategic choices. "It is well established that the decision as to which defense witnesses to call is a matter of trial strategy and tactics. (citation omitted.)" Humphrey v. Nance, 293 Ga. 189, 220 (2013) (quoting Hubbard v. State, 285 Ga. 791, 794 (2009)). Furthermore, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland v. Washington, 466 U.S. 668, 690.

Petitioner alleges trial counsel were ineffective for eliciting testimony that Petitioner was antisocial and a psychopath; and, for failing to procure funds for a prison adaptation expert.[29] In

[29] In his amended petition, Petitioner claims that counsel unreasonably failed to retain a prison adaptation expert to testify at the penalty phase. (Amended Petition at 8, Claim I(o)). However, in his post-hearing brief, Petitioner claims that counsel was ineffective for not procuring funds for a prison adaptation expert. (PHB 51-60).

support of his claims, Petitioner submitted six affidavits of family members and friends, four expert reports, seventy records documenting the history of Petitioner and Petitioner's family, the reports of the four mental health experts who testified for Petitioner at Petitioner's trial, and Ms. Michaels' genogram. (PX 1-76). At the state habeas hearing, Petitioner called one witness to testify, social worker Mary McLaughlin. (HT 1:25-119).

i. Testimony Regarding Antisocial and Psychopathy

Petitioner claims that trial counsel's strategic decision to elicit testimony that Petitioner was antisocial and a psychopath was not reasonable because it "effectively provided evidence in aggravation rather than mitigation." (PHB 1). Petitioner argues that trial counsel should have presented the testimony of a forensic social worker, such as Mary McLaughlin, instead to prevent the testimony that Petitioner is antisocial and/or a psychopath from being introduced. At the evidentiary hearing, Petitioner presented Ms. McLaughlin, who testified that she completed an assessment of Petitioner during habeas proceedings. (HT 1:37-38). Ms. McLaughlin reviewed numerous documents including affidavits of Petitioner's family members and friends; portions of the trial transcript; and medical, school, employment, mental health, and law enforcement records.[30] (HT 1:38-39; PX 9, HT 3:318). Additionally, she interviewed Petitioner, his mother, and his siblings, Sherri, Billy, Mark, and Daniel. (HT 1:38-39; PX 9, HT 3:318; RX 16, HT 12:3106).

Ms. McLaughlin discussed the living conditions of Petitioner's family including how they moved often, lived in poverty, and lived with their extended family at times. (HT 1:40-43). She testified that Petitioner's father was an abusive alcoholic, that the children were afraid of

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[30] The Court notes that the records admitted into evidence by Petitioner at the habeas hearing, which Ms. McLaughlin indicated that she relied upon, contain prison records suggesting that Petitioner suffered from antisocial personality disorder. (PX 25, HT 3:573, 588).

him, and that they recalled hiding in the closet when he came home. (HT 1:40, 44). Ms. McLaughlin discussed sexual abuse within the Ledford family including Petitioner's sister, Sherri, who was sexually abused by her uncle; Petitioner's brother, Daniel, who was sexually abused from age eight to twelve by a cousin and by his sister, Sherri; and, Petitioner, who was molested by his mother's boyfriend. (HT 1:46-47, 49-52, 90). Additionally, Ms. McLaughlin testified regarding Petitioner's history with substance abuse, how the Ledford brothers began drinking together, and their criminal behavior. (HT 1:55-60). Ms. McLaughlin also explained the impact of poor parenting. (HT 1:60-69). This Court finds that the majority of Ms. McLaughlin's testimony is cumulative of the testimony presented at Petitioner's trial.[31]

Furthermore, trial counsel's decision to elicit testimony from Petitioner's mental health experts that Petitioner was antisocial and a psychopath *before* the State's mental health experts presented those same conclusions to the jury during their rebuttal testimony, was reasonable. (T 27:7189). Although Mr. Berry could not specifically recall why he questioned Dr. Shaffer about psychopathy, he stated "I'm sure there was a reason at that particular point in time, but maybe because of the fact that the State was going to argue that, so we wanted to try to get that out...and let the doctor explain that's not something that you wake up and decide you want to be." (HT 2:247-248). This demonstrates counsel's reasonable decision to "preempt any effort by the prosecution to prove the same thing." Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1169 (11th Cir. 2012) (citing Awkal v. Mitchell, 613 F.3d 629, 642 (6th Cir. 2010) (en banc)). This is "the sort of calculated risk that lies at the heart of an advocate's discretion." Yarborough v. Gentry, 540 U.S. 1, 9 (2003).

[31] Regarding the portion of Ms. McLaughlin's testimony which was not cumulative of the evidence presented at Petitioner's trial, as explained below, Petitioner has failed to show prejudice.

Moreover, a capital defense attorney does not render ineffective assistance of counsel "as a matter of law when he introduces evidence of antisocial personality disorder for mitigation purposes." Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1168 (11th Cir. 2012). As the Supreme Court of the United States has explained "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (alteration and emphasis in original) (internal quotation marks omitted). "That a diagnosis of antisocial personality disorder has negative characteristics or presents a double-edged sword renders it uniquely a matter of trial strategy that a defense lawyer may, or may not, decide to present as mitigating evidence." Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1168 (11th Cir. 2012).

Petitioner alleges trial counsel never considered not presenting mental health testimony. However, Mr. West indicated that counsel had considered the possibility that they would not present mental health expert testimony at sentencing:

> [I]f Sachy came back and said, well hey, there's no, I don't see any brain damage, if Shaffer came back and said the guy's as normal as, sound as a bell, we wouldn't have used the experts and we would have come up with a different theory to explain his aberrant behavior.

(HT 1:166). Counsel knew that the State would present highly aggravating evidence of the victim's murder to the jury. Counsel was also aware that despite attempts to limit the introduction of similar transactions, the jury would learn about Petitioner's numerous attacks against women, in some instances through the testimony of the victims themselves. (HT 1:148). Additionally, despite vigorously challenging the introduction of Petitioner's recorded telephone calls from the prison, the trial court ruled during the State's presentation of aggravation at

sentencing that the tapes would be admitted and played to the jury. In light of this aggravating evidence, counsel chose to present expert mental health witnesses to support counsel's argument that Petitioner's behavior was so uncontrollable that it must be involuntary and the result of brain damage, and attempt to counter the State's experts' testimony by presenting the worst of the diagnoses themselves.

Counsel's investigation had revealed a wealth of mitigating evidence. Mr. West instructed the defense team to focus on documents and witnesses that would explain Petitioner's mental, alcohol, and sexual issues. (RX 134, HT 71:18238). However, in addition to the lay witness and fact witness testimony about Petitioner's social history and his history of physical, emotional, sexual, and substance abuse, counsel could have reasonably decided that the additional presentation of expert mental health evidence provided their client's best chance to avoid a death sentence. Different lawyers will evaluate these risks differently as "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689.

The Georgia Supreme Court has held that:

> [E]ven if a defendant can distinguish between right and wrong, expert mental health testimony and evidence regarding the effects of a history of substance abuse, as well as severe abuse at the time of the crimes, "is critical at the penalty phase of a capital case 'because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more culpable than those committed by a person without that appreciation.' [Cit.]"

Hall v. McPherson, 284 Ga. 219, 229-230 (2008) (quoting Bright v. State, 265 Ga. 265, 275 (1995)). In Bright, the Georgia Supreme Court noted:

> Finally, although at sentencing Bright did rely on his own testimony from the guilt-innocence phase of the trial regarding his intoxicated condition on the evening of the murders, and although he possibly could have offered other non-expert evidence regarding his history of drug abuse, his intoxication on the

> evening of the crimes, his emotional troubles, and his troubled youth, Bright's testimony, as would have any other non-expert evidence he could have offered, only inartfully covered the issues in question and did not provide Bright with the meaningful scientific and psychiatric evidence that a defendant with money could have offered in his defense.

Bright, 265 Ga. at 276-277).Counsel representing defendants convicted of capital murder, like counsel here, face difficult sentencing decisions. Here, trial counsel's strategy was to "explain how someone could do what [Petitioner] did[,]" which they thought could best be done through expert mental health testimony. (HT 1:152). Unfortunately, as is often the case with individuals who have committed crimes like those of Petitioner, this mental health evidence will almost certainly have aggravating components. However, counsel considered their options and felt that the testimony of mental health experts could be more mitigating than aggravating.

When the record is viewed as a whole, trial counsel's decision to present expert mental health testimony, including evidence of antisocial personality disorder and psychopathy, was reasonable, and Petitioner has not demonstrated any deficient performance.

ii. Prison Adaptability Expert

Petitioner also claims that counsel unreasonably failed to retain a prison adaptability expert for the sentencing phase of his trial.[32] In his brief, Petitioner acknowledges that trial counsel's file indicates there was discussion about hiring "an expert witness who could opine that [Petitioner] would not pose a future danger while serving the remainder of his life in prison." (PHB 52). However, Petitioner argues counsel had "no reasonable strategic reason" for not hiring a prison adaptation expert.

[32] In his amended petition, Petitioner claims that counsel unreasonably failed to retain a prison adaptation expert to testify at the penalty phase. (Amended Petition at 8, Claim I(o)). However, in his post-hearing brief, Petitioner claims that counsel was ineffective for not procuring funds for a prison adaptation expert. (PHB 51-60). As explained below, this Court finds that both variants of Petitioner's claim are without merit.

As Mr. Berry testified during habeas proceedings, counsel considered the use of a prison adaptability expert at Petitioner's trial; however, they decided against it because Mr. Berry had a bad experience with this type of expert in a prior case. (HT 2:252). Specifically, Mr. Berry testified:

> I think that was more me talking Tom into not doing it. And the reason is, I had been bitten in the Humphreys case. I got talked into putting that expert on, and it turned out to be the turning point in the case. And this is my personal belief: I think a jury does not want to hear that a person is going to enjoy jail and that they're going to fit in just fine. I think a juror, if they're going to give a person a life without parole or a life sentence, they don't want to think the person is going to enjoy themselves and that they're going to have a good time there. I think a juror wants to know they're looking behind their back every minute, it's not going to be a nice place and they're not going to have fun there. So, adaptability in prison is not something that I think is worthwhile at all. I think it undermines, really what you need to do in mitigation. I think that you need to cover with a jury the fact that this person is not going to be able to commit crimes in the prison system because they're locked away, they're shackled, they're handcuffed everywhere they go. They're not going to have the ability to be able to commit another crime. So, their inability to do that is much better to talk about than their adaptability, and that was the reason that I felt like it would not be – and, you know, we talked to Michael. This was going to be a hard sell. This was a difficult case just because of the circumstances. So, I just didn't think it was going to help us at all.

(HT 2:252-253). Mr. West recalled a similar strategic reason for counsel's decision not to present Mr. Aiken:

> We'd always ask for James [Aiken], and typically it would be denied, or in this case it was. We had a budget crunch. We had to pare our budget and I think we pared everyone that wasn't primarily a mental health type person.

(HT 1:174).

Mr. West's testimony also demonstrates that counsel procured funds for expert witnesses to present at sentencing, but given the limitations to the defense team's funding, counsel decided not to present a prison adaptability expert in favor of using their limited resources for mental health experts. Consequently, the Court finds that Petitioner has not demonstrated that counsel's

performance was deficient with regard to their request for funds for a prison adaptability expert, or as to their ultimate decision not to present such an expert.

B. No Prejudice

As discussed above, this Court finds that trial counsel's presentation of evidence in mitigation, including mental health evidence, was reasonable. Furthermore, even if this Court were to find trial counsel's performance deficient, which it does not, Petitioner's claim still fails as he has not shown resulting prejudice.

A comparison of the trial record and the habeas record shows the majority of the evidence presented in habeas was cumulative of the evidence presented at Petitioner's trial. Petitioner argues that this cumulative evidence, the evidence regarding Petitioner's childhood, poverty, familial incest and molestation, alcohol abuse, physical abuse, parental neglect and poor parenting, multigenerational mental illness, residential instability, social isolation, lack of protective factors, school history, and work history, would have resulted in a reasonable probability of a different sentence had counsel presented this evidence at sentencing *without* the testimony regarding Petitioner's diagnoses of antisocial personality disorder and psychopathy. (PHB at 48-49). However, this conclusion ignores the fact that removal of this evidence would have removed the majority of Petitioner's mitigating mental health evidence. Had counsel foregone the expert testimony of Petitioner's mental health issues as Petitioner suggests, the jury would not have heard any plausible explanation for Petitioner's crimes, or for his deviant behavior while awaiting trial in the correctional center. Without Dr. Morton's testimony about Petitioner's alcohol abuse, Dr. Morris's testimony about Petitioner's sexual abuse, and the testimony of Drs. Sachy and Shaffer about Petitioner's brain damage, the jury would have been left even more puzzled.

Furthermore, the presentation of an expert like Ms. McLaughlin and the affidavits tendered at habeas held their own risks. The focus on the sexual molestation by the various family members would likely have undercut the mitigating value of the testimony of Petitioner's sister, Sherri Byess, had the jury heard that Petitioner's brother, William Ledford ("Billy"), claimed that she had molested him as a child. (PX 4, HT 3:291). Billy's medical records, entered by Petitioner at the habeas hearing and relied upon by his habeas expert, indicate that Billy reported as early as 2001 that he had been molested by his sister. (PX 33, HT 4:664).

Likewise, additional testimony from Daniel Ledford regarding alleged sexual misconduct between Petitioner and his brother would have been a "double-edge sword." Courts have "consistently 'rejected the prejudice argument where mitigation evidence was a two-edged sword or would have opened the door to damaging evidence.' Cummings v. Sec'y for the Dep't of Corr., 588 F.3d 1331, 1367 (11th Cir. 2009) (internal quotations marks omitted)." Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1296 (11th Cir. 2012). The evidence that Petitioner allegedly molested his brother Daniel is a double-edge sword because, as noted by Mr. Berry, it could have been used by the State as another similar transaction. (RX 14, HT 12:3059).

Additionally, the Court notes that the information Petitioner claims that counsel was ineffective for presenting to the jury, that Petitioner suffered from antisocial personality disorder, is mentioned in the documents that his habeas expert, social worker Ms. McLaughlin, relied upon and which he entered as exhibits during the habeas hearing. (PX 25, HT 3:573, 588). "[Petitioner] has failed to show how this witness' testimony would have changed the outcome of the trial when the same evidence [he] contends [the witness] would have testified to was admitted through other witnesses." Gibson v. State, 290 Ga. 6, 12 (2011).

The Court finds that both variants of Petitioner's claim, that he suffered prejudice because of counsel's failure to present a social worker such as Ms. McLaughlin to testify at sentencing in order to avoid the jury's exposure to potentially negative mental health testimony, and his claim that he suffered prejudice from the slight differences between the mitigation testimony presented at trial and at the habeas hearing, are without merit.

Regarding the report of James Aiken, testimony from "future dangerousness experts" has previously been found unpersuasive. See Johnson v. Upton, 615 F.3d 1318, 1343 (11th Cir. 2010). Further, the opinions stated in Mr. Aiken's affidavit are contradicted by Petitioner's classification report, dated August 28, 1992, contained within the prison records submitted by Petitioner at the habeas hearing. (PX 25, HT 3:570-571). The report states:

> OPR listed inmate's violence potential as very high. I feel that the inmate has a potential to assault female correctional officers. Inmate does have a past record of sexually assaulting females and I feel he will have a tendency to assault female correctional officers even while incarcerated. I feel that inmate gets some kind of high or thrill by sexually assaulting female victims.

(PX 25, HT 3:570). Additionally, the report recommended that Petitioner "be employed away from female correctional officers or any type of female staff." Id. The Georgia Supreme Court noted the specific evidence that forecloses relief based on Petitioner's current claim:

> Contrary to Ledford's contention, the prosecutor's argument that Ledford might present a future danger to others was based on specific evidence supporting that argument, including evidence that Ledford had sexually harassed a pregnant jail guard and had made sexual remarks to a 14-year-old girl over the telephone from the jail. Compare Henry v. State, 278 Ga. 617, 619 (1) (604 SE2d 826) (2004) ("An argument that a death sentence is necessary to prevent future dangerous behavior by the defendant in prison must be based on evidence suggesting that the defendant will be dangerous in prison.").

Ledford, 289 Ga. at 87.

The United States Supreme Court has held that, with regard to death sentences, "the question is whether there is a reasonable probability that, absent the errors, the sentencer...would

have concluded that the balance of the aggravating and the mitigating circumstances did not warrant death." Strickland, 466 U.S. 668, 695. Petitioner argues the non-mental health mitigating evidence would have resulted in a reasonable probability of a different sentence had counsel presented this evidence at sentencing through a non-mental health expert, without the mental health evidence. (PHB 19). This Court does not agree. Regarding the aggravating circumstances, the Georgia Supreme Court found:

> [T]he separate aggravated battery verdicts are supported by the evidence that the victim's death was not instantaneous...Likewise, the jury's finding of torture was supported by the evidence that the victim's death was not instantaneous, but was preceded by serious sexual abuse, as well as the serious physical abuse which constituted the aggravated batteries...Furthermore, the shocking and vicious nature of the victim's murder by stomping and kicking authorized the jury to find that the murder was outrageously or wantonly vile, horrible, or inhuman.

Ledford, 289 Ga. 70, 89-90.

Weighing the mitigating evidence presented during habeas proceedings[33] against the aggravating circumstances, including Petitioner's "long history of criminal acts against numerous women, including a rape, several apparent attempted rapes, and sexually-deviant behavior directed at women and his own 14-year-old relative,"[34] this Court finds that Petitioner has not met his burden of demonstrating a reasonable probability of a different outcome. Accordingly, Petitioner's claims of ineffective assistance of counsel are DENIED.

2. SENTENCING PHASE INSTRUCTIONS

In **Claim XIII**, Petitioner argues that the trial court's sentencing phase instructions were ambiguous, misleading, insufficient, vague, confusing, and contrary to law and fact.

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[33] The evidence regarding Petitioner's childhood, poverty, familial incest and molestation, alcohol abuse, physical abuse, parental neglect and poor parenting, multigenerational mental illness, residential instability, social isolation, lack of protective factors, school history, and work history.

[34] Ledford, 289 Ga. 70, 90.

Additionally, in **Claim XIV**, Petitioner claims that the trial court failed to instruct the jurors that unanimity was not required to impose a life sentence.

Claims of error in the sentencing phase jury charges in a death penalty case are not subject to procedural default. Head v. Ferrell, 274 Ga. 399, 403 (2001); Tucker v. Kemp, 256 Ga. 571, 573-574 (1987). Accordingly, this claim is properly before the Court for a review on the merits. However, Petitioner did not brief this claim or present evidence to support it. A review of the sentencing phase instructions in their entirety reveals no merit in Petitioner's contentions regarding those charges. Accordingly, this claim is DENIED.

3. ALLEGED JUROR MISCONDUCT

Petitioner requests that this Court reconsider its March 11, 2014 order granting Respondent's motion to quash Petitioner's subpoenas sent to the jurors from his trial. Petitioner repeats his two previous arguments, that he was denied a fair trial and reliable sentencing proceeding because of alleged juror misconduct. (PHB at 80-84). After reviewing the facts and the law this Court declines to reconsider its earlier ruling.

O.C.G.A. § 24-6-606(b) (effective January 1, 2013), provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form.

O.C.G.A. § 24-6-606 (effective January 1, 2013).[35]

[35] Formerly, O.C.G.A. §§ 9-10-9 and 17-9-41 provided that the affidavits of jurors may be taken to sustain but not to impeach their verdict.

This statutory prohibition is deeply rooted in Georgia law and serves important public policy considerations. See, e.g., Oliver v. State, 265 Ga. 653, 654(3) (1995); Reece v. State, 208 Ga. 690, 691 (1952) (holding that "[i]t is well settled, as a matter of public policy, that a juror will not be heard to impeach his verdict by showing his own incompetency or disqualification"); Bowden v. State, 126 Ga. 578 (1906) (holding "[a]s a matter of public policy, a juror can not (sic) be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow- jurors, or by showing his own misconduct or disqualification from any cause"). Moreover, the Supreme Court of Georgia has explicitly applied this statutory prohibition against juror impeachment of the verdict to death penalty cases. See, e.g., Spencer v. State, 260 Ga. 640, 643(3) (1990); Hall v. State, 259 Ga. 412, 414(3) (1989).

Like the Georgia state courts, "for nearly a century, the Supreme Court has recognized a near-universal and firmly established common-law rule *flatly prohibiting* the use of juror testimony to impeach a verdict." United States v. Siegelman, 640 F.3d 1159, 1185 (11th Cir. 2011) (citing Tanner v. United States, 483 U.S. 107, 117 (1987); McDonald v. Pless, 238 U.S. 264 (1915) (emphasis in original)); see also Crawford v. Head, 311 F.3d 1288, 1331-334 (11th Cir. 2002) (juror affidavits containing evidence of juror misconduct were inadmissible because the affidavits did not contain evidence of "external influences"). The Court further explained the "important policy considerations" behind this rule such as harassment of jurors by the defeated party which directly hampers "freedom of discussion" during deliberations and creates "endless attack[s]" on the verdict. United States v. Siegelman, 640 F.3d at 1185-186.

Petitioner has not provided any valid basis for the Court to reconsider these previous rulings regarding Petitioner's claims of juror misconduct, much less any grounds that require the Court to vacate its order and "re-open the evidence to allow testimony from the jurors"

surrounding the alleged misconduct as requested by Petitioner. (PHB at 84). For the reasons set forth in the Court's order filed on March 13, 2014, the Court granted Respondent's Motion to Quash Juror Subpoenas and Motion in Limine to Preclude Evidence Impeaching Jury Verdict. As Petitioner has not presented any proper evidence of juror misconduct Petitioner's claim is therefore DENIED.

VI. CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition, the evidence presented at the habeas corpus hearing, and the argument presented to this Court in Petitioner's post-hearing brief, 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 execution of his lawful sentence.

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

SO ORDERED, this 23rd day of August, 2016.

HONORABLE CHRISTOPHER S. BRASHER
Sitting by Designation in
Butts County Superior Court

APPENDIX 5

SUPREME COURT OF GEORGIA
Case No. S17E0955

Atlanta August 14, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MICHAEL LEDFORD v. ERIC SELLERS, WARDEN

From the Superior Court of Butts County.

After a careful review of Ledford's application for a certificate of probable cause to appeal the denial of his habeas petition, the Warden's response, the record in this case, and the trial record, the application is denied as lacking arguable merit. See Supreme Court Rule 36.

All the Justices concur, except Peterson and Grant, JJ., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk 's Office, Atlanta

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

Clerk

Res. Ex. No. 319
Case No. 4:17-CV-211

APPENDIX 6

289 Ga. 70
Supreme Court of Georgia.

LEDFORD
v.
The STATE.

No. S10P1859.
|
March 25, 2011.
|
Reconsideration Denied April 12, 2011.

Synopsis
Background: Defendant was convicted in the Superior Court, Paulding County, James R. Osborne, J., of malice murder and related offenses and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Carley, P.J., held that:

[1] separate convictions for aggravated battery did not merge with each other, overruling *Nealey v. State,* 285 Ga.App. 334, 646 S.E.2d 471;

[2] convictions for aggravated battery merged with conviction for malice murder that arose from same course of conduct;

[3] change of venue was not warranted based on pretrial publicity;

[4] trial court's rulings on prospective jurors' qualifications were not abuse of discretion;

[5] prior conviction for rape was sufficiently similar to instant rape and aggravated battery;

[6] trial court's comment with respect to jury's visit to crime scene was not improper comment on evidence;

[7] defendant was not required to move for mistrial in order to obtain appellate review of challenge to trial court's alleged improper comment on evidence, disapproving *Whitner v. State,* 276 Ga. 742, 584 S.E.2d 247; *Walker v. State,* 282 Ga. 774, 653 S.E.2d 439; *Pittman v. State,* 273 Ga. 849, 851, 546 S.E.2d 277, and *Paul v. State,* 272 Ga. 845, 537 S.E.2d 58;

[8] prosecutor's comments during argument were not improper;

[9] evidence supported jury's finding of aggravating circumstances; and

[10] death sentence was not disproportionate to sentences imposed in other cases.

Affirmed in part and vacated in part.

West Headnotes (56)

[1] Criminal Law Merger of offenses

The merger rule prohibiting more than one conviction if one crime is included in the other does not apply unless the same conduct of the accused establishes the commission of multiple crimes. West's Ga.Code Ann. § 16–1–7(a)(1).

9 Cases that cite this headnote

[2] Criminal Law Merger of offenses

Three convictions for aggravated battery did not merge with each other, where each battery count was predicated on separate blows to body that caused separate injuries to victim's lung, head and face, and larynx; overruling *Nealey v. State,* 285 Ga.App. 334, 646 S.E.2d 471. West's Ga.Code Ann. §§ 16–1–7(a)(1), 16–5–24(a).

2 Cases that cite this headnote

[3] Criminal Law Merger of offenses

Three convictions for aggravated battery merged with conviction for malice murder that arose from same course of conduct; all three aggravated battery convictions were predicated on injuries that each contributed to victim's death by asphyxiation, battery was included in crime of murder, and only difference between crimes was

degree of injury. West's Ga.Code Ann. §§ 16–1–7(a)(1), 16–5–1(a), 16–5–24(a).

9 Cases that cite this headnote

[4] **Criminal Law** Merger of offenses

If the same conduct established the commission of both offenses, it is generally necessary to take the next step in the merger analysis by applying the "required evidence" test for determining when one offense is included in another: a single act may constitute an offense which violates more than one statute, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. West's Ga.Code Ann. §§ 16–1–6(1), 16–1–7(a)(1).

10 Cases that cite this headnote

[5] **Sentencing and Punishment** Merger

The fact that the same intent supports an element in each charged crime does not warrant merging of the sentences, where other mutually exclusive elements of the crimes remain, which must be compared. West's Ga.Code Ann. § 16–1–7(a)(1).

[6] **Criminal Law** Merger of offenses

A crime is included in another, for merger purposes, if it differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission. West's Ga.Code Ann. § 16–1–7(a)(1).

10 Cases that cite this headnote

[7] **Criminal Law** Particular offenses

Change of venue was not warranted in trial for malice murder and related offenses based on pretrial publicity; much of publicity occurred long before trial and provided little detail about case, and although 22 of 120 prospective jurors questioned on subject were excused for cause based at least in significant part on exposure to information about case pretrial, most jurors had heard nothing of particular import to court's analysis of venue issue.

[8] **Criminal Law** Local Prejudice

In order to be entitled to a change of venue, a defendant is required to show that the trial setting is inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors.

[9] **Jury** Mode of examination

A defendant's right to inquire into the ability of prospective jurors to consider mitigating evidence is not improperly limited by the direction that prospective jurors should not be asked to prejudge a given case based on hypothetical evidence.

[10] **Jury** Mode of examination

Trial court's instruction to prospective jurors that malice murder was defined as unlawful killing without "justification, excuse or mitigation," did not mislead jurors into believing that guilty verdict would exclude possibility of defendant presenting any mitigation evidence at sentencing for capital murder, in view of detailed voir dire, great latitude granted to parties in conducting their own voir dire, and trial court's instructions to jury during penalty phase.

[11] **Jury** Punishment prescribed for offense

The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

2 Cases that cite this headnote

[12] **Criminal Law** Summoning, impaneling, or selection of jury

On appeal, the relevant inquiry as to the qualification of a prospective juror based on his or her views on capital punishment is whether the qualification is supported by the record as a whole.

[13] **Criminal Law** Jury selection

An appellate court must pay deference to the finding of the trial court as to a prospective juror's qualifications based on his or her views of capital punishment; this deference includes the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire.

4 Cases that cite this headnote

[14] **Criminal Law** Selection and impaneling

Jury Discretion of court

Whether to strike a juror for cause is within the discretion of the trial court, and the trial court's rulings are proper absent some manifest abuse of discretion.

[15] **Jury** Punishment prescribed for offense

Prospective juror was disqualified based on her views of death penalty; although she initially stated that she could consider death sentence under certain circumstances, she gradually moved from that position, to point that she stated clearly that she could not impose death under any circumstances whatsoever.

[16] **Jury** Punishment prescribed for offense

Prospective jurors who repeatedly and clearly stated that they were conscientiously opposed to death penalty and could not consider it as option were disqualified from serving on jury in capital murder trial.

[17] **Jury** Punishment prescribed for offense

Prospective juror who initially indicated that she did not know if she could impose death as sentence for capital murder and that she would have to struggle with whether she could do so, but who eventually settled clearly and firmly on opinion that she could not consider imposing death under any circumstances, was disqualified from serving as jury in trial for capital murder.

[18] **Jury** Punishment prescribed for offense

Prospective juror who stated that she would not consider either death or life without possibility of parole as sentence for capital murder was disqualified from sitting on jury in capital murder trial.

[19] **Criminal Law** Impaneling jury in general

Because Georgia law entitles a defendant to a panel of 42 qualified jurors, the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal.

[20] **Jury** Punishment prescribed for offense

A juror who will automatically vote for the death penalty in every case upon a conviction for murder is not qualified to serve, because such a juror, instead of giving consideration to mitigating circumstances, begins the trial with an unwavering bias in favor of one of the sentences authorized under law, to the exclusion of the others.

[21] **Jury** Punishment prescribed for offense

A potential juror's views on capital punishment will disqualify the juror from service if the juror's views would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions given the juror and the oath taken by the juror.

2 Cases that cite this headnote

[22] **Criminal Law** Summoning, impaneling, or selection of jury

Criminal Law Jury selection

In conducting appellate review of the jury voir dire to determine their qualification to serve in a capital murder trial, the Supreme Court views the voir dire of each juror as a whole and gives deference to the findings of the trial court concerning any juror's possible bias.

1 Cases that cite this headnote

[23] **Jury** Punishment prescribed for offense

Prospective juror's conflicting responses as to whether he could consider sentence of life without possibility of parole as sentence for capital murder did not necessarily disqualify him from serving on jury, in light of subsequent, clear responses that he could consider such sentence and that his responses had changed based on his fuller understanding of trial process.

[24] **Jury** Punishment prescribed for offense

Prospective juror who indicated that he leaned somewhat in favor of sentences other than life without possibility of parole, but that he would consider imposing such sentence in light of evidence presented at trial, was qualified to sit on jury in capital murder trial.

1 Cases that cite this headnote

[25] **Jury** Punishment prescribed for offense

Prospective juror's responses at one point during voir dire indicating that she would not consider sentence less than death did not disqualify her from sitting on jury in capital murder trial, where she clarified her responses by stating that, although she leaned in favor of death penalty, she would consider all evidence and all sentencing options.

[26] **Jury** Punishment prescribed for offense

Prospective juror who stated that she favored death penalty for religious reasons was not disqualified from serving on jury in capital murder trial, where she stated repeatedly that her religious beliefs would not prevent her from considering all evidence and all sentencing options.

[27] **Jury** Punishment prescribed for offense

Prospective juror who stated that it was highly improbable that he would find sufficient mitigating circumstances to warrant sentence of life without possibility of parole was not disqualified from sitting on jury in capital murder trial, where he acknowledged that he might be impaired in his ability to select such sentence, and indicated that he would consider all mitigating evidence and all three sentencing options.

[28] **Criminal Law** Impaneling jury in general

Any possible error in failing to excuse two prospective jurors based on their views of death penalty was harmless, in capital murder trial, where jurors were ultimately excused for other reasons.

[29] **Jury** Relationship to party or person interested

Prospective juror was not disqualified from serving based on his statement that he and his wife had ridden bicycles along same trail where victim was beaten and killed, where juror indicated that his contact with trail would not affect deliberations.

[30] **Jury** Relationship to party or person interested

Jury Pretrial publicity

Prospective juror who stated that he had done internet search and found article leading to nothing prejudicial against defendant and whose wife was no longer willing to use trail where victim had been killed was not disqualified from sitting as juror in capital murder trial.

[31] **Jury** Pretrial publicity

Prospective juror who had seen some reports indicating that murder had occurred and recalled hoping at that time that perpetrator of such "heinous crime" would be brought to justice was not disqualified from serving in capital murder trial, in view of voir dire responses indicating that he had not formed opinion regarding defendant's guilt or as to appropriate sentence for perpetrator.

[32] **Jury** Punishment prescribed for offense

Prospective juror who was veterinarian and who euthanized animals and believed process was "humane," without more, was not necessarily disqualified from sitting on jury in capital murder trial.

[33] **Criminal Law** Summoning and impaneling jury

Defendant waived challenge on direct appeal to trial court's question to prospective juror to clarify vague, hypothetical question during prospective juror's voir dire as to whether someone who had done something wrong was entitled to mercy, where defendant did not object to trial court's resolution of matter.

[34] **Criminal Law** Counsel for accused

Defendant waived claim on direct appeal that trial court impermissibly interrupted defendant's voir dire of prospective juror after defendant asked question that could have been construed as seeking prejudgment of case by jury, where defendant interrupted trial court and immediately continued his voir dire.

1 Cases that cite this headnote

[35] **Criminal Law** Counsel for accused

Defendant waived challenge to trial court's limitation of voir dire of prospective juror regarding whether juror would consider life with possibility of parole in case involving no excuse and no justification, following state's objection on basis that question called for prejudgment of case, where, after trial court attempted to resolve matter by asking its own questions about juror's willingness to consider all three sentencing options, it indicated that it would not allow any more hypothetical questions as to what juror would do in extreme case, and defendant raised no further objections.

2 Cases that cite this headnote

[36] **Jury** Mode of examination

Trial court's disallowance of question to prospective juror who had stated that she opposed death penalty because it foreclosed possibility of change, as to whether her view on death penalty might change if she was assured of time gap between sentencing and execution, was not abuse of discretion, in that question would have been meaningful only if combined with improper speculation about length of any appeal process.

[37] **Criminal Law** Temporal Relation of Events

Gap of more than ten years between prior conviction for rape and instant charges for aggravated sodomy and aggravated assault with intent to commit rape did not preclude finding that prior rape was sufficiently similar to be probative on issue of intent, bent of mind, and course of conduct, in view of fact that defendant had served ten-year sentence for prior rape.

2 Cases that cite this headnote

[38] **Criminal Law** Sex offenses, incest, and prostitution

Criminal Law Similar means or method; modus operandi

Evidence that several years prior to instant rape and murder, defendant had attempted to subdue woman riding bicycle along same bike trail where victim was raped and murdered was sufficiently similar to show defendant's modus operandi and common scheme and plan.

[39] **Criminal Law** View and Inspection

Allowing jury to view crime scene was not abuse of discretion, in trial for capital murder; scene view might have aided jury in understanding evidence, despite changes, and because jurors were able to see original condition of scene in photographs placed in evidence.

1 Cases that cite this headnote

[40] **Criminal Law** Course and conduct of trial in general

Defendant waived claims raised on appeal challenging order allowing jury to view crime scene, in trial for capital murder, to extent that defendant did not raise objections at trial.

1 Cases that cite this headnote

[41] **Criminal Law** Comments on Evidence or Witnesses

Trial court's comment to jury prior to visit to crime scene that he would have sheriff go because, "in the woods there are all kinds of critters, snakes and dogs and cats and whatever that might be out there" was not improper comment on evidence suggesting that victim's body had likely suffered damage from animals and insects prior to or after death, in capital murder trial; rather, statement was proper exercise of trial court's duty to manage trial proceedings and to ensure well-being of jury. West's Ga.Code Ann. § 17–8–57.

2 Cases that cite this headnote

[42] **Criminal Law** Conduct of trial in general

Defendant was not required to move for mistrial in order to obtain appellate review of claim that trial court's comment that he would have sheriff go with jury to crime scene visit because "there are all kinds of critters, snakes and dogs and cats and whatever that might be out there" was improper comment on evidence suggesting that victim's body had suffered injury from animals or insects prior to or after death; rather, claim was subject to plain error review; disapproving *Whitner v. State,* 276 Ga. 742, 584 S.E.2d 247; *Walker v. State,* 282 Ga. 774, 653 S.E.2d 439; *Pittman v. State,* 273 Ga. 849, 851, 546 S.E.2d 277, and *Paul v. State,* 272 Ga. 845, 537 S.E.2d 58. West's Ga.Code Ann. § 17–8–57.

[43] **Criminal Law** Course and conduct of trial in general

Criminal Law Conduct of trial in general

Even where a defendant has failed to object or move for a mistrial based on an alleged improper comment on the evidence by the trial court, on appeal, the issue is simply whether there was such a violation. West's Ga.Code Ann. § 17–8–57.

5 Cases that cite this headnote

[44] **Criminal Law** Homicide and assault with intent to kill

Prosecutor's comment during argument, in raised voice, that victim was "kicked," "stomped," and "hit" were permissible comments on evidence presented in trial for capital murder.

[45] **Criminal Law** Putting jurors in place of victim; "golden rule" arguments

Prosecutor's argument urging jury to think about unpleasant way in which victim had died was not impermissible "golden rule" argument, in trial for capital murder, but was made as part of argument that defendant had acted with malice.

3 Cases that cite this headnote

[46] **Criminal Law** Putting jurors in place of victim; "golden rule" arguments

A "golden rule argument" is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position.

2 Cases that cite this headnote

[47] **Homicide** Degree or classification of manslaughter

Evidence that victim had bitten defendant's penis as he attempted to perform aggravated sodomy on her did not warrant instruction for voluntary manslaughter as lesser included offense of malice murder. West's Ga.Code Ann. § 16–5–2(a).

[48] **Criminal Law** Form of verdict

Any defect in original jury form in which jury had dated its guilt/innocence verdict in multiple places was cured by new verdict form to remove any scrivener's error involved.

[49] **Criminal Law** Wrongfully obtained evidence

Defendant waived claim on appeal challenging admission of telephone calls he made from jail based on lack of implied consent to recording of calls, where he did not object to telephone calls on that basis.

[50] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comment during argument in sentencing phase of capital murder trial that defendant might present future danger to others was permissible comment on evidence that defendant had sexually harassed pregnant prison guard and that he made sexual remarks to 14-year-old girl over telephone from jail.

[51] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comment during argument in sentencing for capital murder that defendant had shown of lack of empathy was permissible inference from evidence of telephone call in which he stated desire to make money from his crimes.

[52] **Sentencing and Punishment** Arguments and conduct of counsel

Prosecutor's comment during closing argument at sentencing for capital murder that "[y]ou haven't heard any evidence of his taking responsibility," was not improper comment on defendant's decision not to testify, but was specific reference to matters actually in evidence.

2 Cases that cite this headnote

[53] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

Convictions for aggravated battery supported jury finding of aggravating circumstance that murder was committed while defendant was engaged in commission of aggravated battery, as grounds for imposing death sentence, even though convictions did not merge into conviction for malice murder, in view of evidence that death was not instantaneous. West's Ga.Code Ann. § 17–10–30(b)(2).

5 Cases that cite this headnote

[54] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Evidence supported jury finding of aggravating circumstance that victim was tortured, as grounds for imposing death sentence for capital murder, where death was not instantaneous, but was preceded by serious sexual abuse as well as serious physical abuse. West's Ga.Code Ann. § 17–10–30(b)(7).

[55] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Malice murder was committed in manner that was outrageous or wantonly vile, horrible or inhuman, as aggravating circumstance supporting imposition of death sentence for capital murder, in view of evidence that defendant stomped on and kicked victim's face

and head. West's Ga.Code Ann. § 17–10–30(b)(7).

[56] **Sentencing and Punishment** Proportionality in general

Sentencing and Punishment Vileness, heinousness, or atrocity

Sentencing and Punishment Nature, degree, or seriousness of other offense

Imposition of death sentence was not disproportionate to sentences imposed in other cases, in view of evidence that victim was brutally kicked and stomped in course of violent rape and sodomy, and that defendant had long history of criminal acts against women and sexually deviant behavior, and in light of review of other cases where death sentence was imposed in cases involving murder committed during sexual assault and kidnapping, or where murder involved aggravated battery, torture, or depravity of mind. West's Ga.Code Ann. § 17–10–35(c)(3), (e).

Attorneys and Law Firms

****244** Jimmy Dodd Berry, Marietta, Carl P. Greenberg, Office of Georgia Capital Defender, Thomas McKee West, Atlanta, for appellant.

Fred Andrew Lane, Jr., District Attorney, Patricia B. Attaway Burton, Senior Assistant Attorney General, Thurbert E. Baker, Attorney General, Lyndsey Jean Hurst, Assistant Attorney General, Mary Beth Westmoreland, Deputy Attorney General, Department of Law, for appellee.

Opinion

****245** CARLEY, Presiding Justice.

***70** A jury found Michael William Ledford guilty of the murder of Jennifer Ewing and related offenses. After finding multiple statutory aggravating circumstances, the jury recommended a death sentence for the murder. See OCGA § 17–10–30(b). The trial court entered judgments of conviction on the guilty verdicts and sentenced Ledford to death for murder and to various consecutive terms of imprisonment for the remaining crimes. Ledford appeals after the denial of a motion for new trial. * For the reasons set forth below, we vacate ***71** Ledford's convictions and sentences for aggravated battery, but affirm all remaining convictions and sentences, including his death sentence for the murder.

1. The evidence presented at trial showed that, on July 25, 2006, Michael Ledford pretended to go to work but, instead, bought beer and drank it near the Silver Comet Trail, a recreational trail used for biking, running, and other activities. Ledford knocked Jennifer Ewing from her bicycle as she rode by his location. He dragged her a distance off the trail to a location shielded from view by vegetation. He stripped off all of her clothing from the waist down, and he pulled her shirt up part way, exposing her breasts. She suffered bruises throughout her body in the struggle. When Ledford forced his penis into her mouth, she bit his penis and severely wounded it. Enraged by her resistance, Ledford unleashed a shocking attack during which he stomped on her face and nose, her larynx, and her ribs. Ms. Ewing gradually succumbed to asphyxiation caused by her wounds and the resulting bleeding into her lungs.

Upon our review of the record, we conclude that the evidence presented at trial was sufficient to authorize a rational trier of fact to find Ledford guilty beyond a reasonable doubt on all charges. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). However, we recognize that the victim's death was caused by the same actions which established the commission of the three aggravated batteries. Thus, we will determine whether the aggravated batteries should merge either into each other or into the malice murder.

[1] [2] We will first address the question of whether the aggravated batteries must be merged into each other. "Georgia law prohibits multiple convictions if '(*o*)ne crime is included in the other.' OCGA § 16–1–7(a)(1)." *Goss v. State,* 289 Ga.App. 734, 738(3), 658 S.E.2d 168 (2008). Under the express terms of that statute, however, "[t]he rule prohibiting more than one conviction if one crime is included in the other does not apply unless 'the same conduct' of the accused establishes the commission of multiple crimes." *Waits v. State,* 282 Ga. 1, 4(2), 644 S.E.2d 127 (2007). In this case, the first count of aggravated battery required the State to prove that Ledford seriously disfigured the victim's head and face, the second count required ****246** proof that he rendered

her larynx useless, and the third count required proof that he deprived her of her lung. See OCGA § 16–5–24(a). "Each count thus was predicated on different conduct by [Ledford]." *Goss v. State,* supra at 739(3)(b), 658 S.E.2d 168. Moreover, the testimony of a pathologist shows that each of these injuries was ***72** caused by separate blows to the victim's body. Therefore, each aggravated battery verdict is attributable to different conduct than the other aggravated battery verdicts. See *Waits v. State,* supra. Accordingly, the doctrine of merger does not apply, and separate convictions for each count of aggravated battery clearly are appropriate unless they merge into the murder conviction. *Waits v. State,* supra; *Goss v. State,* supra. Compare *Gonzales v. State,* 298 Ga.App. 821, 824(1), 681 S.E.2d 248 (2009) (error in sentencing defendant on two aggravated battery counts based on the single unlawful act against the same victim of pushing her out of a moving car). We note that the same holding on similar facts is found in *Nealey v. State,* 285 Ga.App. 334, 335–336(1), 646 S.E.2d 471 (2007), but that decision must be overruled because it erroneously skipped the "same conduct" analysis and unnecessarily examined whether one aggravated battery was included in another by utilizing the "actual evidence" test, which was rejected in *Drinkard v. Walker,* 281 Ga. 211, 636 S.E.2d 530 (2006).

[3] **[4]** **[5]** **[6]** We next address whether any of the aggravated battery counts must be merged into the murder count. The evidence showed that each of the three aggravated batteries contributed to the death of the victim by asphyxiation and, thus, the "same conduct" established the commission of both malice murder and the aggravated battery counts. However, merger of any aggravated battery count into the murder count

> is not required on this basis. If the same conduct established the commission of both offenses, it is [generally] necessary to take the next step in the analysis by applying the "required evidence" test[, as adopted in *Drinkard* pursuant to OCGA §§ 16–1–6(1), 16–1–7(a)(1),] for determining when one offense is included in another: "(A) single act may constitute an offense which violates more than one statute, ' "and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Cit.)' [Cit.]" [Cit.]

Linson v. State, 287 Ga. 881, 885(4), 700 S.E.2d 394 (2010). Both malice murder and aggravated battery require a malicious intent. See OCGA §§ 16–5–1(a), 16–5–24(a).

> However, " '(t)he fact that (such intent) supports an element in each crime does not warrant merging of the sentences where other mutually exclusive elements of the crimes remain.' (Cit.)" [Cit.] The other elements of the two ***73** offenses must be compared. "Malice murder, but not [aggravated battery], requires proof that the defendant caused the death of another human being.... OCGA § 16–5–1(a)." [Cit.]

Linson v. State, supra. "Aggravated battery ... requires proof that the victim was deprived of a member of his body ..., or that such member was rendered useless or seriously disfigured. OCGA § 16–5–24(a); [cit.]" *Waits v. State,* supra. This required injury is the only element of aggravated battery which is arguably not also part of the required proof for malice murder. Determination of that question would depend upon whether the proof of death required for murder is viewed as necessarily including proof that a bodily member was rendered useless and the victim deprived thereof. However, even if aggravated battery does require proof of an injury which malice murder does not, merger of the two crimes may still be required by Georgia's statutory definition of included offenses. *Drinkard* explained as follows:

> The "required evidence" test applies strictly within the context of determining whether multiple convictions are precluded because one of the crimes was "established by proof of the same or less than all the facts" that were required to establish the other crime under OCGA § 16–1–6(1). There are additional statutory provisions concerning prohibitions against multiple ****247** convictions for closely related offenses.... These provisions include: OCGA § 16–1–6(1) (one crime is included in the other where it is established by "proof of ... a less culpable mental state"); OCGA § 16–1–6(2) (one crime is included in the other where it differs only in that it involves a "less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability"); and OCGA § 16–1–7(a)(2) (precluding multiple convictions where one crime differs from another "only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct").

> These other statutory provisions resolve potential gaps in the *Blockburger* [*v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] "required evidence" analysis which otherwise might support multiple convictions for closely related offenses where multiple convictions are unwarranted. [Cits.]

Drinkard v. Walker, supra at 216, fn. 32, 636 S.E.2d 530. For this explanation and other portions of *Drinkard,* this Court relied heavily on Justice ***74** Marshall's dissenting opinion in *Haynes v. State,* 249 Ga. 119, 121–130, 288 S.E.2d 185 (1982). As further explained in that opinion, by providing that a crime is included if "[i]t differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest ... suffices to establish its commission," OCGA § 16–1–6(2) "recognizes that a crime such as battery, which prohibits the intentional infliction of bodily injury, is included in a crime such as murder, which prohibits the intentional infliction of more serious bodily injury, i.e., death," despite the distinction between these two injury elements. *Haynes v. State,* supra at 129(3)(b)(2), 288 S.E.2d 185 (Marshall, J., dissenting). Similarly, it is clear that the only difference between aggravated battery and murder is that the former requires a less serious injury to the person of the victim, as the injury to a bodily member specified in the aggravated battery statute is obviously less serious than death. Therefore, pretermitting whether these two offenses meet the "required evidence" test, convictions for both offenses established by the same conduct are prohibited by OCGA § 16–1–6(2). Accordingly, the convictions and sentences entered on the aggravated battery counts must be vacated.

Pre-trial Issues

[7] **[8]** 2. Ledford contends that the trial court erred by refusing to order a change of venue based on pre-trial publicity. In order to be entitled to a change of venue, Ledford was required to "show that the trial setting was inherently prejudicial as a result of pretrial publicity or show actual bias on the part of the individual jurors." *Gissendaner v. State,* 272 Ga. 704, 706–707(2), 532 S.E.2d 677 (2000). Our review of the record reveals that much of the pre-trial publicity in Ledford's case was long before the trial and that much of the publicity provided little detail about the case and was accurate. *Gissendaner v. State,* supra at 706(2), 532 S.E.2d 677. Although our own review of the record reveals that 22 of the 120 jurors questioned on the subject were excused for cause based at least in significant part on exposure to information about the case pre-trial, we note that most jurors had heard nothing of particular import to our analysis regarding venue and that the trial court exercised an "exacting standard" in evaluating jurors' qualifications for service. *Gissendaner v. State,* supra at 707(2), 532 S.E.2d 677. In light of these considerations, we find that the trial court did not abuse its discretion in denying the motion for a change of venue. *Gissendaner v. State,* supra at 706(2), 532 S.E.2d 677.

3. Ledford argues that the trial court erred by denying his motion challenging the constitutionality of Georgia's death penalty ***75** laws on various grounds. For the reasons set forth below, we find no error.

(a) Ledford argues that Georgia's death penalty laws are applied in a discriminatory manner. However, he has utterly failed to show that any such discrimination has occurred in his case. *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Jenkins v. State,* 269 Ga. 282, 285(2), 498 S.E.2d 502 (1998).

****248** **[9]** (b) A defendant's right to inquire into the ability of prospective jurors to consider mitigating evidence is not improperly limited by this Court's direction that prospective jurors should not be asked to prejudge a given case based on hypothetical evidence. See *Lucas v. State,* 274 Ga. 640, 646(9), 555 S.E.2d 440 (2001); *King v. State,* 273 Ga. 258, 267(18)(e), 539 S.E.2d 783 (2000). The right to have jurors consider mitigating evidence is also not improperly limited by the expansive definition of mitigating evidence given to juries in Georgia. See *Rhode v. State,* 274 Ga. 377, 384(15), 552 S.E.2d 855 (2001); Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed.), § 2.15.30.

(c) Georgia's statutory aggravating circumstances do not fail to adequately narrow the class of cases eligible for the death penalty, and they do not otherwise promote the arbitrary and capricious infliction of the death penalty. See *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976);

Arrington v. State, 286 Ga. 335, 336–337(4), 687 S.E.2d 438 (2009).

(d) This Court does not conduct its statutorily-mandated proportionality review in an unconstitutional manner. See *Arrington v. State,* supra at 337(4), 687 S.E.2d 438; *Gissendaner v. State,* supra at 716(16), 532 S.E.2d 677.

4. Ledford argues that Georgia's method of execution by lethal injection is unconstitutional. In support of this claim, Ledford relies on evidence from another death penalty case in which this Court rejected a similar claim. See *Nance v. State,* 280 Ga. 125, 127(4), 623 S.E.2d 470 (2005). As we have done repeatedly, we hold that this evidence fails to show that Georgia's method of lethal injection is unconstitutional. See *Stinski v. State,* 286 Ga. 839, 844(17), 691 S.E.2d 854 (2010); *O'Kelley v. State,* 284 Ga. 758, 769–770(4), 670 S.E.2d 388 (2008) (citing *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)).

Jury Selection Issues

[10] 5. In conducting its initial voir dire of the first three prospective jurors, the trial court, relying on the pattern jury instructions, described the malice involved in the crime of malice murder as being "the unlawful intention to kill without justification, excuse, or mitigation." Suggested Pattern Jury Instructions, Vol. II: Criminal ***76** Cases (4th ed.), § 2.10.10. Ledford objected to the trial court's reference to an absence of " mitigation" in this context, arguing that it had the potential to mislead jurors into believing in the sentencing phase that, by finding Ledford guilty of malice murder, they had already excluded the possibility of there being any mitigation relevant to sentencing. The trial court proposed modifying its statement about malice murder and "mitigation," and it proceeded, without any specific objection to its doing so as proposed, with the voir dire of two additional jurors. After the voir dire of these two jurors, Ledford objected again, and the trial court agreed simply to omit any future reference to " mitigation" in its definition of malice murder. Ledford then moved the trial court to excuse all of the jurors already found qualified. In light of the detailed voir dire conducted by the trial court itself, the great latitude granted to the parties to conduct their own voir dire of the jurors in question, and the trial court's charges to the jury in the sentencing phase, we find that those jurors would not have been confused about the role of mitigating circumstances in the sentencing phase. Accordingly, we hold that the trial court did not err by refusing to excuse the jurors in question. The trial court, in its discretion, might have considered allowing additional voir dire if Ledford had requested it, but Ledford made no such request. See *Arrington v. State,* supra at 338(7), 687 S.E.2d 438 ("The scope of voir dire is generally a matter for the trial court's discretion."). We find no error.

[11] **[12]** **[13]** **[14]** 6. Ledford argues that the trial court improperly excluded a number of prospective jurors based on their views on the death penalty.

> The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " ****249** [Cits.] On appeal, the relevant inquiry is whether the trial court's qualification of the prospective juror is supported by the record as a whole. [Cit.] An appellate court must pay deference to the finding of the trial court; this deference includes the trial court's resolution of any equivocations or conflicts in the prospective juror's responses on voir dire. [Cit.] "Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion." [Cit.]

Nance v. State, 272 Ga. 217, 222(6), 526 S.E.2d 560 (2000). Applying this standard below, we find no error.

[15] ***77** (a) Although Juror Debellevue initially stated that she could consider a death sentence under certain circumstances, she gradually moved from that position, explaining that she had been "nervous" when she gave her earlier responses. As questioning by the parties continued, the juror settled on the position that she did not believe that she could impose a death sentence even under the most extreme hypothetical circumstances that she had previously volunteered as examples. Finally, the juror stated clearly that she could not impose a death sentence under any circumstances whatsoever. The trial court did not abuse its discretion in finding that the juror's responses, taken as a whole, indicated that she was unqualified.

[16] (b) Jurors Davis and Barnes stated repeatedly and clearly that they were conscientiously opposed to the death penalty and could not consider it as a sentencing option. The trial court did not abuse its discretion in finding them unqualified.

[17] (c) Although Juror Grayson initially indicated merely that she did not know if she could impose a death sentence and that she would have to struggle with whether she could do so, she eventually settled clearly and firmly on the position that she would not consider imposing a death sentence under any circumstances. The trial court did not abuse its discretion in finding her unqualified.

[18] (d) Juror Berg stated clearly that she would not consider either a death sentence or a sentence of life with the possibility of parole. The trial court did not err in finding her unqualified.

(e) Juror Wade stated repeatedly and clearly that she would not consider a death sentence under any circumstances. The trial court did not err in finding her unqualified.

(f) As to Jurors Lecca, Ricker, and Jackson, Ledford's only contention is that it is always improper to disqualify jurors simply because they would never be able to actually vote to impose a death sentence. This Court has rejected this view repeatedly. See *Arrington v. State,* supra at 336(2), 687 S.E.2d 438; *Riley v. State,* 278 Ga. 677, 685(6)(B), 604 S.E.2d 488 (2004).

[19] **[20]** **[21]** **[22]** 7. Ledford argues that the trial court erred by finding a number of jurors qualified to serve over his objection based on their death penalty views or their views regarding the sentence of life with the possibility of parole. We have set forth the relevant standards for claims regarding death penalty views as follows:

> Because Georgia law entitles a defendant to a panel of 42 qualified jurors, the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal. [Cit.] "A juror who will automatically vote for the death penalty in every case" upon a conviction for murder is not qualified to serve. [Cit.] This is true because such a ***78** juror, instead of giving consideration to mitigating circumstances, begins the trial with an unwavering bias in favor of one of the sentences authorized under law, to the exclusion of the others. [Cit.] A potential juror's views on capital punishment will disqualify the juror from service if the juror's views would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions given the juror and the oath taken by the juror. [Cits.] In conducting our review, this Court views the voir dire of each juror as a whole and gives deference to the findings of the trial court concerning any juror's possible bias. [Cit.]

Lance v. State, 275 Ga. 11, 15–16(8), 560 S.E.2d 663 (2002). We have also held that a ****250** juror's willingness to consider a sentence of life with the possibility of parole is governed by these same standards. See *Sealey v. State,* 277 Ga. 617, 619(5), 593 S.E.2d 335 (2004). Applying these standards below, we find no error.

(a) Juror Greeson's voir dire responses, viewed as a whole, clearly indicated a willingness to consider mitigating evidence and to consider all three sentencing options. The trial court did not abuse its discretion in finding this juror qualified.

(b) After Ledford objected to a question to Juror Marino about whether he could "look [Ledford] in the eye" and sentence him to death, the trial court sustained the objection on the ground that the juror would never be required to look the defendant in the eye while the jury rendered its sentence. The trial court then asked a proper question regarding whether the juror, under appropriate circumstances, could ever sentence "any person" to death. We find nothing disqualifying about this juror's death penalty views. Furthermore, Ledford's claim regarding the juror's death penalty views, to the extent that he has attempted to raise one, was waived by his failure to raise any relevant objection at trial. See *Braley v. State,* 276 Ga. 47, 51(11), 572 S.E.2d 583 (2011).

[23] (c) Ledford argues that Juror Sherrill should have been excused because he would refuse to consider a sentence of life with the possibility of parole. Juror Sherrill, at first, gave conflicting responses regarding his willingness to consider life with the possibility of parole. However, in light of his later, clear responses indicating that he would consider that sentence and in light of his explanation that his responses had changed based on his fuller understanding of the trial process, the trial court did not abuse its discretion in finding him qualified.

[24] (d) Juror Ridarick's responses indicated that he leaned somewhat in favor of sentences other than life with the possibility of ***79** parole but that he would consider imposing life with the possibility of parole in light of the evidence presented at trial. The trial court did not abuse its discretion in finding him qualified.

(e) Despite Juror Childers' response to an improper hypothetical question regarding what sentence she would impose "if the crime was really bad," her remaining responses

clearly indicated that she was willing to consider all of the evidence at trial and all three sentencing options. The trial court did not abuse its discretion in finding her qualified.

[25] (f) Juror Cash initially stated repeatedly that she could consider all three sentencing options. Although she later seemed to indicate at one point that she would not consider a sentence less than death, she then clarified by indicating that, although she had a leaning in favor of the death penalty, she would consider all of the evidence and all three sentencing options. The trial court did not abuse its discretion in finding that the juror's responses, taken as a whole, indicated that she was qualified. See *Pace v. State,* 271 Ga. 829, 834(7), 524 S.E.2d 490 (1999) (noting that "[a] prospective juror is not subject to excusal for cause for merely leaning for or against a death sentence").

[26] (g) Although Juror Slate indicated that she generally was in favor of the death penalty for religious reasons, she also indicated repeatedly that her religious views would not prevent her from considering all of the evidence and all three sentencing options. The trial court did not abuse its discretion in finding her qualified.

(h) Juror Fennelly initially indicated that she would not consider a sentence of life with the possibility of parole. However, after receiving an explanation about the trial process and the law and after further contemplating her position, she explained that she would consider all of the evidence and all three possible sentences. The trial court did not abuse its discretion in finding her qualified.

[27] (i) Juror Dunbar stated that it was "highly improbable" that he would find sufficient mitigating circumstances to warrant a sentence of life with the possibility of parole. He also acknowledged, in responding to a question invoking technical legal terminology that might have been unfamiliar to him, that he might be substantially impaired in his ability to select such a sentence. Nevertheless, the juror's responses indicating that he ****251** would consider mitigating evidence and all three sentences, especially when combined with the trial court's detailed observations about the juror's demeanor in giving various responses, lead us to conclude that the trial court did not abuse its discretion in finding the juror qualified.

(j) Although Juror Fitzpatrick initially gave responses indicating that he would not consider life with the possibility of parole as a sentencing option, he later clarified that he would consider all of the ***80** evidence and would consider life with the possibility of parole under certain circumstances. The trial court did not abuse its discretion in finding the juror qualified.

[28] (k) Ledford argues that Jurors McClung and Halualani should have been excused based on their death penalty views. Although not noted by either of the parties, our own review of the record reveals that these two jurors were eventually excused for other reasons. Accordingly, we find no possibility of reversible error. See *Butts v. State,* 273 Ga. 760, 763(4), 546 S.E.2d 472 (2001) ("Because it appears that [the appellant's] suggestion that the juror was ultimately found qualified to serve is false, we find no error.").

8. Ledford complains that a number of jurors should have been disqualified from service on grounds unrelated to their willingness to consider all three sentencing options. We find no error.

[29] (a) The trial court did not abuse its discretion by refusing to excuse Juror Belanger based solely on the fact that he and his wife had twice ridden bicycles on the Silver Comet Trail, particularly because the juror indicated that his past contact with the trail would not affect his deliberations. See *Gissendaner v. State,* supra at 707(3)(a), 532 S.E.2d 677 ("A prospective juror need not be 'totally ignorant of the facts and issues involved' in a criminal proceeding in order to be qualified to serve." (quoting *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)); *DeYoung v. State,* 268 Ga. 780, 784(4), 493 S.E.2d 157 (1997)) (noting the trial court's discretion in determining whether a juror should be disqualified based on pre-trial exposure to information about the case).

[30] (b) Ledford argues that the trial court erred in refusing to excuse Juror Marino based on the fact that the juror had done one internet search that had led him to an article revealing nothing prejudicial to Ledford and based on the fact that the juror's wife had learned about a murder on the Silver Comet Trail and was no longer willing to use the trail. The trial court did not abuse its discretion by finding this juror qualified. *Gissendaner v. State,* supra.

[31] (c) Ledford argues that the trial court erred by refusing to excuse Juror Toler based on the fact that the juror had seen some reports indicating that a murder had occurred and on the fact that the juror recalled hoping at that time

that the person guilty of such a "heinous crime" would be brought to justice. In light of Juror Toler's remaining voir dire responses indicating that he had not formed an opinion regarding Ledford's guilt or the appropriate sentence for the perpetrator of the murder, we find that the trial court did not abuse its discretion by finding this juror qualified. *Gissendaner v. State,* supra.

[32] (d) We reject Ledford's argument that Juror Williams was unqualified to serve as a juror simply because she, as a veterinarian, ***81** had euthanized animals and believed that the process was "humane." Jurors in Georgia death penalty trials are never instructed to consider the method of execution in their deliberations. See *Smith v. State,* 270 Ga. 240, 250–251(16), 510 S.E.2d 1 (1998) (noting that the nature of Georgia's method of execution is irrelevant in the sentencing phase), overruled on other grounds, *O'Kelley v. State,* supra at 768(3), 670 S.E.2d 388. Furthermore, to the extent that there was any possibility that Juror Williams, or any other jurors for that matter, might express the view during deliberations that Georgia's method of execution is humane, we see no potential for prejudice to Ledford in light of our own prior holdings expressing that same view. Accordingly, we conclude that the trial court did not abuse its discretion by finding this juror qualified. ****252** *Gissendaner v. State,* supra at 707(3)(a), 532 S.E.2d 677; *DeYoung v. State,* supra at 784(4), 493 S.E.2d 157.

9. Ledford argues that the trial court erred by limiting the voir dire of a number of jurors. For the reasons set forth below, we find no abuse of the trial court's discretion in limiting the scope of voir dire. See *Arrington v. State,* supra at 338(7), 687 S.E.2d 438 ("The scope of voir dire is generally a matter for the trial court's discretion.").

(a) The trial court did not err by refusing to allow Ledford to question Juror Bailey regarding what weight she might give in her sentencing deliberations to several specific hypothetical factors. See *Lucas v. State,* supra at 646(9), 555 S.E.2d 440; *King v. State,* supra at 267(18)(e), 539 S.E.2d 783. The trial court also did not err by refusing to allow Ledford to ask Juror Bailey the largely irrelevant question of whether she would want a juror like herself to serve as a juror but, instead, itself asking the juror the more relevant question of whether she believed she could be fair and could consider all three sentencing options.

[33] (b) After the State objected to a vague, hypothetical question to Juror Hurtado about whether "someone [who] has done something wrong" is entitled to mercy, the trial court asked a related, proper question about whether the juror would consider all of the mitigating evidence. We find no abuse of discretion by the trial court. Furthermore, this claim is waived, because Ledford did not object to the trial court's resolution of the matter. *Braley v. State,* supra at 52(18), 572 S.E.2d 583.

(c) Ledford complains that the trial court improperly sustained an objection to his question to Juror Toler regarding what opinion about sentencing the juror might have had when he first learned some limited information about the crimes. Our review of the record reveals that, regardless of the merit to Ledford's initial objection, the trial court ultimately resolved the matter appropriately by determining through its own questions that the juror had not formed any such opinion. Furthermore, Ledford has waived this claim by failing to object to the trial court's resolution of the matter. *Braley v. State,* supra.

[34] ***82** (d) Ledford made no objection to the trial court's briefly interrupting his voir dire of Juror Ingram after Ledford asked a question that could have been construed as seeking a prejudgment of the case by the juror. Ledford then interrupted the trial court and immediately continued his voir dire of the juror without any restrictions. We find that Ledford has waived his claim regarding any alleged limitation of this portion of his voir dire of the juror. *Braley v. State,* supra.

[35] In another portion of Ledford's voir dire of Juror Ingram, the State objected to a question by Ledford about whether the juror would consider life with the possibility of parole in a case involving "no excuse [and] no justification." In response to the State's objection on the basis that the question called for a prejudgment of the case, the trial court attempted to resolve the matter by asking its own question about the juror's willingness to consider all three sentences. Ledford pursued the matter by stating that he still wished to have the juror answer his initial question. However, after the trial court indicated properly that it would not allow any questions regarding what the juror would do in a hypothetical "extreme case" and asked several more of its own questions to the juror, Ledford raised no further objection and continued by reminding the juror of the definition of murder and questioning the juror extensively about whether she would consider a sentence of life with the possibility of parole upon a conviction for murder. Under these circumstances, we find

that Ledford has waived his right to claim that the trial court improperly limited his voir dire. *Braley v. State,* supra.

[36] (e) Juror Berg stated that she opposed the death penalty because it foreclosed the possibility that a defendant could change in the future. The trial court disallowed a question by Ledford to Juror Berg regarding whether her views on the death penalty might change if she could be assured that there would be a sufficient gap in time between sentencing and the execution of any death sentence. We find that the trial court ****253** did not abuse its discretion in limiting the scope of voir dire by disallowing this question, which would have been meaningful only if combined with improper speculation about the length of any appeal process.

10. Ledford argues that the trial court erred by denying his claim that the State had used its peremptory strikes in a racially discriminatory manner by using one of its strikes against the only African–American juror on the list of jurors from which the panel of 12 jurors was selected. See *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). After the trial court found that Ledford had made a prima facie showing of discrimination, the State presented racially neutral reasons for its strike. We find the State's racially neutral reasons to be satisfactory. Ledford attempted to show in the trial ***83** court that the State's racially neutral reasons were pretextual, but we find that the State provided a satisfactory response indicating otherwise. In light of Ledford's failure to explain on appeal specifically why a different conclusion is warranted, the trial court's finding that Ledford failed to carry his burden of proof was not clearly erroneous. See *Brannan v. State,* 275 Ga. 70, 75(5), 561 S.E.2d 414 (2002).

11. Ledford also argues that the State engaged in gender-based discrimination in its use of peremptory strikes. See *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The record shows that, during the selection of the panel of 12 jurors, the State used 75 percent of the peremptory strikes it exercised to strike women. The trial court found that Ledford failed to make a prima facie showing of discrimination and, therefore, did not require the State to offer gender-neutral reasons for its strikes. In light of Ledford's failure to present any "additional facts which may give rise to an inference of discriminatory purpose," we hold that the trial court did not err in concluding that Ledford had failed to carry his burden of establishing a prima facie case of discrimination. *Whitaker v. State,* 269 Ga. 462, 464(3), 499 S.E.2d 888 (1998) (addressing the State's use of 66 percent of its peremptory strikes to strike women).

Guilt/Innocence Phase Issues

12. Ledford argues that the trial court erred by admitting evidence of two similar transactions. See *Williams v. State,* 261 Ga. 640, 641–642(2), 409 S.E.2d 649 (1991). For the reasons set forth below, we find no error.

[37] (a) The first similar transaction involved the rape of a woman in Paulding County in 1991, for which Ledford was convicted and served ten years in prison. The trial court charged the jury that the evidence was being admitted as possible evidence of "intent, lustful disposition, bent of mind, and course of conduct...." The trial court did not err by finding that the rape was sufficiently similar to form probative evidence on these matters regarding Ledford's pending charges of aggravated sodomy and aggravated assault committed with the intent to rape. See *Hinton v. State,* 280 Ga. 811, 817–818(6), 631 S.E.2d 365 (2006). The lapse in time between this rape and the murder does not erode the relevance of the rape in the guilt/innocence phase of this case, especially because that lapse is explained by Ledford's ten-year incarceration for the rape. *Hinton v. State,* supra. See also *Pareja v. State,* 286 Ga. 117, 120–121, 686 S.E.2d 232 (2009). Finally, the trial court did not abuse its discretion by not excluding the evidence on the ground that its probative value was outweighed by improper prejudice. See ***84** *Hall v. State,* 287 Ga. 755, 757(2), 699 S.E.2d 321 (2010) ("[A]ny prejudice from the age of these prior incidents was outweighed by the probative value of the evidence under the particular facts of this case and the purpose for which the similar transactions were offered.").

[38] (b) The second similar transaction involved Ledford's attempt to subdue a woman riding her bicycle on the Silver Comet Trail in 2005. The trial court charged the jury that the evidence was being admitted as possible evidence of "the modus operandi, common plan and scheme in the crimes charged in this case now on trial." There is no merit to Ledford's argument that the evidence used to prove the actual occurrence of this similar transaction was inadequate. See *Gardner v. State,* 273 Ga. 809, 810–811(2), 546 S.E.2d 490 (2001) ("The state is ****254** only required to prove the accused committed a similar transaction by a preponderance

of the evidence."). The trial court properly admitted this evidence, because it tended to confirm Ledford's role as the perpetrator of the successful abduction of the victim in this case under very similar circumstances. See *Phillips v. State,* 287 Ga. 560, 563–564(4), 697 S.E.2d 818 (2010).

[39] **[40]** 13. We reject Ledford's claim that the trial court erred in several ways regarding the jury's viewing the crime scene. The only objection Ledford raised at trial regarding the scene view was based on the fact that the vegetation at the scene had changed since the murder. However, we find that the trial court did not abuse its discretion by allowing the scene view over this objection, because the scene view might have aided the jurors in their understanding of the evidence despite the changes and because the jurors were able to see the original condition of the scene in the photographs that were in evidence. See *Gissendaner v. State,* supra at 711–712(8), 532 S.E.2d 677 (noting the trial court's discretion in considering a request to have the jury view the crime scene). Ledford's remaining complaints about the manner in which the scene view was conducted are waived, because they were not raised at trial. See *Earnest v. State,* 262 Ga. 494, 495(1), 422 S.E.2d 188 (1992).

[41] 14. In preparing the jury for its visit to the crime scene, the trial judge stated, "I'll ask the Sheriff to go because in the woods there are all kinds of critters, snakes and dogs and cats and whatever that might be out there." Ledford contends that this statement constituted an impermissible comment on the evidence by the trial court in violation of OCGA § 17–8–57. Specifically, Ledford argues that the statement expressed the opinion that the victim's body likely had suffered damage from animals and insects prior to or after her death.

[42] **[43]** The State notes that Ledford made no objection to the trial court's statement, and the State relies on the proposition that "the issue of whether OCGA § 17–8–57 was violated is not reached unless an objection or motion for mistrial is made on that ground." *Whitner* ***85** *v. State,* 276 Ga. 742, 744–745(3), 584 S.E.2d 247 (2003). However, we have explicitly disapproved similar language in other opinions. *Patel v. State,* 282 Ga. 412, 413, fn. 2, 651 S.E.2d 55 (2007) (disapproving inconsistent language in other cases). Even where a defendant has failed to object or move for a mistrial in response to an alleged comment on the evidence by the trial court in violation of OCGA § 17–8–57, this Court nevertheless will examine the claim for plain error. *Patel v. State,* supra. See also *State v. Gardner,* 286 Ga. 633, 634, 690 S.E.2d 164 (2010); *Paul v. State,* 272 Ga. 845, 848–849(3), 537 S.E.2d 58 (2000) (applying the plain error standard). Furthermore, we note that "a violation of OCGA § 17–8–57 will always constitute 'plain error'...." (Emphasis in original.) *State v. Gardner,* supra at 634, 690 S.E.2d 164. Therefore, even where a defendant has failed to object or move for a mistrial, "[o]n appeal, the issue is simply whether there was such a violation." *State v. Gardner,* supra. To the extent that *Whitner* or any other cases suggest otherwise, they are disapproved. In addition to *Whitner,* such cases arguably include *Walker v. State,* 282 Ga. 774, 777 (4), 653 S.E.2d 439 (2007), *Pittman v. State,* 273 Ga. 849, 851, fn. 2, 546 S.E.2d 277 (2001), and *Paul v. State,* supra at 849(3), 537 S.E.2d 58.

Although Ledford's claim that the trial court's comments violated OCGA § 17–8–57 is reviewable as possible plain error, the claim must fail because the trial court's statement was not improper. In the hearing held outside the presence of the jury, the trial judge noted that he had been confronted by a menacing dog when he visited the crime scene, and defense counsel noted that he had encountered a snake during his visit to the scene. Particularly under these circumstances, we find that the trial court's statement to the jury about animals and insects at the crime scene was not an improper comment on the evidence but, instead, was a proper exercise of the trial court's duty to manage the trial proceedings and to ensure the well-being of the jury. See *Walker v. State,* supra at 777(4), 653 S.E.2d 439 (noting that comments made in rendering rulings generally are not impermissible comments on ****255** the evidence); *Whitner v. State,* supra at 744–745(3), 584 S.E.2d 247 (noting that comments made in an "attempt to regulate the proceedings" generally are not impermissible comments on the evidence). See also *Hufstetler v. State,* 274 Ga. 343, 345(2), 553 S.E.2d 801 (2001) ("Under these circumstances, no reasonable juror would have interpreted the trial court's remark as the expression of an opinion on any issue to be decided in the case.").

[44] 15. Ledford claims that the prosecutor argued improperly by stating in a raised voice that the victim was "kicked," "stomped," and "hit." The content of this argument was not improper, because it was based on a reasonable inference from the evidence. See *Payne v. State,* 273 Ga. 317,

318(4), 540 S.E.2d 191 (2001) ("In closing ***86** argument, counsel may draw any reasonable and legitimate inference from the evidence."). As to the volume at which the argument was made, we find nothing in the record to indicate that the trial court abused its discretion by finding no impropriety. See *Morgan v. State,* 267 Ga. 203–204(1), 476 S.E.2d 747 (1996) (noting that counsel are afforded wide latitude in their mode of speech in closing arguments and that trial courts have discretion in limiting closing arguments).

16. The trial court did not abuse its discretion in rejecting Ledford's claim that the prosecutor argued improperly by stating that the victim had intentionally left evidence for the jury to consider by wounding Ledford. *Morgan v. State,* supra.

[45] **[46]** 17. Ledford contends that the prosecutor violated the proscription against "golden rule" arguments by urging the jury to think about the unpleasant way in which the victim had died. This argument was made as part of the prosecutor's argument that Ledford had acted with malice. "A 'golden rule' argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position." *Braithwaite v. State,* 275 Ga. 884, 885(2)(b), 572 S.E.2d 612 (2002). We hold that this argument was not improper.

[47] 18. Ledford claims that the trial court erred by refusing to charge the jury on voluntary manslaughter. See OCGA § 16–5–2(a) (providing that voluntary manslaughter occurs when one "causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person"). There was not even slight evidence to suggest that the victim was killed for any reason other than the victim's having bitten Ledford's penis in self-defense as he attempted to commit aggravated sodomy against her, facts which cannot form the basis for a charge on voluntary manslaughter. See *Beck v. State,* 272 Ga. 863, 865(3), 535 S.E.2d 756 (2000) (noting that "when a victim is attacked by a defendant and the victim attempts to defend himself or end the altercation, the victim's actions in doing so cannot provide the serious provocation necessary to justify a charge on voluntary manslaughter").

[48] 19. Our review of the record reveals that, in the trial court's words, the jury had dated its guilt/innocence verdict in "multiple places." In response to Ledford's contention that the verdict was thereby rendered ambiguous, the trial court filed the first verdict form with the clerk, and provided the jury with a new verdict form to complete. Even assuming that there was any actual defect in the manner in which the first verdict form was dated, we find no error in the trial court's instructing the jury to complete a new verdict form ***87** to remove any minor "scrivener's error" involved. *Jones v. State,* 273 Ga. 231, 235(7), 539 S.E.2d 154 (2000).

Sentencing Phase Issues

20. There is no merit to Ledford's claim that victim impact testimony is categorically unconstitutional. See *Braley v. State,* supra at 54(33), 572 S.E.2d 583. Ledford has withdrawn his claim that a certain video recording constituted improper victim impact evidence, conceding that the recording was not actually played for the jury at trial. The trial court did not err in admitting photographs of the victim in life. See *Lucas v. State, supra* at 648(14), 555 S.E.2d 440.

****256** **[49]** 21. Ledford argues that telephone calls he made from the jail were improperly admitted into evidence, citing only *Smith v. State,* 254 Ga.App. 107, 561 S.E.2d 232 (2002). *Smith* addresses the circumstances in which a person gives sufficient implied consent to having his or her telephone conversations recorded to render the recording lawful under OCGA §§ 16–11–62 and 16–11–66 and, thus, admissible under OCGA § 16–11–67. Because it appears that Ledford never objected to the recordings on these grounds, his claim is waived. See *Earnest v. State,* supra at 495(1), 422 S.E.2d 188. Furthermore, the record clearly supports the trial court's finding, made sua sponte, that Ledford consented to the recording of the telephone calls.

22. Ledford contends that the prosecutor's closing argument in the sentencing phase was improper for a number of reasons. For the reasons set forth below, we find no error.

[50] (a) Contrary to Ledford's contention, the prosecutor's argument that Ledford might present a future danger to others was based on specific evidence supporting that argument, including evidence that Ledford had sexually harassed a pregnant jail guard and had made sexual remarks to a 14–year–old girl over the telephone from the jail. Compare *Henry v. State,* 278 Ga. 617, 619(1), 604 S.E.2d 826 (2004)

("An argument that a death sentence is necessary to prevent future dangerous behavior by the defendant in prison must be based on evidence suggesting that the defendant will be dangerous in prison.").

[51] (b) The prosecutor's argument that Ledford had shown a lack of empathy by stating a desire to make money from his crimes was based on a recorded telephone call Ledford had made from the jail. This argument was not improper, because it was a based on a reasonable inference from the evidence. See *Payne v. State,* supra at 318(4), 540 S.E.2d 191.

(c) There is no merit to Ledford's contention that it was improper for the prosecutor to argue that, based on his actions, Ledford had shown that "he believes in the death penalty." See ***88** *Crowe v. State,* 265 Ga. 582, 592(18)(c), 458 S.E.2d 799 (1995).

[52] (d) Ledford contends that the following argument by the prosecutor was improper: "You haven't heard any evidence of his taking responsibility...." The argument, in context, specifically referred to matters actually in evidence and made no reference to Ledford's decision not to testify. We conclude that the argument was not improper. See *Hammond v. State,* 264 Ga. 879, 886(8)(b), 452 S.E.2d 745 (1995) ("We do not read the prosecutor's remark concerning Hammond's lack of remorse as a comment on Hammond's failure to testify during the sentencing phase.").

Sentence Review

23. Upon our review of the record, including the portion of the State's closing argument in the guilt/innocence phase to which Ledford has drawn our attention, we conclude that the sentence of death in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See OCGA § 17–10–35(c)(1).

24. This Court is required by statute to review the sufficiency of the evidence supporting each of the statutory aggravating circumstances in death penalty cases. OCGA § 17–10–35(c)(2).

The jury found that the murder was committed while Ledford was engaged in the commission of aggravated battery. See OCGA § 17–10–30(b)(2). The jury further found that the murder was outrageously vile, horrible, or inhuman in that it involved torture, depravity of mind, and aggravated battery to the victim. See OCGA § 17–10–30(b)(7). In response to *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), this Court set forth certain criteria which the evidence at trial must satisfy for the (b)(7) aggravating circumstance to be constitutionally applicable, including the following:

> Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the ****257** victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained. An aggravated battery occurs when "(a) person ... maliciously causes bodily harm to another by depriving him [or her] of a member of his [or her] body, or by rendering a member of his [or her] body useless, or by seriously disfiguring his [or her] body or a member thereof." [OCGA § 16–5–24(a).] In order to constitute aggravated battery, the bodily harm to the victim must occur before death. [Cit.] Torture occurs when the victim is subjected to serious ***89** physical abuse before death. [Cit.] Serious sexual abuse may be found to constitute serious physical abuse. [Cit.] Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined.... Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery ([cits.]); i.e., only facts showing aggravated battery or torture (as hereinabove defined), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind. ([Cit.]) Where only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i.e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

Hance v. State, 245 Ga. 856, 861–862(3), 268 S.E.2d 339 (1980). See also *West v. State,* 252 Ga. 156, 161–162, 313 S.E.2d 67 (1984)(Appendix)(providing the pattern jury charge on torture to be given upon the defendant's request); *Krier v. State,* 249 Ga. 80, 88–89(7), 287 S.E.2d 531 (1982); *Patrick v. State,* 247 Ga. 168, 169, 274 S.E.2d 570 (1981). With respect to an aggravated battery "alleged to have been committed upon the person who is also the murder victim, the same limitations ... apply to the § (b)(2) circumstance as to the § (b)(7) circumstance." *Davis v. State,* 255 Ga. 588, 594(3)(c), 340 S.E.2d 862 (1986).

[53] **[54]** **[55]** As we noted above in our review of the sufficiency of the evidence to support the verdicts rendered by the jury in the guilt/innocence phase, although the evidence showed that the acts constituting the three aggravated batteries were the same as the acts constituting the murder, the separate aggravated battery verdicts are supported by the evidence that the victim's death was not instantaneous. For the same reason, the jury was authorized to find the statutory aggravating circumstance set forth in OCGA § 17–10–30(b)(2) and the aggravated battery portion of the (b)(7) circumstance. See *Hall v. Terrell,* 285 Ga. 448, 452–453(II)(C), 679 S.E.2d 17 (2009); *Perkins v. State,* 269 Ga. 791, 796(6), 505 S.E.2d 16 (1998); *Hance v. State,* supra. Likewise, the jury's finding of torture was supported by the evidence that the ***90** victim's death was not instantaneous, but was preceded by serious sexual abuse, as well as the serious physical abuse which constituted the aggravated batteries. See *Loyd v. State,* 288 Ga. 481, 489(4)(b), 705 S.E.2d 616 (2011); *Hall v. Terrell,* supra; *Jones v. State,* 279 Ga. 854, 860(7)(b), 622 S.E.2d 1 (2005); *Hance v. State,* supra. The authorized findings of aggravated battery and torture also support a finding of depravity of mind. See *Loyd v. State,* supra; *Perkins v. State,* supra; *Hance v. State,* supra at 862(3), 268 S.E.2d 339. Furthermore, the shocking and vicious nature of the victim's murder by stomping and kicking authorized the jury to find that the murder was outrageously or wantonly vile, horrible, or inhuman. Accordingly, we find that the evidence was sufficient to support the jury's findings beyond a reasonable doubt of both the (b)(2) and (b)(7) statutory aggravating circumstances. See *Taylor v. State,* 261 Ga. 287, 297(13)(c), 404 S.E.2d 255 (1991); *Patillo v. State,* 258 Ga. 255, 262–263(6), 368 S.E.2d 493 (1988); *Jefferson v. State,* 256 Ga. 821, 828(9), 353 S.E.2d 468 (1987); ****258** *Baxter v. State,* 254 Ga. 538, 549(20)(b), 331 S.E.2d 561 (1985); *Conner v. State,* 251 Ga. 113, 116(3), 303 S.E.2d 266 (1983); *Krier v. State,* supra at 89(7), 287 S.E.2d 531; *Cape v. State,* 246 Ga. 520, 528–529(13), 272 S.E.2d 487 (1980).

The jury also found two additional statutory aggravating circumstances involving Ledford's prior conviction for rape and his having committed the murder during the commission of a kidnapping with bodily injury. See OCGA § 17–10–30(b)(1, 2). The evidence presented at Ledford's trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of these statutory aggravating circumstances. *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Jackson v. Virginia,* supra; OCGA § 17–10–35(c)(2).

[56] 25. Considering both the crime and the defendant in this case, we find that the death sentence is not disproportionate punishment within the meaning of Georgia law. See OCGA § 17–10–35(c)(3); *Gissendaner v. State,* supra at 716–717(19)(a), 532 S.E.2d 677 (noting that this Court's statutorily-mandated proportionality review concerns whether a particular death sentence "is excessive per se" or is "substantially out of line" for the type of crime and defendant involved). This finding obviously takes into consideration the shocking details of the murder in this case. This finding also takes into consideration Ledford's long history of criminal acts against numerous women, including a rape, several apparent attempted rapes, and sexually-deviant behavior directed at women and his own 14–year–old relative. The cases cited in the Appendix support our finding in that each involves a jury's willingness to impose a death sentence where the defendant has a prior conviction for a capital felony, where the defendant committed murder during both a sexual assault and a ***91** kidnapping, or where the murder involved aggravated battery, torture, or depravity of mind. See OCGA § 17–10–35(e).

Judgments affirmed in part and vacated in part.

All the Justices concur.

APPENDIX.

Loyd v. State, 288 Ga. 481, 705 S.E.2d 616 (2011); *Tate v. State,* 287 Ga. 364, 695 S.E.2d 591 (2010); *Rivera v. State,* 282 Ga. 355, 647 S.E.2d 70 (2007); *Williams v. State,* 281 Ga. 87, 635 S.E.2d 146 (2006); *Nance v. State,* 280 Ga. 125, 623 S.E.2d 470 (2005); *Lewis v. State,* 279 Ga. 756, 620 S.E.2d 778 (2005); *Riley v. State,* 278 Ga. 677, 604 S.E.2d 488 (2004); *Franks v. State,* 278 Ga. 246, 599 S.E.2d 134 (2004); *Sealey v. State,* 277 Ga. 617, 593 S.E.2d 335 (2004); *Sallie v. State,* 276 Ga. 506, 578 S.E.2d 444 (2003); *Braley v. State,* 276 Ga. 47, 572 S.E.2d 583 (2002); *Terrell v. State,* 276 Ga. 34, 572 S.E.2d 595 (2002); *Arevalo v. State,* 275 Ga. 392, 567 S.E.2d 303 (2002); *Lance v. State,* 275 Ga. 11, 560 S.E.2d 663 (2002); *Presnell v. State,* 274 Ga. 246, 551 S.E.2d 723 (2001); *Colwell v. State,* 273 Ga. 634, 544 S.E.2d 120 (2001); *Jones v. State,* 273 Ga. 231, 539 S.E.2d 154 (2000); *Heidler v. State,* 273 Ga. 54, 537 S.E.2d 44 (2000); *Drane v. State,* 271 Ga. 849, 523 S.E.2d 301 (1999); *Pace v. State,* 271 Ga. 829, 524 S.E.2d 490 (1999); *Johnson v. State,* 271 Ga. 375, 519 S.E.2d 221 (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); *Pye v. State,* 269 Ga. 779, 505 S.E.2d 4 (1998); *Mize v. State,* 269 Ga. 646, 501 S.E.2d 219 (1998); *Raulerson v. State,* 268 Ga. 623, 491 S.E.2d 791 (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); *Davis v. State,* 263 Ga. 5, 426 S.E.2d 844 (1993); *Tharpe v. State,* 262 Ga. 110, 416 S.E.2d 78 (1992).

All Citations

289 Ga. 70, 709 S.E.2d 239, 11 FCDR 934

Footnotes

* Ledford committed the crimes on July 25, 2006. He was originally indicted by a Paulding County grand jury on September 28, 2006. On October 26, 2006, he was re-indicted on the same charges, which were one count of malice murder, two counts of felony murder, three counts of aggravated battery, one count of aggravated sodomy, two counts of kidnapping with bodily injury, and one count of aggravated assault. On November 3, 2006, the State filed written notice of its intent to seek the death penalty. Jury selection began on April 13, 2009. On May 18, 2009, the jury found Ledford guilty of all counts and, on May 22, 2009, recommended a death sentence for the murder. On that same day, the trial court entered the judgments, imposed a death sentence for the malice murder, and properly treated the felony murder convictions as mere surplusage. See *Malcolm v. State,* 263 Ga. 369, 371–372(4), 434 S.E.2d 479 (1993); OCGA § 16–1–7(a). The trial court also imposed the following terms of imprisonment, each to be consecutive to one another and to the death sentence: 20 years for each of the three aggravated batteries; life without parole for the aggravated sodomy; life without parole for the first count of kidnapping with bodily injury; and 20 years for the aggravated assault. See OCGA § 17–10–7(b)(2) (providing for the sentencing of repeat offenders). The trial court properly treated the conviction on the second count of kidnapping with bodily injury as mere surplusage. Id. Ledford filed a motion for new trial on June 10, 2009, which he amended on September 30, 2009, and which the trial court denied on May 25, 2010. After obtaining a 30–day extension for filing, Ledford filed a notice of appeal on July 23, 2010. This appeal was docketed on July 27, 2010, for the September 2010 term of this Court, and the case was orally argued on January 24, 2011.

APPENDIX 7

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My name is Mary McLaughlin and I was contacted by counsel for Mr. Michael Ledford who have retained me as a social worker in Mr. Ledford's post-conviction case. I have been an independently licensed clinical social worker since 1992 and I have been working as a master's level social worker since 1989. I am currently employed at Georgia State University in the School of Social Work and in the Associate Provost Office. I began teaching in the School of Social Work nineteen years ago while in clinical practice in Riverdale, Georgia. My clinical work, as well as my program development, evaluation, research and teaching experience has been in the areas of child welfare and substance abuse. A copy of my curriculum vitae is attached.

Materials Reviewed

In preparation for this report and/or testimony, I have reviewed medical, school, employment, prison, jail, court, vital, DHS, group home, probation/parole, social security, and mental health records of Michael Ledford as well as his family. I also reviewed portions of Michael Ledford's trial transcript which included all of the testimony given by: (1) Michael Ledford's family; (2) the mitigation specialist; and (3) the mental health professionals (both defense and prosecution). In addition, I have reviewed the reports of the mental health professionals who testified and/or evaluated Mr. Ledford. I have examined the files accumulated by the trial level mitigation specialist. Furthermore, I interviewed Michael Ledford, as well as his sister Sherri Byess and his brother's Billy, Daniel and Mark. Michael's father and stepfather have recently died. I met and spoke with Michael's mother, Shirley Mihalek, but she has suffered a stroke and was not able to provide any pertinent information.

Childhood History

Michael Ledford was the second oldest of six children in a family that was marked by poverty, incest, alcohol abuse, physical violence, neglectful and poor parenting, multi-generational familial mental illness and residential instability. Each of the aforementioned conditions, on their own, are known to have a negative effect on the healthy development and well-being of children. In combination, these conditions, or risk factors, are exponentially deleterious. In addition, the residential instability in Michael's Ledford's history further compounded the negative conditions. Michael family moved at least once a year, if not more during his formative years. These moves not only worsened the negative effects of Michael's childhood, it also excluded him from opportunities for intervention and treatment.

A. Poverty

Michael and his family lived on or below the poverty level throughout his childhood. Michael's biological father, William Ledford, Sr., was an alcoholic who rarely held a job and when he did, spent most of his earnings on alcohol. After he abandoned the family when Michael was seven years old he never provided any financial support for his children. After William Sr. left, Shirley saw a number of men and remarried twice more eventually settling with Leo Mihalek. Even then, the family primarily lived off of welfare as their mother Shirley and Leo rarely held steady jobs. Michael described his family as always being "the poorest in the town" and Michael, Sherri and Billy have shared memories of being hungry as children.

Michael and some of his siblings attribute the multiple moves in their lives to his parent's inability to pay rent. Thus the family often ended up having to depend on Shirley's parents, Wilber and Ruby, for shelter. Although Wilber and Ruby were far from affluent, they had a place to live, as they worked on a farm in exchange for housing as a condition of their employment. Often, when Shirley's family arrived, there were other relatives staying with Wilber and Ruby so the Ledfords would share the home with Shirley's other impoverished siblings.

B. Incest and Molestation

Incest and molestation were prevalent in the Ledford home and the abuse was mainly directed at the young Ledford children at the hands of their grandfather, cousin, uncle and a boyfriend of Michael's mother.

Michael and his siblings, Sherri and Daniel all relay incidents of sexual abuse as children. Furthermore, Michael and his siblings all recount instances where their grandfather Wilbur, would make them take naps with him in the nude.

Shirley's brother, Bill Daugherty, not only molested his own children, but also molested Michael's sister Sherri. The sexual abuse that occurred, on the rare occasion it was brought to light, was often met with hostility by the adults. For instance, Sherri described an incident which occurred when Bill Daugherty had been charged with molesting children. Sherri had reported Bill's sexual abuse of her and was to be a witness against him in court proceedings. At some point, she and her mother were at the courthouse and Shirley angrily said "I hope you are happy tearing our family apart like this. It happened to me and I turned out all right." Even after Bill was convicted of the charges, Shirley allowed him to reside with her and her family upon his release from prison. Not surprisingly, he resumes raping Sherri. Thus, the clear message conveyed by Shirley is that sexual abuse of children by adults is the norm and is to be, at the very least, tolerated.

C. Alcohol Abuse

Alcohol abuse was frequent and common in both the maternal and paternal sides of the family. All of Michael's maternal uncles, Ray, Donald and Bill were alcoholics as was his grandfather, Wilbur.

Paternally, William Ledford Sr., as noted above, was an alcoholic as were his siblings, Ethel, Gary and Tommy.

In the time he lived with the family, William Sr. was most often drunk and he encouraged the consumption of alcohol by his children. For instance, when Michael was just a toddler, William Sr. gave Michael a glass of vodka and cheered him on as young Michael drank the entire glass. Unsurprisingly, Michael got very ill and had to be taken to a local hospital for treatment.

Michael began abusing substances regularly by twelve years of age. He describes himself as a daily drinker who spent most of his time "either thinking about drinking, getting money to buy alcohol, or drinking." He thought that because his main drink of choice was beer, that he didn't have a problem. He now knows he was mistaken.

Michael and all of his male siblings, Donald, Daniel Billy and Mark have all struggled with alcoholism. As they got older, their drinking played a significant role in their becoming involved with the criminal justice system. Donald, Michael, Daniel and Billy each have at least one DUI, and Donald, Billy and Michael were all intoxicated the night they car-jacked a woman in Florida (Michael was ultimately convicted and the conviction was used by the State in the instant trial). In fact, it is apparent that alcohol played a critical role in each of the crimes Michael has been convicted of.

D. Physical Violence

Michael's childhood is marked by repeated physical abuse. His biological father, William, Sr., would routinely beat Michael, his siblings and their mother, Shirley. William Sr. did not attempt to hide the abuse, often administering a beating in front of whoever in the family was present. Shirley was likewise physically abusive toward the children and Michael recounts how she would beat the boys "with a belt, a chord, whatever she could get her hands on." One winter in Michigan, William Sr. threw Michael into a snow bank because he was mad at Shirley and he wanted to make an example out of Michael. On at least one occasion, William, Sr.'s abuse turned potentially lethal when, during an altercation with Donald, William Sr. put a knife to his son's throat.

E. Neglect and Poor Parenting

Although perhaps physically present, Shirley's behavior was of severe neglect ranging from failing to provide food for her children to abrogating her responsibility in terms of guidance, rules, and support. For example, when Michael was young and was drinking, Shirley, rather than trying to stop him from drinking, would buy him beer to keep him home and out of trouble. Similarly, she did not ensure that the children attended school regularly and all of the Ledford boys had long truancy records. As Michael got older, he and his brothers started getting into trouble with no apparent consequences from Shirley. Looking back, Michael sees that he grew up in a family that taught him, "not to get caught" instead of "not to get in trouble in the first place."

Sherri, even as a teen, saw that Shirley was lacking in parenting skills and attempted to fill the void by cooking for her siblings, and making sure they all had clean clothes to wear. She did her best to keep the

siblings together and she would often step in and try to stop her mother from beating her brothers so badly.

As a result of her neglect, either because of her inability to parent or hospitalization, there were several times the Ledford children were placed in foster care. Each child describes foster care in positive terms. "The food was good." "The foster parents were really nice." "I liked it because there was structure and things were organized." "We had activities and regular meals." Michael said his mother would always come back when she got a house set up for them and they would return to the old routine.

F. Multi-generational Familial Mental Illness

Michael's mother is described by each sibling as having "mental problems" and she was hospitalized several times for depression, "nerves" and suffered from agoraphobia. When the children were younger, Shirley did not like to be left alone so she would often keep one child home with her instead of sending them to school. Daniel and Billy have all been diagnosed with a mental illness.

G. Residential Instability

As noted above, there were several instances the Ledford children were placed in foster care. This, however, was not the extent of the residential instability that marked Michael's childhood. The Ledford family, while headed by William, Sr. moved constantly either to stay one step ahead of the eviction notice or for William to find work. This pattern did not change when Shirley married Leo Mihalek. By the time Michael dropped out of school in 9th grade he had attended approximately ten (10) different schools. He never spent more than one school year (if he completed one) at the same school.

Fear, anxiety, chaos and abrupt changes were the hallmark of Michael's childhood. While other children were playing sports, Boy Scouts or 4-H club, Michael was just trying to survive. He said he and siblings shared the notion that "it is them or us." Billy was the fourth child in the family, and he remembers being anxious and fearful with each new move. He said when he dropped out in ninth grade, he had been to nine different schools (like Michael). Sherri voiced similar concerns. The Ledford children were moved at least once a year, or more, during their entire childhoods.

a. Social Isolation

As a result of constantly moving, the only friends the Ledford children had growing up were each other or the family members that lived in their home. The family was never in one place long enough for the children to make lasting, meaningful social relationships. Consequently, the children learned from each other (and the maladaptive adults around them) all of their social skills. On the occasion that one of the children made a friend outside of the family, that friend was shared by the rest of the siblings. The same thing was true with girlfriends. When one of the boys went out with a girl, often that same girl would go out with other boys in the family and this pattern continued into adulthood. As Sherri recalled, "Deborah, who is currently married to my brother Mark, also had a relationship with Michael and Billy. Deneen is Billy's ex, but she also dated Mark as well. I think that Billy dated Deborah on purpose as payback for Mark getting together with Deneen. Becky, who is Michael's ex-girlfriend and mother to his

son Michael, also dated Donald, Billy, Mark and possibly Danny. Rosemary, who is Michael's ex-wife and mother to his son Tony, is currently married to Michael's cousin Ray Daugherty. Liliah dated Donald, Michael and possibly Mark and Billy. Liliah's sister, Amanda dated Mark for a while and then they had a child together."

b. Lack of Protective Factors

The years of residential instability aggravated an already strained family system. As a result, the systems of care, "society's safety nets," kept missing Michael. These "safety nets" are apparent but inconspicuous. For instance, the doctors and nurses at emergency rooms or hospitals make observations about patients and if suspicious, report their suspicions to the proper authority. The same is true for teachers and other professionals children come into contact with on a routine basis. Either because of their poverty, because of the times, or because they were not in a single place long enough, the intervention of these professionals that we are so accustom to today, did not occur.

When Michael was born, he was the second child of a young couple already struggling with substance abuse, domestic violence and mental illness. A hospital worker could have noticed the signs of trouble and intervened thereby taking Michael out of harm's way. That did not happen. Similarly when Michael was a toddler and brought to the hospital after ingesting a tumbler full of vodka, a hospital worker could have reported the incident to DFACS (which surely would have happened in this day and age) and, again, steps would have been taken to protect Michael. At school, teachers are the number one professional that children will disclose abuse to, as Sherri, Michael's sister did. The short stays in each school kept the Ledford children from forming any relationship with teachers long enough to allow a teacher to become familiar with the children and thereby notice any subtle (or not so subtle) changes that might signal a problem at home.

School History

Michael has minimal memories of school. He is not able to recall the names of any of his teachers and he has a difficult time remembering what schools he attended for each year of his life. Michael never spent one full year in a particular school and when he was enrolled, there were many days when he was not in attendance. He was never in school long enough to join any clubs or athletic teams and he does not recall any friends that he may have had in school. Because his parents constantly moved the family from town to town or from state to state, there were gaps when Michael was not enrolled in school at all. In fact, although he was fairly bright, school was a source of anxiety for Michael as he was always the new kid and always trying to learn his way around a new school and new people. Eventually, school became too much for Michael to bear and he dropped out as a young teenager.

It appears that only one of Michael's teachers recall him. This is probably due to the fact he was never in the same school for more than one school year. However, one teacher, Michael's 8th grade teacher, recalls that he had taken a "special Interest" in Michael. This teacher recalled that Michael appeared to have "no supportive attachments in his life" and that he tried to spend extra time with Michael. Although Michael did well in his class, the family unfortunately moved before the end of the school year and Michael lost this chance for a positive connection.

Work History

Because Michael was never in one place long enough to learn a trade, he mostly worked odd jobs in construction, painting and he did factory work that was low paying and required little skill. Most, if not all of the jobs that Michael held, were obtained because a family member was either working there at the time or had worked there previously and they were able to help Michael get the job. Between being incarcerated so often and when not in prison, working menial jobs, his earning records from social security reflect that Michael made very little money throughout his lifetime.

The job Michael had at the time of his arrest appears to have been the best work situation he had. He was a machinist at a laminating company and held the job for more than a year. Michael worked at this job for over a year. Michael liked his boss and described him as being "laid back". This job as a machinist was going well in spite of Michael's alcohol abuse and he was even promoted.

V. Conclusion

Risk is the presence of one or more factors that contribute to a negative outcome. Risk can be an internal attribute or it can be an environment condition. The Adverse Childhood Experience Scale (ACE) is a study conducted by the CDC. The study presents a scientific link of risk factors to poor outcomes. The ACE risk categories are Abuse (emotional, physical, sexual), Neglect (emotional and physical) and household Dysfunction (mother treated violently, household substance abuse, household mental illness, parental separation or divorce, incarcerated household member). The ACE study gives a score and as the number of ACE factors increases, the risk for health problems and substance abuse increases.

Resiliency is the ability of a person to rise above adversity and have a reasonably successful life course. Protective factors are those buffers in an individual, family or community that help alleviate the risk factors. Individual protective factors can be a sense of humor or intelligence. Familial factors are closeness, support or the presence of rituals and community factors are safety, social supports and a connected community group. Applying the risk/resiliency approach to Michael Ledford, it is clear that the risk factors were overwhelming. The records from his childhood, the affidavits of his siblings and the interviews I personally conducted reveal a family system that was so chaotic and abusive that the Ledford children's basic needs for safety and security were not guaranteed. The risk factors are additionally compounded by the residential instability that left the family isolated, and without access to intervention and treatment.

Michael Ledford was born into a family already mired in poverty, incest and alcoholism. As a result of multiple moves, Michael was not in a position long enough for any protective community factor to reach him. Michael was not given a chance to develop along the normal life pathway that most children are afforded.

Signed: Mary J McLaughlin, LCSW

Date: March 13, 2014

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Mary L. McLaughlin, LCSW

Education

Northeastern University Boston MA 02137	Human Services 1978-1979
University of Massachusetts Boston, MA 02315	BA Sociology 1983
Boston College Chestnut Hill, MA 02167	MSW, Clinical Social Work 1989

Administrative Experience

Georgia State University
School of Social Work
Atlanta GA 30303

Director, Administrative Assessment- Office of Institutional Effectiveness
August 2012-present

Undergraduate Program Director /Clinical Assistant Professor– Georgia State University School of Social Work
August 2010 – August 2012

- Responsible for tracking WEAVE data for the undergraduate program
- Participate in Administrative management team meeting with Director of the School
- Assisted in preparations for the reaccreditation site visit for the SW school
- Advise and monitor academic progress for 200 undergraduate social work majors
- Teach Field Practicum Seminar

Project Director – Professional Excellence Training Program
August 2005 – August 2010

- Responsible for the development and implementation of a statewide advanced skills continuing education program for public child welfare workers
- Supervision of 5 full time staff as well as multiple subcontractors and consultants

- Oversight of 1.5 million dollar budget
- Grant writing
- Project evaluation and data tracking for accountability
- Collaborate with 9 other social work programs in Georgia, the Rollins School of Public Health at Emory, the Barton Child Law Clinic at Emory and the Department of Human Resources as well as social service providers across the state to develop and or deliver new training curricula to public child welfare workers
- Monitor trainings state wide through focus groups, meetings and data evaluation

Project Director - Ready for Work Program Evaluation
January 2000 – August 2005

As Project director of a program that provided evaluation of residential substance abuse treatment centers for women in children, I performed the following:

- Conducted a formative and summative outcome evaluation of 12 residential substance abuse treatment sites in the state of Georgia.
- Developed pilot initiatives at each site to demonstrate models of practice in the areas of gender-specific treatment, therapeutic childcare, work skill development and community partnerships.
- Supervised 5 research associates, 1 full time office assistant
- Monitored 12 sites statewide
- Responsible for 500,000 budget

Project Director - Title IV-E Public Child Welfare public education grant.
January 2001 – August 2005

As project director of the Title IV-E training program I performed the following:

- Oversight of $500,000 budget
- Teaching the practicum seminar to 14 – 18 BSW students placed in public child welfare settings
- Supervised practicum experience for BSW students
- Conducted ongoing site visits and agency meetings to develop collaborative learning experiences for students
- Chaired a subcommittee of the Georgia Education Consortium responsible for setting policy and strategic planning.
- Provided monthly and annual reports

Teaching/Training Experience

Certified Trainer – Martin Luther King, Jr. Center for Nonviolent Social Change
1988 - 1996

Part time instructor
Georgia State University
Department of Social Work 1992 to 2012

Taught Communications; Child Abuse and Neglect and The Practicum Seminar to bachelor of social work students

Clinical Social Work Experience

Clinical Social Worker February 1992-December 1999
1655 Phoenix Blvd.
Oasis Counseling Center
College Park, GA 30349
770-997-1738

Clinical supervisor and administrator of a five county program providing therapeutic services to the Department of Family and Children Services.

- Designed and implemented a substance abuse treatment program for women.
- Liaison to the Clayton County and Fayette County schools providing employee assistance, in-service trainings and student assessments
- Maintained a clinical outpatient therapy practice for children and adults.

Family Therapist June 1991-February 1992
Talbott Recovery Center
College Park, GA 30349
770-994-0185

Family Advocacy Social Worker April 1990 – June 1991
Fort McPherson, GA
Community Mental Health clinic
Third Army FORSCOM

Family Therapist May 1989 – April 1990
Waltham Hospital
Waltham, MA 02167

Professional Affiliations

- Member, National Association of Social Workers
- Member, American Professional Society on the Abuse of Children (APSAC)

- Licensed by Georgia Composite Board License Number 1545

References available upon request

Publications

Wolk, J. & McLaughlin, M. "Supporting the Fidelity of Assessment Tools in a Statewide Multisite Residential Substance Abuse Experience for Mothers and their Children" The Journal of Residential Childcare. In Press.

Conference Proceedings

McLaughlin, M. & McLaughlin, B. & Coan, C.The Use of Narrative in the Classroom. Adult Higher Education Alliance Conference (2003)

McLaughlin, M. & Saturday, J. Adult Education, Higher Education and Public Child Welfare: Georgia's Response to the Workforce Crisis in Public Child Welfare. (2005)

Presentations

McLaughlin, Mary, **Separation and Attachment** Clayton County Juvenile Court CASA Volunteer training 1995 – 1998.

McLaughlin, M. & McLaughlin, B. & Coan, C. **The Use of Narrative in the Classroom** The Adult Higher Education Alliance National Conference, Ashville, NC October 2003.

McLaughlin, M. & Park, Wansoo. **Creating Communities that Care** NASW Georgia Annual Conference, Marietta, GA. October 2004.

Lyons P, & McLaughlin, M. (2004) **Ethical issues in child welfare: What are you going to do now?** Georgia Association of Homes and Services for Children: Annual Conference. April 27-29 Hilton Head NC. (podium refereed).

Lyons, P. & McLaughlin. M (2005) **Child welfare: Ethics for professionals.** Georgia Association of Homes and Services for Children: Annual Conference. April 25-28 Hilton Head NC. (podium refereed).

McLaughlin, M. & Saturday, J. **Adult Education, Higher Education and Public Child Welfare: Georgia's Response to the Workforce Crisis in Public Child Welfare** The Adult Higher Education Alliance national conference. Boston MA October 2005.

Lyons, P. & McLaughlin, M. (2006) **Collaborative Partnerships: Best Practices Applications. Community Forum 2006**. Georgia State University. March 29th.

Beck, E. & Brown, P. & Henry, J. & McLaughlin, M. **Restorative Justice and Child Welfare.** GSU Community Forum, April 2008.

McLaughlin, M. **An Overview of Psychological Trauma** guest lecturer, GSU School of Nursing, Sept. 16, 2008

Lyons, P. & McLaughlin, M. & Carmichael, D. **Déjà vu All Over Again: Starting a State Child Welfare Training Program from Scratch** The National Staff Development and Training Association Conference, Atlanta GA Sept. 23, 2008.

McLaughlin, M. & McLaughlin B. & Coan C. **Helping, Serving, Fixing: Service Learning Strategies**
Alliance for Higher Education conference, Mobile Alabama Oct. 3, 2008.

Funded Projects

Lyons, P. & McLaughlin (2006) Maternal Substance Abuse and Child Development Project:
Program Evaluation. Technical Report for Emory University Atlanta GA

Lyons, P. & McLaughlin (2007) Maternal Substance Abuse and Child Development Project:
Program Evaluation. Technical Report for Emory University Atlanta GA

Lyons, P., McLaughlin, M., Schroeder, L., York, J., & Mobely, A. (2007). Process and Outcome Evaluation Summary: Professional Excellence Program (2006-2007). School of Social Work, GSU: Atlanta, GA.

Lyons, P. McLaughlin, M. (2007) Social Work Education for Public Child Welfare Practice under Title IV-E Contract: Georgia Department of Human Resources $708,346.59

Lyons, P. & McLaughlin, M. (2007) Professional Excellence in Child Welfare. Georgia Department of Human Resources $1,537,219.00

Lyons, P. McLaughlin, M. (2006) Social Work Education for Public Child Welfare Practice under Title IV-E Contract: Georgia Department of Human Resources $688,000.

Lyons, P. & McLaughlin, M. (2006) Professional Excellence in Child Welfare. Georgia Department of Human Resources $1,537,219.00

Lyons, P. McLaughlin, M. (2005) Social Work Education for Public Child Welfare Practice under Title IV-E Contract: Georgia Department of Human Resources $748,635.

Lyons, P. & McLaughlin, M. (2005). Georgia DFCS Comprehensive Professional Development Plan. Component 1: Advanced training for veteran caseworkers. $1,563,588.00

Lyons, P. & McLaughlin, M. (2003) Preparation training for DFCS employees. $15,000

Lyons, P. & McLaughlin, M. (2003) Evaluation of preparation training for DFCS employees. $117,980.