No. ____

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

DAVID SCOTT FRANKS,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF *CERTIORARI*

Capital Case

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17478

D.C. Docket No. 2:11-cv-00325-WBH

DAVID SCOTT FRANKS,

Petitioner - Appellant,

versus

GDCP WARDEN,

Respondent - Appellee.

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

(September 16, 2020)

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

MARCUS, Circuit Judge:

Petitioner David Scott Franks was sentenced to death in Georgia for the murder of Debbie Wilson. Because the facts surrounding the crime were

especially heinous, including two other homicides and the almost fatal attacks on two young children, his trial counsel relied on residual doubt at sentencing. Franks argued in Georgia's state courts that his counsel were constitutionally ineffective at sentencing because they relied on residual doubt and because they failed to investigate and present additional mitigating evidence concerning Franks's childhood, substance abuse, and cognitive deficits. The state habeas court concluded that his attorneys were not ineffective and that Franks was not prejudiced by the failure to introduce what it characterized as weak additional mitigating evidence. The federal district court, in turn, determined that the state court's decisions were neither contrary to nor an unreasonable application of clearly established federal law, nor were they based on an unreasonable determination of the facts, and denied Franks's § 2254 petition. We agree and affirm its judgment.

I.

In the early morning hours of August 5, 1994, David Martin and Clinton Wilson arrived at David Franks's pawn shop in Bremen, Georgia. Like so many of these cases, the details of what transpired between the three men that morning remain murky. But we know that the encounter ended in brutality: Franks shot Martin and Wilson execution-style with a nine-millimeter pistol. A medical

examiner concluded from the trajectory of the bullet wounds that the men had been shot from behind while lying face down on the floor.

David Franks fled the scene in Wilson's white cube van. He drove nearly two hours away to Wilson's home in Gainesville, Georgia, where Franks believed Wilson had hidden tens of thousands of dollars in cash. Franks was friendly with Wilson and knew his wife and kids -- Franks had even vacationed with the couple. So when he arrived at the Wilson home, Clinton Wilson's nine-year-old daughter Jessica answered the door and allowed Franks to come in. Franks told Clinton's wife Debbie that he was looking for Clinton, despite knowing that Clinton Wilson lay dead in Bremen. At around 1:30 p.m., Debbie telephoned David Martin's wife, explained that "the other David" was looking for Clinton, and asked if Martin's wife had seen him.

In an apparent bid to get young Jessica out of the house, Franks told Debbie he wanted to go fishing with Brian, the Wilsons' thirteen-year-old son, who was at a neighbor's home. Debbie sent Jessica to tell Brian. With Jessica out of the house, Franks pulled a gun on Debbie and forced her to an upstairs bedroom, where he knew Clinton kept a safe. After taking money from the safe, Franks stabbed Debbie, piercing a major artery to her lung. But Debbie did not die just then. She called 911 and identified her attacker repeatedly as "David Franks," telling the 911 operator that he attacked her for money. Paramedics eventually

arrived to treat Debbie, and she told them the same thing: David Franks attacked her for money. But Debbie's blood loss was too severe. Debbie Wilson went into cardiac arrest and died before reaching the hospital.

After he attacked Debbie, Franks went back downstairs. When the children returned, he told Jessica to go outside to the van to get a briefcase for him and told Brian to get his fishing gear. As Brian was getting his fishing rod, and with Jessica out of the house again, Franks attacked thirteen-year-old Brian from behind, stabbed him in the chest and stomach, and slashed his throat at least twice. Brian fought back and cut Franks on his left arm. The injuries Brian sustained were profound: a five- to six-inch-deep stab wound in the right side of his chest just below the nipple, which penetrated the diaphragm into the abdominal cavity, damaging his lung, diaphragm, and liver; and a wound that penetrated his neck through to the base of his tongue, necessitating the use of a feeding tube for ten days.

Franks left Brian and then targeted nine-year-old Jessica, whom he stabbed in the chest as she came back into the house. Both children survived and escaped to a neighbor's house. They told the neighbor that their father's friend "David Franks" -- whom they physically described -- had attacked them and that he was driving their father's white cube van. At the hospital later, both children picked Franks from a photo lineup.

Franks fled his second crime scene in the white cube van, abandoned it, and traveled on foot to a nearby house, where he stole clothing and another car, a Mazda 626. He drove the Mazda to a casino in Biloxi, Mississippi, where he gambled for three days using the pseudonym "Ty Dare." He then traveled to Mobile, Alabama and checked into a Red Roof Inn. A Mobile police officer spotted the Mazda in the motel parking lot and called for a tactical team. Franks saw the police activity on his way back to the motel and fled once more.

After evading police at the motel, Franks invaded the home of Carrie and Willie Cooper. Carrie was 76 years old; Willie was 82, had mobility difficulties, and used a motorized chair to get around. Franks held the couple hostage with no water in their sweltering garage from mid-morning until late in the afternoon, at one point nailing shut a side door to the garage, locking the two inside. The Coopers' daughter, Linda Goodwin, became concerned when she couldn't reach her parents by telephone and went to check on them. Franks then took Goodwin, her husband, and their son hostage too, threatening them with a gun. He finally stole the family's car, but not before ripping all of the telephone lines from the walls of the home.

The police eventually apprehended Franks at his sister's home after his brother-in-law turned him in. When he was arrested, Franks had a .22 caliber derringer and a bandaged cut on his left arm. Before his arrest, he told his brother-

in-law that the pawn-shop victims had promised to come up with $100,000 to buy drugs. When they didn't have the money, Franks made them lie down on the floor and shot them. Franks told his brother-in-law that Martin and Wilson "got what they deserved."

Franks was charged in Haralson County, Georgia for the murders of Clinton Wilson and David Martin; he was also charged in Hall County for the offenses that occurred at the Wilsons' home, including the murder of Debbie Wilson. A Hall County jury convicted Franks of malice murder, armed robbery, aggravated battery, cruelty to a child, aggravated assault, burglary, and theft by taking. The trial court sentenced Franks to imprisonment for 20 years for armed robbery, 20 years for each of two counts of aggravated battery, 20 years for burglary, and 10 years for theft, with the sentences to run consecutively. Following the penalty phase, the jury unanimously recommended that Franks be executed; the trial court agreed and sentenced Franks to death for the malice murder of Debbie Wilson. Because he was convicted and sentenced to death in Hall County, Franks was never tried for the murders of Clinton Wilson and David Martin in Haralson County.

After initial motions for a new trial had been litigated and denied but before the case had been appealed, the state trial court granted Franks's trial counsel's motions to withdraw. The court explained that by doing so it would permit the

issue of ineffectiveness of trial counsel to be raised before direct appeal. The following month, the state trial court appointed replacement counsel, who sought a new trial alleging, among other things, constitutionally ineffective assistance of trial counsel.

The state trial court denied that motion, and Franks's convictions and sentence were affirmed on direct appeal. See Franks v. State, 599 S.E.2d 134 (Ga. 2004), cert. denied, 543 U.S. 1058, reh'g denied, 544 U.S. 914 (2005). The Georgia Supreme Court denied the ineffectiveness claim because Franks's new counsel "presented no competent evidence of what a more thorough mitigation investigation would have uncovered," offering only a summary of Franks's life that was neither offered into evidence nor supported by competent testimony. Id. at 148. Put another way, Franks's appellate counsel failed to properly present the claim that trial counsel denied him the effective assistance of counsel.

Franks then filed a petition for a writ of habeas corpus in Butts County Superior Court. Relevant to the claim now before us, Franks argued that his trial counsel were constitutionally ineffective for failing to investigate and present additional mitigating evidence about Franks's difficult childhood and abusive father, his substance abuse, his cognitive deficits and mental illness, and for relying instead on a theory of residual doubt. Moreover, he claimed his appellate counsel were ineffective for failing to properly raise that claim. Following an extensive

evidentiary hearing, the state habeas court denied Franks collateral relief. See Franks v. Hall, No. 2005-V-1070 (Butts Cty. Super. Ct. Apr. 27, 2010). The court concluded that Franks's claim concerning ineffectiveness of trial counsel could not be reviewed either because of res judicata or procedural default. Id. at 12. It noted, however, that Franks's claim about appellate counsel's ineffectiveness was properly presented and that, in the course of reviewing it, the court would necessarily have to examine trial counsel's performance as well. Ultimately, the state habeas court concluded that because trial counsel were not ineffective, appellate counsel were not deficient, nor was Franks prejudiced by their failure to challenge trial counsel's mitigation investigation and presentation.

Franks next set his sights on federal court, filing this § 2254 petition in the United States District Court for the Northern District of Georgia. Like the state habeas court, the district court examined whether Franks's trial counsel were constitutionally ineffective on the theory that if trial counsel were not ineffective, appellate counsel could not have been ineffective either for failing to raise a claim about trial counsel's performance. Applying the deference mandated by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court concluded that none of the state habeas court's factual findings were unreasonable in light of the evidence presented, and none of its conclusions of law

were contrary to or involved an unreasonable application of clearly established federal law.

We granted a certificate of appealability limited to one claim:

> Whether appellate counsel provided ineffective assistance in violation of the Sixth Amendment to the United States Constitution by failing to present evidence to support the claim that trial counsel was ineffective in violation of the Sixth Amendment to the United States Constitution when at the penalty phase of trial, it failed to conduct a reasonable mitigation investigation and failed to uncover and present mitigation evidence.

The only claim properly before us, then, is whether Franks's appellate counsel were ineffective in presenting his claim of ineffectiveness of trial counsel at the penalty phase. Because his appellate counsel did not properly present the ineffective assistance of trial counsel in the motion for a new trial, and because the state habeas court concluded it was bound by res judicata or procedural default on claims related to the ineffectiveness of trial counsel, that claim, as a procedural matter, is unexhausted in state court. However, we have repeatedly held that if a particular claim itself is without merit, "any deficiencies of [appellate] counsel in failing to raise or adequately pursue" it "cannot constitute ineffective assistance of counsel." Owen v. Sec'y for Dep't of Corr., 568 F.3d 894, 915 (11th Cir. 2009). "In other words, whether appellate counsel failed to properly challenge trial counsel's mitigation inquiry focuses on essentially the same corpus of evidence and the same legal questions underlying trial counsel's effectiveness -- which

strategies did trial counsel pursue, were those strategies reasonable under the circumstances, and what kinds of penalty-phase evidence was developed, or could reasonably have been developed." Ferrell v. Hall, 640 F.3d 1199, 1225 (11th Cir. 2011).

Thus, we, like the state habeas court and the district court too, consider whether Franks's trial counsel were constitutionally ineffective. Since Franks's claim that his trial counsel were constitutionally ineffective is without merit -- particularly when measured against AEDPA deference, and particularly after the state habeas court held a lengthy evidentiary hearing and made extensive findings on the reasonableness of trial counsel's strategic choices and on prejudice -- we have no occasion to evaluate the performance of his appellate counsel directly. His appellate counsel could not have been constitutionally ineffective by failing to present a meritless claim.

II.

"We review de novo a district court's grant or denial of a habeas corpus petition." McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). Because Franks filed his federal habeas petition after April 24, 1996, this case is governed by AEDPA. "Under AEDPA, if a state court has adjudicated the merits of a claim -- as the state court did here -- we cannot grant habeas relief unless the state court's decision '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 in light of the evidence presented in the State court proceeding.'" Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1309 (11th Cir. 2015) (quoting 28 U.S.C. § 2254(d)).

"Under § 2254(d)(1)'s 'contrary to' clause, we grant relief only '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.'" Jones v. GDCP Warden, 753 F.3d 1171, 1182 (11th Cir. 2014) (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). "Under § 2254(d)(1)'s 'unreasonable application' clause, we grant relief only '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.'" Id. (alteration in original) (quoting Williams, 529 U.S. at 413).

The second prong of § 2254(d) -- that an adjudication 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 -- "requires that we accord the state trial court substantial deference." Brumfield v. Cain, 576 U.S. 305, 314 (2015). "If '[r]easonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial

court's . . . determination.'" Id. (alteration and ellipsis in original) (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)). Indeed, on AEDPA review, "a determination of a factual issue made by a State court shall be presumed to be correct" -- a presumption that the petitioner carries the burden of rebutting "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

III.

To properly analyze the state habeas court's findings of fact and conclusions of law concerning the effectiveness of Franks's trial counsel -- and thus whether his appellate counsel could have been ineffective for failing to support the claim -- we detail the guilt-phase and sentencing-phase strategy and presentation made by Franks's trial counsel. Although the guilt-phase performance of trial counsel is not before us, the guilt-phase presentation is critical to understanding trial counsel's mitigation strategy, which focused primarily on the theory of residual doubt.

It is undeniable that Franks's trial counsel faced overwhelming evidence of their client's guilt. In addition to Debbie Wilson's 911 calls and the Wilson children's positive identification of Franks as their attacker, two firefighters responding to Debbie Wilson's 911 calls observed a man matching Franks's description driving away from the Wilsons' home in the white cube van. Police found the abandoned van about nine miles away from the Wilson home, along with a bloodstained shirt Franks had been seen wearing that day, a knife, and what was

later identified as Franks's blood on the left armrest of the vehicle. The Wilson children testified at trial; they recounted the brutal attacks and identified Franks as their assailant. And testing of two bloodstains in the Wilsons' home confirmed the presence of Franks's DNA.

Franks's defense was that other men had murdered Debbie, and that the attacks on the children, if he did them, were the result of coercion. Testifying on his own behalf, Franks told the jury that he had set up a drug deal between Clinton Wilson and members of a criminal organization -- the "Dixie Organization." Franks said he had been drinking and using crank (a methamphetamine) with Wilson the previous night; the two picked up David Martin, and at around 4 a.m. the three of them went to eat at a truck stop diner. Franks went to sleep for a few hours at his girlfriend's mother's house, and then met Wilson and Martin at his pawn shop in Bremen -- one of two pawn shops Franks owned -- in the morning. Franks claimed that four men from the Dixie Organization arrived at the pawn shop, and Franks went to a convenience store to buy a soda and talk to his girlfriend. Franks said that when he returned, Wilson and the Dixie Organization men were arguing because Wilson had not produced the cash required for a planned drug deal. Franks claimed that the men pressed them for the money; they also threatened to kill Franks's mother. The men forced Martin, Wilson, and Franks to lie face down on the floor; they then shot Martin and Wilson with a gun

the men had found in Franks's briefcase in his pawn shop. All the while Franks was "begging for [his] life."

The four men then tied up Franks with flex cuffs and placed him in Wilson's van. They drove Franks to Wilson's home and told him go inside and make sure that they could get in. After Franks talked with Debbie Wilson for a while, two of the men came into the home and told Debbie that her husband owed them money. Franks testified that he tried to distract the Wilson children. Franks claimed that he saw one of the men (Reece) stab Debbie in the back after taking her upstairs to the safe. Franks said that the next thing he remembered was seeing lights and hearing sirens. He could not remember the attacks on the children. He fled the scene because he feared the Dixie Organization; he did not go to the police immediately because "[t]hese people [were] very well connected in all areas, and [he] didn't trust the police or anyone else at that time."

Franks could not recall many details of the days following the triple homicide, but he remembered gambling in Biloxi and abandoning his belongings at the Red Roof Inn in Mobile when he saw police cars outside the motel. He also admitted to the encounter with the Coopers. He said that he first tried to buy the Coopers' truck but, when they refused, he forced the couple into their garage and nailed the door shut. He then stole their daughter's car to get away yet again. Eventually, he went to his sister's home and remembered meeting his brother-in-

law, Wayne McConathy, though he claimed not to recall what he told McConathy. When asked why he went to a casino in Biloxi and why he used the name Ty Dare, Franks offered only that perhaps the casino presented familiar surroundings, and that he was scared to use his own name.

Finally, his counsel asked: "David, you've seen the evidence regarding the slashing of the two kids, you've seen the pictures, you've heard their testimony. Are you telling this jury that you didn't do that?" Franks responded, "All I can say is I just don't remember that. . . . I'm just saying I don't remember it. I don't remember that event."

Franks's counsel presented several other pieces of evidence to support his account that four men from the Dixie Organization were involved and had murdered Debbie Wilson. One witness (Annie Carlisle), who was driving by Franks's pawn shop on the morning of the murders, saw four men drive into the parking lot, exit their car, and push three other men through the door of the pawn shop. Moreover, telephone records revealed that a phone call was placed from Franks's pawn shop in Bremen to the Wilson home two hours away in Gainesville at 1:54 p.m. on the day of the crimes. Because the state's timeline put Franks at the Wilson home by 1:30 p.m., defense counsel argued this phone call demonstrated that others were involved in the crimes. His counsel also emphasized the difference between the crime scene found at the pawn shop in

Haralson County and the scene at the Wilson home in Hall County. The pawn shop killings were methodical, gang-like executions, but the Hall County crimes were frenzied. Defense counsel also argued that Debbie Wilson's 911 calls strongly suggested other people were involved because Debbie Wilson told the 911 dispatcher three times that "they're hurting my kids." The defense also presented evidence that the crime scenes may have been contaminated, important evidence not preserved, and certain items not tested, suggesting that the police failed to exhaust the search for other suspects. Among other things, the investigators failed to identify fingerprints found on beer cans recovered from the pawn shop and failed to even so much as investigate tire tracks left at the Wilson home on the day of the crimes.

At the penalty phase, the state's aggravation case grew still stronger. Debbie Wilson's family testified about the impact her death had on all of them and the impact the attacks had on the children. A firearms examiner said that the bullets at the Haralson County crime scene matched Franks's gun recovered from the Red Roof Inn. Two Haralson County Sheriff's Department officers recounted Franks's attempted jail escape after he was finally arrested for the crimes, explaining that he shattered a jail window with a screwdriver. Further, Carrie Cooper and her daughter testified about being held hostage and threatened by Franks.

Franks's counsel primarily relied on residual doubt -- a doubt they attempted to create during the guilt phase. But they also presented significant mitigation testimony from eight family members: Jane Mashburn (Franks's aunt), Susan McConathy (Franks's sister), Nancy Rowell (Franks's ex-wife), Calvin Franks (Franks's brother), Mildred Rowell (Franks's ex-mother-in-law), Lynette Dickinson (Franks's second wife), Patty Murch (Franks's cousin), and Doris Franks (Franks's mother). Mashburn testified to David Franks's good character and explained that his father was "a severe alcoholic" who physically abused David's mother. Nancy and Mildred Rowell, McConathy, Dickinson, Murch, and Doris Franks each similarly testified about David's good character. All of this good character evidence supported residual doubt: David had never been known to be violent and each account of his decency was designed to sow more doubt in the jurors' minds that Franks went into a violent frenzy.

The defense did not rely solely on good character. Counsel also introduced some mitigating evidence about David's troubled childhood. David's older brother, Calvin Franks, testified that "David's childhood was not exactly a ros[y] one." He described their dysfunctional childhood this way:

> We came from a violent family, and our dad, as has already been stated, he was very much so an alcoholic, an unreasonable man that you could not talk to, you couldn't have friends over, at any -- I used to sleep with a knife in the head of my bed, I was afraid of my dad. I was afraid he would come in and kill me when I was a child. I've had conflicts with my dad telling him that he would not do my younger

> brother as he did myself. My mother is a very religious woman. She -- to the point I've seen her do without food for days fasting and praying. My sister is likewise. We were, if you'll pardon the expression, we were very much black and white. One side of my family was -- would die before they would tell you a lie, and the other side of my family was the devil himself. So there was a lot of confusion growing up. I've even seen -- there was a time when my mom and David was sitting on the couch and my dad shot right between them while they were sitting on the couch, it came so close to my mom's leg it actually burnt her leg. If we were a family today they would take David and I and my sister away from my mom and dad and give us to somebody else . . . .

In closing argument at the penalty phase, the prosecutor detailed the aggravating circumstances, highlighting the terror and torture of Brian and Jessica Wilson, orphaned, hospitalized, and fearful for their lives as David Franks eluded law enforcement after the crimes, and the horror experienced by Debbie Wilson, who lay dying while hearing the attacks on her children. Franks's counsel countered with residual doubt, telling the jury, "I submit to you that one of the factors that you need to consider here is the proof in the case, and whether questions will come zinging back to you when you're in that quiet place alone with your thoughts and you say what if? What if? Or why?" His counsel detailed holes in the state's case -- including the unidentified fingerprints, tire tracks at the scene that were never tested, and Franks's behavior fleeing the scene onto the street rather than running into the nearby woods -- as well as evidence supporting David's account that other men were involved in the homicide, such as the testimony of Annie Carlisle. Ultimately, he asked the jury to "sprinkle mercy"

rather than "revenge and vengeance" into their deliberations and concluded: "I beg you ladies and gentlemen, don't kill that man."

The jury unanimously recommended that Franks be sentenced to death for the murder of Debbie Wilson. It found five statutory aggravating factors beyond a reasonable doubt: (1) the murder of Debbie Wilson was committed while Franks was engaged in the commission of the aggravated battery of Brian Wilson, Ga. Code Ann. § 17-10-30(b)(2); (2) the murder of Debbie Wilson was committed while Franks was engaged in the commission of the aggravated battery of Jessica Wilson, id.; (3) the murder was committed while Franks was engaged in the commission of an armed robbery, id.; (4) Franks committed the murder for the purpose of receiving money or any other thing of monetary value, id. § 17-10-30(b)(4); and (5) the murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind and torture, id. § 17-10-30(b)(7).

Franks now says his trial counsel were ineffective at the penalty phase because they relied on a residual doubt defense, and because they failed to investigate and present additional details about David's difficult childhood, substance abuse, and cognitive deficits. After a three-day evidentiary hearing, the state court denied Franks's habeas petition. The court found that "trial counsel made a reasonable, strategic decision to present character evidence and a residual doubt theory at the sentencing phase of trial," and that this strategic decision was

supported by a reasonable investigation that included extensive interviews with Franks's family and friends, and the examination of "possible mental health history, dependency issues and other extenuating factors." Particularly, the court concluded that "trial counsel made a reasonable, strategic decision to focus on residual doubt as their mitigation theory after a thorough investigation of 'law and facts.'" The state habeas court reviewed the additional mitigating evidence introduced collaterally -- evidence we detail in Section IV below -- and concluded both that counsel made a reasonable strategic choice not to present it and that the evidence was weak and would have had little mitigating value. Thus, Franks was not prejudiced by the choice to omit it. The district court, in turn, concluded that the state habeas court's denial of the petition was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor were any of its factual findings unreasonable in light of the evidence presented.

IV.

Under Strickland v. Washington, 466 U.S. 668 (1984), a petitioner must show that his counsel's performance was constitutionally deficient -- that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" -- and that the deficient performance prejudiced the defendant, depriving him of a "fair trial, a trial whose result is reliable." Id. at 687. Simple mistakes or strategic errors are not enough,

nor are serious errors if, absent those errors, there is no "reasonable probability" that the outcome would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" -- in this case, a probability sufficient to undermine confidence that the jury would have recommended death. Id.

In other words, Franks must show that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 688, 694; accord Knowles v. Mirzayance, 556 U.S. 111, 124 (2009); Wiggins v. Smith, 539 U.S. 510, 521 (2003); Williams, 529 U.S. at 390; Darden v. Wainwright, 477 U.S. 168, 184 (1986). The failure to meet either Strickland prong is fatal to the claim.

A. Franks's Trial Counsel's Performance Was Not Constitutionally Deficient.

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. We apply a "strong presumption" that counsel performed competently and ask only whether any "identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 689–90. And our review under AEDPA is doubly deferential: we extend deference both to the trial counsel's choices and to the state court's assessment of their reasonableness. "The pivotal question is whether the state court's application of

the Strickland standard was unreasonable," which is "different from asking whether defense counsel's performance fell below Strickland's standard." Harrington v. Richter, 562 U.S. 86, 101 (2011). Indeed, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Because Strickland allows for a range of strategic choices by trial counsel, so too is there considerable leeway for state courts to determine the reasonableness of those choices. "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." Harrington, 562 U.S. at 101 (quoting Yarborough, 541 U.S. at 664). For Franks to prevail, then, he would have to show that no reasonable jurist could find that his counsel's performance fell within the wide range of reasonable professional conduct.

"The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct." Provenzano v. Singletary, 148 F.3d 1327, 1330 (11th Cir. 1998). On the other hand, "the question of whether the strategic or tactical decision is reasonable enough to fall within the wide range of professional competence is an issue of law not one of fact." Id. If fairminded

jurists could disagree as to whether trial counsel's strategic choices were reasonable, a petitioner is not entitled to federal habeas relief. Moreover, "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Knowles, 556 U.S. at 124 (quotation omitted); see also Nance v. Warden, Ga. Diagnostic Prison, 922 F.3d 1298, 1302 (11th Cir. 2019) ("It is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence."). When trial counsel fails to discover mitigating evidence, we ask whether the decision not to investigate further was reasonable. Strickland, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); see also Wiggins, 539 U.S. at 527–28 (finding ineffective assistance because "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible").[1]

[1] We note at the outset that Franks had experienced trial counsel who each had at least some familiarity with death penalty cases in particular. "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) (en banc); see also Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("[T]he more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in

1. Reliance on Residual Doubt

Franks first says it was constitutionally deficient for his counsel to rely on residual doubt at sentencing, despite the overwhelming evidence of Franks's guilt. Defense counsel testified both at the hearing on the motion for a new trial and at the collateral state habeas hearing that residual doubt was a strategic choice. Counsel didn't mince words about the defense thinking: "our theory on sentencing was you can put in whatever you want, strong about David or weak about David personally," but "[g]iven these sets of facts and given what happened to the children, if you're unable to point out residual doubt, you're going to lose the penalty phase."

Franks says the state habeas court's conclusion about residual doubt was contrary to or an unreasonable application of clearly established federal law. We are unpersuaded. "We have said before that focusing on acquittal at trial and then on residual doubt at sentencing (instead of other forms of mitigation) can be reasonable." Chandler, 218 F.3d at 1320. It is true that we have also said this is

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rejecting a defense without substantial investigation was reasonable under the circumstances." (quotation omitted)). Experienced litigators Stanley Robbins and Joseph Homans, aided by investigator Andrew Pennington, represented Franks at trial. Robbins and Homans had each been practicing law for more than a decade. Robbins had tried over one hundred felony criminal cases and had been involved in multiple death penalty cases, though he had never tried one. Homans had worked in the district attorney's office for several years and had defended a number of murder trials as appointed defense counsel. Homans had tried one death penalty case, which resulted in acquittal and did not proceed to the penalty phase, but he had "fully participated" in preparation for sentencing.

especially so when the evidence of guilt is not overwhelming. But the brutal and aggravated nature of this crime -- particularly the attacks on Debbie Wilson and her two young children, following on the heels of the double homicide at the pawn shop -- could lead a reasonable attorney to conclude that without residual doubt, a life sentence would be difficult to sustain. Moreover, the story Franks told at trial was supported by some additional evidence: Carlisle's testimony that at the pawn shop she saw four men push three others inside; the phone call from the pawn shop at the time of the crimes in Gainesville; Debbie Wilson's frantic calls to the 911 operator when she exclaimed three times that "they're hurting my kids"; additional, unidentified fingerprints at the crime scenes; and the disparity between the calculated, gang-like killings in Bremen and the frenzied crime scene at the Wilsons' home. Given the horrific facts surrounding these crimes and the availability of some extrinsic evidence supporting Franks's account, a reasonable jurist could conclude that a reasonable lawyer could have performed the way Franks's trial counsel performed.

2. Cognitive Deficits

Franks argues next that it was unreasonable for trial counsel to neither hire a mental health expert nor present mitigating mental health evidence at sentencing. In preparation for sentencing, defense counsel hired a well-known and experienced mitigation investigator, Andrew Pennington, who had been a police officer and

worked with one of Franks's attorneys in a previous death penalty case. Pennington interviewed Franks and his family extensively; he was never given any indication that Franks's mental health required further investigation. Indeed, the state habeas court found that the defense team went "very in depth" with Franks's mother concerning his childhood and spoke "very frequently" with his aunt, Jane Mashburn. The state habeas court found that "[t]rial counsel were not given the names of any treating doctors or hospitals," that their investigator "did not come across any relevant medical records during his investigation," and that neither Franks's family nor Franks himself ever gave any indication that there were any mental health issues. The state habeas court also found that "trial counsel made the determination not to hire a mental health expert to evaluate [Franks] prior to trial as they concluded, after a thorough investigation, that they did not have a good faith basis to request such an evaluation."[2] The court concluded that trial counsel

[2] Franks's counsel also testified, however, that they chose not to retain a mental health expert because they believed they could not make an ex parte request for funds and thus would necessarily alert the state to a mental health evaluation, thereby allowing the state to hire a mental health expert of its own. On direct review, the Georgia Supreme Court determined this was an "erroneous impression" on the part of Franks's counsel -- that is, it was legal error to believe they could not request funds on an ex parte basis and to believe seeking a mental health evaluation would automatically open the door to an opposing state expert. Franks, 599 S.E.2d at 148. Franks says that the state habeas court ignored this mistake of law, and that it was contrary to or an unreasonable application of clearly established law to fail to conclude that the legal error by Franks's counsel constituted deficient performance. The problem with Franks's argument is that his trial counsel gave multiple sufficient and alternative bases on which they made the decision to forego a mental health evaluation -- the most important of which was that their investigation revealed no need for one. Franks has not shown by clear and convincing evidence that the state habeas court's factual finding that Franks's counsel decided not to seek a mental health evaluation because they believed there was no good-faith basis to do so was erroneous.

were not deficient (and Franks was not prejudiced) by the failure to investigate and present mitigating mental health evidence. That conclusion was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

First, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . . In particular, what investigation decisions are reasonable depends critically on such information." Strickland, 466 U.S. at 691. Counsel "is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems." Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000).

Franks claims that his counsel overlooked red flags -- his inconsistent statements about the crime and failing grades in his school records -- that should have alerted them to the need for neuropsychological testing. He argues that his inconsistent statements about the crimes to his defense team indicated that his memory was impaired, that he was dissociating, or that there was some other mental health issue that necessitated an evaluation by and the presentation of an expert.

But trial counsel did, in fact, address the gaps in Franks's memory at trial through the presentation of an expert witness. Since Franks was going to testify

and there were gaps in his memory, the defense consulted and ultimately called a psychiatrist, Dr. John Connell, in the middle of the trial. Dr. Connell testified that Franks had some features of post-traumatic stress disorder ("PTSD"), explaining that individuals will often repress memories of traumatic events and be unable to recall certain things, but that other aspects of the traumatic experience, like the Dixie Organization threatening to kill his mother, would stick in his mind. Dr. Connell opined that PTSD symptoms like these "would be hard to fake." His testimony supported the defense theory that Franks had not committed any of the murders and that, even if he had harmed the children, which he did not recall, he did so under duress or coercion. Franks's counsel asked Dr. Connell whether he would "expect that somebody who is in a [traumatic situation] could be made to do something they knew was wrong?" Connell responded, "Balancing that with what could occur on the other side if they didn't do something, it could happen, yes."

Franks now also claims that his failing grades in school should have alerted the defense team to the need for a mental health expert. School records indicate that Franks repeated the second and third grades, and that he never progressed past the sixth. The state habeas court found that Franks's mother gave the school records to the defense team, but that they discounted the records because they saw nothing remarkable in them.

We have found deficient performance where trial counsel failed to investigate mental health issues that were "overt and fairly apparent to anyone who cared to look closely." Ferrell, 640 F.3d at 1228. But Franks's inconsistent statements and school records, particularly in light of the defense team's extensive interviews with Franks and his family that indicated that there were no significant cognitive deficits or other mental health issues worth pursuing, do not rise to that level. In fact, the red flags in his apparent memory lapses were addressed in the evaluation and testimony of Dr. Connell. And as the state court noted about the school records, "by the time of [Franks's] trial, [he] had owned two separate businesses and had never been diagnosed or even treated for any mental health issues." We cannot say that the state court's determination that counsel made a reasonable, strategic use of mental health evidence at trial after thorough investigation was contrary to or an unreasonable application of clearly established Supreme Court law.

3. Franks's Childhood and Substance Abuse

Franks further argues that his trial lawyers were constitutionally ineffective because they failed to present a more detailed account of his difficult childhood and substance abuse. Counsel knew about Franks's abusive father and long history of substance abuse, and they presented some of both themes at trial. Franks himself testified that he was using methamphetamines at the time of the crimes,

and his brother, Calvin Franks, testified in some detail that their father terrorized the family. Collaterally, Homans explained that he made a strategic choice not to focus on Franks's childhood and drug abuse because of his familiarity with Hall County juries and his belief that such a mitigation strategy "was not going to be a winning hand." Homans explained, "some of the jurors during jury selection had made a point of, you know, of somebody commits murder I don't want to hear a sob story about their childhood. And that's the kind of thing you get from some of our jurors at home, and so we told [the family] we've got to be careful about trying to blame something for the conduct, we just need to show this is out of character."[3]

The state habeas court concluded that "trial counsel made a reasonable, strategic decision not to focus on [Franks]'s drug use as a mitigating factor at trial." As we've repeatedly said, "reasonably competent counsel may not present such evidence because a detailed account of a defendant's alcohol and drug abuse is invariably a 'two-edged sword.'" Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1217 (11th Cir. 2007) (quoting Housel v. Head, 238 F.3d 1289, 1296 (11th Cir. 2001)). "Rarely, if ever, will evidence of a long history of alcohol and drug abuse be so powerful that every objectively reasonable lawyer who had the

[3] As Franks concedes, at least one venire member indicated that she would not be sympathetic to mitigating evidence about a troubled childhood: "I don't believe there are many excuses for taking another person's life, I would say self-defense, accident, that's about it. I can't imagine many mitigating circumstances like I had an unhappy childhood so I turned out bad so I killed somebody. I don't -- I would not be very sympathetic in that regard." It was not an unreasonable determination of the facts for the state habeas court to credit Homan's testimony.

evidence would have used it." Id. Applying the second layer of AEDPA deference owed to the state court, we conclude that its determination was not an unreasonable determination of the facts in light of the evidence presented, nor was it contrary to or an unreasonable application of clearly established federal law.

B. Franks Suffered No Prejudice as a Result of Any Alleged Deficiency in his Counsel's Performance.

Perhaps even more clearly, the state court's determination that Franks suffered no prejudice on account of any alleged deficiencies in the performance of his counsel was neither contrary to nor an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. To show prejudice,

> it must be established that, but for counsel's unprofessional performance, there is a reasonable probability the result of the proceeding would have been different. See Strickland, 466 U.S. at 694. "It is not enough for the [petitioner] to show the errors had some conceivable effect on the outcome of the proceeding . . . ," because "[v]irtually every act or omission of counsel would meet that test." Id. at 693. Nevertheless, a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Rather, where, as here, a petitioner challenges a death sentence, "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." Id. at 695.

Putman v. Head, 268 F.3d 1223, 1248 (11th Cir. 2001) (alterations and ellipses in original); see also Ferguson v. Sec'y for Dep't of Corr., 580 F.3d 1183, 1198–99 (11th Cir. 2009) (noting that Strickland asks if a different result is "reasonably

probable," not if it is "possible" (emphases omitted)). Thus, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins, 539 U.S. at 534 (emphasis added). We examine all of the good and all of the bad, what was presented during the trial and what was offered later, collaterally. The question is whether, "viewed as a whole and cumulative of mitigation evidence presented originally," there is "'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399. In determining whether a reasonable probability of a different outcome exists -- that is, a probability sufficient to undermine confidence in the outcome -- we presume a reasonable decisionmaker. See Nix v. Whiteside, 475 U.S. 157, 175 (1986) ("[I]n judging prejudice and the likelihood of a different outcome, 'a defendant has no entitlement to the luck of a lawless decisionmaker.'" (alteration adopted) (quoting Strickland, 466 U.S. at 695)).

We start with what is indisputable: the aggravating factors were very powerful. Franks shot two people execution style over drug money in his pawn shop; he drove hours away to attack the wife and two children of one of his victims, abusing the family's trust to gain entry into their home in order to rob the family safe; he stabbed Debbie Wilson and left her to helplessly hear his brutal

attacks on her young children; he attacked a thirteen-year-old and a nine-year old; he evaded law enforcement for nine days; he held an elderly couple hostage in their sweltering garage; he showed little remorse when he told his brother-in-law that his pawn-shop victims "got what they deserved"; and when he was finally apprehended, he attempted to escape from jail. The weak mitigation evidence about Franks's abusive childhood, substance abuse, and cognitive deficits presented collaterally does not create a reasonable probability of a different outcome. And most significantly, the state habeas court's determination that there was no prejudice was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

1. Cognitive Deficits

For starters, even if Franks's counsel had discovered and presented the evidence of cognitive deficits proffered in the postconviction hearing, that evidence was, as the state habeas court determined, equivocal. We detail the postconviction cognitive evidence in order to properly evaluate whether, when coupled with other, additional mitigating evidence, it would have raised a reasonable probability that the jury would have recommended life, not death. The evidence included the testimony of Franks's mother Doris, school and medical records from Franks's adolescence and early adulthood, and the expert testimony

of Dr. Daniel Grant, a board-certified neuropsychologist and forensic examiner, and Dr. Todd Antin, a psychiatrist specializing in forensic and addiction psychiatry.

Doris Franks testified that she was sick for the duration of her pregnancy with David, that she lacked prenatal care, and that he was born with hepatitis. The state habeas court found, however, that Franks's "childhood medical records establish that the pediatrician who examined [him] noted [Franks's] mother's pregnancy . . . was 'normal'; that [Franks] weighed eight pounds at birth; and his condition at birth was 'good.'" Doris said David was frequently sick throughout childhood, and at nine months nearly died from a high fever, which caused him to lose his sight in one eye. David also suffered a head injury at age four but did not black out or lose consciousness during the episode. As reflected in his elementary school records, David had difficulty in school, and he was held back in the second and third grades. Doris testified that she had not seen the records before David's habeas counsel showed them to her, and that she was unaware that her son was struggling to that degree in school.

Dr. Daniel Grant evaluated Franks's medical records, performed a complete neuropsychological evaluation, and concluded that Franks suffers cognitive deficits that "could be" linked to traumatic brain injury. Dr. Grant identified cognitive deficits in executive functioning characterized by difficulty with complex tasks,

planning, organizing, shifting between tasks, conceptualizing situations and tasks, and problem solving. Franks also exhibited perseveration and inflexibility. But Franks also obtained a full-scale IQ score of 96, placing him within the average range of intelligence. Notably, Dr. Grant testified that the cognitive deficits were not "glaring," "not the kind of thing that makes attorneys hearts palpitate": "there's nothing that really stands out glaring, huge, you know, it's subtleties."

Dr. Grant posited that traumatic brain injury "could" explain the cognitive deficits. Franks's medical records following a car accident at age eighteen indicate a primary diagnosis of "closed head trauma" and describe a seizure Franks suffered at the hospital following the accident. A CAT scan at the time of the accident, however, showed no significant lesions, and an EEG came back normal. Dr. Grant explained that a head injury, combined with loss of consciousness and a seizure, could indicate "ongoing abnormal activity in the brain." He explained that it's not unusual for CAT scans to show no significant damage, and that a normal CAT scan "doesn't mean that there was no residual results." But the state habeas court found that Grant's testimony was weak and equivocal, and that Franks had not been prejudiced by the failure to introduce it.

Dr. Todd Antin likewise evaluated Franks and agreed that Franks exhibits cognitive deficits that could be linked to brain injury. The state habeas court noted that Dr. Antin performed no independent medical testing but instead relied on the

tests conducted by Dr. Grant, met with Franks one time, and did not attempt to make any diagnosis of Franks. Dr. Antin also reviewed school and medical records and testimony about Franks's background. Dr. Antin posited that having sustained a severe fever at nine months, and having been in a car accident at eighteen, might have caused brain damage, and that could explain Franks's cognitive deficits. But Antin's expert report mentioned Franks's head injuries only in passing and did not discuss brain damage extensively, suggesting only that these incidents may have been a contributing factor, along with substance abuse and childhood trauma, to his cognitive deficits as an adult. Antin also testified that he could "pretty accurately say [Franks is] not mentally retarded" and "wasn't insane at the time of the crime," but that his early illness could have affected his brain development, leading to "problems with thinking, with decision making, with planning, with behavior." Ultimately, the state habeas court found Dr. Antin's testimony weak and concluded that Franks had not been prejudiced by the failure to present it.

We have found prejudice in two ineffectiveness cases relating to organic brain damage, but in both cases, the evidence was unequivocal and powerfully contextualized otherwise inexplicable crimes. See Jefferson v. GDCP Warden, 941 F.3d 452 (11th Cir. 2019); Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011). Jefferson beat a coworker to death after the two went on a fishing trip, but the jury

never heard "the most powerful explanation for an otherwise inexplicable crime": that Jefferson suffered organic brain damage after being struck in the head and dragged by an automobile when he was just two years old, resulting in chronic headaches, blackout spells that may have been petit mal seizures, and frontal lobe and neurological damage "which likely caused diminished impulse control, irritability and short-temperedness, intermittent outbursts of rage, impaired judgment, and an inability to foresee the consequences of his actions." Jefferson, 941 F.3d at 456–57, 469. Eric Ferrell executed his 72-year-old grandmother and fifteen-year-old cousin before walking up the street to his mother's house to fix a cup of hot chocolate and watch television. Ferrell, 640 F.3d at 1204, 1207. Similarly, the jury never heard unequivocal expert testimony that Ferrell suffered from a seizure disorder (even suffering one in front of defense counsel at a charging conference), hallucinations, borderline mental retardation, and organic brain damage, including frontal lobe dysfunction characterized by "impaired insight and learning abilities" and tendencies toward "impulsive and explosive behaviors." Id. at 1206, 1213–14.

In Franks's case, by contrast, the expert testimony was far more equivocal. Dr. Grant said repeatedly that Franks's cognitive deficits were not "glaring" -- "nothing that really stands out glaring, huge"; only "subtleties." Moreover, Franks's background and the facts of the case powerfully undercut the equivocal

expert testimony about Franks's cognitive deficits -- specifically that he suffered from impaired executive functioning, which manifested as an inability to plan or foresee the consequences of his actions. Franks, of course, demonstrated the capacity to function at a high level. For one thing, he owned and operated two pawnbroker businesses. For another, the facts surrounding Franks's extended crime spree reveal a person who acted with presence of mind and foresight -- as the state habeas judge found -- rather than an individual driven primarily by impulse. After murdering Wilson and Martin gangland style in his pawn shop, he drove two hours across the state to rob Wilson's safe. He had the presence of mind to trick Jessica Wilson into letting him into the home. He had the foresight to bring flex ties with him with the intent of immobilizing Debbie Wilson. He had the presence of mind to send the Wilson children out of the house separately to isolate his victims as he attacked each of them. He knew enough to ditch Wilson's van and steal clothing and another vehicle in furtherance of his escape from the crime scene. He had the presence of mind to use a pseudonym as he gambled over the course of several days. He managed to evade capture at the Red Roof Inn and then hold up the Coopers in an attempt to steal their truck, ultimately taking their daughter's car instead. And he had the presence of mind to rip the telephone lines out of the walls at the Cooper home, again in order to elude capture. Indeed, he was careful enough to elude law enforcement for nine days and nearly succeeded

in a jail escape. This evidence substantially undermined the equivocal expert testimony about Franks's "subtle" cognitive deficits. It was not unreasonable for the state habeas court to conclude that Franks suffered no prejudice on account of an alleged failure to introduce relatively weak evidence suggesting his inability to plan and impulsivity.

2. Childhood and Substance Abuse

Nor was the Petitioner prejudiced by any alleged failure to introduce additional evidence about his tumultuous childhood and drug abuse. For one thing, this testimony was at least partly cumulative. As we've noted, Franks's older brother Calvin testified at the penalty phase that their father was an alcoholic and that Calvin slept with a knife near his bed because he lived in fear of their father. Calvin also detailed abuse suffered by David, recounting one of the more vivid episodes that Doris Franks testified to at the postconviction hearing -- when David's father, Charles Franks, shot a gun between her and David while they were sitting on a couch.

Doris Franks added collaterally that David's father was delusional, erratic, and abusive. His behavior was punctuated by the threatening use of a firearm, which he carried around the house at all times and would sometimes shoot randomly outside the home. He once grabbed David's older brother Calvin by the arm and told him he would "blow [his] brains out," dragging him outside and

shooting at him and at a neighbor who came out to investigate the commotion. Charles would sometimes tell Doris and David that they "would make pretty corpses."

Doris offered only two new, isolated instances of physical abuse -- one when Charles kicked David, and one when Charles "jumped on" David but David managed to get away. But, as the state habeas court noted, Doris had previously denied that Charles physically abused David, which was documented in Pennington's contemporaneous notes. Moreover, Franks's aunt, Jane Mashburn, told appellate counsel that she had never heard David say he was afraid of his father. The state habeas court also cited Franks's Department of Corrections file that indicated Franks said he was not physically or emotionally abused as a child. The state court also determined that given the passage of time between the Petitioner's childhood and the murders, "it is likely that Petitioner's childhood would have received little, if any, mitigating weight." And at least some of Charles's abusive behavior -- and his family's fear -- was presented during Calvin's penalty-phase testimony. Again, it was not unreasonable for the state habeas court to conclude that the failure to introduce the additional collateral evidence did not prejudice Franks, particularly when weighed against the truly horrific nature of the crimes and the many aggravating circumstances.

Collaterally, the primary evidence regarding Franks's substance abuse came from Dr. Antin. Antin testified that David has a long history of substance abuse, likely linked to a genetic predisposition, and that chronic substance abuse affects neurological development in the areas of memory, intelligence, behavior, and cognition. Dr. Antin opined that because of his drug use at the time of the crimes, Franks was "in a very frenzied and maniacal and paranoid state" and was acting impulsively. Although evidence of substance abuse may be mitigating, it is "invariably a 'two-edged sword'" and "may have the counterproductive effect of alienating the jury." Stewart, 476 F.3d at 1217 (quoting Housel, 238 F.3d at 1296). This is especially so where the primary mitigation theory is residual doubt. As the state habeas court noted, evidence of Franks's "drug use, difficult childhood and learning disability, in addition to being weak mitigating evidence, may have eroded any residual doubt if trial counsel had focused on those issues."

Ultimately, weighing the weak mitigating evidence offered collaterally, along with the mitigating evidence presented at trial, against the parade of aggravating factors -- all of the good and all of the bad, all of the old and all of the new -- does not create a reasonable probability of a different outcome. It does not undermine our confidence that the jury would have sentenced Franks to death, let alone lead us to conclude that the state court's determination about prejudice was contrary to or amounted to an unreasonable application of clearly established law.

The Petitioner cites to three Supreme Court cases finding prejudice as a result of counsel's failure to offer mitigating evidence, but in each of the cases the disparity between what was presented at trial and what was offered collaterally was vast. In other words, the balance between the aggravating and mitigating evidence at trial and in postconviction proceedings shifted enormously, so much so as to have profoundly altered each of the defendants' sentencing profiles. In Wiggins v. Smith, for example, trial counsel introduced no evidence about Wiggins's tragic life history, which the postconviction record demonstrated was marked by "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," followed by "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." 539 U.S. at 535. In Williams v. Taylor, trial counsel put on almost no mitigation case, calling witnesses who testified only generally that Williams was a "nice boy" and not violent, while the postconviction evidence "dramatically described mistreatment, abuse, and neglect during his early childhood" and also contained testimony "that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." 529 U.S. at 369–70. In Porter v. McCollum, trial counsel put on nothing in mitigation except "inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son," while the postconviction record revealed a

severely abusive childhood, including routinely witnessing his father beating his mother, as well as being the repeated target himself of his father's violence, along with a heroic and decorated record of military service that left him with post-traumatic stress disorder and brain damage. 558 U.S. 30, 32–36 (2009) (per curiam).

In sharp contrast, the weak mitigating evidence about Franks's childhood and substance abuse presented collaterally would barely have altered his sentencing profile. And there is no reasonable probability, after reweighing the aggravating and mitigating evidence, of a different outcome. The state court's determination that Franks suffered no prejudice from the omission of this evidence or from his counsel's primary reliance on residual doubt is neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

We, therefore, **AFFIRM** the district court's denial of Franks's § 2254 habeas petition.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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

David J. Smith
Clerk of Court

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September 16, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-17478-P
Case Style: David Franks v. GDCP Warden
District Court Docket No: 2:11-cv-00325-WBH

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Petitioner's Appendix 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17478-P

DAVID SCOTT FRANKS,

Petitioner - Appellant,

versus

GDCP WARDEN,

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 MARCUS, Circuit Judges.

PER CURIAM:

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

ORD-46

Petitioner’s Appendix 3

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

DAVID SCOTT FRANKS,	:	CIVIL ACTION NO.
Petitioner,	:	2:11-CV-0325-WBH
	:	
v.	:	DEATH PENALTY
	:	HABEAS CORPUS
CARL HUMPHREY, Warden	:	28 U.S.C. § 2254
Respondent.	:	

ORDER

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

I. Background

A. Procedural History and Facts

On February 2, 1998, Petitioner was convicted in Hall County Superior Court of malice murder, armed robbery, aggravated battery (two counts), cruelty to children (two counts), burglary, and theft. After a penalty hearing, the jury found five statutory aggravating circumstances and recommended that Petitioner be executed. In affirming his convictions and sentences, the Georgia Supreme Court described the evidence presented at Petitioner's trial as follows:

The evidence at trial showed that [Petitioner] was an acquaintance and occasional business associate of Clinton Wilson, the husband of the murder victim. On the morning of August 5, 1994, Clinton Wilson and David Martin visited [Petitioner]'s pawn shop in Haralson County. The next day, Wilson and Martin were found shot to death on the bottom floor of [Petitioner]'s pawn shop. They had been shot with a nine-millimeter pistol. The medical examiner testified that the upward trajectory of the bullet wounds in the bodies was consistent with the two victims being shot from behind while lying face-down.

After killing Martin and Wilson, [Petitioner] took Wilson's white "cube" van and drove to Hall County to Wilson's house, where [Petitioner] believed that Wilson had secretly hidden tens of thousands of dollars. The Wilsons' nine-year-old daughter Jessica answered the door and invited [Petitioner] into the home. [Petitioner] told Clinton's wife, Debbie Wilson, that he was looking for Clinton and waited with her in the kitchen. At approximately 1:30 p.m., Debbie telephoned David Martin's wife and asked her if she had seen Clinton because "the other David" was at her house looking for him. About this time, the Wilsons' thirteen-year-old son, Brian, returned home, but then left again with a friend.

When [Petitioner] said he wanted to go fishing, Debbie sent Jessica to retrieve Brian. While the children were gone, [Petitioner] pulled a gun on Debbie and forced her to the upstairs bedroom, where he knew a safe was located. After retrieving money from the safe, [Petitioner] stabbed Debbie Wilson in the back and went downstairs to await the children's return. After [Petitioner] went downstairs, Debbie called 911, identified her attacker as "David Franks" several times, and stated that he assaulted her for money. She also reported this information to the paramedics who arrived to treat her. She went into cardiac arrest due to blood loss and died before reaching the hospital. When the children returned to the house, [Petitioner] asked Jessica to go to the van and get a briefcase for him, and he told Brian to fetch fishing gear so they could go fishing. While Brian was getting his fishing rod, [Petitioner] attacked him from behind and slashed his throat. Brian managed to fight back, cutting [Petitioner] on the left arm. [Petitioner] then left Brian and stabbed Jessica as she came back in the house. Brian and Jessica were able to

escape and run to a neighbor's house; they both survived. Brian and Jessica told the neighbor that their father's friend "David" had attacked them and that he was driving a white cube van. They also described [Petitioner]'s physical appearance. Later, at the hospital, the children each picked [Petitioner] out of a photo lineup. At trial, they identified [Petitioner] as their attacker. DNA taken from two bloodstains in the Wilsons' house matched [Petitioner]'s DNA.

[Petitioner] fled the Wilsons' house in the white cube van. Two firefighters responding to the 911 calls observed the van, which had been described on the radio, driving away from the Wilsons' house. They testified that there was a lone man fitting [Petitioner]'s description driving it. The police found the van abandoned about nine miles away. In and around the van the police found a knife, a blood-stained shirt that [Petitioner] had been seen wearing that day, and a bloodstain on the left armrest of the van's driver's seat. A forensic chemist from the state crime lab found that DNA from blood on the shirt and armrest matched [Petitioner]'s DNA. A canine unit tracked [Petitioner]'s scent from the abandoned van to a nearby house that had been burglarized. The homeowner's Mazda 626 and some clothes had been stolen.

[Petitioner] drove the stolen Mazda 626 to Biloxi, Mississippi, and gambled several thousand dollars over a three-day period in a casino. From the casino, he obtained a player's advantage card, in the name of "Ty Dare." A casino surveillance videotape from August 8, 1994, depicts [Petitioner] playing blackjack. [Petitioner] then traveled to Mobile, Alabama, and checked into a motel under the name Ty Dare. A Mobile police officer spotted the Mazda 626 in the motel parking lot and responding police officers found, in the room registered to Ty Dare, a nine-millimeter handgun, cash, keys to the Mazda 626, recently purchased clothes, a jacket emblazoned with the name of the Biloxi casino where [Petitioner] had been observed gambling, a belt with a letter "D" belt buckle, cowboy boots similar to boots worn by [Petitioner] on August 5, and a wallet containing [Petitioner]'s driver's license, social security card, and a casino player's advantage card in the name of Ty Dare. The boots and belt had human bloodstains on them but the amount was insufficient for DNA analysis. [Petitioner]'s girlfriend, Frankie Watts, identified the handgun as similar to the nine-millimeter handgun

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> owned by [Petitioner]. The Mazda 626 contained [Petitioner]'s fingerprints and a bloodstain that matched his DNA. [Petitioner] observed the police activity at the motel when he was returning on foot and he fled the scene.
>
> On August 14, 1994, the police arrested [Petitioner] at a relative's house in Alabama in possession of a .22 caliber derringer. He had a bandaged cut on his left arm. Before his arrest, he told his relatives that the pawn shop victims were supposed to come up with $100,000 to buy drugs but they did not have the money. He told his brother-in-law that he had an altercation with them and had made them lie on the floor before shooting them; he also said the pawn shop victims "got what they deserved."
>
> The State presented evidence that [Petitioner] had promised to pay cash to a car dealer on the day of the murders for a Lincoln Town Car he had obtained two days before. There was also evidence that he and his girlfriend planned to close a transaction on some property in Alabama shortly after the murders. At trial, [Petitioner] admitted being present at both murder scenes during the killings, but he claimed that other men, who were drug dealers, had killed the victims.

Franks v. State, 599 S.E.2d 134, 138-39 (Ga. 2004).

After affirming Petitioner's convictions and sentences, the Georgia Supreme Court denied Petitioner's motion for reconsideration. On January 10, 2005, the United States Supreme Court denied his petition for a writ of certiorari. Petitioner then filed a petition for a writ of habeas corpus in Butts County Superior Court. After a hearing, the state court denied relief on December 19, 2005, and the Georgia Supreme Court denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief on November 30, 2011. This action followed.

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B. Introductory Statement

Before moving to the analytical discussion of Petitioner's claims, this Court deems it necessary to highlight the truly horrific nature of Petitioner's crimes because understanding exactly what Petitioner did, and knowing what the jury knew when it sentenced Petitioner to death, is important to the analysis of Petitioner's claims. As described by the Georgia Supreme Court, Petitioner forced Clinton Wilson and David Martin to lie down on the floor of his pawnshop and shot both men in the head. He knew where Clinton Wilson lived and that Wilson had a safe and likely had significant sums of cash and possibly narcotics in his home. He drove from his pawn shop in Bremen, Georgia, to Wilson's home across the state in Gainesville, stopping on the way to buy some zip ties, presumably to immobilize Wilson's wife, Debbie.

Petitioner and Debbie were already acquainted; Petitioner and his ex-wife had vacationed together with Clinton and Debbie. When Petitioner got to the Wilson's home, he told Debbie that he was looking for Clinton. Debbie's daughter, nine-year-old Jessica, was watching television. Petitioner lingered around the Wilson's home for a while, during which he searched the garage for drugs. He eventually told Debbie to send Jessica to fetch Debbie's son, thirteen-year-old Brian, so that Petitioner and Brian could go fishing.

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Once Jessica left, Petitioner pulled a gun on Debbie and forced her up to the bedroom where the safe was. Debbie opened the safe and gave Petitioner the money from it. Petitioner then stabbed Debbie in the back, piercing a major artery to her lung from which she bled to death before reaching the hospital. Petitioner then went downstairs and attacked thirteen-year-old Brian. Brian had gone to his room to get his fishing gear, and Petitioner attacked him from behind. Petitioner stabbed Brian's shoulder and pulled him down onto the ground. He then stabbed Brian in the chest and again in the stomach. Brian grabbed the knife blade, cutting his hand in an effort to defend himself, and Petitioner slashed Brian's throat at least twice. As a result of this attack, Brian had a deep stab wound in the right side of his chest just below the nipple which penetrated the diaphragm into the abdominal cavity. This injury was five or six inches deep and damaged Brian's lung, diaphragm and liver. Brian suffered another stab wound in the upper part of his abdomen. When Petitioner slashed Brian's throat, he cut all the way through the neck, the skin, the muscles and all the way into where the base of the tongue is into the hypopharynx or the entrance to the esophagus. Another slash wound to the neck on the left side was across Brian's mandible which damaged the marginal mandibular nerve causing his face to droop. Because of the neck injury, Brian had to be fed through a feeding tube for ten days. Brian also had a laceration on his shoulder and cuts on his hand, his fingers, and his thumb.

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After leaving Brian's room, Petitioner attacked nine-year-old Jessica. Petitioner had told Jessica to go retrieve a briefcase from the van he arrived in, apparently to get her out of the house while he attacked Brian. She went to the van and could not find the briefcase. She returned to the house and heard her brother scream. Then Petitioner ran out of Brian's room towards Jessica and pushed her down and stabbed her in the chest, causing a "sucking" chest wound, which means that he stabbed her deep enough to puncture her lung. Lung tissue was coming out of the wound.

Petitioner then left in Clinton Wilson's van and drove nine miles to another house which he burglarized. He stole some clothes and a car. He then drove the car to Mississippi where he spent time gambling. In the intervening nine days, Petitioner held a couple hostage and eventually stole their daughter's car, and took the car of another woman whose house he had also broken into.

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II. Discussion

A. Habeas Corpus Standard of Review

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 § 2254(d) mandates deference to claims that have been "adjudicated on the merits in State court proceedings." Under § 2254(d), a habeas corpus application

> shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential" demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (citing Visciotti, 537 U.S. at 25. Petitioner "must show that the state court's ruling on the claim being presented

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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 102-03. In Pinholster, the Supreme Court further noted

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

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

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Id. at 405, 406 (2000). If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413. This reasonableness determination is objective, and a federal court

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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."). An application of federal law is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington, 562 U.S. at 102 (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015).

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

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B. Discussion of Petitioner's Claims

1. Claims I and II - Ineffective Assistance of Counsel

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

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Furthermore, "[s]trategic decisions will amount to ineffective assistance only if so patently unreasonable that no

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competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987).

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Finally, regarding claims of ineffective assistance of appellate counsel, the Supreme Court has noted that appellate counsel need not advance every possible argument on behalf of his client, even those that are non-frivolous, and should instead concentrate his advocacy on "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751 (1983).

a. Ineffective Assistance of Trial Counsel

Before analyzing Petitioner's claims of ineffective assistance of trial counsel, there are two matters that this Court will address. First, trial counsel did not represent Petitioner on appeal. Rather, after the trial, other lawyers were appointed who filed an

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amended motion for a new trial. After substantial briefing and a hearing, the trial court denied that motion, and the Georgia Supreme Court, as is noted above, affirmed Petitioner's convictions and sentences. In doing so, the appellate court concluded that Petitioner's appellate counsel had failed to establish a claim of ineffective assistance of trial counsel, ruling as follows:

> We need not decide whether trial counsel's investigation for the mitigation evidence was reasonable, because [Petitioner] has made no showing that he was prejudiced by the investigation taken. At the motion for new trial hearing, appellate counsel presented no competent evidence of what a more thorough mitigation investigation would have uncovered, and instead relied on a detailed summary and evaluation of [Petitioner]'s life. However, that summary was not offered into evidence, but was presented to the trial court under seal, with no testimony as to who prepared it, and no showing that it, or the evidence it detailed, would be admissible at a trial. Appellate counsel claimed that this procedure was necessary because ineffective assistance of counsel claims are litigated on habeas corpus, and allowing the State to learn about this information would give it an advantage at a possible retrial. However, this procedure dooms the ineffectiveness claims regarding the mitigation investigation because it prevents the trial court and appellate court from evaluating whether prejudice resulted from trial counsel's alleged failure to uncover and present mitigating evidence. Because [Petitioner] failed to offer mitigation evidence that should have been presented at trial, he cannot satisfy his burden of demonstrating prejudice.

Franks, 599 S.E.2d at 148-49.

What the Georgia Supreme Court's decision means procedurally in this action is that Petitioner's claim that other mitigation evidence was available is technically unexhausted because the evidence in support of that claim was not presented in the

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state court. Again technically, trial counsel's failure to present a proper case in mitigation is in reality a part of the analysis of Petitioner's claim of ineffective assistance of appellate counsel for the manner in which appellate counsel failed to present the evidence at the motion for a new trial and on appeal. This Court also notes that all of Petitioner's claims of ineffective assistance of appellate counsel allege that appellate counsel was ineffective in failing to demonstrate that trial counsel was ineffective. For the sake of simplicity, this Court will avoid the rather strained procedural posture and treat the ineffective assistance of trial counsel claim as properly-presented under the reasoning that if this Court concludes that trial counsel was not ineffective, appellate counsel cannot have been ineffective for failing to establish that claim.

Second, as indicated by the Georgia Supreme Court's description of the evidence quoted above and as acknowledged by Petitioner, [Doc. 49 at 34-36], after a review of the entire record in this matter, this Court can only conclude that the evidence presented at Petitioner's trial was so overwhelming that no competent lawyer could be expected to have secured an acquittal. Thus, no matter how incompetently Petitioner's trial counsel presented Petitioner's defense during the guilt/innocence phase of the trial, Petitioner could not have been prejudiced, and Petitioner cannot obtain relief in this Court pursuant to his ineffective assistance claims as they relate to

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his convictions. Accordingly, this Court's analysis of Petitioner's ineffective assistance claims will focus entirely on determining whether trial counsel was ineffective in opposing the death sentence. This Court recognizes, of course, that actions taken by counsel during the guilt/innocence phase of the trial could affect the outcome of the penalty phase, and this Court will analyze that aspect of Petitioner's claims.

i. Petitioner's Assertion that Trial Counsel was Ineffective in Investigating and Presenting Mitigating Evidence to Avoid the Death Penalty

In attempting to establish that his trial counsel was ineffective as it relates to the preparation and presentation of his case in mitigation, Petitioner first points to the fact that, during the guilt/innocence phase of the trial, counsel put Petitioner on the stand to testify that others had been involved in his crimes despite the fact that the state's evidence clearly indicated that Petitioner acted alone. Petitioner asserts that it was thus clear to the jury that Petitioner lied to them, which could not have helped him during the penalty phase of the trial. Petitioner further criticizes trial counsel for presenting the testimony of a psychiatrist who had purportedly had a conflict of interest because he treated the two children that Petitioner had stabbed.

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With regard to the penalty phase, Petitioner claims that his trial counsel was ineffective for failing to conduct a meaningful mitigation investigation including consultation with mental health experts. According to Petitioner, trial counsel dedicated an excessive amount of time to the development of their case for the guilt/innocence portion of the trial even though the chances for an acquittal were hopeless. As a result, Petitioner claims that counsel missed a great deal of information that could have been used in mitigation, notably evidence about Petitioner's mental health, his substance abuse, and his personal history. Trial counsel presented some of this information during the trial, but Petitioner claims that it was done in a "cursory and largely incoherent manner such that it likely did little to assist the jury in understanding [Petitioner]'s background." [Doc. 49 at 33-34].

According to the Supreme Court, in evaluating this type of claim, the "principal concern in deciding whether [trial counsel] exercised reasonable professional judgment is not whether counsel should have presented certain evidence in mitigation. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Petitioner]'s background was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 522-23 (2003) (citations, internal quotations, alterations and emphasis omitted). If counsel's investigation was adequate – meaning that counsel's investigation into mitigating evidence "'comprise[d] efforts to discover all reasonably

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available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor,'" id. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)) – then counsel's derivative decisions regarding what evidence to present are sufficiently informed so as to be "virtually unchallengeable" strategic decisions. See Strickland, 466 U.S. at 690.

Important to this case is the fact that:

> When counsel focuses on some issues to the exclusion of others, there is a *strong presumption* that he did so for tactical reasons rather than through sheer neglect. See Strickland, 466 U.S., at 690 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment). That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." Massaro v. United States, 538 U.S. 500, 505 (2003).

Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (emphasis added).

After properly identifying the Strickland standard, the state habeas corpus court made extensive findings of fact regarding Petitioner's claims of ineffective assistance during the penalty phase of the trial. [Doc. 37-21 at 39-44]. Based on that factual summary, it is clear that trial counsel had performed an extensive investigation into Petitioner's background in order to discover mitigating evidence and developed a sound strategy for the penalty phase of the trial. The state court ultimately found that

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"trial counsel's investigation into Petitioner's background was extensive and reasonable," [id. at 44], and, based on that finding, concluded that Petitioner had failed to demonstrate that trial counsel was ineffective. After a careful review of its findings and conclusions, this Court has determined that it must defer to the state court under 28 U.S.C. § 2254(d) because none of the findings are unreasonable in light of the evidence presented in the state court proceeding and none of the court's conclusions of law were contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court. Accordingly, Petitioner is not entitled to relief on this claim.

Even if this Court were not bound by § 2254(d) to defer to the state court, this Court would nonetheless conclude that Petitioner has failed to demonstrate that his trial counsel was ineffective. Responding to Petitioner's claims that trial counsel spent too much effort on the guilt/innocence phase of the trial and that trial counsel permitted Petitioner to testify in his own behalf about the involvement of others in the crimes, this Court notes that trial counsel had a perfectly reasonable strategic basis for handling the guilt/innocence phase of the trial in the manner that they did. As indicated by the discussion above, trial counsel recognized that the crimes that Petitioner committed would be viewed by the jury with abhorrence. As a result, trial counsel felt that if the defense was not able to point to at least some residual doubt

about Petitioner's role in the crimes, then it did not matter what the evidence in mitigation was going to be. The jury would opt for the death penalty in any event. [Doc. 21-11 at 84 ("So our effort in the case was do all that we could so that then if the jury convicted him beyond a reasonable doubt, there would still be enough residual doubt and enough strong evidence about [Petitioner] and his background, the type of person he was, to save his life.")]. Accordingly, trial counsel viewed the creation of residual doubt in the minds of the jurors during the guilt phase of the trial as a crucial part of their developing their case in mitigation. See Chandler v. United States, 218 F. 3d 1305, 1320, n.28 (11th Cir. 2000) (noting that "residual doubt is perhaps the most effective strategy to employ at sentencing").

Rejecting Petitioner's claim about the fact that the psychiatrist hired by trial counsel had a conflict of interest, the Georgia Supreme Court discussed the matter as follows:

> Trial counsel selected Dr. John Connell, a psychiatrist, with whom they had previously worked and who would be available to evaluate [Petitioner] on short notice. Dr. Connell spent about seven hours interviewing [Petitioner] and diagnosed him with post-traumatic stress disorder. He testified about this diagnosis at trial, and he informed the jury that this would explain [Petitioner]'s failure to recall everything that happened on the day of the crimes. Dr. Connell also recited [Petitioner]'s version of events that day, which was consistent with what [Petitioner] had told the jury, and he testified that [Petitioner] was not malingering.
>
> On appeal, [Petitioner] argues that Dr. Connell had a conflict of interest because he had previously treated the child victims in the case; at trial,

> the prosecutor argued that Dr. Connell had betrayed the children by testifying. However, Dr. Connell explained that he had not treated the children; he had substituted for an absent colleague in a consultant capacity for a few days in August 1994 when the children were in the hospital. He had briefly spoken with both children in August 1994 and prepared a two-page report, but he had not seen either child since that time. He also explained that he had discussed whether it was improper for him to interview [Petitioner] with two other psychiatrists and they had concluded that it was not.
>
> At the motion-for-new-trial hearing, trial counsel testified that they learned about Dr. Connell's contact with the child victims, but they did not believe that this would be a problem; trial counsel also testified that they had very little time as they needed an expert on short notice. They knew Dr. Connell was available and they had worked with him before. Trial counsel's performance is evaluated under the circumstances confronting counsel at the time and their selection of an expert was made under severe time pressure. [Petitioner] has not shown that there was another psychiatrist available who would have been willing or able to interview [Petitioner] at the jail, as Dr. Connell did, and testify in court within a week's notice. Moreover, [Petitioner] does not take issue with the substance of Dr. Connell's testimony, only with the prosecutor's irrelevant and emotional remark in closing argument. [Petitioner] has therefore not shown that trial counsel's selection of Dr. Connell was deficient performance.

Franks, 599 S.E.2d at 149.

Petitioner cannot establish that he is entitled to relief under § 2254 on this claim because he makes no effort to argue that the state court's findings and conclusions are not entitled to deference under § 2254. Moreover, the record is clear that, as the state court held, any "conflict" that Dr. Connell may have had was minor and could not have affected the outcome of the trial.

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Turning to Petitioner's claims that trial counsel's investigation and presentation of the mitigation case during the penalty phase of the trial was inadequate, this Court again concludes that Petitioner has failed to establish that trial counsel was ineffective.

In attempting to make this claim, Petitioner points to the evidence that he claims trial counsel failed to properly present during the penalty phase of his trial. According to Petitioner, he was twice quite sick as a young child and suffered a significant head injury at age eighteen. According to Petitioner, those illnesses and the injury resulted in permanent physical, neurological damage. Petitioner further points out that he failed three grades in elementary school (the second, third, and sixth grades), indicating cognitive impairments and/or a troubled home life. Petitioner also asserts that trial counsel originally opted not to hire a mental health expert, despite certain "red flags" that counsel should have noticed, in the mistaken belief that they would have to notify the state about the expert. Petitioner also claims that his experiences with his father, an abusive alcoholic, left him mentally damaged and that Petitioner's own abuse of alcohol and drugs seriously impacted his judgment. After a careful review of the record, however, this Court finds that none of this evidence is particularly compelling in light of Petitioner's crimes so that, if this evidence had been presented to the jury, it is not likely that the outcome of the penalty phase of the trial would have been different.

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At the state habeas corpus hearing, Petitioner presented the testimony of two mental health experts, contending that this type of testimony should have been presented by trial counsel. Psychiatrist Dr. Todd Antin testified generally about how Petitioner's background of illness and injury might have affected his brain development, and his ability to make judgments and control impulsive behavior. Antin further opined that Petitioner's consumption of alcohol and drugs from a young age could have exacerbated these possible problems and that the abuse Petitioner suffered from his father might have made Petitioner more "on edge" and impulsive so that he tended to overreact when faced with problems or frustrations. Antin also discussed the fact that, at the time of his crimes, Petitioner was sleep-deprived and had been doing drugs for an extended period, causing him to be in a frenzied, maniacal, and paranoid state to the degree that he could not think clearly. After the drugs wore off, Antin testified, he became more like his normal self.

Petitioner also offered the testimony of Dr. Daniel Grant, a forensic neuropsychologist, at the state habeas corpus hearing. [See Doc. 23-14]. Dr. Grant diagnosed Petitioner with "difficulties with executive functioning, including deficits in abstract thinking, problem solving, conceptualization, planning, organization, evaluating consequences, deficits in complex attention and concentration, marked difficulty with rapid processing of information, and quickly responding to changing

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stimuli." [Id. at 10]. According to Grant, these deficits may have been caused by issues at birth, fevers in childhood, the head injury he suffered in a car accident, mental abuse by his father, and alcohol and substance abuse throughout his life. [Id. at 53-54]. Grant also opined that methamphetamine abuse would make these "deficits" worse. [Id. at 55].

Having reviewed Dr. Antin's and Dr. Grant's testimony, this Court is first struck by the fact that Antin bases his opinions on very thin evidence. Antin did not administer any psychological testing, so that none of his opinions have any empirical basis beyond the test results from Grant's tests, and Antin did not make any diagnosis of Petitioner. Dr. Grant's diagnosis, quoted above, is limited to intellectual deficits and does not include a diagnosis of psychosis or even neurosis. As a result, Petitioner cannot fault trial counsel for failing to secure a mental health expert earlier than they did. Trial counsel testified that, in their frequent meetings, Petitioner never demonstrated any type of mental issue and that further investigation revealed that Petitioner had never had any mental problems and that no one in the family suspected that Petitioner had any. [Doc. 23-15 at 10]; see Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000) (noting that "counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems"); Doe v. Woodford, 508 F.3d 563, 569 (9th Cir. 2007) (noting that the duty to

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investigate mental defenses is only triggered "if there is evidence to suggest the defendant is impaired").

While Petitioner was very sick as a young child, and those sicknesses may have caused lingering problems for Petitioner, the record demonstrates that, despite any such "deficit" that may have been caused by his illnesses and by the head injury, he demonstrated average intelligence on the intelligence quotient test that the psychologist hired by habeas corpus counsel administered, [Doc. 23-14 at 48], and in the second grade, he also scored in the average range on his IQ test, [Id. 48-49], indicating that he was not significantly hampered by any trauma that he may have suffered.

Moreover, based on the evidence in the record, Petitioner's claims that his father was physically abusive are not supported. Antin testified that Petitioner himself did not say that he was abused as a child just that his home life was chaotic. In her testimony, Petitioner's mother could only remember two instances in which Petitioner's father was physically abusive toward Petitioner, and those instances do not appear to have been significant. According to his mother's testimony, Petitioner's father kicked him one time and "jumped on him once."[1] This Court also points out that

[1] It also appears that Petitioner told the investigator hired by trial counsel that his father did not abuse him. This is relevant on two levels. First, it is further indication that the claims that Petitioner's father was abusive are overblown. Second, given the limited resources available to death penalty counsel, it is not unreasonable for counsel to believe what his client says so as to avoid wasting those resources in

the investigator hired by trial counsel questioned Petitioner's mother about abuse by Petitioner's father prior to the trial, and Petitioner's mother told the investigator that Petitioner's father was verbally abusive but not physically abusive. [Doc. 37 at 40]. This Court acknowledges that Petitioner's father was mentally or verbally abusive, but that fact was presented to the jury by the testimony of Petitioner's brother during the penalty phase of trial.[2]

In response to Antin's testimony that Petitioner was in a drug-fueled frenzy, acting purely on impulse at the time of the crimes, as Respondent points out, the evidence is more supportive of the argument that Petitioner was acting in a careful and calculating manner. After killing Clinton Wilson, Petitioner was aware that Clinton's wife, Debbie, knew that Petitioner had been with Clinton, so that he would be at least questioned when Clinton turned up dead unless he removed Debbie as a potential witness. On the way to see Debbie, he stopped to purchase zip ties, likely to immobilize Debbie and/or the children if need be. The drive from Bremen, where he shot Clinton, to Gainesville would have taken in the neighborhood of two hours, giving

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pursuing information that does not exist.

[2] Petitioner devotes a substantial portion of his brief to describing the many bizarre things that his father did while Petitioner was growing up. Most of this behavior was not, however, directed at Petitioner. Other than demonstrating that Petitioner's father was strange and that he drank to excess, this Court does not consider this evidence about Petitioner's father to be compelling mitigation evidence.

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him plenty of time to "come down" from whatever high he may have been on and to contemplate his actions. Then, after arriving at the Wilson's home, Petitioner bided his time without committing any form of violence. Rather, the indication is that he searched the garage for money and drugs. Finding none, he concocted the plan to offer to take Brian fishing to get Jessica out of the house before forcing Debbie up to the bedroom. Then he got Jessica out of the house again by asking her to get his briefcase so that he could attack Brian. After carrying out his attacks and leaving the scene, Petitioner ditched Clinton Wilson's van, which authorities were certain to be looking for, and stole a car from a home some miles from the Wilson's home. The evidence simply does not support Antin's testimony that Petitioner "was in a very frenzied and maniacal and paranoid state" during the crimes, [Doc. 23-13 at 25], and the prosecution would have easily refuted Antin's contention at the trial.

More generally, Dr. Antin's and Dr. Grant's testimony does not undermine this Court's confidence in the outcome of Petitioner's trial. The central point of Antin's testimony was that the neuro-psychological damage done to Petitioner by the combination of his sicknesses, his head injury, his abusive father, and his drug and alcohol use left him in a condition under which significant ingestion of intoxicants could cause him to act out impulsively and violently. However, evidence that Petitioner is a violent, unpredictable drunk and/or drug addict is just as likely to prove

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harmful to Petitioner in the eyes of the sentencing jury. Cade v. Haley, 222 F.3d 1298, 1306 (11th Cir. 2000) (noting that a petitioner's evidence that his "mental condition was created or exacerbated by drinking . . . also . . . provides an independent basis for moral judgment by the jury"); see Waldrop v. Jones, 77 F.3d 1308, 1313 (11th Cir. 1996) (holding that a "history of excessive alcohol and drug use . . . might have been harmful to [the petitioner's] case" even though offered for mitigation). More significant to this Court's conclusion is the fact that trial counsel knew about Petitioner's drug use and made the reasonable strategic decision not to present it to the jury because they knew that "drug use . . . was not going to serve a mitigation purpose." [Doc. 23-15 at 8 ("Well, I think [Petitioner's drug abuse] certainly wouldn't go to mitigation, I mean, I think a jury would say wait a minute, you want me to show sympathy because a man used drugs to the point that he committed these acts?")].

The main takeaway from Dr. Grant's testimony was that Petitioner has deficits that make it difficult for him to make good decisions in complex or stressful situations and that the negative effect of these deficits are heightened when Petitioner consumes mind-altering substances, which this Court concludes falls well short of the type of compelling evidence of a significant mental disorder that might sway a jury. This Court again points to the nature of Petitioner's crimes and notes that killing three

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people and severely injuring two young children is substantially more than making a bad decision in a stressful situation.

For the foregoing reasons, this Court concludes that Petitioner has failed to demonstrate that trial counsel was ineffective for failing to properly investigate and present mitigation evidence that would have convinced the jury not to impose the death penalty.

ii. Petitioner's Purported Confession to Trial Counsel

Petitioner dedicates a significant portion of his brief to faulting trial counsel for ineffectively reacting to a confession that Petitioner made before counsel. In the record, there is a transcript of a March 14, 1995, conversation between Petitioner, trial counsel, and the investigator that trial counsel hired. In the conversation, Petitioner gave a version of events that was fairly close to what is understood to have happened at Petitioner's pawn shop and later at the Wilson's home on the day of Petitioner's crimes: That, acting alone, he forced Clinton Wilson and David Martin to the floor of his pawn shop and shot both men in the head. He then went to Wilson's home where he killed Debbie and stabbed Brian and Jessica. [Doc. 27-27 at 44-60 and Doc. 27-28 at 1-37]. Petitioner raises three issues related to this transcript. First, Petitioner claims that it demonstrates that trial counsel lied on the stand during the motion for new trial

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hearing in testifying that Petitioner refused to tell them exactly what happened on the day of the killings. Second, during this description of killing Debbie Wilson and attacking the two children, Petitioner stated that "everything went red," which Petitioner contends should have been a red flag to trial counsel that Petitioner suffered from some form of psychological dysfunction at the time of the crimes. Third, Petitioner asserts that his admission of guilt should have forced trial counsel to abandon their strategy of focusing on the guilt/innocence phase of the trial and to work toward developing a more substantial case in mitigation.

Petitioner, however, gave a series of conflicting versions of his crimes.[3] In August, 1994, Petitioner twice told trial counsel that he had been at the Wilson's home but that a man named David had killed Debbie and attacked the children. [Doc. 27-27 at 3 et seq.]. On March 10, 1995, Petitioner gave yet another version of events to trial counsel that differed from his March 14, 1995, statement. [See Doc. 28-1 at 5].

With respect to Petitioner's March 14, 1995, statement, it is clear from reading the transcript that trial counsel and the investigator suspected that Petitioner was lying to protect his girlfriend and family, [see, e.g., Doc. 27-28 at 32-33 (investigator telling Petitioner that he did not believe what Petitioner had told him because, "[t]he physical

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[3] In its order denying relief, the state habeas corpus court describes the varying versions of events and Petitioner's refusal to cooperate with trial counsel in much more detail. [Doc. 37 at 21-28].

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evidence that they recovered doesn't coincide with what you're saying . . .")], based on statements that Petitioner had made earlier. Trial counsel also testified at length during the state habeas corpus hearing detailing why this statement conflicted with the evidence and was difficult to believe. [Doc. 23-15 at 13-14]. In February, 1996, Petitioner told his trial counsel's investigator that, at the time of the murders, he and Clinton Wilson had been involved in a $100,000.00 drug deal involving the "Dixie Mafia." [Doc. 28-10 at 58]. Petitioner later recanted regarding his claim of a massive drug deal. Nonetheless, this story is consistent with what Petitioner told other witnesses, and a woman told investigators that she had seen a group of four men confront Petitioner and Clinton Wilson outside of Petitioner's pawn shop on the day of the murders. Petitioner also told the psychiatrist that trial counsel hired that the "Dixie Mafia" had killed the two men in his pawn shop as well as Debbie Wilson and had forced Petitioner to injure Brian and Jessica by threatening Petitioner's family. [Doc. 37-21 at 26].

In short, given all of the conflicting statements that Petitioner made to trial counsel and to the investigator, it is not at all surprising that trial counsel did not credit the statement that Petitioner gave them on March 14, 1995, especially in light of the facts that (1) trial counsel believed that elements of that particular version of events did not square with evidence at the crime scene, and (2) trial counsel had information that

indicated that other people had been involved in the crimes such as Debbie Wilson's statement during the 911 call that "they are hurting my kids." [Tr. Trans. at 7338].

iii. Petitioner's Claim that Trial Counsel Was Ineffective for Failing to Negotiate a Plea for a Sentence less than Death

Petitioner next faults trial counsel for failing to obtain a plea agreement where Petitioner would receive a life sentence in exchange for his guilty plea.[4] In support of this claim, Petitioner points to a tape-recorded conversation between trial counsel and the Hall County District Attorney. [Doc. 48]. In that conversation, trial counsel and the District Attorney first discuss the course of plea negotiations in Haralson County where Petitioner was charged with murdering Clinton Wilson and David Martin. It appears that the judge presiding over the Haralson County case wanted trial counsel

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[4] The procedural posture of this claim is somewhat byzantine. As has been discussed, new counsel was appointed to represent Petitioner on direct appeal, and appellate counsel raised a claim of ineffective assistance of trial counsel. Appellate counsel did not raise a claim related to trial counsel's failure to obtain a plea agreement from the state. The claim, as raised by Petitioner in this proceeding, is based on a tape recorded conversation between trial counsel and the district attorney about a possible plea deal. Appellate counsel had a copy of the tape recorded conversation included in the record prepared for Petitioner's appeal, but he never listened to the recording. As such, the procedurally proper claim before this Court is a claim that appellate counsel was ineffective for failing to listen to the tape. In the interest of efficiency, this Court will determine whether trial counsel was ineffective in failing to secure a plea deal, which has the effect of determining whether Petitioner can establish the chain of claims necessary for him to obtain relief.

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to approach Hall County prosecutors to work out a deal where the Hall County prosecutors would not mention the Haralson County guilty plea during the guilt/innocence portion of the Hall County trial so that Petitioner would be willing to plead guilty to the Haralson County charges. Trial counsel did not, however, intend to enter a plea in Haralson County prior to the conclusion of the Hall County trial, and the purpose of the conversation was solely to enable trial counsel to be able to inform the Haralson County judge that they had approached Hall County prosecutors as that judge had instructed.

After this pro forma conversation, trial counsel asked the district attorney about the possibility of Petitioner pleading guilty in the Hall County case in exchange for a life sentence. The district attorney responded that if trial counsel provided her with "substantial" mitigation evidence, she would consider permitting Petitioner to plea to a lesser sentence.[5] However, Petitioner has failed to demonstrate any likelihood that prosecutors would have agreed to a plea deal. In the tape recorded conversation – which is Petitioner's best evidence – the district attorney voices strong skepticism that she would be willing to accept a plea. The district attorney stated that Petitioner would

[5] Petitioner claims that a reading of the transcript of the recorded conversation demonstrates that trial counsel testified falsely at the motion for a new trial hearing regarding the substance of the conversation. First, whether trial counsel's post-trial testimony was false has no bearing on whether counsel was ineffective. In any event, this Court disagrees that the testimony was false.

very likely receive at least two life sentences for the Haralson County murders, and she thus had little to lose in bringing the Hall County case to trial. Also, as is demonstrated in the discussion above, Petitioner did not have substantial mitigating evidence that was likely to convince prosecutors to accept a plea given the nature of Petitioner's crimes, and Petitioner cannot, therefore, demonstrate that he was prejudiced by trial counsel's failure to present the case in mitigation to prosecutors. Finally, trial counsel had sound strategic reasons not to reveal Petitioner's mitigation evidence to prosecutors and give them a better opportunity to counter that evidence at the trial.

Petitioner's claim that the tape recorded conversation indicates that prosecutors were willing to accept a plea deal is simply wrong. At most, the conversation suggests that the district attorney, while highly skeptical, did not entirely reject the possibility of a plea deal, and nothing else in the record even suggests a possibility that the prosecution would have accepted a plea.[6] Accordingly, this Court concludes Petitioner cannot establish that his trial counsel was ineffective for failing to obtain a plea deal.

b. Petitioner's Ineffectiveness Claims Fail

[6] The weakness of the evidence of the recorded conversation further leads this Court to conclude that Petitioner cannot show good cause for a hearing or discovery regarding this claim.

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Based on the foregoing discussion, this Court concludes that Petitioner has failed to demonstrate that his trial counsel was ineffective. As all of Petitioner's stand-alone claims of ineffective assistance of appellate counsel are based on Petitioner's assertions that appellate counsel failed to properly raise claims of ineffective assistance of trial counsel, Petitioner has also failed to demonstrate that he is entitled to relief with respect to his appellate counsel claims.

2. Petitioner's Claim III – Deadly Weapons Instruction

In his third ground for relief, Plaintiff claims that the trial court erred in giving the following jury instruction at the close of the guilt/innocence phase of the trial:

> A knife, if and when used in making an assault upon another person, is not a deadly weapon per se, but may or may not be a deadly weapon depending upon its character, the manner in which it is used, the extent of the injury inflicted and other circumstances of the ease. You may infer that a person of sound mind and discretion intends to accomplish the natural and probable consequences of that person's intentional acts, and if a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrument in the manner in which the weapon or instrument is ordinarily used and thereby causes the death of a human being, you may infer an intent to kill. Whether or not you make such an inference is a matter solely within your discretion.

[Doc. 17-15 at 27].

Petitioner fails to sufficiently explain what is wrong with the instruction, but he cites to a case, Harris v. State, 543 S.E.2d 716 (Ga. 2001), in which the Georgia

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Supreme Court held that a trial court erred in giving a similar instruction because it tended to shift the burden of proof. Petitioner raised this claim in his direct appeal, and in denying the claim, the Georgia Supreme Court held:

> In 2001, in Harris v. State, this Court held that giving such a charge was error. The Court also held that this new rule applied to all cases in the pipeline, which includes Franks's case. Therefore, the trial court erred by giving this charge, but we conclude that the charge was not reversible error under the circumstances. Unlike Harris, the evidence of malice was overwhelming in this case and, therefore, it is highly probable that the charge did not contribute to the verdict. [See Scott v. State, 565 S.E.2d 810 (Ga. 2002)] The erroneous Harris charge was not reversible error.

Franks, 599 S.E.2d at 151.

Petitioner asserts that, because a jury trial is a fundamental right, the faulty instruction constituted a "structural error" that cannot be cured and is not amenable to harmless error analysis. The Supreme Court has identified a limited class of error for which there is an irrebuttable presumption of prejudice requiring that the criminal defendant's conviction be reversed. Examples of such structural error include a trial judge's direction to a jury to return a verdict of guilt, United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), a failure to provide a criminal defendant with counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), a failure to provide a criminal defendant counsel at a preliminary hearing, White v. Maryland, 373 U.S. 59 (1963), the exclusion of members of the defendant's race from the grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986), having a judge with a financial interest preside over

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the case, Tumey v. Ohio, 273 U.S. 510, 535 (1927), a violation of the guarantee of a public trial, Waller v. Georgia, 467 U.S. 39, 49 (1984), and the use of peremptory strikes to exclude members of a minority race, Batson v. Kentucky, 476 U.S. 79 (1986). In all of these cases, the criminal defendant establishing a structural error need not demonstrate prejudice because the error strikes at society's fundamental notions of justice, "undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." Vasquez, 474 U.S. at 263-264.

In looking at the Supreme Court's structural error cases, this Court concludes that all such errors strongly implicate, if not directly violate, core constitutional principles. Additionally, this Court interprets the phrase "not amenable to harmless-error review" to mean that it is impossible to determine prejudice because reviewing courts cannot know what the outcome of the case would have been in the absence of the structural error. The evidence of guilt presented at Clarence Gideon's first trial, for example, may have appeared fairly strong, but there was no way to tell what a competent lawyer could have done with the case. Likewise, with a Batson violation, a reviewing court cannot divine what a jury composed of different people would have found. Here, as was found by the Georgia Supreme Court, there was strong and ample evidence of Petitioner's malice and intent, and this Court has no doubt that the jury would have found Petitioner guilty of malice murder if the trial court had not given the

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challenged instruction. As such, the trial court instruction, to the degree that it was even erroneous under federal constitution law, did not constitute a structural error, and Petitioner is not entitled to relief with respect to his Claim III.

3. Petitioner's Claim IV - Jury Array

According to Petitioner, the trial judge took all members of the jury venire who indicated that they knew or had heard anything about the case and moved them to the back of the strike list so that they would be less likely to serve on the jury. Also, the potential jurors who missed the first day of voir dire were not called back.

The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. Berghuis v. Smith, 559 U.S. 314, 319 (2010). In Duren v. Missouri, 439 U.S. 357(1979), the Supreme Court described three showings a criminal defendant must make to establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

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According to Petitioner, putting the jurors who had knowledge of the case at the back end of the jury pool had the effect of removing a disproportionate number of potential jurors that were "intelligent, literate and invested in their community as indicated by the fact that they read the newspapers and watched or listened to the news." [Doc. 49 at 222]. However, the intelligent, the educated, and those with a high level of concern for the community are not "distinctive" groups under Duren. Anaya v. Hansen, 781 F.2d 1 (1st Cir.1986); Ford v. Seabold, 841 F.2d 677 (6th Cir.1988). This Court further concludes that the trial judge's decision to move the "informed" jurors to the back of the jury pool is not an example of a "systematic" exclusion of that type of juror. As a result, Petitioner cannot demonstrate that the trial court violated his Sixth Amendment fair cross section right.

Petitioner cites to Yates v. State, 553 S.E.2d 563 (Ga. 2001), in asserting that the trial court erred in permitting the potential jurors who missed the first day of voir dire to avoid serving on his jury. In Yates, the Georgia Supreme Court announced the rule that excusing a potential juror from jury duty without making an inquiry into the nature of the juror's problem violated O.C.G.A. § 15-12-1. This Court first notes that there is no federal constitutional rule analogous to § 15-12-1, and Petitioner's contention thus fails to raise a cognizable § 2254 claim. Moreover, the jurors that Petitioner complains of were not excused by the court but failed to appear for jury duty. Clearly,

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§ 15-12-1 does not impose a duty on trial courts to track down jury duty "no-shows" and dragoon them into serving on a jury. For these reasons, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief with respect to the arguments he raised in his Claim IV.

4. Petitioner's Claim V - Prosecutorial Misconduct

Petitioner raises a claim of prosecutorial misconduct concerning the recording, discussed above, between Petitioner's trial counsel and the Hall County District Attorney regarding her willingness to accept a plea. At the motion for a new trial hearing, the prosecution elicited testimony that the District Attorney was not willing to accept a plea in exchange for a life sentence and that Petitioner had told his trial counsel that he did not want to plead guilty. Petitioner contends that this testimony was false and claims that the tape-recorded conversation discussed above establishes that the testimony was false. However, as this Court has pointed out, a review of the transcript of the conversation between trial counsel and the District Attorney reveals that the District Attorney was very skeptical that she would accept a plea and only then if Petitioner was able to demonstrate substantial mitigating evidence which Petitioner did not (and does not) have. Very simply, Petitioner's evidence that the prosecution

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presented false testimony at the motion for new trial hearing is entirely unconvincing. As such, this Court concludes that Petitioner has failed to establish his prosecutorial misconduct claim.

5. Petitioner's Claim VI - Juror who had Difficulty with English

Petitioner contends that one of the jurors at his trial, an Hispanic man, was incompetent to serve because he did not understand English. This juror's voir dire appears in the record, [Doc. 16-9 at 218 et seq.; 16-13 at 611 et seq.], and there is no reason to repeat it here other than to note that the juror had some difficulty understanding some of the questions put to him, and he indicated that he could not read or write English very well. However, he generally appears to have understood the questions that the trial judge, the state, and trial counsel asked him, and when he did not understand, the questioner was able to reword the question in a manner that the juror understood. Both the prosecution and Petitioner's trial counsel requested that the juror not be excused by the trial court, and neither side struck the juror. The first time that Petitioner raised a claim regarding this juror was in his state habeas corpus proceeding, and the state habeas corpus court, in an adequate and independent state

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ground for denying relief, concluded that the claim was procedurally defaulted.[7] [Doc. 37 at 8-9]. As a result, the claim is also defaulted before this Court. In an effort to overcome the default, Petitioner attempts to demonstrate cause and prejudice, see generally Hill v. Jones, 81 F.3d 1015, 1022-23 (11th Cir. 1996), by arguing that his trial counsel was ineffective for failing to object to the juror and his appellate counsel was ineffective for failing to raise the claim at his motion for new trial hearing and in his appeal. Petitioner's problem with that argument is that he does not have sufficient evidence in the record to establish an ineffective assistance claim. As this Court noted in discussing the legal standard for establishing a claim of ineffective assistance, there is a strong presumption that counsel's actions were made in a calculated and strategic manner rather than through sheer neglect. See Strickland, 466 U.S., at 690. To overcome this presumption, the error must be so patently obvious that no competent attorney would commit it, or the Petitioner making the claim must inquire of counsel why counsel did what he did.

Here, it is clear that trial counsel wanted the Hispanic juror on the panel as counsel had two opportunities to get rid of him and did not. There could be many reasons that a criminal defense attorney would want an Hispanic and immigrant on his

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[7] Petitioner's contention that this claim is not defaulted is entirely unsupported and conclusory.

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client's jury. For example, perhaps counsel thought that the juror might be a little less trusting of American law enforcement officials, or his (probable) Catholic faith might make him less likely opt for the death penalty. As is pointed out by Respondent, neither trial counsel or appellate counsel made any statements about this juror in the affidavits submitted to the state habeas corpus court, and in examining trial counsel and appellate counsel at the state habeas corpus hearing, Petitioner's habeas corpus counsel did not ask them any questions about the juror.[8] As such, this Court concludes that Petitioner has failed to overcome the presumption that trial counsel's action in failing to take steps to remove the Hispanic juror from the jury had a sound strategic basis. Petitioner has thus failed to establish that his counsel was ineffective and his claim remains defaulted before this Court.

This Court further concludes that Petitioner's arguments regarding the difficulties that the Hispanic juror may have had during Petitioner's trial to be unavailing. As pointed out by the Eleventh Circuit, "a criminal defendant may not make an affirmative, apparently strategic decision at trial and then complain on appeal that the result of that decision constitutes reversible error." United States v. Jernigan,

[8] Petitioner seeks a hearing and/or discovery to further develop this claim. However, as Petitioner had trial counsel on the stand during the state habeas corpus hearing and did not ask about the Hispanic juror, he cannot meet the standard under §2254(e)(1) to obtain a hearing.

341 F.3d 1273, 1290 (11th Cir. 2003). As stated, this Court must presume that trial counsel opted not to remove the juror believing that it was to Petitioner's benefit. If the Hispanic juror's presence on the jury did constitute error, Petitioner invited that error and thereby waived review of that matter. United States v. Ortega, 344 Fed. Appx. 539, 540-541 (11th Cir. 2009).

6. Petitioner's Claim VII - Single Jury for both Phases of the Trial

In his Claim VII, Petitioner contends that his constitutional rights were violated when the same jury determined his guilt and his sentence because, according to Petitioner, death qualified jurors are more likely to vote to convict. Petitioner further contends that, after voting to convict him, the jury was already biased against him for the penalty phase of the trial.

"Constitutional challenges to the use of a death-qualified jury in the guilt-innocence portion of the trial have been soundly and repeatedly rejected." United States v. Brown, 441 F.3d 1330, 1354 (11th Cir. 2006). Moreover, the Supreme Court has specifically approved Georgia's bifurcated death penalty procedure. Gregg v. Georgia, 428 U.S. 153 (1976). This Court therefore concludes that Petitioner's Claim VII fails to state a claim under § 2254.

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7. <u>Petitioner's Claim VIII - Various Trial Court Errors</u>

In his Claim VIII, Petitioner provides a list of purported errors committed by the trial court that are wholly unsupported by fact or citation. For example, Petitioner first claims that

> [t]he trial court improperly failed to strike for cause several venirepersons whose attitudes towards the death penalty would have prevented or substantially impaired their performance as jurors. The trial court erred by phrasing the voir dire questions in a manner that suggested to jurors who gave neutral responses that they were or should be in favor of the death penalty. The court erred in its rulings on motions to challenge prospective jurors for cause based on their attitudes about the death penalty and stated biases, engaged in improper voir dire, and allowed fair and impartial jurors to be struck for cause.

[Doc. 49 at 276-77].

Petitioner does not, however, identify the venirepersons with wrong attitudes about the death penalty, he does not attempt to explain what those venirepersons said during voir dire that demonstrated those attitudes, he does not relate or cite to questions that the trial court asked the panel that violated his rights, he does not identify the motions that the trial court improperly ruled on, and he does not identify which members of the juror panel were improperly struck for cause or explain why they were improperly struck. With two exceptions, Petitioner's Claim VIII follows this same pattern of raising claims without any factual support or citation to the record. The two exceptions are (1) his claim about the fact that the trial court changed the

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order of the venire panel based on who had read or heard anything about the case and (2) his claim about the juror who had trouble understanding English, both of which claims this Court disposed of in the discussions above.

In the order of February 7, 2012, this Court instructed Petitioner that he "must raise all claims, issues, and arguments he wishes the Court to consider. If a matter is not in the final brief, this Court will not consider it." [Doc. 39 at 3]. Moreover, it is not this Court's duty to mine the record in a likely fruitless attempt to make a party's claims for him. Reese v. Herbert, 527 F.3d 1253, 1268 (11th Cir. 2008). In the absence of any factual support, Petitioner's Claim VIII clearly fails to state a claim under § 2254.

Moreover, to the degree that Petitioner's Brady v. Maryland, 373 U.S. 667 (1965), claim that the Georgia Supreme Court denied on appeal and concerning evidence of a telephone call made from Petitioner's pawn shop, see Franks, 278 Ga. at 265, could be deemed to have been one of the claims raised under Petitioner's Claim VIII, this Court agrees with Respondent and with the state court that the evidence regarding that call was not Brady material, and Petitioner has failed to meet his burden

to establish that the state court's conclusion was incorrect under the standard set out in § 2254(d).[9]

8. Petitioner's Claim IX - Jury Instructions

In his Claim IX, Petitioner contends that the trial court gave several erroneous jury instructions that violated his constitutional rights. With respect to the guilt/innocence phase instructions, Petitioner contends that the trial court made the following errors:

> a) the trial court improperly charged the jury on the burden of proof beyond a reasonable doubt, permitting the jury to convict Petitioner upon less than "utmost certainty" of guilt;
>
> b) improperly shifted the burden of proof to the defendant;
>
> c) improperly charged on impeachment of witnesses;
>
> d) improperly charged vague and essentially standardless definitions of statutory terms;

[9] For some reason, near the end of his discussion of Claim VIII, and without mentioning it anywhere else, Petitioner argues that his claim that trial counsel was ineffective during voir dire was properly exhausted and, without further argument or support, that the Georgia Supreme Court, in denying the claim had made a contrary or unreasonable application of federal law. To the degree that Petitioner intends to raise this claim as part of his Claim VIII, this Court concludes that he has not raised it adequately to state a claim for § 2254 relief and that the state court reached the proper result.

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e) and improperly charged the jury on the offenses charged in the indictment.

[Doc. 49 at 281].

However, as with some of his other claims, Petitioner fails to provide any specifics or describe what about the instructions were erroneous so as to make it possible for this Court to analyze the claims.[10] Petitioner raised these claims in the same conclusory fashion in his state habeas corpus action. As Respondent points out, the state habeas corpus court held that these claims were procedurally defaulted because Petitioner failed to raise them in his appeal, and they are thus barred before this Court. Petitioner asserts ineffective assistance of trial and appellate counsel as cause to excuse the default.

For a variety of reasons, this Court concludes Petitioner has failed to establish that he is entitled to relief with respect to his claims that the trial court erred with respect to certain of the instructions given at the conclusion of the guilt/innocence phase. First, given the manner in which Petitioner raised these claims in the absence of argument and evidentiary support, this Court concludes that Petitioner fails to state a claim for § 2254 relief. Even if Plaintiff could be said to have made a cognizable argument that the trial judge erred in giving the instructions, as discussed above, the

[10] This Court notes that it discussed Petitioner's challenge to the trial court's deadly weapons instruction above in relation to his Claim III.

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evidence of Petitioner's guilt was overwhelming such that any erroneous jury instructions made during the guilt/innocence phase of the trial are harmless. See United States v. Vernon, 723 F.3d 1234, 1263 (11th Cir. 2013). Further, Petitioner cannot overcome the procedural default of these claims because he failed to ask trial counsel why they failed to object to the instructions or appellate counsel why he failed to raise claims related to the instructions at the motion for a new trial or on appeal. Petitioner therefore cannot overcome the presumption, discussed above, that his counsel did what they did for reasonable strategic reasons, and he cannot establish that his trial or appellate counsel was ineffective. Finally, this Court, in an abundance of caution and giving Petitioner every benefit of the doubt, carefully reviewed the trial court's instructions and could find nothing constitutionally infirm about them.

Turning to Petitioner's claims regarding the penalty phase jury instructions, at the close of the penalty phase in Petitioner's trial, the trial court gave Georgia's pattern instruction. See, Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions (hereinafter "GA PI") - Criminal at 2.15.30 et seq. Petitioner first complains that the pattern instruction on mitigating evidence[11] is "multisyllabic

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[11] That instruction is:

> Mitigating or extenuating facts or circumstances are those that you, the jury, find do not constitute a justification or excuse for the offense in question but that, in fairness and mercy, may be considered as

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legalese [and] the functional equivalent of no instruction on mitigating evidence at all." [Doc. 49 at 293]. According to Petitioner, the trial court never defined mitigating evidence, and it did not give examples of mitigating evidence. [Id.]. Petitioner further argues:

> The trial court failed to draw a meaningful connection between the concepts of mitigation and evidence. Its instruction effectively separated the consideration of evidence from the consideration of mitigation, and left the definition of mitigation vague and standardless. It did not explain that the jury could decline to impose the death penalty on the basis of any or all mitigating evidence, or – for that matter – for no particular reason at all. It did not tell the jury that it could consider any of the evidence it heard as mitigating evidence. It did not explain that the jury could consider the facts regarding [Petitioner]'s mental health or background as mitigating evidence.

[Id. 295].

Petitioner also contends that, because the trial court went on at length about aggravating factors in comparison to the rather short discussion of mitigating evidence, it created a risk that the jury would give undue weight to the aggravating factors.

The standard to be applied upon a challenge to the adequacy of an instruction on mitigating circumstances is whether any reasonable juror could have failed to understand the challenged instructions and the role of mitigation. High v. Kemp, 819

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extenuating or reducing the degree of moral culpability or blame.

GA PI 2.15.30.

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F.2d 988, 991 (11th Cir. 1987) (citing, inter alia, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986) (en banc). "[T]he ultimate question is whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner," Peeks, 784 F.2d at 1479, or misunderstood "its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence." Id. at 1488.

Having reviewed the entire penalty phase jury instruction in light of the standard just discussed, this Court concludes that the trial court's penalty phase instruction was clear and proper. The trial court instructed the jury that it must consider all of the evidence including mitigation evidence, that it could opt for a life sentence based upon any mitigating evidence or even in the absence of mitigating evidence, and that it could opt for a life sentence for any reason or for no reason. The court further told the jury that the state had the burden of proving aggravating factors beyond a reasonable doubt, that it was the jury's decision alone to determine whether aggravating factors had been proven, and that even if the jury found the presence of aggravating factors, the jury could opt to impose a life sentence. [See Doc. 17-18 at 29-37]. Nothing about the instructions would have caused the jurors to misunderstand the nature of mitigating evidence or their duties in imposing sentence. See generally, Gissendaner v. Seabolt, 2012 WL 983930 at *19 (N.D. Ga. 2012) (approving the Georgia pattern death penalty sentencing jury charge); Fults v. Upton, 2012 WL 884766 at *16 (N.D. Ga. 2012)

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(same); Jefferson v. Terry, 490 F. Supp. 2d 1261, 1310 (N.D. Ga. 2007) (same) rev'd on other grounds sub nom Jefferson v. Hall, 570 F.3d 1283 (11th Cir. 2009).

This Court disagrees with Petitioner's argument that the instructions given at his penalty phase are comparable to the verdict form that the Supreme Court found offensive in Mills v. Maryland, 486 U.S. 367 (1988). In Mills, the verdict form required that the jurors find the presence of mitigating factors unanimously before the jury could consider those factors in fixing a sentence. In Petitioner's case, the trial court stressed that the jurors should consider all of the evidence "in extenuation, mititgation and aggravation of punishment."

This Court also disagrees with Petitioner's argument that his rights were violated when the trial court failed to instruct the jury that a non-unanimous jury would result in a life sentence. In response to a similar claim, the Eleventh Circuit, in acknowledging and validating the important interest the criminal justice system has in unanimous verdicts, concluded that the trial court was not required to instruct the jury that its inability to reach a unanimous verdict would result in the imposition of a term of imprisonment rather than a death sentence. United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir.1993).

For all of these reasons, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief with respect to his Claim IX.

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9. Petitioner's Claim X - Cumulative Error

In his Ground X, Petitioner raises a cumulative error claim, asserting that his trial and sentencing were so "fraught with procedural and substantive errors" which, when viewed cumulatively, cannot be deemed harmless as they deprived Petitioner of a fundamentally fair trial.

"The cumulative error analysis' purpose is to address the possibility that '[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.'" United States v. Mendoza, Case No. 05-2054, 2007 WL 1575985, at *18 (10th Cir. June 1, 2007) (quoting United States v. Rosario Fuentez, 231 F.3d 700, 709 (10th Cir. 2000)). However, in order for this Court to perform a cumulative error analysis, there first must be errors to analyze. Neither the Georgia Supreme Court, the state habeas corpus court, nor this Court have held that the trial court committed error — harmless or otherwise — and Petitioner is therefore not entitled to relief as to his Ground X.

10. Petitioner's Claim XI - The Georgia Supreme Court's Proportionality Review

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In his Claim XI, Petitioner asserts that the Georgia Supreme Court has failed to properly apply the proportionality review required of every death sentence under O.C.G.A. § 17-10-35(c)(3). Respondent argues that Claim XI is unexhausted because he has raised it here for the first time. This Court only partially agrees. To the degree that this Court reads Petitioner's claim as an assertion that Petitioner's sentence is disproportionate, the claim is obviously exhausted because it was decided by Georgia's highest court. See Pope v. Secretary for Dept. of Corrections, 680 F.3d 1271, 1284 (11th Cir. 2012) (claim is exhausted under § 2254 if presented to state's highest court, either on direct appeal or on collateral review). The claim is not exhausted, however, to the degree that Petitioner complains that the state court denied him a due process right in failing to properly apply its mandatory proportionality review because no state court has had an opportunity to adjudicate that claim.

With respect to the exhausted portion of Petitioner's claim – that his death sentence is disproportional when compared with the sentence received by other convicted murderers in Georgia – the claim fails. This Court has repeatedly noted the horrific nature of Petitioner's crimes and cannot conceive of a metric under which those crimes would not qualify Petitioner for the death penalty when they are compared to the crimes of other capital defendants. This reasoning also applies to Petitioner's unexhausted claim that the state court has not properly applied the

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proportionality review. Even if this Court were to concede that the Georgia Supreme Court has a constitutional obligation to apply the proportionality review in a certain manner, and further that the court failed in that duty, Petitioner cannot demonstrate that he suffered prejudice given the nature of his crimes.

This Court further stresses that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," McCleskey, 481 U.S. at 306 (citing Pulley v. Harris, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate. Collins v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted). As the proportionality review is not required by the Constitution, Petitioner cannot claim relief under § 2254 for the Georgia Supreme Court's failure to properly carry out its statutory mandate. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons."). Petitioner's Claim XI thus fails.

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11. Petitioner's Claim XII - Constitutionality of Georgia's Lethal Injection Protocols

In his Claim XII, Petitioner asserts that Georgia's lethal injection protocols put him at serious risk of being subjected to cruel and unusual punishment in violation of his Eighth Amendment rights. However, this Court has repeatedly held that claims raising challenges to lethal injection procedures should be brought under § 1983 rather than in a habeas proceeding. Tompkins v. Secretary, Dept. of Corrections, 557 F.3d 1257, 1261 (11th Cir. 2009). This is especially relevant in light of the well-documented problems that states, including Georgia, have encountered obtaining the drugs necessary for lethal injections and the changes that Georgia has made in its lethal injection protocol. See generally, Bill Rankin, et al., Death Penalty, Atl. J. Const., Feb. 17, 2014 at A1 (discussing the increasing reluctance of drug manufacturers and compounding pharmacies to supply drugs for executions); DeYoung v. Owens, 646 F.3d 1319, 1323 (11th Cir. 2011). It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court. This Court also points out that bringing this claim under § 1983 would likely work to Petitioner's substantial advantage because he will be able to conduct discovery without leave of court, and he will be more likely to have

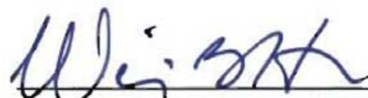
a hearing. Accordingly, Petitioner's challenge to Georgia's lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

III. Conclusion

For the reasons stated above, this Court now concludes that Petitioner has failed to demonstrate that he is entitled to relief under 28 U.S.C. § 2254. As such, his petition for a writ of habeas corpus is **DENIED**, except his Claim XII regarding the constitutionality of Georgia's lethal injection protocols, which is **DENIED WITHOUT PREJUDICE** to Petitioner's raising the claim in an action brought pursuant to 42 U.S.C. § 1983.

As this Court concludes that none of Petitioner's claims have arguable merit, a certificate of appealability is **DENIED**.

IT IS SO ORDERED, this 29th day of April, 2016.



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

Petitioner's Appendix 4

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

DAVID SCOTT FRANKS,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2005-V-1070**
	*	
v.	*	**HABEAS CORPUS**
	*	
HILTON HALL, Warden,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

ORDER

I. STATEMENT OF THE CASE

On February 2, 1998, the jury found Petitioner guilty of felony murder, armed robbery, two counts of aggravated battery, two counts of aggravated assault, two counts of cruelty to children, burglary, and theft by taking. (R. 863-865). The jury found five aggravating circumstances and made a mandatory recommendation of death. (R. 872-873). The trial court sentenced Petitioner to death on February 3, 1998. (R. 871). In addition to the death sentence, Petitioner was also sentenced to consecutive sentences of twenty years for armed robbery, twenty years for each count of aggravated battery, twenty years for burglary, and ten years for theft. (R. 866-870). On March 16, 1999, the trial court denied Petitioner's motion for new trial. (R. 949-955).

On September 13, 1999, trial counsel, Stanley Robbins, made a motion to withdraw from Petitioner's case based on Petitioner's request. (R. 964-966). On January 26, 2000, trial counsel, Joseph Homans, filed a motion to withdraw as his law partner had been appointed as a Special Assistant Attorney General, and Mr. Homans felt there may be a possible conflict of

interest. (R. 973-975). Following a hearing and "with Defendant's consent given in open court," the trial court granted the motions of both counsel and held "by so doing, it will permit issues of ineffective assistance of counsel, if any, to be raised at an earlier stage." (R. 978).

On March 2, 2000, the trial court appointed Michael Mears of the Multi-County Public Defender's Office and Susan D. Brown to represent Petitioner. (R. 980). Petitioner's new appellate counsel filed an additional motion for new trial on February 28, 2001. (R. 986-988).

On April 23, 2001, the trial Judge disqualified himself based on his "professional and personal relationship with former defense counsel," which the trial judge was concerned "may interfere with [his] impartiality on the issue of ineffective assistance [of counsel]... ." (R. 990-991). Subsequently, on July 26, 2001, Judge Robert B. Struble was assigned to hear Petitioner's motion for new trial and post-trial hearings. (R. 1000).

Following Petitioner's amendment to the motion for new trial, (R. 1130-1215), and extensive briefing on all the issues, (R. 1010-1019, 1020-1127, 1312-1334, 1450-1454, 1456-1471, 1477-1507, 1509-1519, 1561-1632, 1757-2851), the trial court denied Petitioner's second motion for new trial. (R. 2858-2861).

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on June 28, 2004. Franks v. State, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, Franks v. Georgia, 543 U.S. 1058 (2005), reh'g denied, Franks v. Georgia, 544 U.S. 914 (2005).

Petitioner filed this instant habeas corpus petition on December 15, 2005, and his amended petition on March 7, 2007. An evidentiary hearing was held before this Court on October 29-31, 2007. After review and consideration of the claims, evidence and pleadings, this Court hereby DENIES Petitioner's petition for writ of habeas corpus.

II. STATEMENT OF FACTS

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

Franks was an acquaintance and occasional business associate of Clinton Wilson, the husband of the murder victim. On the morning of August 5, 1994, Clinton Wilson and David Martin visited Franks' pawn shop in Haralson County. The next day, Wilson and Martin were found shot to death on the bottom floor of Franks' pawn shop. They had been shot with a nine-millimeter pistol. The medical examiner testified that the upward trajectory of the bullet wounds in the bodies was consistent with the two victims being shot from behind while lying face-down.

After killing Martin and Wilson, Franks took Wilson's white "cube" van and drove to Hall County to Wilson's house, where Franks believed that Wilson had secretly hidden tens of thousands of dollars. The Wilsons' nine-year-old daughter Jessica answered the door and invited Franks into the home. Franks told Clinton's wife, Debbie Wilson, that he was looking for Clinton and waited with her in the kitchen. At approximately 1:30 p.m., Debbie telephoned David Martin's wife and asked her if she had seen Clinton because "the other David" was at her house looking for him. About this time, the Wilsons' thirteen-year-old son, Brian, returned home, but then left again with a friend.

When Franks said he wanted to go fishing, Debbie sent Jessica to retrieve Brian. While the children were gone, Franks pulled a gun on Debbie and forced her to the upstairs bedroom, where he knew a safe was located. After retrieving money from the safe, Franks stabbed Debbie Wilson in the back and went downstairs to await the children's return. After Franks went downstairs, Debbie called 911, identified her attacker as "David Franks" several times, and stated that he assaulted her for money. She also reported this information to the paramedics who arrived to treat her. She went into cardiac arrest due to blood loss and died before reaching the hospital.

When the children returned to the house, Franks asked Jessica to go to the van and get a briefcase for him, and he told Brian to fetch fishing gear so they could go fishing. While Brian was getting his fishing rod, Franks attacked him from behind and slashed his throat. Brian managed to fight back, cutting Franks on the left arm. Franks then left Brian and stabbed Jessica as she came back in the house. Brian and Jessica were able to escape and run to a neighbor's house; they both survived. Brian and Jessica told the neighbor that their father's friend "David" had attacked them and that he was driving a white cube van. They also described Franks' physical appearance. Later, at the hospital, the children each picked Franks out of a photo lineup. At trial, they identified Franks as their attacker. DNA taken from two bloodstains in the Wilsons' house matched Franks' DNA.

Franks fled the Wilsons' house in the white cube van. Two firefighters responding to the 911 calls observed the van, which had been described on the radio, driving away from the Wilsons' house. They testified that there was a lone man fitting Franks' description driving it. The police found the van abandoned about nine miles away. In and around the van the police found a knife, a blood-stained shirt that Franks had been seen wearing that day, and a bloodstain on the left armrest of the van's driver's seat. A forensic chemist from the state crime lab found that DNA from blood on the shirt and armrest matched Franks' DNA. A canine unit tracked Franks' scent from the abandoned van to a nearby house that had been burglarized. The homeowner's Mazda 626 and some clothes had been stolen.

Franks drove the stolen Mazda 626 to Biloxi, Mississippi, and gambled several thousand dollars over a three-day period in a casino. From the casino, he obtained a player's advantage card, in the name of "Ty Dare." A casino surveillance videotape from August 8, 1994, depicts Franks playing blackjack. Franks then traveled to Mobile, Alabama, and checked into a motel under the name Ty Dare. A Mobile police officer spotted the Mazda 626 in the motel parking lot and responding police officers found, in the room registered to Ty Dare, a nine-millimeter handgun, cash, keys to the Mazda 626, recently purchased clothes, a jacket emblazoned with the name of the Biloxi casino where Franks had been observed gambling, a belt with a letter "D" belt buckle, cowboy boots similar to boots worn by Franks on August 5, and a wallet containing Franks' driver's license, social security card, and a casino player's advantage card in the name of Ty Dare. The boots and belt had human bloodstains on them but the amount was insufficient for DNA analysis. Franks' girlfriend, Frankie Watts, identified the handgun as similar to the nine-millimeter handgun owned by Franks. The Mazda 626 contained Franks' fingerprints and a bloodstain that matched his DNA. Franks observed the police activity at the motel when he was returning on foot and he fled the scene.

On August 14, 1994, the police arrested Franks at a relative's house in Alabama in possession of a .22 caliber derringer. He had a bandaged cut on his left arm. Before his arrest, he told his relatives that the pawn shop victims were supposed to come up with $100,000 to buy drugs but they did not have the money. He told his brother-in-law that he had an altercation with them and had made them lie on the floor before shooting them; he also said the pawn shop victims "got what they deserved." The State presented evidence that Franks had promised to pay cash to a car dealer on the day of the murders for a Lincoln Town Car he had obtained two days before. There was also evidence that he and his girlfriend planned to close a transaction on some property in Alabama shortly after the murders. At trial, Franks admitted being present at both murder scenes during the killings, but he claimed that other men, who were drug dealers, had killed the victims.

Franks v. State, 278 Ga. at 247-249.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLAIMS WHICH ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

The following claims were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court. Franks v. State, 278 Ga. 246 (2004). This Court is precluded from reviewing such claims under well-settled Georgia Supreme Court precedent. See Gunter v. Hickman, 256 Ga. 315 (1986); Roulain v. Martin, 266 Ga. 353 (1996).

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to conduct an adequate pretrial investigation into Petitioner's life and background to uncover and present to the jury evidence in mitigation of punishment, as well as provide background information which would have served as the basis of expert mental health testimony at either phase of trial, (see Franks v. State, 278 Ga. at 261-263(2)(B)(7));

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to conduct an adequate pretrial investigation into the State's case and defenses available to Petitioner at both phases of trial, including medical, psychological, psychiatric and other defenses affecting Petitioner's mental state before, during and after his participation in the murder for which he was charged and including defenses based on forensic crime scene analysis and testing, (see Franks v. State, 278 Ga. at 249-264(2)(A), 2(B)(7) and 2(B)(8)(a));

Portion of Claim One: trial counsel rendered ineffective assistance of counsel in negotiating a plea agreement, (see Franks v. State, 278 Ga. at 258-259(2)(B)(3));

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by retaining a mental health expert in the middle of the trial, failing to adequately prepare the expert, failing to provide the mental health expert with any of the available background information, and in retaining the same mental health expert who had previously treated Jessica and Brian Wilson, (see Franks v. State, 278 Ga. at 263-264(2)(B)(8));

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to present a closing argument that adequately and meaningfully discussed the evidence and set forth reasons for the jury to acquit or to impose a sentence less than death, and improperly and without consent confessed guilt to several crimes that were considered as aggravating factors during sentencing, (see Franks v. State, 278 Ga. at 255-258(2)(B)(1) and (2));

Portion of Claim One and Claim Five, footnote 10: trial counsel rendered ineffective assistance of counsel by failing to conduct an adequate voir dire, (see Franks v. State, 278 Ga. at 259(2)(B)(4));

Claim Two: the State suppressed information that Frankie Watts was the one who made the one-minute phone call from the pawn shop to the Wilsons' home. (see Franks v. State, 278 Ga. at 265(4));

Portion of Claim Five: the trial court erred in excusing potential jurors or moved them to the back of the venire for improper reasons under the rubric of hardship, (see Franks v. State, 278 Ga. at 266-267(7));

Portion of Claim Seven: Petitioner's death sentence was imposed arbitrarily and capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, (see Franks v. State, 278 Ga. at 267-268(8));

Portion of Claim Seven: Petitioner's death sentence is disproportionate, (see Franks v. State, 278 Ga. at 267-268(8)); and

Portion of Claim Seven: lethal injection is unconstitutional, (see Franks v. State, 278 Ga. at 265(3)).

CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that the following allegations were not properly raised at trial or on appeal and are therefore procedurally defaulted as Petitioner has failed to establish the requisite cause and prejudice, or a miscarriage of justice, sufficient to excuse the procedural default under the principles set forth in Black v. Hardin, 255 Ga. 239 (1985):

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to file pretrial requests for forensic testing and a medical, psychological and/or psychiatric evaluation of Petitioner and the effect of the intoxicating substances on his behavior on the day of the crime;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to thoroughly investigate the nature and extent of Clint Wilson's involvement in the drug trade, his overtly and implied threatening behavior towards Petitioner in the time leading up to the crime, and generally his history with Petitioner;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to adequately supervise the investigation which was performed to ensure that available leads and "red flags" were followed up;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to obtain appropriate testing to corroborate Petitioner's account of his drug use and acute intoxication the day of the crimes, as well as contemporaneous intoxicant use by David Martin and Clint Wilson;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to secure the services of a forensic pathologist, serologist, or criminalistics/crime scene expert;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by advising Petitioner to give testimony regarding the crime which contradicted his prior admissions as well as the physical evidence;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to make adequate objections to the prosecutor's injection of prejudicial hearsay into cross-examination questions and in closing argument;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to object to improper and prejudicial comments and mischaracterization of evidence at closing argument at both phases of trial;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to object to the admission of several items of evidence and testimony offered by the State during the guilt/innocence phase of trial;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to raise proper objections to improper charges given by the trial court to the jury at the conclusion of the guilt and sentencing phases of trial;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to make adequate requests for continuances in order to prepare for trial and failed to make use of time available to adequately investigate and prepare for trial;

Portion of Claim One: trial counsel rendered ineffective assistance of counsel by failing to make timely requests for the assistance of co-counsel and investigative support so that counsel could have conducted a thorough and adequate pretrial investigation into available defenses at both phases of trial;

Claim Two: prosecutorial misconduct in that:

1) the State made improper and prejudicial remarks in its argument at the guilt/innocence and sentencing phases of the trial;

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

3) the State argued to the fact finder that which it knew or should have known to be false and/or misleading;

4) the State allowed its witnesses to convey a false impression to the fact finder in pretrial and trial proceedings;

Claim Two, footnote 3: trial counsel were ineffective in not objecting to the improper comments made by the prosecution or seeking a mistrial or other appropriate relief, or to otherwise preserve objections to the State's arguments;

Claim Two, footnote 4: trial counsel were ineffective in not raising a claim of improper communications between jurors and bailiffs and/or sheriff's deputies and/or other State agents;

Claim Two, footnote 5: trial counsel were ineffective in not obtaining and effectively utilizing favorable evidence;

Claim Three: juror misconduct that included the following:

1) improper consideration of matters extraneous to the trial;

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

3) failure to reveal U.S. citizenship status;

4) serving on a jury while not a citizen of the U.S.;

5) harboring improper biases which infected deliberations;

6) putting undue pressure on individual jurors to vote for death;

7) exploiting individual juror's inability to fully understand the English language in order to pressure them to vote for death;

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

9) improper communications with third parties;

10) improper communication with jury bailiffs;

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

12) improperly prejudging the guilt and penalty phases of trial;

Claim Three, footnote 6: trial counsel were ineffective by not protecting Petitioner's rights with regard to juror misconduct;

Claim Three, footnote 7: trial counsel were ineffective in not arguing or presenting a claim of juror misconduct, and failing adequately to preserve objections thereto;

Portion of Claim Four: Petitioner was denied due process of law when the same jury that convicted him was responsible for determining the appropriate sentence;

Portion of Claim Four: death qualification is unconstitutional;

Claim Four, footnote 9: trial counsel were ineffective in not raising or litigating a claim of trial court error in not bifurcating the guilt/innocence and sentencing phase;

Portion of Claim Five: trial court error in that the trial court:

1) failed to excuse a juror for cause due to the fact that he could not adequately understand written or spoken English;

2) failed to adequately inquire into the U.S. citizenship status of a juror and excuse that juror if he was not a U.S. citizen;

3) admitted various items of prejudicial, unreliable, unsubstantiated and irrelevant evidence tendered by the State at either phase of trial;

Claim Five, footnote 11: trial counsel were ineffective in not adequately litigating and/or making timely objections to the trial court's improper rulings;

Portion of Claim Six: trial court erred in its instructions to the jury during the guilt phase as follows:

1) permitted the jury to convict Petitioner upon less than "utmost certainty" of guilt;

2) improperly shifted the burden of proof to the defendant;

3) improperly charged on impeachment of witnesses;

4) improperly charged vague and essentially standardless definitions of statutory terms; and

5) improperly charged the jury on the offenses charged in the indictment;

Claim Six, footnote 12: trial counsel were ineffective in not adequately preserving objections to the trial court's charges;

Claim Seven, footnote 13: trial counsel were ineffective in not adequately litigating lethal injection is unconstitutional;

Claim Eight: the Unified Appeal Procedure is unconstitutional;

Claim Eight, footnote 14: trial counsel were ineffective in not arguing or presenting a claim that the Unified Appeal Procedure is unconstitutional and not preserving objections thereto; and

Claim Nine, footnote 15: trial counsel were ineffective in litigating a claim of cumulative error.

Part III of Petitioner's Post-Hearing Brief: The District Attorney Presented False and Misleading Testimony at the Motion for New Trial Regarding Plea Negotiations: In his post-hearing brief, Petitioner claimed that the Hall County District Attorney presented false and misleading testimony at the motion for new trial hearing regarding plea negotiations in Petitioner's case. As Petitioner failed to raise this claim at the motion for new trial or on direct appeal to the Georgia Supreme Court, and as Petitioner has failed to establish cause and prejudice or a miscarriage of justice, it is barred from this Court's review under the law of procedural default. O.C.G.A. § 9-14-48(d); Black v. Hardin, supra.

This Court finds that Petitioner has failed to show prejudice as trial counsel testified that Petitioner informed trial counsel prior to trial that Petitioner would not accept a plea, (11/28/01 MNT hearing, p. 226), and Petitioner has never testified differently.

Petitioner has also failed to show deficiency or prejudice as he has failed to show that the Hall County District Attorney, Lydia Sartain, was ever "willing to enter into a deal". Instead, in a tape recorded conversation, which was submitted by Petitioner in the habeas

proceedings, the District Attorney discussed with trial counsel her belief in the strength of Petitioner's case, her opinion that Petitioner would likely receive the death penalty and her certainty that the facts justified the death penalty in Petitioner's case. (HT, Vol. 17, 4377).

The record does not establish that a substantial showing of life history evidence may have convinced her to offer a plea to Petitioner. Instead, in the audio-taped conversation, the District Attorney never stated that she would be willing to negotiate a plea with Petitioner. Ms. Sartain stated that she would not consider anything less than life without parole, however she further stated that she was not sure she would even consider that sentence. (HT, Vol. 17, p. 4377). The mere fact that she informed trial counsel that she would take into consideration whatever evidence they wanted to provide her to attempt to persuade her to negotiate a plea for less than death, does not indicate that she would have ever seriously entertained a plea bargain under the facts of the instant case. Clearly, as testified to by trial counsel, (MNT 11/28/01, p. 303), trial counsel did not believe she would negotiate a plea and that is, in part, why they did not discuss the issue with her further. Id.

As Petitioner has failed to establish cause or prejudice to overcome his procedural default of this claim, the claim remains barred from this Court's review.

CLAIMS THAT ARE NON-COGNIZABLE

This Court finds that **Claim Nine** of cumulative error fails to allege a cognizable claim for relief as it fails to state a ground which would constitute a constitutional violation in the proceedings which resulted in Petitioner's conviction and sentence. O.C.G.A. § 9-14-42(a).

In the alternative, this Court finds that the claim is procedurally defaulted and Petitioner failed to establish cause or prejudice or a miscarriage of justice to overcome that default. See Head v. Taylor, 273 Ga. 69, 70 (2000).

CLAIMS PROPERLY BEFORE THE COURT

Appellate Counsel's Effectiveness

Petitioner was represented by new counsel at his motion for new trial and on direct appeal. Appellate counsel raised numerous claims regarding the effectiveness of trial counsel on direct appeal. The Georgia Supreme Court rejected Petitioner's claims. See Franks v. State, 278 Ga. 246. Thus, Petitioner's claims regarding the effectiveness of **trial** counsel are barred from this Court's review under either the doctrine of *res judicata* or procedural default.

However, this Court must review trial counsel's performance in analyzing appellate counsel's effectiveness, which Petitioner has asserted as "cause" to overcome his procedural default of his claims.

Applicable Standard

The standard for reviewing allegations of ineffective assistance of counsel are contained in the United States Supreme Court's seminal case of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. Under the holding of the Supreme Court in Strickland, in order to establish his ineffectiveness claims, Petitioner had to show the following:

> 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.

Strickland, 466 U.S. at 687. See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims). "Unless a

defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.[1]

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. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 688.

Further, not only did the Strickland court establish a strong presumption in favor of effective assistance of counsel, but the Court in Strickland also instructed reviewing courts that the proper focus of a court reviewing a claim of ineffective assistance of counsel is 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 v. Washington, 466 U.S. at 688. See also Franks v. State, 278 Ga. 246, 250 (2004) and Adams v. State, 274 Ga. 854, 856 (2002) ("strong presumption" exists in favor of finding defendant was provided with effective representation).

Specifically, with regard to analyzing claims regarding the effectiveness of **appellate counsel** under the Strickland standard, the Georgia Supreme Court has held:

> ... it has been recognized that in attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made. Rather, in determining under the first Strickland prong whether an appellate counsel's performance was deficient

[1] The Strickland standard was adopted by the Georgia Supreme Court in Smith v. Francis, 253 Ga. 782, 783 (1985) and therefore, the Strickland standard is applicable under state and federal jurisprudence.

> for failing to raise a claim, the question is not whether [an appellate] attorney's decision not to raise the issue was correct or wise, but rather whether his decision was an unreasonable one which only an incompetent attorney would adopt.

Battles v. Chapman, 269 Ga. 702, 703 (1998). See also Hammond v. State, 264 Ga. 879, 887 (1995) (citing Jones v. Barnes, 463 U.S. 745 (1983) ("appellate counsel does not have a duty to raise every nonfrivolous issue available to him")).

The Court further held:

> the better focus is on the strength of the arguments that appellate counsel did present (first prong) rather than the weakness of those issues he elected not to raise (second prong), especially given that appellate counsel may be found to have acted reasonably in failing to raise an error, and thus his performance was not deficient, even where a petitioner can establish that the omitted error was potentially meritorious.

Battles, 269 Ga. at 705.

After considering all the evidence and pleadings, this Court finds that considering all Petitioner's ineffective assistance of appellate counsel claims collectively, (see Schofield v. Holsey, 281 Ga. 809, 812 (2007)), Petitioner has failed to establish the requisite prongs of Strickland and its progeny with regard to his claims.

Appellate counsel's Experience

Petitioner was represented during his motion for new trial proceedings and direct appeal by Michael Mears and Susan Brown. At the time of his representation of Petitioner, Mr. Mears was a vastly experienced capital litigation attorney in both trials and appeals. (See HT, Vol. 3, p. 450-455).

Mr. Mears was assisted in Petitioner's case by experience capital litigator Holly Geerdes and nationally recognized mitigation specialist Pamela Leonard. (HT, Vol. 3, pp. 456-458).

With regards to the vast experience of Petitioner's appellate team, the Eleventh Circuit, sitting en banc, in Chandler v. United States, noted that greater deference is to be afforded the decisions of experienced counsel, stating "[w]hen courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." 218 F. 3d 1305, 1312 (11th Cir. 2000)(en banc). See also Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998); Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994).

Trial Counsel's Experience

In analyzing the effectiveness of appellate counsel, this Court must review the reasonableness of trial counsel's strategic decisions to determine if appellate counsel could have possibly established any deficiency with regard to trial counsel's strategic decisions or any resulting prejudice. Accordingly, trial counsel's experience is also important to this Court's analysis of Petitioner's claims against appellate counsel's representation.

As with appellate counsel, Petitioner's trial team was well versed in criminal cases and experienced in death penalty law. Petitioner was represented at trial by Stanley Robbins and Joseph Homans. Both attorneys had twelve years of experience at the time of Petitioner's trial and had tried numerous cases. (11/27/01 MNT hearing, p. 46, 147-148, 154-155; HT, Vol. 2, p. 375). Mr. Robbins had been involved with other capital cases, (11/27/01 MNT hearing, pp. 46-49), and Mr. Homans had handled one other death penalty case to trial, which resulted in an acquittal. (11/28/01 MNT hearing, pp. 155-156, 158; HT, Vol. 2, p. 376).

In addition to trial counsel's experience, counsel also had investigator Andrew Pennington assisting them on Petitioner's case. (HT, Vol. 2, p. 377). Investigator Pennington had a law enforcement background and had been a private investigator for a number of years prior to Petitioner's trial. (HT, Vol. 22, p. 5842). Mr. Homans had previously worked with

Investigator Pennington on a number of cases, including Mr. Homan's prior death penalty case, and they "had developed a very strong rapport." (HT, Vol. 2, p. 377; HT, Vol. 22, p. 5845). Most significantly, Investigator Pennington had experience in the investigation of mitigation evidence in a death penalty case. (HT, Vol. 2, p. 444).

Negotiating a Plea

Petitioner alleges that appellate counsel were deficient and Petitioner prejudiced by appellate counsel not utilizing an audio-tape recording by trial counsel to allegedly establish that if trial counsel had performed effectively: trial counsel would have presented further evidence to the District Attorney to obtain a plea, the District Attorney would have negotiated a plea, and Petitioner would have accepted a plea.

The Courts notes that Petitioner argued to the Georgia Supreme Court that "[trial] counsel unconscionably failed to prepare at all and failed to diligently pursue a plea offer." (Direct Appeal Brief, pp. 25-26). Petitioner also asserted, as he reargues to this Court, that although "the prosecutor was amenable to a plea offer if defense counsel could justify for them why defendant was not worthy of death," trial counsel presented "absolutely nothing to convince the prosecutor to give the defendant a plea offer." (Direct Appeal Brief, pp. 29-30).

In rejecting this claim by Petitioner on direct appeal, the Georgia Supreme Court held:

> Franks claims that his trial counsel was ineffective because they failed to effectively pursue a plea bargain with the State. A plea deal allowing Franks to plead guilty in exchange for a sentence less than death would have required the agreement of both parties. The evidence at the motion for new trial hearing failed to establish that either party was interested in such a deal before trial. Trial counsel testified that they pursued a possible plea bargain with the Hall County district attorney, but the district attorney was not willing to enter into a deal. Homans testified that the district attorney said she needed to hear something "substantial" that would justify such a deal, and they were unwilling to give away information about the possible involvement of other suspects in the event she deemed this to be not substantial and they had to try the case. Moreover, Homans also testified that Franks had instructed them that

> he was not interested in pleading guilty to avoid a death sentence. Trial counsel pursued a possible plea bargain and the evidence does not show that a plea offer would have been extended by the State under the circumstances or, if extended, that such an offer would have been accepted by the defendant. Trial counsel's performance was not deficient.

Franks v. State, 278 Ga. at 259.

The audio-tape submitted by Petitioner in the habeas proceedings contains a recorded conversation between trial counsel and the District Attorney Sartain concerning plea negotiations in Petitioner's case. This conversation, taped by trial counsel, presumably without the District Attorney's knowledge, corroborates trial counsel's testimony at the motion for new trial hearing and the conclusions of the Georgia Supreme Court.

At the motion for new trial, trial counsel testified they met with the Hall County District Attorney once or twice to discuss plea negotiations. (MNT, pp. 119, 136, 225). Trial counsel did not remember when those discussions took place only that they "didn't get very far." (MNT, pp. 119-120, 136). The Court notes that trial counsel's billing records indicate that trial counsel met with the Hall County District Attorney on December 19, 1997, less than a month prior to trial. (11/28/01 MNT hearing, p. 225). At that time, counsel had investigated their case and developed their defense theory. (11/28/01 MNT hearing, p. 311).

Trial counsel also testified that Ms. Sartain informed them that they would "have to offer something very substantial before she would consider making a plea offer and did not define what she meant by 'very substantial.'" (HT, Vol. 2, p. 421; see also 11/28/01 MNT hearing, p 227). Trial counsel explained that they asked the District Attorney what she thought was substantial and "she said, you'll just have to give me what you think is substantial and I'll determine whether it's sufficient or not." (HT, Vol. 2, pp. 421-422; 11/28/01 MNT hearing, p. 227). Trial counsel testified that they wanted to secure a plea offer from the District Attorney,

"[b]ut at the same time, we did not want to release information to the State that may come back and bite us later if the plea offer was not accepted…." (11/28/01 MNT hearing, p. 227).

Additionally, trial counsel testified at the motion for new trial proceedings that, in preparation for the plea negotiations, they consulted other attorneys who had death penalty cases prosecuted by the same Hall County District Attorney and discussed what strategy and efforts had been successful. (11/28/01 MNT hearing, p. 225). Counsel reviewed their file for information that they believed could help secure a plea. Id. Counsel felt that the fact that the Haralson County District Attorney may be willing to accept a plea of less than death for a double homicide, Petitioner's non-violent background and the telephone records from the Haralson pawn shop indicating someone else was inside the pawn shop when Petitioner was in Hall County were bases for a plea offer of less than death from the Hall County District Attorney. (11/28/01 MNT hearing, pp. 226-228). However, counsel were sensitive to utilizing only the information that would assist them in obtaining a plea, but not hurt the defense at trial. (11/28/01 MNT hearing, p. 227). Further, although the Hall County District Attorney said information such as life history may be something she might consider in discussing a plea, she did not specify what type of life history information would affect her decision-making.

Additionally, on the audio-tape, trial counsel stated they were *attempting* to obtain two consecutive life sentences for Petitioner in Haralson County. Thereafter, the Hall County District Attorney is heard to ask, "not life without parole," (HT, Vol. 17, 4369); and trial counsel states "we haven't gotten that far, could be, could very well be." (HT, Vol. 17, p. 4369). Trial counsel stated on the audio-tape that they had only an informal agreement with the Haralson County District Attorney. (HT, Vol. 17, pp. 4365, 4372). Further, the Hall

County District Attorney stated that she has spoken to the District Attorney in Haralson County and "he never indicated to [her] that [Petitioner] had agreed to a plea." (HT, Vol. 17, p. 4367).

Moreover, on the audio tape, trial counsel stated that their client may not now be willing to accept a plea offer in the Haralson County case, (HT, Vol. 17, p. 4369), and at the motion for new trial, trial counsel testified that Petitioner informed trial counsel prior to trial that Petitioner would not accept a plea in the Hall County case. (11/28/01 MNT hearing, pp. 225-226). At the motion for new trial, trial counsel testified "we had also been instructed by our client that had that plea been worked out it was moot anyway and he wasn't going to accept it." (11/28/01 MNT hearing, p. 226). Petitioner has not testified differently in the proceedings before this Court.

This Court finds that Petitioner has failed to establish that appellate counsel were deficient or Petitioner prejudiced by appellate counsel's raising of this claim on direct appeal.

Formulating Guilt Phase Strategy

On direct appeal to the Georgia Supreme Court, appellate counsel alleged that trial counsel were deficient and Petitioner prejudiced as trial counsel allegedly failed to formulate and present a coherent defense strategy for the guilt phase of trial. (Direct Appeal Brief, pp. 45-55). In rejecting this claim, the Georgia Supreme Court held:

> Franks claims that his trial counsel failed to formulate a coherent guilt-innocence phase strategy. However, as previously detailed, trial counsel faced an enormous amount of evidence of their client's guilt and did not have their client's full cooperation until during the trial. Trial counsel formed and implemented a strategy that focused on the involvement of dangerous drug dealers who committed the killings and forced Franks to accompany them to the Hall County crime scene. Trial counsel uncovered witnesses and evidence to support this theory, they strongly challenged the thoroughness of the State's investigation, and the theory was consistent with Franks' trial testimony. They also argued Franks lacked the criminal intent that was necessary for a conviction for the attack on the children. Under the circumstances, we

> conclude that trial counsel's performance in selecting and pursuing their guilt-innocence strategy was reasonable and, therefore, not deficient.

Franks, 278 Ga. at 260. As the Georgia Supreme Court rejected this claim regarding the effectiveness of trial counsel, it is barred from this Court's review under the doctrine of *res judicata*. Gunter v. Hickman, supra.

As to Petitioner's claim that appellate counsel were ineffective in raising this allegation of trial counsel's ineffectiveness on direct appeal, this Court finds that appellate counsel were neither deficient nor Petitioner prejudiced as appellate counsel could not overcome the fact that trial counsel conducted a thorough and reasonable investigation into evidence for the guilt phase of trial or overcome the overwhelming evidence against Petitioner to establish the requisite prejudice.

The record establishes that after a thorough investigation for the guilt phase of Petitioner's trial, trial counsel made a strategic decision to present a defense theory that Petitioner was actually innocent of the murders and Petitioner acted under coercion or mental distress in attacking the children. (11/27/01 MNT hearing, p. 87; 11/28/01 MNT hearing, pp. 259-260; HT, Vol. 2, p. 382). Such strategic decisions have been held by the United States Supreme Court to be "virtually unchallengeable." Strickland, 466 U.S. at 690.

In formulating a defense theory, trial counsel had to take into consideration that Debbie Wilson identified Petitioner as her and her children's attacker on the 911 tape. Trial counsel knew this tape would be played for the jury and that both children would testify at trial that Petitioner attacked them. Specifically with regard to the assault on the children, trial counsel acknowledged that it was their determination that it would be "unwise to refute" that Petitioner attacked them as "the jury was never going to let that go." (11/28/01 MNT hearing, pp. 275-276, 320; see also HT, Vol. 2, pp. 389-390). Trial counsel testified that they could not ignore

the crime; they had to "acknowledge it and deal with it in order to maintain any credibility with the jury." (HT, Vol. 2, p. 391). Trial counsel discussed the effect on the sentencing hearing of admitting the assaults on the children, and they believed that they had "no choice based on the evidence that was being presented." (11/28/01 MNT hearing, p. 276).

The coercion part of the defense, which did not pertain to the murder charges in Bremen or Gainesville, but to the assaults on the children and the armed robbery, was thoroughly discussed by trial counsel. (Tr. T., pp. 3531-3532, 3533). Petitioner asserted that the mafia men forced him into Mr. Wilson's van, tied his hands with flex ties, and drove him to Clint Wilson's home in Gainesville. (Tr. T., p. 3376). Petitioner testified that the men made threats to him and his family and stated "they would cut off his head and send it to his mother" and that they would kill his mother and his son if Petitioner did not get them their money. (Tr. T., p. 3376). Thus, this Court finds that, although not charged by the trial court, (Tr. T., p. 3543), trial counsel's strategy and argument on a coercion defense under O.C.G.A. § 16-3-26 was reasonable.

A significant fact in the reasonableness of trial counsel's chosen defense was that Petitioner repeatedly maintained his innocence of the murder of Debbie Wilson and the attack on the Wilson children.

In reviewing trial counsel's investigation on direct appeal, the Georgia Supreme Court held, that trial counsel "met with Franks many times. They testified that they had some difficulty because, although they spent hours trying to convince him to do so, Franks refused to tell them exactly what had happened on the day of the killings." Franks v. State, 278 Ga. at 251. The record establishes that Petitioner maintained his version, even throughout his direct appeal, that he shot Clint Wilson and David Martin, but was innocent of the murder of Debbie

Wilson and was coerced to attack the children. See HT, Vol. 24, pp. 6554-6556 (pre-arrest statement to brother); HT, Vol. 24, pp. 6587-6589 (pre-arrest statement to sister-in-law); HT, Vol. 23, pp. 6180, 6629-6634; HT, Vol. 24, pp. 6613-6614 (pre-arrest statement to brother-in-law); HT, Vol. 23, pp. 6273, 6278, 6280-6297 (post-arrest statement to trial counsel); HT, Vol. 23, p. 6252 (defense investigator).

The record does show that on March 14, 1995, Petitioner again spoke with trial counsel about the murders and, contrary to all his other statements, alleged that he had committed all three murders and the attacks on the children, acting alone. This statement was transcribed by hand and in a "report." (HT, Vol. 26, p. 7308; HT, Vol. 43, p. 11,996). In that March 14, 1995, statement, Petitioner stated, instead of a drug deal gone bad, as Petitioner had previously claimed, he alleged that he was able to lure Clint Wilson to the pawn shop by telling Mr. Wilson that he was going to sell Mr. Wilson some pool tables. (HT, Vol. 26, p. 7314). After breakfast, and after initially separating from Mr. Wilson and David Martin to go to Margie Watts' house, Petitioner stated that he went to his pawn shop around 6:00 a.m. and sat inside, drank beer and thought for approximately an hour about his actions. (HT, Vol. 26, pp. 7314-7315). When asked by Investigator Pennington during this interview, as to whether he just planned to rob Clint Wilson and David Martin and get out of the country, Petitioner responded, "Uh. No. I was, I was probably really thinking about shooting 'em." (HT, Vol. 26, p. 7315). Petitioner stated he "wanted some more drugs and some money and that it, just, it happened." (HT, Vol. 26, p. 7317).

Petitioner said that, after he executed David Martin and Clint Wilson, he knew that Debbie Wilson knew her husband was with Petitioner and Petitioner also knew that Mr. Wilson generally kept a great deal of cash in the home safe. (HT, Vol. 26, p. 7318). Based on

this knowledge, Petitioner made the decision to drive to the Wilson home, across the State, to Gainesville. Id. Before going to Gainesville, Petitioner purchased beer and flex ties as he planned to tie up Debbie Wilson. (HT, Vol. 26, p. 7322; HT, Vol. 43, p. 11,998).

When Petitioner arrived at the Wilson's home, Petitioner told Debbie Wilson that he needed to get in to the garage to unload some machines, but, in actuality he was looking for drugs or money. (HT, Vol. 26, p. 7322). Petitioner told Mrs. Wilson that he was waiting on a U-Haul to bring the machines. (HT, Vol. 26, p. 7323). Petitioner stated that he waited a couple of hours "trying to get [his] courage up or didn't know what [he] was gonna do." Id. Petitioner finally determined to use his gun and force Debbie Wilson upstairs to the safe. (HT, Vol. 26, p. 7323).

Debbie Wilson opened the safe and handed Petitioner the money. (HT, Vol. 26, p. 7323). Petitioner obtained $10,000 from the safe. (HT, Vol. 43, p. 11,998). He then told her to lie on the bed and it was his intention to "tie her up with the phone cord." (HT, Vol. 26, p. 7324). However, Petitioner claimed the next thing he remembered was that he had stabbed her in the back area. Id. Petitioner then stated the children came back in the house and he "guess" he attacked them. (HT, Vol. 26, p. 7325). Petitioner told trial counsel he initially planned to leave while the children had gone fishing, "but they came back." Id.

Petitioner stated that, when he came out of Debbie Wilson's bedroom, he saw Brian Wilson. (HT, Vol. 26, p. 7326). Petitioner told trial counsel he followed Brian Wilson into the boy's bedroom. Id. Petitioner stated, "I went behind him and stabbed him, I believe. That's really the only thing I remember. I know I was, seems like he was there messing with a rod and reel or something." (HT, Vol. 26, p. 7328). During the struggle with Brian Wilson, Petitioner got cut by Brian Wilson with a knife. Id. The boy then ran out the back door. (HT,

Vol. 26, p. 7329). Petitioner told trial counsel that, at that time, Jessica Wilson came to the bedroom door and he "guess" he attacked her. (HT, Vol. 26, p. 7329).

From a review of the March 14, 1995, statement, it is clear that Petitioner had previously asserted that he could not tell trial counsel what happened on the day of the crimes because his family's lives had been threatened. (HT, Vol. 26, pp. 7337, 7340). Trial counsel questioned Petitioner about his change in the story and their concerns that he was accepting blame to protect his family. Id. Trial counsel informed Petitioner that "things can be done to protect your family." (HT, Vol. 26, p. 7340). Trial counsel also asked Petitioner why Debbie Wilson would have used the term "they are hurting my kids" in her 911 call following her stabbing. (HT, Vol. 26, p. 7338). Thereafter, Mr. Robbins informed Petitioner:

> [unintelligible] concerned about, man, is he thinks that somebody is going to kill his mother. What you've told us right now, effectively, you know, says there was nobody else involved. I'm sure that's not gonna be good enough for Andy [Pennington]. He's gonna keep digging. You know we can't stop pursuing that end of it just on the chance you're trying to protect your family.

(HT, Vol. 26, p. 7341).

The transcript from that March 14 statement further shows that Investigator Pennington then informed Petitioner, "my personal opinion, David. Your story about Bremen is about ninety percent believable. Your story about Gainesville, I think somebody else was with you." (HT, Vol. 26, p. 7356). He then stated to Petitioner that the physical evidence did not "coincide" with Petitioner's March 14, 1995, story. Id. Investigator Pennington then reiterated Mr. Robbins' statements that protection could be obtained for Petitioner's family. (HT, Vol. 26, p. 7357).

Additionally, Investigator Pennington reviewed Petitioner's statements. He stated that he told the attorneys that these statements made by Petitioner were lies

did not fit the evidence. (HT, Vol. 22, p. 5881). However, according to Investigator Pennington, when the defense team went back to speak with Petitioner after the March 14, 1995 statement, "he clammed up and wouldn't talk to [them] anymore." Id. Trial counsel corroborated the testimony of Investigator Pennington as they testified at the motion for new trial hearing that when they questioned Petitioner about the specifics of the crime, he refused to talk to counsel about it. (11/27/01 MNT hearing, pp. 88-89; 11/28/01 MNT hearing, p. 300). Trial counsel testified at the motion for new trial hearing that everything that was developed regarding the crime was done independent of Petitioner, and that they "spent hours and hours, Mr. Pennington, Mr. Homans and I, attempting to get Mr. Franks to tell us what happened." (11/27/01 MNT hearing, p. 89).

Significantly, Petitioner's unwillingness to discuss the events of the murders is also corroborated by notes between trial counsel and Petitioner that were taken contemporaneous with Petitioner's trial. (HT, Vol. 27, p. 7421). In those notes, Mr. Robbins wrote, "How are we going to get you acquitted of murder? Will you ever tell me?" Id. (Emphasis in original). Petitioner responded, "I really can't at this time answer that I can't tell you at this time." Id.

Additionally, memorandum contemporaneous with Investigator Pennington's investigation of the case, establishes that Investigator Pennington spoke to Petitioner on February 27, 1996. (HT, Vol. 25, p. 7031). Petitioner reiterated in this statement that he was supposed to obtain $100,000 from a "big drug deal" from Clint Wilson, who was the "money man." Id. Investigator Pennington noted that, when he asked Petitioner "who the other persons were involved in the 'big drug deal,' Franks recanted stating that there was no big drug deal, he was just going to rip off Cuz." Id. Investigator Pennington followed up, by asking again who were the other persons involved in the drug transaction, and Petitioner "stated that he did not know

anyone personally and then again recanted stating that there were no other persons involved." Id. (Emphasis in original).

Trial counsel testified that in addition to these statements made by Petitioner, they also met with him and talked to him about their guilt phase theory. (11/28/01 MNT hearing, p. 301). Trial counsel testified:

> At one point I met with David alone and laid out my theory to him, and that's the only reason I continued to pursue that theory was when I finished, that was the only time David held his gaze at mine as I walked him through with names, and when I finished he said, "You've done a good job," and said, "It's time for me to go."

Id. In addition to not contradicting this theory presented to him by trial counsel, trial counsel testified that they believed Petitioner was admitting to their theory as Petitioner's "body language and everything was so different than what it had been, so we continued pursuit of that theory." Id.

Subsequently, at trial, following the testimony of the two children victims, Petitioner claimed that he did not remember what had happened on the day of the murders. (11/27/01 MNT hearing, pp. 96, 133; 11/28/01 MNT hearing, p. 253; Vol. 2, HT 417-418, 436). In response, trial counsel hired Dr. John Connell, an independent psychiatrist to evaluate Petitioner. Id. During that evaluation, Petitioner gave Dr. Connell a new version of events that he had not committed any of the murders, but the Dixie Mafia had committed the Bremen murders and the murder of Debbie Wilson and coerced Petitioner to attack the Wilson children, by threatening death and harm to Petitioner and Petitioner's family.

Appellate counsel were also aware of Petitioner's March 14, 1995, statement as they made a file for that specific statement in one of their 28 boxes of files for this case. (HT, Vol. 53, pp. 15,219, 15,275-276). Notably, however, when the appellate investigator spoke to

Petitioner in September of 2001, in preparation for the motion for new trial hearing and the direct appeal, Petitioner was still maintaining his innocence and his claim of a drug deal "gone bad." (HT, Vol. 29, p. 8181).

In 2001, one of Petitioner's defense team memorialized a conversation with Petitioner as follows: he "still does not want to discuss the names of the other men who were involved in the drug deal the day of the crimes. He said Bubba was not one of them." However, he told the investigator that it was too dangerous for her to investigate the drug deal "because the men involved in the drug deal were linked with the Dixie Organization or the Dixie Mafia." Id. Petitioner for the first time claimed he knew someone called from his pawn shop in Bremen to the Wilson home the afternoon of the murders, while he was at the home, "but he could not say which man called." Id. Petitioner told the appellate investigator, "that David Martin and Clint were alive when he left the pawn shop. He pointed out that the men needed Clint alive so they could have him speak to his wife on the phone about getting the money if that was called for. David said he was taken to the Wilson home to help the two men who made him go into the house (since Deb. Wilson knew him). He said that he was kept tied up in the cube van (he had to give directions to the house)." Id.

Subsequently, appellate counsel again talked to Petitioner and noted in the contemporaneous memorandum, "He explained his motivation for not discussing or providing the names of the other men involved in the crimes. He discussed how much fear he has for the safety of his family." (HT, Vol. 53, p. 14,372).

Also, as set forth below, trial counsel conducted a thorough investigation into Petitioner's guilt and thereafter, settled on the defense theory of actual innocence and coercion.

Based on trial counsel's thorough investigation of Petitioner's guilt and based on Petitioner's repeated assertions of his innocence prior to and during trial, and his claims to appellate counsel that he was innocent , appellate counsel were not deficient nor Petitioner prejudiced by appellate counsel not attempting to impeach trial counsel with the March 14, 1995, statement or further challenging trial counsel's effectiveness with regard to trial counsel's chosen defense strategy.

Investigation Into Actual Innocence/Coercion Defense

Petitioner also alleges that appellate counsel were deficient and Petitioner prejudiced by appellate counsel's challenge to trial counsel investigation for their guilt phase defense theory.

Trial counsel testified that the "two crime scenes were so different that it was just stark." (HT, Vol. 2, p. 386). One crime scene was "methodical" and was a "gangland sort of killing," while the other crime scene was not methodical and involved the use of a different weapon. Id. Additionally, trial counsel had reports from the State where at least one witness stated that he saw Petitioner in the carport, and the evidence showed that Petitioner was inside. (HT, Vol. 2, p. 387). Trial counsel testified they investigated by speaking with the people from Tennessee from whom Petitioner was allegedly buying land and the car dealership where Petitioner had recently purchased a car as these large purchases supported the defense theory that Petitioner was expecting to "be receiving a large sum of money" from a drug deal with Clint Wilson or others. (11/28/01 MNT hearing, p. 260). Trial counsel testified they investigated, "every aspect and every detail of that, that we could find" and that "[e]verything we did tied into the coercion defense and establishing that other people were involved...." (11/28/01 MNT hearing, p. 261).

Also in support of their actual innocence/coercion theory, trial counsel conducted an extensive investigation into other potential suspects. (HT, Vol. 2, p. 383-384; HT, Vol. 22, pp. 5996, 6008, 6095-6098, 6103-6104, 6114, 6175, 6182; ; HT, Vol. 23, p. 6186; HT, Vol. 24, pp. 6767-6768; HT, Vol. 25, pp. 7092-7099; HT, Vol. 22, pp. 5865, 5868, 5884, 5912). However, the defense team was never able to locate any other suspects. (HT, Vol. 22, p. 5854).

Investigator Pennington also attempted to contact various people to try to verify that Clint Wilson was involved in dealing drugs to support Petitioner's claims of actual innocence and the "drug deal gone bad" (HT, Vol. 22, pp. 5858-5859; HT, Vol. 22, pp. 6015-6016); whether Mr. Wilson had been charged with any drug offenses in the past (HT, Vol. 2, p. 406; HT, Vol. 22, pp. 6019-6028); or the possibility of Mr. Wilson or Mr. Martin being an informant at the time of the crime. Id. (See also HT, Vol. 22, pp. 5865, 5924). The defense team did not find any one to substantiate the claim that Clint Wilson was dealing drugs. (HT, Vol. 22, pp. 5869, 5910, 5926).

Because the defense team believed Petitioner's girlfriend, Frankie Watts, was "very much involved" in connecting Petitioner to the alleged mafia drug dealers, Investigator Pennington also contacted and interviewed Frankie Watts. (HT, Vol. 22, pp. 5863-5864; HT, Vol. 2, pp. 381-382; HT, Vol. 23, p. 6180; HT Vol. 24, p. 6765). Investigator Pennington also conducted an investigation into Ms. Watts' background. (11/28/01 MNT hearing, pp. 185-187, 189, 293-294; HT, Vol. 22, pp. 5862-5863; HT, Vol. 2, p. 384; HT, Vol. 22, pp. 6080, 6106-6109).

Significant to the defense team's investigation and their defense theory, Investigator Pennington spoke with Doug and Annie Carlisle on June 8, 1995. (HT, Vol. 22, p. 6167). Mrs. Carlisle stated that at approximately 10 or 10:15 a.m. on August 5, 1994, she and her

husband passed Petitioner's Bremen pawn shop and "they observed a male who they were certain was Petitioner and another male, who they believed was Clint Wilson, at the front door of the pawn shop. Id. Annie Carlisle stated that she was familiar with both men due to her husband doing business at the pawn shop in the past. Id.

Mrs. Carlisle told Investigator Pennington that it appeared Petitioner was unlocking the front door when a "late model Lincoln Continental four-door drove into the pawn shop parking lot." (HT, Vol. 22, p. 6168).[2] Mrs. Carlisle stated that when the vehicle came to a stop, four males exited the vehicle. Id. She stated the four males left the doors to the car open, ran to the front door of the pawn shop, and shoved Petitioner and the other male into the pawn shop "looking back over their shoulder at the Carlisle's vehicle." (HT, Vol. 22, p. 6168). Annie Carlisle stated that the driver of the vehicle, who was wearing a suit, appeared to be reaching for something in his waistband as he exited the vehicle and rushed to the front door. Id. Ms. Carlisle then described the four males to Investigator Pennington. (HT, Vol. 22, p. 6169).

In addition to obtaining the testimony of Annie Carlisle, the defense team also attempted to find the brown Lincoln Town car to support Petitioner's actual innocence/coercion theory. In their attempts to find the brown Lincoln Town Car and the renter of that car, the defense team contacted several car rental companies, (HT, Vol. 24, pp. 6747, 6750), and checked the registry of the Super 8 Motel. (HT, Vol. 22, p. 6175).

The defense team also found other evidence to support their defense theory. Investigator Pennington interviewed an individual named Randy Brown who stated that he saw Clint Wilson's van at the Wilson home between 8:00 and 8:30 a.m., a time when the State

[2] Petitioner was attempting to purchase a gray Lincoln Town Car at the time of the murder and Mrs. Carlisle claimed to see a brown Lincoln at the pawn shop that morning. (HT, Vol. 2, p. 385).

placed Petitioner in Bremen, and the description that he provided of the person he observed in the carport did not match Petitioner. (Vol. 2, HT 388; HT, Vol. 23, p. 6182). Trial counsel also interviewed a witness who reported seeing two people in a van that left the area later that day, instead of only one. Id.

Through their subpoenas for phone records, trial counsel also discovered that a phone call was placed from Petitioner's pawn shop in Bremen, Georgia to the residence of Mr. Wilson on August 5, 1994, at 1:54 p.m. (Tr. T., pp. 3325-3327). Trial counsel believed that this evidence supported Petitioner's story that someone else was involved with the crimes.

As found by the Georgia Supreme Court, trial counsel "uncovered witnesses and evidence to support [their] theory," which "was consistent with Franks' trial testimony." Franks v. State, 278 Ga. at 260. As the record establishes trial counsel's effectiveness as to their guilt phase investigation, appellate counsel were not deficient and Petitioner was not prejudiced under the Strickland standard in raising and presenting the claim regarding trial counsel's investigation or formulation of the guilt phase defense strategy at the motion for new trial or on direct appeal.

Presentation at the Guilt Phase of Trial

The Court also concludes that appellate counsel were not deficient or Petitioner prejudiced by appellate counsel's challenge at the motion for new trial or on direct appeal to trial counsel's presentation of their actual innocence/coercion defense theory.

The first witness presented by trial counsel was Petitioner. After consultations among the defense team and with Petitioner, (11/27/01 MNT hearing, pp. 90, 106; 11/28/01 MNT hearing, pp.251-252, 309), trial counsel determined they had no choice but to have Petitioner testify before the jury. (11/28/01 MNT hearing, pp. 251-252).

At trial, Petitioner testified that, on August 4, 1994, he met Clint Wilson at the Wilson residence around 9:00 p.m., and they discussed the drug deal that was to take place the next day at Petitioner's pawn shop in Bremen, Georgia. (Tr. T., p. 3231). As to the specifics of the drug deal, Petitioner, who allegedly set up the drug deal, stated that they were supposed to meet some men at his pawn shop at 8:00 a.m. Id. Mr. Wilson was going to purchase $500,000 thousand dollars worth of drugs from a group of men who allegedly belonged to the Dixie Organization, and Petitioner was to receive $100,000 from Mr. Wilson for making the arrangements for the drug deal. (Tr. T., p. 3232).

According to Petitioner's trial testimony, on the night of August 4, 1994, Petitioner and Mr. Wilson were both drinking beer and using crank at Mr. Wilson's home. (Tr. T., p. 3233). Around 1:30 or 2:00 a.m., Mr. Wilson and Petitioner left the residence in separate vehicles. Mr. Wilson wanted to show Petitioner his game room that he was opening in the Gainesville area. (Tr. T., p. 3233-3234). Prior to going to the game room, Mr. Wilson stopped and picked up David Martin. (Tr. T., p. 3234). When they arrived at the game room, Petitioner approached Mr. Wilson about Mr. Martin being present, and Mr. Wilson told Petitioner that he "had some business to take care of when we got through." (Tr. T., p. 3235).

Petitioner testified that they stayed at the game room for a short period of time, and they then went to Leather's Truck Stop to get something to eat. (Tr. T., p. 3235). They arrived at the truck stop around 3:30 or 4:00 a.m. (Tr. T., p. 3236). After they ate, Petitioner told Mr. Wilson that he was going to go to his girlfriend's house, Frankie Watts, to rest. Id. Around 7:00 a.m., Petitioner woke up and had Ms. Watts drop him off at the pawn shop in Bremen around 8:00 a.m. (Tr. T., pp. 3236-3237).

Petitioner testified that, when he arrived at the pawn shop, he found Mr. Wilson and Mr. Martin asleep in the white cube van that was located behind the shop. (Tr. T., p. 3237). After waking them up, they all went inside the pawn shop and waited for everyone else to arrive. Id.

Petitioner testified that he then heard the sound of a car, and he allowed four men to enter the pawn shop. (Tr. T., pp. 3237-3238). In describing the four men, Petitioner stated that they were all between the ages of forty and fifty, and they were well-dressed. (Tr. T., p. 3243). One of the men was referred to as "Reece," and he was heavy set with dark hair. Id. Petitioner stated that another man was named "Gonzo," and he was of medium build with salt and pepper hair. (Tr. T., pp. 3238, 3243). Petitioner did not know the names of the remaining two men, but he described them as being of medium build with no distinguishing marks. (Tr. T., pp. 3243-3244).

After brief introductions, Petitioner went to a nearby store and purchased a drink. (Tr. T., pp. 3238-3239). Upon returning to the shop, Petitioner had a brief conversation with Ms. Watts outside the pawn shop, who had arrived at the store unannounced, regarding the plans that they had made to leave that day for Tennessee. (Tr. T., pp. 3239-3240). Petitioner testified that he then went back inside the pawn shop and heard a loud discussion regarding the fact that Mr. Wilson did not bring the money. (Tr. T., p. 3240).

Some of the other men then searched the briefcases of Petitioner and Mr. Wilson, and they found a gun that was located in Petitioner's briefcase. (Tr. T., pp. 3242-3243). Petitioner testified that, after they discovered the gun, the situation became "more aggravated" in that weapons were drawn and he, David Martin, and Clint Wilson were directed to go into the living room. (Tr. T., p. 3244).

Petitioner testified that the argument continued in the living room, and that the men told the three of them that they needed to find the money. (Tr. T., p. 3245). At some point, Petitioner and Mr. Wilson were taken out to the white van to prove that the money was not located in the van. Id. When the money was not located in the van, they all went back inside the pawn shop. Id. The men then threatened to hurt them and their families if they did not provide them with the money. (Tr. T., pp. 3245-3246). During the heated discussion, Mr. Wilson informed the men that he had the money back at his residence. (Tr. T., p. 3247). Petitioner testified that both Mr. Wilson and Mr. Martin where then shot, and he was then tied up with plastic strips. (Tr. T., pp. 3247-3248). Upon tying him up, the men told Petitioner that he was responsible for getting them their money. (Tr. T., p. 3248).

Petitioner testified that he was then carried out and placed in the passenger side of the van, which was driven by "Reece" to Gainesville. (Tr. T., p. 3249). When they arrived at the guard shack of Mr. Wilson's subdivision, Petitioner was "cut loose and told to drive to his house." Id. Upon arriving at Mr. Wilson's house, Petitioner was instructed to back the van up to the garage area. (Tr. T., pp. 3249-3250). Petitioner testified that he then knocked on the door and entered the residence as he wanted to make sure that the door was unlocked so that the four men could gain entry into the house. (Tr. T., p. 3250).

Petitioner testified that as he was sitting in the kitchen, "Reece" and "Gonzo" entered the residence, grabbed Debbie Wilson by the hair and shoulder and demanded the money. (Tr. T., p. 3250-3251). They then went upstairs and Ms. Wilson opened the safe; however, the money was not inside the safe. (Tr. T., p. 3252). "Reece" then threw Mrs. Wilson on the bed and threatened to kill her if she did not show him the money. (Tr. T., pp. 3252-3253). Mrs.

Wilson stated that she did not know where the money was located, and "Reece" then stabbed her in the back. (Tr. T., p. 3253).

Petitioner testified that he did not have any recollection of what happened at the Wilson residence after Mrs. Wilson was stabbed. Id. He stated that the next thing he could remember was hearing sirens and seeing lights, and he recalled being in a field covered with blood. (Tr. T., pp. 3253-3254). Petitioner testified that he ran as he was in fear for his life as the mafia men were "very well connected in all areas." (Tr. T., p. 3254).

In addition to Petitioner's testimony, trial counsel: tendered telephone records showing that a phone call was placed from Petitioner's pawn shop in Bremen, Georgia to the residence of Mr. Wilson on August 5, 1994 at 1:54 p.m. (Tr. T., pp. 3325-3327); presented the testimony of Annie Carlisle to support Petitioner's version of the events (Tr. T., pp. 3428-3429); and had Petitioner's ex-wife, Nancy Prewett, testify that Petitioner "gets real weak" or loses consciousness at the sight of blood. (Tr. T., pp. 3342-3343). Trial counsel also attacked the State's investigation of the case, including law enforcement allegedly not following up on "leads." (Tr. T., pp. 3466-3470, 3475).

Trial counsel also presented the testimony of James L. Buchannan. Mr. Buchannan testified that he observed a man kneeling in the middle of the driveway of the Wilson residence around 3:00 p.m. (Tr. T., pp. 3456-3457). In describing the man, Mr. Buchannan stated that he had black hair and was wearing a light colored t-shirt, which did not match the description of the shirt Petitioner was wearing on the day of the murders. (Tr. T., pp. 3457-3458).

Also at trial, trial counsel called Dr. Connell, who evaluated Petitioner. Dr. Connell testified to the version of the crime as given to him by Petitioner as part of his evaluation, which were consistent with Petitioner's trial testimony. (Tr. T. pp. 3370-3379).

Dr. Connell testified that Petitioner never told anyone what really happened until he spoke with Dr. Connell because Petitioner "was terrified that repercussions would occur toward his family if he had divulged any of this material." (Tr. T., p. 3383). However, when Petitioner came to court, memories started coming back and he was "aware that he had a great deal of respect for his family and he's ashamed, he's ashamed that this is what his family is being faced with, that he could have done something like this." (Tr. T., pp. 3383-3384).

Dr. Connell testified that Petitioner was not psychotic, but had features of post-traumatic stress disorder (hereinafter "PTSD"). (Tr. T., p. 3385). Dr. Connell testified that it was a disorder that was caused by experiencing a major trauma or major event that was unexpected, horrific, out of contact with basic reality, such as seeing other people murdered and being coerced to attack the children. (Tr. Tr., p. 3386). Dr. Connell based this diagnosis on the fact that Petitioner could not recall material facts and because he did not show a connection between "what we call affect or feelings in what happened." (Tr. T., p. 3386). Dr. Connell explained, "he's horrified by what he sees and what he's heard here, but he can't connect himself with them because they don't fit, they don't fit what his experience is." (Tr. T., p. 3386). Dr. Connell also testified that PTSD would be hard to fake. Id.

Trial counsel believed that PTSD and coercion "fit together" in that the PTSD "would be consistent with the traumatic event which would be the coercion." (11/28/01 MNT hearing, p. 267). Thus, Dr. Connell's testimony "tied in with the coercion defense." (11/28/01 MNT hearing, p. 287).

During their closing arguments, trial counsel acknowledged that the State's evidence proved that Petitioner had committed the crimes against Brian and Jessica Wilson; however,

they stated that the remainder of the case was "more complicated." (Tr. T., p. 3550). As noted by the Georgia Supreme Court on direct appeal:

> Trial counsel instead argued that others had killed the three people that day and forced Franks to go to the Wilsons' house to obtain cash. Trial counsel also argued that Franks suffered from post-traumatic stress syndrome and lacked the criminal intent to be convicted of attacking the children. Trial counsel pointed to evidence adduced at trial that supported this version of events, including that the police fixated on David Franks as the lone assailant due to Debbie Wilson's identification of "David Franks" in her 911 call; the police ignored evidence that could point to the involvement of others; Franks' face on the casino surveillance videotape appears to be devoid of emotion, as if he is in a daze; and that the children had testified that Franks never said a word when attacking them.

Franks, 278 Ga. at 256.

As further noted by the Georgia Supreme Court in finding trial counsel were not deficient, "[b]oth of Franks' trial lawyers testified that they therefore conceded the commission of the acts, but not the requisite mental state when it came to the crimes against the children. Under the circumstances facing counsel at the time we cannot conclude that this strategy was unreasonable." Franks, 278 Ga. at 257.

Trial counsel stressed to the jury that they needed to carefully analyze the 911 call of Debbie Wilson. (Tr. T., p. 3550). Specifically, trial counsel reminded the jury that Mrs. Wilson stated on the 911 tape that she had been shot and that "they're hurting my kids." (Tr. T., p. 3551). (Emphasis added).

Based on the overwhelming evidence of Petitioner's guilt and the presentation of evidence at the guilt phase of trial that supported the defense strategy, this Court finds that Petitioner failed to establish that appellate counsel were deficient or Petitioner prejudiced by appellate counsel's challenge at the motion for new trial or on direct appeal to trial counsel's presentation of evidence in support of their guilt phase defense strategy.

Investigation and Preparation for the Sentencing Phase of Trial

This Court concludes that appellate counsel were not deficient or Petitioner prejudiced by appellate counsel's representation in challenging trial counsel's mitigation investigation and presentation at trial as the record establishes that trial counsel thoroughly investigated Petitioner's background and family before formulating their mitigation theory and thereafter, reasonably supported that theory at trial.

Investigation

Strickland focuses on whether the investigation supporting counsel's decision was itself reasonable. Alderman v. Terry, 468 F.3d 775, 793 (11th Cir. 2006) ("trial counsel's strategy to show 'residual doubt' was a reasonable, professional decision"). Petitioner's trial counsel testified that almost "everything [they] did involved the mitigation phase" of Petitioner's trial. (HT, Vol. 2, p. 389).

A factor this Court must consider in analyzing appellate counsel's challenge to trial counsel's performance is the fact that trial counsel made a reasonable, strategic decision to present character evidence and a residual doubt theory at the sentencing phase of trial. Thus, the investigation conducted for the guilt phase of trial carried over into mitigation.

> At least when guilt in fact is denied, a "lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase." Tarver v. Hopper, 169 F.3d 710, 715 (11th Cir.1999); *see also* Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 2473, 91 L. Ed. 2d 144 (1986) (rejecting petitioner's argument that counsel had only spent the time between conviction and sentencing preparing the case for mitigation because "counsel engaged in extensive preparation prior to trial, *in a manner that included preparation for sentencing* ") (emphasis added); Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 1769, 90 L. Ed. 2d 137 (1986) ("It seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase....").

Chandler, 218 F.3d at 1320, fn 27.

Further, the Court notes that trial counsel did not simply rely on their guilt phase investigation for the sentencing phase of trial. Trial counsel also performed legal research, interviewed witnesses, investigated Petitioner's background from interviewing friends and family, reviewed closing statements from prior death penalty cases, reviewed death penalty seminar materials, and spoke with various death penalty groups both in Georgia and in other states in preparing Petitioner's case for trial. (11/28/01 MNT hearing, pp. 159, 291; HT, Vol. 2, p. 391). Trial counsel testified that, in preparing for the sentencing phase of trial:

> We interviewed the family primarily. We asked the investigator to interview anybody he could find where David had lived that may be helpful to us in presenting that evidence; got with the family about bringing us photographs. We specified the type of photographs we would like to obtain, and in effect, what we were trying to go for was a quick -- what we did was put a number of photographs on a poster showing David's life, so we wanted photographs from when David was young, with his kids. We were looking for photographs of David with a pet, whether it would be a dog or a pet, if he had played any ball, in his ball uniform, but mainly the photographs, and then the investigation of David's background.

(11/28/01 MNT hearing, p. 291).

In the proceedings before this Court, trial counsel testified that they interviewed Petitioner's family members, and they developed a general information form that was utilized during their interviews. (HT, Vol. 2, p. 390). Trial counsel testified that they discussed possible mental health history, dependency issues and other extenuating factors with Petitioner's family. (11/27/01 MNT hearing, p. 85). Trial counsel testified that, as early as his first meeting with the family, he asked about Petitioner's family, about Petitioner's background and childhood, "who was influential with" Petitioner. (11/28/01 MNT hearing, p. 212). Mr. Homans testified they also "wanted to know something about David's religious upbringing and background and just more human approaches...." (11/28/01 MNT hearing, p. 212). Mr.

Robbins testified that he was sure they spoke to "every family member to find out everything that was possibly in mitigation." (11/27/01 MNT hearing, p. 85). Additionally, Investigator Pennington testified that he traveled to Alabama to meet with Petitioner's family to discuss possible mitigation evidence with them. (HT, Vol. 22, p. 5940).

The defense team spoke with Petitioner's mother when investigating for mitigating evidence. (HT, Vol. 2, p. 396). Investigator Pennington testified that he went "very in depth" with Petitioner's mother about Petitioner's background. (HT, Vol. 22, p.5951). Petitioner's mother informed the defense team that Petitioner had quit school to help support her and that Petitioner was a good child who looked out for and took care of her. (HT, Vol. 2, pp. 397). Investigator Pennington testified that he believed he spoke with Petitioner's mother about Petitioner's mental health as well. (HT, Vol. 22, p. 5950).

Investigator Pennington also questioned Petitioner's mother about Petitioner's father's abuse and was informed by Petitioner's mother that Petitioner's father drank heavily and was verbally abusive. (HT, Vol. 2, p. 396). Petitioner's mother told Investigator Pennington that Petitioner's father was not physically abusive, but he was verbally abusive. Id. This statement by Petitioner's mother, denying any physical abuse by Petitioner's father, is also documented in Investigator Pennington's notes, which were taken contemporaneously with the interview of Petitioner's mother. (HT, Vol. 22, p. 6100).

The defense team also interviewed Petitioner's brother, Calvin Franks, about Petitioner's background. (HT, Vol. 2, p. 397). Calvin Franks did not want to talk about Petitioner's childhood. (HT, Vol. 22, p. 5899; HT, Vol. 24, p. 6565). Nevertheless, as part of that investigation, trial counsel were able to gather information concerning Petitioner's father

from Calvin Franks, including the fact that their father had been abusive and an alcoholic. (HT, Vol. 2, p. 397; HT, Vol. 24, p. 6565; 11/28/01 MNT hearing, p. 233).

In addition to Petitioner's mother and brother, trial counsel spoke with Petitioner's aunt, Jane Mashburn. Trial counsel testified they relied heavily on Ms. Mashburn as she provided them with the majority of the information, and she provided them with the names and contact information of other potential mitigation witnesses. (HT, Vol. 2, pp. 391-392). Trial counsel testified that they spoke with Ms. Mashburn "very frequently" and she provided them with information as to the family background. (HT, Vol. 2, pp. 398-399).

Ms. Mashburn told trial counsel that Petitioner's father was present, but he was an alcoholic and was verbally abusive. (HT, Vol. 43, p. 12,145). Additionally, Ms. Mashburn informed trial counsel that: Petitioner's mother was sick while pregnant with Petitioner; Petitioner almost died of dehydration when he was a few months old; and Petitioner quit high school at 16 to support his mother. Id.

Trial counsel testified that they discussed with Ms. Mashburn the types of witnesses they were looking for, including coaches, teachers, friend and family. (11/28/01 MNT hearing, pp. 223-224). Further, in reviewing death penalty seminar materials, Mr. Robbins had a list of good information to offer during the sentencing phase of a death penalty trial, and they went over those things with Ms. Mashburn. (11/28/01 MNT hearing, pp. 223-224).

Investigator Pennington also interviewed Petitioner's sister-in-law, Katrina Franks, who provided background information on Petitioner, (HT, Vol. 22, p. 6172 (6/26/95 Memo of Pennington)), and Ms. Mashburn's daughter also provided the defense team with a great deal of information. (HT, Vol. 2, p. 392). The defense team also interviewed Petitioner's ex-wife,

Petitioner's son, Petitioner's former mother-in-law, several aunts, a cousin, and his sister. (HT, Vol. 2, pp. 392-395).

In addition to interviewing Petitioner's family, trial counsel also directed Investigator Pennington to investigate Petitioner's background by conducting interviews of other potential mitigation witnesses. (HT, Vol. 2, p. 390). Regarding the interviews of other potential mitigation witnesses, trial counsel testified:

> Yes. And if we were given a name, we interviewed them. And if we were given contact information I sent them a form and asked them to fill it out, and then I would call them and add details.

(HT, Vol. 2, p. 392).

Investigator Pennington also contacted Petitioner's pastor, (HT, Vol. 22, p. 5904; HT, Vol. 24, p. 221), friends from when Petitioner was younger, and neighbors and/or friends in Ider, Alabama, a small town in which Petitioner grew up, in attempts to find mitigation evidence or potential mitigation witnesses. (HT, Vol. 2, p. 400; HT, Vol. 22, pp. 5884-5885). Trial counsel discovered that Petitioner lacked a violent background, which they believed would be helpful in the sentencing phase. (Vol. 2, HT 390).

In addition to interviewing witnesses for background information, Mr. Robbins also requested Petitioner's mother to obtain and bring them school records, medical records and "any other papers [the family] thought may be important." (Vol. 2, HT 399; 11/28/01 MNT hearing, p. 213). Petitioner's mother provided trial counsel with Petitioner's school records; however, they did not keep the school records as they contained "nothing remarkable." (11/28/01 MNT hearing, pp. 232, 284). Although Petitioner argues that his failing grades were a "red flag" that a mental health evaluation was warranted, however, by the time of Petitioner's

trial, Petitioner had owned two separate businesses and had never been diagnosed or even treated for any mental health issues.

The family also provided trial counsel with Petitioner's divorce records (11/28/01 MNT hearing, p. 234), and photographs of Petitioner to be used during the sentencing phase. (HT, Vol. 2, pp. 399, 401).

Further, in their pre-trial investigation, the defense team learned that Petitioner had abused drugs and alcohol in the years prior to the murders. (HT, Vol. 23, p. 6252; HT, Vol. 24, pp. 6492, 6618, 6770; HT, Vol. 25, p. 7031; HT, Vol. 27, p. 7737).

Subsequently, following their investigation, Investigator Pennington prepared a list of potential character witnesses. (HT, Vol. 2, pp. 399-400). Trial counsel testified that they had spoken to all of these witnesses. (HT, Vol. 2, p. 400; HT, Vol. 22, p. 5950). In making the determination as to who to call as witnesses during the sentencing phase, trial counsel stated they wanted witnesses who could testify as to the following information:

> That David had not been a violent person at any time in his past, that he had been very good to his mother, looked after his mother, in fact, he quit school to go to work to support his mother and the family, that David had been very good to his son, despite the divorce David had looked after his son, and that he, you know, these events were just so far out of his character. And then once the brother said that he would testify that the father had been abusive to the family, we also put that up to show that he had come from a very difficult background.

(HT, Vol. 2, p. 401).

As far as preparing the witnesses to testify, trial counsel stated that they met at their office and "went through what we expected their testimony would be." (11/27/01 MNT hearing, p. 146; HT, Vol. 2, pp. 401-402). Trial counsel were clear that they prepared the witnesses for their sentencing phase testimony. (11/28/01 MNT hearing, pp. 235-236; HT,

Vol. 2, pp. 402-403). Mr. Homans testified he spent approximately eight hours to prepare the family for their testimony. (11/28/01 MNT hearing, pp. 235-236).

Trial counsel told Petitioner's brother, Calvin, that they were going to ask him about his father. (HT, Vol. 2, p. 403). Specifically, trial counsel testified:

> Well, he was the one who said, Calvin was fairly insistent that he wanted to get on the stand and testify. And I remember him saying he used to sleep with a knife underneath his pillow because he was afraid of his dad.
>
> * * *
>
> And he did. And he wanted to get up there and say it because we were telling, you know, that there's legal issues and there's factual issues and we need to connect with this jury. And, you know, some of the jurors during jury selection had made a point of, you know, of somebody commits murder I don't want to hear a sob story about their childhood. And that's the kind of thing you get from some of our jurors at home, and so we told them we've got to be careful about trying to blame something for the conduct, we just need to show that this is out of character. So, we went over some of that.

(HT, Vol. 2, p. 403).

Trial counsel were also aware through their investigations of Petitioner's drug abuse and his father's abuse and alcoholism. However, based on their investigation and their opinion of the evidence and the mindset of the juries in their area, trial counsel determined that the mitigation strategy would focus on residual doubt and Petitioner's good character.

The Court finds that, as the record establishes that trial counsel's investigation into Petitioner's background was extensive and reasonable, Petitioner failed to establish that appellate counsel were deficient or Petitioner prejudiced by appellate counsel's challenge to trial counsel's representation during their sentencing phase investigation.

Residual Doubt Theory

Ultimately trial counsel chose to rely, in part, on residual doubt as their mitigation theory. The decision to rely upon residual doubt is a perfectly acceptable strategy at

sentencing, particularly where the defendant denies guilt. See Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 787-788 (11th Cir. 2003).

Additionally, in Chandler v. United States, 218 F. 3d 1305, 1320, n. 28 (11th Cir. 2000), the Court stated as follows:

> We have accepted that residual doubt is perhaps the most effective strategy to employ at sentencing. See Tarver, 169 F.3d at 715-16 (citing law review study concluding that "the best thing a capital defendant can do to improve his chances of receiving a life sentence ... is to raise doubt about his guilt"). Counsel cannot be held to be ineffective when he has taken a line of defense which is objectively reasonable.

See also Felker v. Thomas, 52 F.3d 907, 912 (11th Cir. 1995); Alderman v. Terry, 468 F.3d 775, 794 (11th Cir. 2006); Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999).

As the record establishes that trial counsel made a reasonable, strategic decision to focus on residual doubt as their mitigation theory after a thorough investigation of "law and facts" and as Petitioner repeatedly maintained he was innocent as set forth above, Petitioner failed to establish that appellate counsel were deficient or Petitioner prejudiced by appellate counsel challenging the effectiveness of trial counsel in this regard.

Presentation

This Court further concludes that appellate counsel were not deficient nor Petitioner prejudiced by appellate counsel's challenge to trial counsel's sentencing phase presentation.

Trial counsel presented a multi-faceted mitigation case at the sentencing phase of trial, which included residual doubt, good character, and remorse. In support of this theory, trial counsel presented the testimony of nine witnesses during the sentencing phase of trial concerning a number of specific instances of Petitioner's good character, his "loving" and "caring" nature, and that he was the "kindest, gentlest person". (T., pp. 3732-3736, 3738-3740, 3743, 3750, 3752-3753, 3754-3756, 3761-3762, 3763, 3766-3767). The witnesses testified

about Petitioner's relationship with his mother, Petitioner supporting his mother from an early age, and Petitioner's "real good relationship" with his son. (Tr. T., pp. 3735-3736, 3744-3747, 3757, 3761, 3763-3766). Further, during the testimony of Ms. McConathy, trial counsel tendered the poster board that contained various photographs of Petitioner and his family. (T. 3740-3741

In addition, these witnesses supported the theory of residual doubt as trial counsel had them testify that they had never observed Petitioner act in a violent manner. (Tr. T., pp. 3733-3735, 3739, 3743, 3747, 3748-3749, 3752, 3755).

Trial counsel had Calvin Franks testify that he and his siblings were raised in a violent family in that their father was an alcoholic and an "unreasonable man that you could not talk to." (Tr. T., pp. 3748-3749). Calvin stated that they were unable to have friends over to their house, and that he slept with a knife as he was scared that his father would murder him. (Tr. T., p. 3749). Further, Calvin Franks described mental abuse by his father to Petitioner. He testified that he saw his father fire a shot between Petitioner and his mother as they were sitting on the couch. Id. He testified that the shot missed his mother's leg; however, it came close enough to burn her leg. Id.

As to his mother, Calvin testified that she was a "very religious woman" who would go "without food for days fasting and praying." Id. He stated that his family was "very much black and white" in that one side of the family "would die before they would tell you a lie, and the other side of my family was the devil himself." Id.

In their closing arguments, trial counsel urged the jury to consider both residual doubt and the background of Petitioner. (Tr. T., p. 3805). Regarding residual doubt, trial counsel requested that the jury reconsider the evidence presented by the State during the guilt phase of

trial as there were questions in the evidence presented that reached the level of reasonable doubt. (Tr. T., pp. 3805-3810). As far as Petitioner's background, trial counsel argued that the crime was uncharacteristic of the person described by his family as being "a compassionate man who helped others, who's a loving daddy and a loving son." (Tr. T., p. 3811).

Subsequently, on direct appeal to the Georgia Supreme Court, appellate counsel raised the claim that trial counsel were deficient and Petitioner prejudiced by trial counsel's investigation and presentation of evidence at the sentencing phase of Petitioner's trial. In rejecting this argument, the Georgia Supreme Court found the evidence supported the following facts:

> Robbins testified that he and Homans recognized that the evidence against Franks "seemed overwhelming." They therefore recognized that the penalty phase was critical and their ultimate strategy was to "save his life." Although they had wanted to pursue a strategy in guilt-innocence that other more culpable people were involved, they were not able "to develop the defense to the extent that we wanted to." Nevertheless, the strategy for the penalty phase was to continue to argue that other more culpable people were involved and also to present testimony from family about Franks' good character and alcoholic father.
>
> Shortly after being appointed in 1994, Robbins met with Franks' family and asked about his background, asked for his school records, and asked them to gather pictures of Franks' life. Once Homans was appointed, he was principally in charge of the mitigation phase. Homans testified that he first met Franks' family in February 1997 and asked for information about Franks' background. He did not ask for any records because he believed that Robbins had already made that request; he reviewed the school records but saw "nothing remarkable." Homans talked with Franks' family members over the phone to discuss information to be used at sentencing and shortly before trial, he met with some of the family who would testify at the penalty phase. Trial counsel did not engage any experts to assist in preparing a mitigation case, although they had an investigator who interviewed people in the area where Franks had been raised. They studied seminar materials on mitigation issues. Trial counsel learned from Franks' brother about Franks' violent, alcoholic father; they had their investigator look into Franks' father, who was deceased.
>
> ... At the penalty phase, they presented eight family and former-family members, Franks, and a poster showing pictures of Franks' life.

Franks v. State, 278 Ga. at 263.

However, the Court went on to hold that Petitioner had "made no showing that he was prejudiced by the investigation taken" as appellate counsel had not submitted any mitigation evidence that they alleged should have been presented at trial, but only submitted a summary of the evidence under seal for the trial court's review. Id.

In the proceedings before this Court, Pam Leonard, the appellate mitigation specialist, testified by affidavit that she was concerned that MCPDO did not have "the time nor the resources to plunge" into investigating a claim of ineffective assistance of counsel, an area in which she claims they had no expertise. (HT, Vol. 21, p. 5750). Further, although Ms. Leonard states the appellate team only made preliminary contacts with the family and had only started looking into potential areas of mitigation, (HT, Vol. 21, p. 5751), the record before this Court does not bear out Ms. Leonard's assertions. In fact, the majority of Petitioner's evidence presented at the habeas hearing was gathered by or in the possession of appellate counsel at the time of the motion for new trial. As conceded by Petitioner, appellate counsel "amassed the vast bulk of the evidence" relied on Petitioner in these habeas corpus proceedings. (Petitioner's post-hearing brief, p. 96).

Pretermitting the issue of whether appellate counsel made a strategic decision not to present evidence at the motion for new trial proceedings, (see HT, Vol. 28, p. 7799), this Court finds that a review of the evidence discovered by appellate counsel as well as the evidence obtained by Petitioner's habeas counsel shows that Petitioner failed to establish that appellate counsel were deficient or Petitioner prejudiced by appellate counsel not presenting this evidence at the motion for new trial proceedings.

The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight -- except perhaps the rule that we will not judge trial counsel's performance through hindsight. See, e.g., Strickland v. Washington, 466 US 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort must be made to eliminate the distorting effects of hindsight."); Atkins v. Singletary, 965 F2d 952, 958 (11th Cir. 1992) ("Most important, we must avoid second-guessing counsel's performance. As is often said, 'Nothing is so easy as to be wise after the event.'" (Citation omitted.)). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F2d 402, 406 (11th Cir. 1987), cert. denied, 487 US 1241 (1988); Waters v. Thomas, 46 F.3d at 1514.

Mother's Pregnancy

The Court finds that, with regard to Petitioner's mother's claims of a difficult pregnancy, Petitioner's mother only stated that she was nauseous throughout her pregnancy with Petitioner. Moreover, the Petitioner's childhood medical records establish that the pediatrician who examined Petitioner noted Petitioner's mother's pregnancy with Petitioner was "normal"; that Petitioner weighed eight pounds at birth; and his condition at birth was "good." (HT, Vol. 31, p. 8944). Appellate counsel were not deficient and Petitioner was not prejudiced by appellate counsel not raising this "factor" as part of his claim on direct appeal in challenging trial counsel's representation at the sentencing phase of trial.

Drug Usage

Appellate counsel and trial counsel were well aware of and thoroughly investigated Petitioner's drug usage. In investigating Petitioner's drug use for the motion for new trial and

on direct appeal, appellate counsel discovered that, Petitioner informed Dr. Daniel Grant, Petitioner's appellate mental health expert, that Petitioner had been using highly addictive drugs since 1991, three years prior to the murders. (HT, Vol. 2, pp. 360-361; HT, Vol. 27, p. 7580). This was twelve years after leaving his father's home. (HT, Vol. 27, p. 7560).

Although Petitioner argued to this Court that his life was spiraling out of control at the time of the murders because of his recent drug addiction and his need for money based on his drug addiction, the record establishes that Petitioner's money problems and his criminal activities predate the murders and his drug usage. The records show that Petitioner was arrested in 1983 for conspiracy to commit armed robbery. (HT, Vol. 31, pp. 8731-8800; HT, Vol. 42, p. 11,976). This was eight years prior to Petitioner beginning his use of cocaine and crank. The records also show that Petitioner had changed his name in 1985 because, according to his ex-wife, Lynette Dickinson, Petitioner owed money to a bank. (HT, Vol. 24, p. 6546). Accordingly, Petitioner's money troubles also began before his abuse of drugs. Moreover, at the time of the murders, Petitioner owed money, not for the purchase of drugs, but for daily bills, cars, land, and fines from his criminal activities. (HT, Vol. 24, pp. 6542, 6581 6776, 7609; HT, Vol. 25, p. 7033; HT, Vol. 26, p. 7409).

Further, trial counsel testified at the proceedings before this Court that they chose not to attempt to present a theory that Petitioner's heinous acts were mitigated based on Petitioner committing the crime because he was abusing drugs. (HT, Vol. 2, p. 408). Trial counsel explained, "Well, I think that certainly wouldn't go to mitigation, I mean, I think a jury would say wait a minute, you want me to show sympathy because a man used drugs to the point that he committed these acts?" Id.

At the time trial counsel was making these determinations, he had been practicing in Hall County for twelve years. (HT, Vol. 2, HT 404-405). Trial counsel stated that it was his opinion, based on his knowledge of Hall County juries, that the drug use "was not going to serve a mitigation purpose." (HT, Vol. 2, pp. 4080-409).

The Eleventh Circuit has noted:

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

Waters v. Thomas, 46 F.3d 1506, 1521-1522 (11th Cir. 1995) (en banc).

This Court also notes that trial counsel's determination that Petitioner's drug and alcohol abuse would not be mitigating has been recognized by numerous courts to be sound trial strategy. In Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1217 (11th Cir. 2007), the Eleventh Circuit held:

> Barbas's decision not to present evidence of Stewart's drug and alcohol abuse is afforded a "strong presumption" of reasonableness, and Barbas did not perform deficiently for several reasons. *Chandler*, 218 F.3d at 1314; *see also Fugate v. Head*, 261 F.3d 1206, 1223-24 (11th Cir. 2001) (noting that we avoid second-guessing counsel's strategic decisions with the benefit of hindsight).
>
> First, reasonably competent counsel may not present such evidence because **a** detailed account of a defendant's alcohol and drug abuse is invariably a "two-edged sword." *Housel v. Head*, 238 F.3d 1289, 1296 (11th Cir. 2001) (internal quotation marks omitted). We have repeatedly recognized that evidence of a defendant's alcohol or drug abuse holds little mitigating value and may have the counterproductive effect of alienating the jury. *See, e.g., Haliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1244 (11th Cir. 2003) ("[E]vidence [of substance abuse] can often hurt the defense as much or more than it can help."); *Crawford*, 311 F.3d at 1321 ("[S]uch evidence often has little mitigating value and can do as much or more harm than good in the eyes of the jury."); *Grayson*, 257 F.3d at

> 1227 ("[W]e note that emphasizing [the petitioner's] alcoholic youth and intoxication may also have been damaging to [the petitioner] in the eyes of the jury."). Rarely, if ever, will evidence of a long history of alcohol and drug abuse be so powerful that every objectively reasonable lawyer who had the evidence would have used it.

Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1217 (11th Cir. 2007).

As trial counsel made a reasonable, strategic decision not to focus on Petitioner's drug use as a mitigating factor at trial, the Court concludes that appellate counsel were not deficient or Petitioner prejudiced by appellate counsel's challenge to trial counsel's effectiveness at the motion for new trial or on direct appeal with regard to this claim.

Abuse

Appellate counsel discovered during the course of their investigation that Petitioner's father and Petitioner's brother, Calvin, had a volatile relationship. (HT, Vol. 27, p. 7567). Further, as to Petitioner's father's abuse, interviews by appellate counsel with family members indicated that Jane Mashburn believed Petitioner's father was a "good daddy, just bad when he was drunk." (HT, Vol. 28, p. 7766). Additionally, she informed appellate counsel that she had never heard Petitioner say he was scared of his father. Id. Petitioner's mother informed the appellate team that she "thought both older children were afraid of Charles [Petitioner's father], but that Calvin was especially picked on by him" (HT, Vol. 28, p. 7788), and it was recorded in Petitioner's 1998 Department of Corrections file that Petitioner stated that he was not physically or emotionally abused as a child. (HT, Vol. 27, p. 7657).

Records submitted at the habeas proceedings do indicate that Petitioner's father appears to have suffered from alcoholism. (HT, Vo. 31, p. 8949). However, Petitioner's father's alcoholism, behavior and abuse were introduced at trial through the testimony of Calvin Franks who testified that their father was violent, an alcoholic (Tr. T., pp. 3748-3749); that Calvin

slept with a knife as he was scared that his father would murder him (Tr. T., p. 3749); and he told the jury about an incident when his father fired a shotgun between Petitioner and his mother, while they sat on the couch (id.). As held by the Georgia Supreme Court, trial counsel are not ineffective for not presenting cumulative evidence. DeYoung v. State, 268 Ga. 780, 786 (5), 493 S.E.2d 157 (1997). See also Devier v. Zant, 3 F.3d 1445, 1452 (11th Cir. 1993); Glock v. Moore, 195 F.3d 625, 636 (11th Cir. 1999).

It was also reasonable for trial counsel not to make Petitioner's father's actions the focus of their mitigation as Petitioner was 29-years-old at the time of the crime, had not lived in his father's home in 12 years, (HT, Vol. 27, p. 7560), and as trial counsel had determined, based on their thorough investigation and knowledge of Gainesville juries, that focusing on residual doubt was their best strategy.

Given the passage of time between the alleged abuse and the murder in this case, this Court finds that it is likely that Petitioner's childhood would have received little, if any, mitigating weight. "When a defendant is several decades removed from the abuse being offered as mitigating evidence its value is minimal." Callahan v. Campbell, 427 F.3d 897, 937 (11th Cir. 2005). See also Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000)(finding that an abusive childhood would have been entitled to little, if any, mitigating weight" for a 40-year-old defendant); Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir. 1999)(finding a deprived and abusive childhood is barely mitigating when there are significant aggravating circumstances and the defendant is 26); Marek v. Singletary, 62 F.3d 1295, 1300-1301 (11th Cir. 1995)(holding that evidence of childhood abuse would be entitled to little, if any, mitigating weight given the circumstances of the crime).

The Court also notes that Mr. Homans, who had extensive knowledge of and experience with Hall County juries testified that the juries in Gainesville, where Petitioner was tried, "don't want to hear a sob story about their childhood." (HT, Vol. 2, p. 403). In further describing Hall County jurors, Mr. Homans stated that they were "very, very conservative" and "church folks." (HT, Vol. 2, p. 405). He further stated, "Don't try to dance with them, I mean, you need to be straight with them." Id.

This evidence discovered and obtained by appellate counsel in their extensive investigation for mitigating evidence establishes that appellate counsel were not deficient nor Petitioner prejudiced by not alleging that trial counsel were ineffective for failing to present this additional, mitigating evidence of alleged abuse at the sentencing phase of trial.

Evidence Contrary to Residual doubt

The Court further finds that it was a reasonable trial strategy for trial counsel not to present and/or focus on other potentially mitigating evidence that ran contrary to their chosen residual doubt strategy. In Ferrell v. Head, 398 F. Supp. 2d 1273, 1287 (N.D. Ga. 2005), the federal district court found:

> When an attorney adopts a residual doubt strategy, it often makes sense for the attorney not to present other potentially mitigating evidence that runs contrary to the strategy. A strategy of residual doubt relies upon the possibility that the defendant did not commit the crime of which he was found guilty. Many forms of mitigating evidence at sentencing do not exculpate the defendant, but rather attempt to explain why the defendant may have committed the crime. Evidence of a defendant's disadvantaged upbringing surrounded by violence may aid in explaining why he may have used violence to resolve a situation. At the same time, such evidence may erode any residual doubt, reinforcing the likelihood that the defendant would have committed the crime.

Ferrell v. Head, 398 F. Supp. 2d at 1287.

Additionally, the Georgia Supreme Court has held, "[s]tacking different defenses can undercut with the jury the defense team's credibility, which is essential to a likelihood of success. [Cits.] ... Good advocacy requires the winnowing out of some arguments in favor of stressing others: multiplicity of arguments or defenses hints at the lack of confidence in any one. [Cit.]" Turpin v. Christenson, 269 Ga. 226, 244 (Ga. 1998). See also Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000) .

The Eleventh Circuit has also held, "[i]n light of the reasonableness standard set forth by the Strickland Court, our circuit maintains that constitutionally sufficient assistance of counsel does not require presenting an alternative -- not to mention unavailing or inconsistent -- theory of the case. [Cits]. Reasonableness, indeed, suggests that a trial counsel would weigh competing theories and choose to present the most compelling theory among the various options." Dill v. Allen, 488 F.3d 1344, 1357 (11th Cir. 2007).

In the instant case, the record establishes that trial counsel did not make his strategic decision in a cursory fashion, but made a deliberate, well-thought out, strategic decision based on several reasonable factors. The evidence of Petitioner's father's abusiveness, which was cumulative of evidence presented at trial, and Petitioner's newly developed theory of mitigation do not establish deficiency or prejudice under Strickland. As the United State Supreme Court explained, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. With regard to strategies chosen by trial counsel the court stressed, "there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689. Trial counsel in the instant case

made a reasonable strategic decision to focus on residual doubt and character, not drug abuse and poor childhood. As this strategic decision was based on a reasonable investigation, it is virtually unchallengeable. Thus, this Court finds that Petitioner has failed to show that appellate counsel were deficient or Petitioner prejudiced in appellate counsel challenging trial counsel's effectiveness during the sentencing phase of trial.

Investigation of Mental Health Evidence Prior to Trial

Petitioner also alleges that appellate counsel were deficient and Petitioner prejudiced by appellate counsel's challenge to trial counsel's use of mental health at trial.

The record establishes that trial counsel had prior experience using mental health experts in criminal trials. (HT, Vol. 2, p. 411). Trial counsel also testified that they considered having a psychological evaluation conducted on Petitioner prior to trial, but decided it would not be in their best interests. (MNT hearing, pp. 96, 215). Specifically, Mr. Homans testified they discussed "early and often" about the possibility of having Petitioner evaluated by a mental health expert prior to trial. (11/28/01 MNT hearing, p. 215). However, "it was never done for very specific reasons." Id. Trial counsel had concerns about the State obtaining its own expert if trial counsel sought an evaluation of Petitioner. (HT, Vol. 2, p. 434). Trial counsel testified that they were also aware of "some local cases where defense counsel had tried to use a mental health type defense that had backfired" and hurt the defendant's case. (HT, Vol. 2, pp. 410-411).

At the motion for new trial, Mr. Homans made it clear that he was aware of Ake v. Oklahoma, 470 U.S. 68 (1985), and understood its import. (11/28/01 MNT hearing, p. 283). He testified, however, that the trial judge had made the determination that the Ake line of cases "severely limited ex parte communication with the court." (11/28/01 MNT hearing, p. 283).

However, regardless of the trial court's position on ex parte Ake hearings, trial counsel made the determination not to hire a mental health expert to evaluate Petitioner prior to trial as they concluded, after a thorough investigation, that they did not have a good faith basis to request such an evaluation. (11/28/01 MNT hearing, pp. 283-284).

The Court further notes that trial counsel testified that there was no indication of any mental health problems, either through talking with Petitioner or with his family, although counsel specifically explored the possibility of mental health problems with Petitioner's family. (11/28/01 MNT hearing, pp. 85, 213, 321-322, 410, 436; HT, Vol. 2, pp. 09-410; HT, Vol. 22, p. 5951). Further, trial counsel testified that, prior to trial, Petitioner never claimed a lack of memory and counsel never saw anything in Petitioner's demeanor that made them suspect mental problems. (11/27/01 MNT hearing, p. 98).

Further, trial counsel spoke with Petitioner and his family about whether there was any "relevant information" regarding Petitioner's medical background that they needed to pursue. (HT, Vol. 2, pp. 432-433). Trial counsel were not given the names of any treating doctors or hospitals as they "didn't understand there to be any." Id. In addition, Investigator Pennington did not come across any relevant medical records during his investigation. (HT, Vol. 2, p. 433).

Additionally, throughout their representation of Petitioner, trial counsel met with Petitioner frequently. (HT, Vol. 2, p. 409). During their interviews with Petitioner, trial counsel asked him about any potential mental health problems. (HT, Vol. 2, p. 410). Trial counsel testified that, after their investigation and numerous conversations with Petitioner, they believed strongly that mental health was not an issue for Petitioner's case. (MNT hearing, pp. 98, 324). Trial specifically testified, "we had discussed it with Mr. Franks, we had discussed it

with the family, and we had no reason to believe there was a mental health issue." (HT, Vol. 2, pp. 434-435). Trial counsel testified that if they had seen any indications of mental health problems, they would have hired an expert. (HT, Vol. 2, p. 411).

In Baldwin v. Johnson, 152 F.3d 1304 (11th Cir. 1998), the Eleventh Circuit Court of Appeals held that the failure of trial counsel to request a psychiatric examination of his client was not ineffective where nothing the client had done or said indicated that he had any mental problem. Baldwin, 152 F.3d at 1314-1315.

Additionally, in Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000), the Court held:

> counsel is not required to seek an independent evaluation when the defendant does not display strong evidence of mental problems. Additionally, the choice not to seek out such an evaluation is a tactical decision, which "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. Whether the tactical decision is reasonable is a question of law.

Holladay v. Haley, 209 F.3d 1243, 1250 (11th Cir. 2000).

Based on the foregoing facts and law, this Court concludes that appellate counsel were not deficient or Petitioner prejudiced by appellate counsel's representation at the motion for new trial or direct appeal in challenging trial counsel's reasonable, strategic use of mental health at trial.

Investigation and Presentation of Mental Health Evidence at Trial

Additionally, trial counsel had an independent psychiatric examination performed on Petitioner after Petitioner alleged during the middle of his trial that, after the stabbing of Debbie Wilson, everything "went red" and he could not remember what had occurred. (11/27/01 MNT hearing, pp. 96, 133; 11/28/01 MNT hearing, p. 253; HT, Vol. 2, pp. 417, 436).

Trial counsel retained Dr. John Connell to "verify that, almost as a scientific fact, that that could occur, that if a person's seeing and having gone through what Mr. Franks had gone through, that, in fact, a person could have a loss of memory and what they call seeing red." (HT, Vol. 2, pp. 418-419).

Dr. Connell was specifically chosen by trial counsel as trial counsel were pressed for time and as both Mr. Robbins and Mr. Homans had previously used Dr. Connell on other cases. (MNT, pp. 96, 110, 253). Additionally, as Mr. Robbins and Dr. Connell were friends, trial counsel were able to contact him after hours. (11/28/01 MNT hearing, p. 265; Vol. 2, HT 420).

Counsel were aware that Dr. Connell had spoken to, but had not treated the children victims, (see Franks, 278 Ga. at 264), but did not consider that a problem. (11/27/01 MNT hearing, p. 97). After a full discussion between themselves and then Dr. Connell, trial counsel determined they would call Dr. Connell as a witness and did not believe any potential conflict would affect Dr. Connell's trial testimony. (11/27/01 MNT hearing, pp. 114-116, 132). In reviewing the effectiveness of trial counsel decision to hire Dr. Connell, the Georgia Supreme Court held:

> Franks has not shown that there was another psychiatrist available who would have been willing or able to interview Franks at the jail, as Dr. Connell did, and testify in court within a week's notice. Moreover, Franks does not take issue with the substance of Dr. Connell's testimony, only with the prosecutor's irrelevant and emotional remark in closing argument. Franks has therefore not shown that trial counsel's selection of Dr. Connell was deficient performance.

Franks, 278 Ga. at 264.

Prior to Dr. Connell's evaluation of Petitioner, counsel provided Dr. Connell with Petitioner's social history. (11/28/10 MNT hearing, pp. 254, 272).

After Dr. Connell's evaluation of Petitioner and prior to Dr. Connell's testimony, Mr. Robbins spent hours with the doctor to prepare him for trial. (11/28/01 MNT hearing, p. 269).

At trial, trial counsel presented Dr. Connell's testimony to show that Petitioner suffered from PTSD as trial counsel believed PTSD and the coercion/duress defense were integrally related with each other and supported their actual innocence/residual doubt theories. (11/28/01 MNT hearing, pp. 267-268).

Dr. Connell prepared a report with his findings with regard of his evaluation of Petitioner. (HT, Vol. 47, p. 13,331). In that report, Dr. Connell noted that Petitioner denied that he shot either Clint Wilson or David Martin and denied harming Debbie Wilson; he also denied memory of the assaults against the children. (HT, Vol. 47, p. 13,331).

Further, Petitioner informed Dr. Connell he had been exposed to cocaine during the year prior to the incident and was buying "relatively small amounts (one half to one gram) for personal consumption." (HT, Vol. 47, p. 13,331). In his report, Dr. Connell sets out Petitioner's version of events as they were testified to by Dr. Connell at Petitioner's trial. (HT, Vol. 47, pp. 13,331-13,332).

Trial counsel testified that they believed Dr. Connell's diagnosis of PTSD and coercion "fit together" in that the PTSD "would be consistent with the traumatic event which would be the coercion." (11/28/01 MNT hearing, pp. 267, 287).

Further, consistent with the theory of coercion/duress and Petitioner suffering from PTSD resulting from Petitioner witnessing the murder of Debbie Wilson, trial counsel subsequently argued in closing that Petitioner attacked the children after he "snapped" and argued that Petitioner did not have the requisite intent. (Tr. T., pp. 3582-3583, 3585).

Subsequently, as part of their investigation into whether trial counsel had performed effectively at trial with the use of Dr. Connell, in addition to questioning trial counsel, appellate counsel also had Petitioner evaluated by a neuropsychologist, Dr. Daniel Grant.

In the proceedings before this Court, Dr. Grant testified that, on October 31 and November 1, 2001, he had conducted a "limited interview and performed neuropsychological testing" on Petitioner at the request of appellate counsel. (HT, Vol. 21, p. 5653). Dr. Grant testified that his 2001 testing showed impaired functioning in cognitive ability, specifically "problem solving, judgment, memory, planning, and organizing." Id. Dr. Grant testified that in 2001 he suspected those deficits were longstanding, however, he did not have school records to verify this information. (HT, Vol. 21, p. 5655). Dr. Grant testified he reported his basic results of the test and his speculation about a learning disability to Pam Leonard following his evaluation. (HT, Vol. 21, p. 5655). Dr. Grant testified he was never called again by the Multi-County Public Defender's Office about Petitioner's case. Id.

Dr. Grant further testified that he was, however, subsequently contacted by Petitioner's habeas counsel who gave Dr. Grant background materials. (HT, Vol. 21, p. 5656). Dr. Grant testified that the background information supported his prior findings and had he been provided that type of information prior to trial, he would "definitely have requested that Mr. Franks' attorneys retain a psychiatrist with experience dealing with drugs of addition, who could have assessed his life history and behavior at the time of the crimes...." (HT, Vol. 21, p. 5658).

Initially, it is significant to note that, although Dr. Grant testified to this Court that his 2001 evaluation of Petitioner was somehow lacking as he was provided no background materials, it does not appear that Dr. Grant ever informed Pam Leonard that he needed any

additional materials to make his findings. However, as Dr. Grant's findings before this Court are the same as his findings in 2001, the record establishes that Dr. Grant was able to formulate his conclusions without background materials.

Moreover, in Head v. Carr, 273 Ga. 613, 631 (2001), the Georgia Supreme Court held, "[i]t is simply not reasonable to put the onus on trial counsel to know what additional information would have triggered [an mental health expert] to order neuropsychiatric testing; a reasonable lawyer is not expected to have a background in psychiatry or neurology. *See Mobley*, 269 Ga. at 640." Likewise, in the instant case, if Dr. Grant was truly hindered by not having background material, appellate counsel did not act unreasonably in not discerning that more information was needed by Dr. Grant as Dr. Grant reported his findings without requesting any additional information.

Further, the cross-examination testimony of Dr. Grant in the habeas hearing established that in 2001 Dr. Grant was aware of all the background material subsequently provided to him by habeas counsel and that Dr. Grant informed Pam Leonard, in 2001, of the same findings Dr. Grant has submitted to this Court. The record establishes that in conducting his evaluation in 2001: Dr. Grant knew Pam Leonard was looking for anything that could be used in mitigation in a death penalty trial; Dr. Grant knew what constituted potential mitigation at a death penalty trial as he had been involved in "excess of 50 capital cases during his career; and he had been "involved in numerous cases in the mitigating phase of the trial." (HT, Vol. 2, pp. 269, 299, 328-334). Dr. Grant also testified that he knew what to look for in evaluation for mitigating purposes and "what the attorneys want [him] to look for." (HT, Vol. 2, p. 371).

Dr. Grant testified that Ms. Leonard informed him that she wanted a psychological evaluation, (HT, Vol. 2, p. 270), and that he "gave a complete psychological,

neuropsychological evaluation…." (HT, Vol. 2, p. 271). Further, Dr. Grant testified that in the forensic setting, such as all death penalty cases, he always used the same testing. (HT, Vol. 2, p. 336). He also testified that he always does a very thorough evaluation; he does a neuropsychological and psychological evaluation to look at "a broad spectrum of abilities." (HT, Vol. 27, p. 7493).

Following his evaluation, Dr. Grant found Petitioner's I.Q. to be 96. (HT, Vol. 2, p. 274). Dr. Grant found the test showed that Petitioner's behavior patterns were not "flexible," (HT, Vol. 2, p. 281), and that Petitioner made "poor decisions." (HT, Vol. 2, p. 316). Dr. Grant found Petitioner suffered from a learning disability and attention deficit hyperactivity disorder. (HT, Vol. 2, p. 326). Petitioner also had problems with planning, organizing and encoding information. (HT, Vol. 2, p. 326). In the proceedings before this Court, he testified, "But it's nothing like glaring. You know, he's not retarded, you know, he's not the kind of thing that makes attorneys' hearts palpitate." (HT, Vol. 2, p. 327; HT, Vol. 27, p. 7524).

The record establishes that these findings were all reported to Pam Leonard. Dr. Grant testified that after his evaluation, he spoke to Ms. Leonard for 30 to 45 minutes. (HT, Vol. 27, p. 7525). He informed her of the results of the testing and described Petitioner's performance. (HT, Vol. 2, pp. 285, 367). In Ms. Leonard's notes, apparently taken contemporaneously with her 30 to 45 conversations with Dr. Grant, it is noted that: Petitioner has a learning disability; has "difficulty encoding"; his attention, memory and concentration are "impaired"; his full scale I.Q. score is 96; "can't process fast or well"; and utilized "trial and error." (HT, Vol. 29, p. 8152).

Dr. Grant testified before this Court that he was not diagnosing Petitioner with anything. (HT, Vol. 2, p. 367). He believed Petitioner had neurological deficits, but he "can't'

tell you exactly what caused the deficits." (HT, Vol. 2, p. 316). He testified "there's some risk factors, but I can't say those risk factors actually contributed." (HT, Vol. 2, p. 367). He further testified that he did find that Petitioner had "deficits"; notably, the same deficits he previously found in 2001. (HT, Vol. 2, p. 367). However, Dr. Grant testified that he did not have background information to support these findings. (HT, Vol. 2, p. 343). Dr. Grant found that the "new" information of Petitioner's mother's "difficult" pregnancy, Petitioner almost dying at nine months, Petitioner's car accidents, Petitioner's drinking at an early age and Petitioner's father's mental abuse, were all "risk factors." (HT, Vol. 2, pp. 315, 344). Dr. Grant concluded that, if he had been provided the same background information during his 2001 evaluation, he would have advised the defense team "to retain an expert psychiatrist that's also an expert in substance abuse." (HT, Vol. 2, p. 323).

However, the record shows that Dr. Grant, as part of his 2001 evaluation, was aware of these "risk factors," but did not advise Pam Leonard to hire a psychiatrist who specialized in substance abuse. Dr. Grant's notes, taken contemporaneously with his 2001 evaluation of Petitioner, show that Dr. Grant was aware that: Petitioner had started work at an early age; Petitioner broke his back in a car wreck and was found unconscious outside the car; Petitioner fell off the porch as a child and hit his head on a rock; Petitioner claimed he was in a car wreck at age 15; Petitioner said he was pushed into a metal post in the fifth grade; he failed third grade; he had rheumatic fever; was dehydrated when young and loss vision in one eye; and that he began to consume alcohol around age 12 or 13-years of age. (HT, Vol. 2, pp. 344-345, 348, 366).

Dr. Grant agreed the only "risk factor" he was not aware of was the alleged physical abuse of Petitioner by his father. (HT, Vol. 2, p. 349). However, Dr. Grant testified that

Petitioner even "alluded" to that "risk factor" as Petitioner told Dr. Grant that he never had encouragement at home and that his home was not a good place to do schoolwork. (HT, Vol. 2, pp. 345-346, 349).

Dr. Grant was also aware that Petitioner claimed to have been using cocaine and methamphetamines in large quantities for approximately one to one and half years prior the murders. (HT, Vol. 2, pp. 360-361). Petitioner informed Dr. Grant that he was using crank, crystal meth and speed in 1991, and was buying seven thousand dollars worth of drugs in 1991 and 1992. (HT, Vol. 2, p. 360). Accordingly, Dr. Grant knew, prior to Petitioner's trial, that Petitioner had a substance abuse problem. (HT, Vol. 2, pp. 360-361). However, knowing all this information, he did not at the time inform Pam Leonard to seek the assistance of a psychiatrist specializing in substance abuse.

Dr. Grant claims that although he knew these "risk factors" and knew that Petitioner had a substance abuse problem, in the 30 to 45 minutes conversation with Pam Leonard following Dr. Grant's evaluation, they never discussed hiring a psychiatrist dealing with substance abuse because the "conversation never even got there." (HT, Vol. 2, p. 361).

Dr. Grant concluded that Petitioner had difficulty planning, but that Petitioner can plan. (HT, Vol. 2, p. 368). Dr. Grant testified that Petitioner can plan to kill people; can form the requisite intent for murder; can form malice to commit murder; is not insane; and is not retarded. (HT, Vol. 2, p. 371).

This Court finds that the testimony provided by Dr. Grant to this Court does not establish Petitioner's claim that appellate counsel were deficient or Petitioner prejudice in asserting a claim that trial counsel were ineffective in their use of their mental health expert. As recognized by the Eleventh Circuit Court of Appeals, "[c]ounsel is not required to shop for

a psychiatrist who will testify in a particular way." Ellege v. Dugger, 823 F.2d 1439 (11th Cir. 1987). Simply because a paid expert is willing to testify to a given diagnosis, or in this case "findings", does not mean that counsel should offer this testimony to the court or to a jury.

Also of significance with regard to this Court's analysis of Petitioner's claim is the fact that trial counsel testified that they believed mental health evidence could potentially harm Petitioner's case. (HT, Vol. 2, p. 435). Trial counsel agreed that they were concerned that "it could turn off the jury." (HT, Vol. 2, p. 435). Waters v. Thomas, 46 F.3d 1506, 1521-1522 (11th Cir. 1995) (en banc). This strategic determination by trial counsel is entitled to deference. See Spaziano v. Singletary, 36 F.3d at 1040; Stewart v. Sec'y, Dep't of Corr., 476 F.3d at 1217; Housel v. Head, 238 F.3d 1289.

As held by the Eleventh Circuit:

> Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so. This burden which is Petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers performances; we are interested in whether the adversarial process at trial ... worked adequately." See White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992). Therefore, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.

Rogers v. Zant, 13 F.3d 384, 386 (1984).

Based on the above facts and law, this Court concludes that appellate counsel were not deficient and Petitioner was not prejudiced by appellate counsel not challenging trial counsel's use of a mental health expert and/or mental health evidence as now raised by Petitioner.

Abuse Expert

In these habeas proceedings, Petitioner also tendered the testimony of psychiatrist Dr. Todd Antin. (HT, Vol. 21, p. 5760). Dr. Antin testified that in evaluating Petitioner, he was

not attempting to make any diagnosis of Petitioner. (HT, Vol. 21, p. 5766). Dr. Antin testified, "it wasn't my full intent to go into great detail to make an accurate diagnosis." (HT, Vol. 21, p. 5766). However, Dr. Antin opined Petitioner may suffer from poly-substance dependence ("methamphetamine, cocaine, alcohol, marijuana, abuse of that nature") and that Petitioner "probably would qualify for PTSD," but he "would have to spend more time with [Petitioner] to get into his upbringing and how that affected him." (HT, Vol. 21, p. 5767). Finally, Dr. Antin determined, with regard to Petitioner, "there's also some learning disability type issues." Id.

Dr. Antin met with Petitioner one time for approximately two and half hours. (HT, Vol. 1, p. 172; HT, Vol. 21, p. 5762). He did not conduct any testing, but reviewed the testing results of Dr. Grant. (HT, Vol. 1, p. 175; HT, Vol. 21, p. 5763). Dr. Antin did not personally speak to any family members, but relied upon the post-conviction affidavits of family and friends given to him by Petitioner's habeas counsel. (HT, Vol. 1, p. 172; HT Vol. 21, p. 5766). Dr. Antin concluded that "genetics," "poor parenting, the drugs, the alcohol, the sleep deprivation," Petitioner's "financial problems, chaotic state of mind" led to the crimes in this case. The Court finds that Petitioner has failed to show appellate counsel were deficient or Petitioner prejudiced by appellate counsel not presenting testimony such as that offered by Dr. Antin at the motion for new trial or on direct appeal to challenge trial counsel's effectiveness .

PTSD (Poor Parenting)

Dr. Antin testified that Petitioner's chaotic household led Petitioner to suffer from PTSD and be an "over-responder," which would affect his judgment and cause him to overreact to stress. (HT, Vol. 1, pp. 147-148; HT, Vol. 21, p. 5771-5772). Although trial counsel had Dr. Connell testify at trial that he found Petitioner suffered from PTSD based on

the events of the murders, Petitioner has now presented the testimony of Dr. Antin to assert that Petitioner has longstanding PTSD resulting from childhood, predating the murders.

Dr. Antin's finding that Petitioner has longstanding PTSD is based on Petitioner's alleged "over-responsiveness" and Dr. Antin's "factual" conclusion that Petitioner's father physically abused Petitioner. (HT, Vol. 21, pp. 5779, 5784). However, upon cross-examination, Dr. Antin conceded that Petitioner never stated that his father abused him, (HT, Vol. 1, pp. 174-175; HT, Vol. 21, pp. 5784-5784), and Petitioner's mother and Petitioner's aunt had stated that Petitioner's father was verbally abusive, not physically abusive. (HT, Vol. 2, p. 396; HT, Vol. 22, p. 6100; HT, Vol. 43, p. 12,145). As to Dr. Antin's conclusion that Petitioner was an over-responder, this finding is undermined by testimony from Petitioner's aunt and mother that Petitioner kept "a cool head" at times when others would get angry. (HT, Vol. 28, p. 7766; Tr. T., pp. 3734-3735, p. 3766).

Dr. Antin also testified that Petitioner's PTSD resulted, in part, from Petitioner's mother not being "stronger and more dominant" and thus, not a "good buffer" for Petitioner from his father. (HT, Vol. 21, p. 5773). However, Dr. Antin testified he "did not know what to make of" the records he had not previously seen, regarding Petitioner's mother's application to care for children in her home, which showed that Petitioner's mother was described as "emotionally mature and levelheaded." (HT, Vol. 1, p. 187; HT, Vol. 31, pp. 8948-8982).

Dr. Antin also found fault with Petitioner's mother's religious beliefs based on Dr. Antin's opinion that "she was so dogmatic about things like heaven and hell and scared [Petitioner] to a certain extent." (HT, Vol. 1, pp. 189-190). Dr. Antin found Petitioner's mother to be very "pious" and "religious" as she attended church every Sunday. (HT, Vol. 1,

pp. 187-188). However, Mrs. Franks testified that she did not force her children to go to church and she never told them they would go to hell if they misbehaved. (HT, Vol. 1, p. 80).

Dr. Antin testified that Petitioner "wasn't given good parenting so he didn't know right from wrong. He didn't know that there are things you do that you shouldn't do." (HT, Vol. 21, p. 5784). Dr. Antin testified that Petitioner's mother only provided the basics for her children and that food and clothing were in short supply at the Franks household. (HT, Vol. 1, pp. 186,189). However, Ms. Franks testified that this was not true. (HT, Vol. 1, p. 85). Dr. Antin testified that it was his opinion that "money was not being spent on the children." (HT, Vol. 1, p. 186). This ignores evidence, which was not provided to Dr. Antin, that: Calvin had a guitar; Davenia had an interest in sewing so she had a sewing machine; and the family owned a piano as they were all interested in music. (HT, Vol. 31, p. 8954).

Genetics

Dr. Antin also based his determinations on his "diagnosis" of Petitioner's father as mentally ill, although Dr. Antin conceded he had never met or interviewed Petitioner's father and could not diagnose him as having been mentally ill. (HT, Vol. 1, pp. 190-191).

Dr. Antin also found it important that Petitioner's mother had no prenatal care and was nauseous throughout her pregnancy. (HT, Vol. 1, p. 138; see also HT, Vol. 1, p. 42). However, he also conceded that Petitioner's mother had no prenatal care with any of her three children. (HT, Vol. 1, pp. 178-179). Dr. Antin had not seen Petitioner's birth records or any records to indicate Petitioner's birth was anything other than normal. (HT, Vol. 1, p. 178; see also HT, Vol. 31, p. 8944 (pediatrician records)). Further, contrary to reports of repeated childhood illness, the pediatrician notes Petitioner was well-nourished, (weighing 43 pounds),

has had colds, but nothing more. Id. There are no medical records indicating Petitioner was hospitalized with severe dehydration and near death. (HT, Vol. 1, p. 182).

Dr. Antin also testified that it was significant to his conclusions that Petitioner had high fevers and possible seizures as a child. (HT, Vol. 1, p. 138). Dr. Antin testified that fevers, can lead to seizures, "which can lead to problems with "thinking, with decision making, with planning, with behavior." (HT, Vol. 1, p. 141). However, there are no medical records to support these "significant" factors.

Head Injuries

Dr. Antin also relied on Petitioner's "significant head injury" from a car wreck as the partial basis of his conclusions. (HT, Vol. 1, p. 143). However, Dr. Antin conceded that the "head injury" was not the main concern upon Petitioner being admitted to the hospital. (HT, Vol. 1, p. 183). Petitioner's documented injury was a back injury and it was noted that Petitioner had an abrasion on his head. Id.

Early alcohol use and Three Year Addiction

Dr. Antin also testified that alcohol use at an early age could affect a person's memory retention, coordination and the inability to "conform your behavior to what society dictates is right or normal." (HT, Vol. 1, pp. 142-143, 156). Contrary to the theory that Petitioner's life spiraled out of control based on his increasing drug problems immediately prior to the murders, Petitioner told Dr. Antin that he was "using and abusing drugs" at an early age. (HT, Vol. 1, p. 144; HT, Vol. 21, pp. 5784, 5785). Dr. Antin concluded that Petitioner started using drugs because his father was an alcoholic, (HT, Vol. 1, pp. 152-153), and began to use more serious drugs to self-medicate. (HT, Vol. 1, p. 153). Petitioner stated that he started to use cocaine or crank around age 26, three years prior to the murders, (HT, Vol. 21, pp. 5790-5791), and Dr.

Antin testified that Petitioner began using methamphetamines and cocaine a few years prior to committing the murders. (HT, Vol. 1, p. 200).

Impulsivity, Paranoia and Inability to Remember Events

Dr. Antin also reviewed Petitioner's March 14, 1995, statement giving specific details about the facts of the crimes and concluded that Petitioner was not a violent person, could not think well at the time of the crime, was "very intoxicated, was feeling threatened, being paranoid," and did not have a full recollection of what happened at the time of the crimes. (HT, Vol. 21, pp. 5778-5779). Dr. Antin testified that Petitioner "just doesn't remember. His brain shut off. ... He hears and he is told things that he can't remember doing." (HT, Vol. 21, pp. 5780-5781).

As to the paranoia, Dr. Antin testified that based on the affidavits provided to him by Petitioner, it appeared that Petitioner was more paranoid, withdrawing from people and fearful leading up to the murders from his abuse of drugs, which, in part, led to the murders and assaults in this case. (HT, Vol. 1, pp. 161-162; HT, Vol. 21, pp. 5778-5779). When questioned about this, Dr. Antin testified that "there may have just been a generalization" about Petitioner withdrawing, that he did not "know the fact pattern." (HT, Vol. 1, p. 201).

Dr. Antin also based his conclusion regarding Petitioner's personality change on the post-conviction affidavits of Petitioner's family and friends who testified that Petitioner believed people were after him for money. (HT, Vol. 1, pp. 201-202). When asked if this "factor" was truly based in fact would it truly be paranoia, Dr. Antin testified "it could be exaggerated." The record before the Court establish that a number of people were "after" Petitioner for debts owed to them. The record shows, and Dr. Antin agreed, that Petitioner owed money, not for drugs, but: owed $40,000 to the bank for a loan for the pawn shop (HT,

Vol. 24, p. 6542); owed Ed Askew $10,000 from selling pawn shop and owed Jim McGinnis $6500 (HT, Vol. 24, p. 7609; HT, Vol. 25, p. 7033); owed $70,000 for land in Tennessee (HT, Vol. 26, p. 7409); owed $26,000 for the Lincoln (HT, Vol. 24, p. 6776); and $20,000 fine for his 1994 theft by receiving stolen property charges. (HT, Vol. 24, p. 6581).

Dr. Antin also testified that Petitioner was unable to remember the events, was not thinking clearly, acting impulsively and was "totally out of control." (HT, Vol. 1, p. 169). However, establishing that Petitioner was not acting "impulsively," but had planned in advance to, at the very least, rob Clint Wilson are Petitioner's actions and the statements of several witnesses which show that Petitioner had planned to obtain a large amount of money at the time period surrounding the murders. Frankie Watts told Investigator Pennington that on the morning of August 5, 1994, Petitioner told her, with regard to the early bird catching the worm, "he was gonna catch the whole damn bird today." (HT, Vol. 24, p. 6779). In the days preceding the murders, Petitioner had put down earnest money ($70,000) for a piece of property in Tennessee, (HT, Vol. 26, p. 7409), and bought a new car for $26,000. (HT, Vol. 24, p. 6776).

Further, in the March 14, 1995, statement, which Petitioner's habeas counsel now purports to be the truth, (Petitioner's brief, p. 32), in which Petitioner explained his rationale for not "rip[ping] off" another individual as daylight was approaching (HT, Vol. 26, p. 7313), his story to Mr. Wilson of selling him pool tables to entice Mr. Wilson to the pawnshop (HT, Vol. 26, p. 7314), and contemplating the killings for approximately an hour before committing the murders (HT, Vol. 26, pp. 7314-7317) all show planning and not impulsivity.

Additionally, Petitioner said that after executing David Martin and Clint Wilson, he knew that Debbie Wilson was aware that her husband was with Petitioner, and Petitioner also

knew that Mr. Wilson generally kept a great deal of cash in the home safe. (HT, Vol. 26, p. 7318). Based on this knowledge, and planning ahead, Petitioner made the decision to drive to the Wilson home, across the state, to Gainesville. Id. Petitioner carried flex ties with him as he planned to tie up Debbie Wilson. (HT, Vol. 26, p. 7322). When Petitioner arrived at the Wilsons' home, Petitioner concocted a story, which appeased Debbie Wilson, by telling her that he needed to get into the garage to unload some machines, but, in actuality he was looking for drugs or money. (HT, Vol. 26, p. 7322). Petitioner told Mrs. Wilson that he was waiting on a U-Haul to bring the machines. (HT, Vol. 26, p. 7323). Contrary to acting impulsively, Petitioner stated that he waited a couple of hours "trying to get [his] courage up or didn't know what [he] was gonna do." Id. Petitioner finally determined to use his gun and force Debbie Wilson upstairs to the safe. (HT, Vol. 26, p. 7323). Thereafter, in order to avoid a gunshot, which would have alerted neighbors to his criminal activities, Petitioner chose to stab Debbie Wilson in the back.

Also undermining Dr. Antin's testimony that Petitioner was "very intoxicated" and "out of control" at the time of the murders is a witness that saw Petitioner at the time of the murders. The defense team also spoke to Stella Gooden who operated the convenience store next to the pawn shop in Bremen. Ms. Gooden stated that around 10:00 a.m. on the morning of the murders, Petitioner came into the store and bought a non-alcoholic drink. (HT, Vol. 22, p. 6163). Petitioner did not appear intoxicated and she was "kidding" him about growing a beard. Id.

As to Petitioner's actions following the murders, Dr. Antin testified that he was not surprised that, after committing three murders and attacking two innocent children, Petitioner went to Mississippi to gamble in the casinos because Petitioner had "come back to baseline and

you go about doing other activities." (HT, Vol. 1, p. 168). He further testified that he found that when the drugs wore off Petitioner was "more hospitable and courteous" with "normal interactions with individuals." (HT, Vol. 1, p. 168). This ignores the fact that Petitioner kidnapped an older couple at gunpoint and locked them in their own garage. (Tr. T., pp. 3699-3703). After leaving them locked in the garage for five hours in the heat of the day, Petitioner released them. Upon releasing them, the couple's daughter, son-in-law and grandson arrived. (Tr. T., p. 3705). Petitioner attempted to force the entire family into the house at gunpoint and eventually stole the daughter's car. (Tr. T., pp. 3716-3720).

Learning Disability

As to Petitioner having a learning disability and ADHD, trial counsel testified in the proceedings before this Court that they would not have introduced that type of testimony to the jury in sentencing. "Trying to blame some deficiency that had never been treated before, David had owned businesses, had worked and had proven that he could be productive, so I think that trying to show those events would justify his conduct was not going to be a winning hand." (HT, Vol. 2, p. 409).

Erosion of Residual Doubt

The Court further notes that the type of evidence Petitioner introduced in the habeas proceedings, such as Petitioner's drug use, difficult childhood and learning disability, in addition to being weak mitigating evidence, may have eroded any residual doubt if trial counsel had focused on those issues. The Federal District Court of the Northern District of Georgia correctly observed:

> When an attorney adopts a residual doubt strategy, it often makes sense for the attorney not to present other potentially mitigating evidence that runs contrary to the strategy. A strategy of residual doubt relies upon the possibility that the defendant did not commit the crime of which he was

> found guilty. Many forms of mitigating evidence at sentencing do not exculpate the defendant, but rather attempt to explain why the defendant may have committed the crime. Evidence of a defendant's disadvantaged upbringing surrounded by violence may aid in explaining why he may have used violence to resolve a situation. At the same time, such evidence may erode any residual doubt, reinforcing the likelihood that the defendant would have committed the crime. Evidence of a defendant's diminished mental capacity or mental illness may lead a jury to conclude that the defendant's actions were due as much to derangement as to malice. ... Because mitigating evidence attempts to explain why the defendant committed the crime, it necessarily reinforces the notion that the defendant did indeed commit the crime. For this reason, the Court of Appeals for the Eleventh Circuit has made it clear that sentencing counsel need not present all the mitigating evidence available to him.

Ferrell, 398 F.Supp.2d at 1286-1287.

In Alderman v. Terry, the Eleventh Circuit upheld a state court's finding that trial counsel were not ineffective in presenting a residual doubt theory because, "to effectively present a penalty phase defense of mercy based on sad circumstances of his childhood and adolescence, Alderman may have had to admit to committing the crime and then ask the jury to spare him the death penalty due to his difficult childhood. Because Alderman maintained his innocence ..., such a strategy would have been incompatible with his testimony; therefore, the residual doubt strategy used by [counsel] was a reasonable one[.]" 468 F.3d at 789-790 (quoting *Alderman v. Head*, No. 94-V-720 at 23).

This Court finds that in the instant case appellate counsel were not ineffective in not presenting the additional weak and, in part, cumulative mitigating evidence offered by Petitioner in the state habeas proceedings to attempt to show trial counsel were ineffective at either phase of trial. The Court further finds that appellate counsel were not ineffective in not presenting the mitigation strategy Petitioner has now presented to this Court. The record shows that, after a thorough investigation, trial counsel made a reasonable, strategic decision to present residual doubt and character evidence in an attempt to mitigate Petitioner's sentence.

As held by the United States Supreme Court, such "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690 (emphasis added). See also Crawford v. Head, 311 F.3d 1288, 1298 (11th Cir. 2002). "[W]e expect that petitioners can rarely (if ever) prove a lawyer to be ineffective for relying on this seemingly reasonable strategy to defend his client. Chandler, 218 F.3d at 1320-1321. "The fact that [Petitioner] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Petitioner] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847, 440 S.E.2d 452 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5, 426 S.E.2d 360 (1993)). See also Griffin v. Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384.

In the instant case, it is clear that, after a thorough investigation, trial counsel chose not to pursue a mental health defense or hire mental health expert prior to trial. Thus appellate counsel were not deficient or Petitioner prejudiced by appellate counsel not presenting additional mental health evidence in support of their claim regarding the effectiveness of trial counsel in utilizing their mental health expert prior to or during trial.

SENTENCING PHASE INSTRUCTIONS WERE PROPER

As errors in the sentencing phase charge to the jury are "never barred by procedural default," these claims are properly before this Court for review on the merits. Head v. Ferrell, 274 Ga. 399, 403, 554 S.E. 2d 155 (2001).

In **Claim Six**, Petitioner alleges that the trial court erred in its sentencing phase jury instructions in that the trial court allegedly failed to "adequately": guide the jurors' discretion; explain the meaning and purpose of mitigating circumstances; explain to the jury that

aggravating circumstances must be found beyond a reasonable doubt but that mitigating circumstances need not be; and explain that only a death verdict must be unanimous, but that each individual juror may vote for life regardless of how the other jurors vote.

The Court notes that Petitioner failed to argue these claims to the Court. However, reviewing the trial court's charge as a whole, the Court finds that the trial court's sentencing phase jury instructions were not improper.

The trial court clearly and fully instructed the jury as to "what a mitigating circumstance is" and "its function in the jury's sentencing deliberations." (Tr. T., pp. 3814-3815, 3819).

As to Petitioner's claim that the trial court failed to adequately explain to the jury that aggravating circumstances must be found beyond a reasonable doubt but that mitigating circumstances need not be, the Georgia Supreme Court has held that a trial court is "not required to charge the jury in the penalty phase that non-statutory aggravating circumstances can only be considered if proven beyond a reasonable doubt or that mitigating circumstances need not be unanimously found" if "the trial court properly charged the jury that they could return a life sentence for any reason or no reason." Sallie v. State, 276 Ga. 506, 512 (2003). The trial court properly charged the jury in Petitioner's case that they could return a life sentence for any reason or no reason. (Tr. T., p. 2819).

As to Petitioner's claim that the trial court failed to adequately explain that only a death verdict must be unanimous, Petitioner's claim not only is without merit, it also misinterprets the law. Any verdict by a jury must be unanimous. Accordingly, the trial court had no obligation to charge the jury that they could return a non-unanimous verdict of life

imprisonment. Such a charge is not a proper statement of the law. See Ward v. State, 262 Ga. 293, 417 S.E.2d 130 (1992); Tharpe v. State, 262 Ga. 110, 416 S.E.2d 78 (1992).

All of Petitioner's claims regarding the trial court's sentencing phase jury instructions are hereby denied as being without merit.

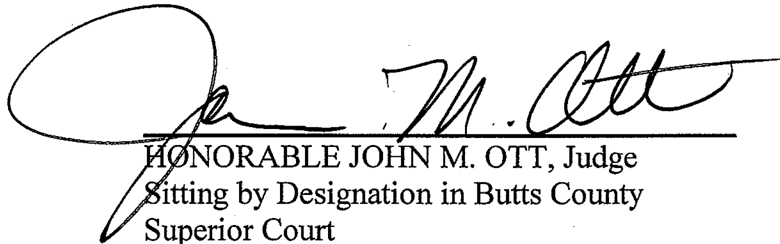
CONCLUSION

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

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

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

SO ORDERED, this 22nd day of April, 2010.



HONORABLE JOHN M. OTT, Judge
Sitting by Designation in Butts County
Superior Court

Prepared by:

Beth A. Burton
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 656-3499

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

DAVID SCOTT FRANKS, Petitioner,	:	Civil File #2005-V-1070
Vs.	:	
HILTON HALL, Warden Georgia Diagnostic Prison, Respondent.	:	

CERTIFICATE OF SERVICE

This is to certify that I have this date served a true and correct copy of the foregoing **ORDER – Habeas Corpus** by placing a copy of same in the United States mail with adequate postage affixed thereon to ensure delivery as follows:

Brian Kammer, Esquire
Georgia Resource Center
303 Elizabeth Street, N. E.
Atlanta, Georgia 30307

John C. Kissinger Jr., Esquire
Nelson, Kinder, Mosseau & Saturley
99 Middle Street
Manchester, New Hampshire 03101

Beth Burton, Esquire
Senior Assistant Attorney General
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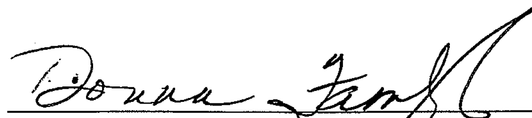
Atlanta, Georgia 30334-1300

Shannon N. Weathers, Esquire
Council of Superior Court Judges
Habeas Corpus Clerk
18 Capitol Square – Suite 108
Atlanta, Georgia 30334

This 23rd day of April, 2010.



Donna Fambrough, Secretary to the
Honorable John M. Ott, Judge
Sitting by Designation in Butts County
Superior Court

Petitioner's Appendix 5

SUPREME COURT OF GEORGIA
Case No. S10E1660

Atlanta, November 30, 2011

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DAVID SCOTT FRANKS v. HILTON HALL, WARDEN

From the Superior Court of Butts County.

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

Trial Court Case No. 2005V1070

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

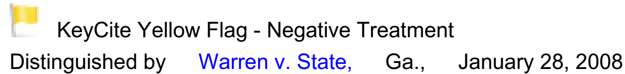
I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

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

Pamela M. Fishburne, Deputy Clerk

Res. Ex. No. 175
Case No. 2:11-CV-325

Petitioner's Appendix 6



KeyCite Yellow Flag - Negative Treatment
Distinguished by Warren v. State, Ga., January 28, 2008

278 Ga. 246
Supreme Court of Georgia.

FRANKS
v.
The STATE.

No. S04P0113.
|
June 28, 2004.
|
Reconsideration Denied July 30, 2004.

Synopsis
Background: Defendant was convicted by a jury in the Superior Court, Hall County, Robert B. Struble, J., of malice murder, armed robbery, two counts of aggravated battery, two counts of cruelty to a child, two counts of aggravated assault, burglary, and theft by taking and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Fletcher, C.J., held that:

[1] evidence was sufficient to support convictions;

[2] counsel's conduct in conceding that defendant attacked murder victim's children and arguing that even though he attacked the children he lacked the requisite mental intent to commit an offense was reasonable trial strategy;

[3] attorneys' conduct in allegedly failing to effectively pursue a plea bargain with the State did not prejudice defendant; and

[4] attorneys' alleged inadequate investigation into defendant's background for mitigation evidence to be used during the penalty phase of death penalty case did not prejudice defendant.

Affirmed.

Attorneys and Law Firms

****137 *268** Michael Mears, Susan D. Brown, Holly L. Geerdes, Gainesville, for appellant.

Jason Deal Dist. Atty., Lee Darragh, Asst. Dist. Atty., Thurbert E. Baker, Atty. Gen., Patricia B. Attaway Burton, Asst. Atty. Gen., for appellee.

***246** FLETCHER, Chief Justice.

A Hall County jury convicted David Scott Franks of malice murder, armed robbery, two counts of aggravated battery, two counts of cruelty to a child, two counts of aggravated assault, burglary, and theft by taking. The jury found five statutory aggravating circumstances beyond a reasonable doubt and recommended a death sentence for the malice murder of Deborah Diane Wilson. Franks appeals. Finding no reversible error, we affirm the convictions and sentences. [1]

****138 [1] *247** 1. The evidence at trial showed that Franks was an acquaintance and occasional business associate of Clinton Wilson, the husband of the murder victim. On the morning of August 5, 1994, Clinton Wilson and David Martin visited Franks's pawn shop in Haralson County. The next day, Wilson and Martin were found shot to death on the bottom floor of Franks's pawn shop. [2] They had been shot with a nine-millimeter pistol. The medical examiner testified that the upward trajectory of the bullet wounds in the bodies was consistent with the two victims being shot from behind while lying face-down.

After killing Martin and Wilson, Franks took Wilson's white “cube” van and drove to Hall County to Wilson's house, where Franks believed that Wilson had secretly hidden tens of thousands of dollars. The Wilsons' nine-year-old daughter Jessica answered the door and invited Franks into the home. Franks told Clinton's wife, Debbie Wilson, that he was looking for Clinton and waited with her in the kitchen. At approximately 1:30 p.m., Debbie telephoned David Martin's wife and asked her if she had seen Clinton because “the other David” was at her house looking for him. About this time, the Wilsons' thirteen-year-old son, Brian, returned home, but then left again with a friend.

When Franks said he wanted to go fishing, Debbie sent Jessica to retrieve Brian. While the children were gone, Franks pulled a gun on Debbie and forced her to the upstairs bedroom, where he knew a ***248** safe was located. After retrieving money from the safe, Franks stabbed Debbie Wilson in the back and went downstairs to await the children's return. After Franks went downstairs, Debbie called 911, identified her attacker as “David Franks” several times, and stated that he assaulted her for money. She also reported this information to the paramedics who arrived to treat her. She went into cardiac arrest due to blood loss and died before reaching the hospital.

When the children returned to the house, Franks asked Jessica to go to the van and get a briefcase for him, and he told Brian to fetch fishing gear so they could go fishing. While Brian was getting his fishing rod, Franks attacked him from behind and slashed his throat. Brian managed to fight back, cutting Franks on the left arm. Franks then left Brian and stabbed Jessica as she came back in the house. Brian and Jessica were able to escape and run to a neighbor's house; they both survived. Brian and Jessica told the neighbor that their father's friend “David” had attacked them and that he was driving a white cube van. They also described Franks's physical appearance. Later, at the hospital, the children each picked Franks out of a photo lineup. At trial, they identified Franks as their attacker. DNA taken from two bloodstains in the Wilsons' house matched Franks's DNA.

Franks fled the Wilsons' house in the white cube van. Two firefighters responding to the 911 calls observed the van, which had been described on the radio, driving away from the Wilsons' house. They testified that there was a lone man fitting Franks's description driving it. The police found the van abandoned about nine miles away. In and around the van the police found a knife, a ****139** blood-stained shirt that Franks had been seen wearing that day, and a bloodstain on the left armrest of the van's driver's seat. A forensic chemist from the state crime lab found that DNA from blood on the shirt and armrest matched Franks's DNA. A canine unit tracked Franks's scent from the abandoned van to a nearby house that had been burglarized. The homeowner's Mazda 626 and some clothes had been stolen.

Franks drove the stolen Mazda 626 to Biloxi, Mississippi, and gambled several thousand dollars over a three-day period in a casino. From the casino, he obtained a player's advantage card, in the name of “Ty Dare.” A casino surveillance videotape from August 8, 1994, depicts Franks playing blackjack. Franks then traveled to Mobile, Alabama, and checked into a motel under the name Ty Dare. A Mobile police officer spotted the Mazda 626 in the motel parking lot and responding police officers found, in the room registered to Ty Dare, a nine-millimeter handgun, cash, keys to the Mazda 626, recently purchased clothes, a jacket emblazoned with the name of the Biloxi casino where Franks had been observed

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gambling, a belt with a letter "D" belt buckle, cowboy boots similar to boots worn by Franks on August 5, and a wallet containing Franks's driver's license, social ***249** security card, and a casino player's advantage card in the name of Ty Dare. The boots and belt had human bloodstains on them but the amount was insufficient for DNA analysis. Franks's girlfriend, Frankie Watts, identified the handgun as similar to the nine-millimeter handgun owned by Franks.[3] The Mazda 626 contained Franks's fingerprints and a bloodstain that matched his DNA. Franks observed the police activity at the motel when he was returning on foot and he fled the scene.[4]

On August 14, 1994, the police arrested Franks at a relative's house in Alabama in possession of a .22 caliber derringer. He had a bandaged cut on his left arm. Before his arrest, he told his relatives that the pawn shop victims were supposed to come up with $100,000 to buy drugs but they did not have the money. He told his brother-in-law that he had an altercation with them and had made them lie on the floor before shooting them; he also said the pawn shop victims "got what they deserved." The State presented evidence that Franks had promised to pay cash to a car dealer on the day of the murders for a Lincoln Town Car he had obtained two days before. There was also evidence that he and his girlfriend planned to close a transaction on some property in Alabama shortly after the murders. At trial, Franks admitted being present at both murder scenes during the killings, but he claimed that other men, who were drug dealers, had killed the victims.

After reviewing the evidence in the light most favorable to the jury's determination of guilt, we conclude that any rational trier of fact could have found Franks guilty beyond a reasonable doubt of the crimes for which he was convicted.[5] The evidence was also sufficient to authorize the jury to find beyond a reasonable doubt the statutory aggravating circumstances that supported his death sentence for the murder of Debbie Wilson.[6]

INEFFECTIVE ASSISTANCE OF COUNSEL

[2] [3] [4] [5] [6] [7] 2. Franks claims that in denying the motion for new trial, the trial court erred by finding that his trial counsel was not ineffective ***250** in the preparation and presentation of his case. In order to prevail on a claim of ineffective assistance of counsel, Franks must show deficient performance and ****140** actual prejudice.[7] To show deficient performance, Franks must demonstrate that his counsel's performance was not reasonable under the circumstances confronting his counsel at the time, without resorting to hindsight.[8] Trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[9] The test for reasonable attorney performance is

> whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial ... we are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.[10]

To show prejudice, Franks must 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."[11] A claim of ineffective assistance of counsel is a mixed question of law and fact: we accept the trial court's factual findings unless clearly erroneous, but we independently apply the legal principles to the facts.[12]

A. *Trial counsel's preparation and presentation of Franks's case.* In order to better address the claim of ineffective assistance of trial counsel involving several alleged errors and omissions, we first review the actions trial counsel took in their representation of Franks. Stanley Robbins was appointed in 1994 to represent Franks, and Joseph Homans was appointed as co-counsel in January 1995. Robbins had been an attorney since 1987 and had tried a hundred felony cases. Before Franks's case he had represented two other death penalty clients; Robbins had to withdraw from one case because

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he had earlier represented one of the witnesses, and the other client pled guilty to avoid the death penalty. Homans had been a lawyer since 1986 and had served as a Hall County assistant district attorney for two years. He had previously represented a defendant facing the ***251** death penalty and that case resulted in the defendant's acquittal. Both lawyers testified that they had some training in death penalty cases. For Franks's case, they sought and received funds to hire an investigator to assist with their investigation.

They met with Franks many times. They testified that they had some difficulty because, although they spent hours trying to convince him to do so, Franks refused to tell them exactly what had happened on the day of the killings. Trial counsel filed numerous pretrial motions, two of which resulted in pretrial appeals to this Court. The trial court denied Franks's motion for discharge and acquittal based on his speedy trial demand, and this Court affirmed. [13] Trial counsel testified that they filed the speedy trial demand to force the State to rush to prepare for trial and to start the Hall County death penalty trial before there were any convictions in the Haralson County pawn shop murders. Robbins believed that it was preferable for evidence of those killings, which would be admissible as part of the same criminal transaction, to come before the Hall County jury as allegations instead of as convictions. [14] Trial counsel also was successful in suppressing a statement made by Franks to an FBI agent after his arrest in Alabama. ****141** [15]]

Trial counsel testified that they were pessimistic about their chances for an acquittal due to the amount of incriminating evidence. They sought a plea deal with the Hall County district attorney, but she had no interest in accepting a plea deal. Franks had also told trial counsel that he would not plead guilty to avoid the death penalty.

Franks had told his relatives before his arrest that others were involved in the killings and he had insisted to his relatives that he had not harmed Debbie Wilson or her children. Trial counsel's strategy for trial was to focus on these other men and they found some evidence to support this theory. They located a witness who testified that on the morning of the crimes she had seen four men drive into the pawn shop parking lot, get out of their car, and push three men through the door of the pawn shop. They also learned something the State did not know: a phone call had been placed from Franks's pawn shop to the Wilson's house at 1:54 p.m. on August 5 when, according to the State's evidence, Franks was already at the Wilsons' house. They noted that the pawn shop killings seemed deliberate, but the Hall County crimes seemed to have been frenzied. Debbie Wilson had also said on the 911 tape, “*They're* hurting my kids.”

***252** Evidence that a drug deal had been planned at the pawn shop was going to be admitted. Trial counsel thus formulated a guilt-innocence strategy that portrayed the alleged “drug deal gone bad” at the Haralson County pawn shop as involving other, more dangerous men who had killed Clinton Wilson and David Martin at the pawn shop and then forced Franks to go to the Wilsons' house in Hall County to get cash. Franks had no history of violent crime. Trial counsel planned to argue that Franks may have committed some of the Hall County acts under duress or coercion, but that the other men had committed all three killings. Trial counsel believed they could show deficiencies in the crime scene investigation because potential scientific evidence that could point to the involvement of others was not obtained or preserved. For example, a photograph of the inside of the white cube van showed several plastic ties or “flex cuffs” that could have been used as restraints on Franks, but the police failed to preserve them.

At the start of the trial in January 1998, Franks had still not communicated to trial counsel about the events on the day of the killings. In the guilt-innocence phase, the State presented the evidence as outlined in Division 1 of this opinion. During the cross-examination of several police witnesses, trial counsel tried to show that the crime scenes may have been contaminated or that potentially important evidence had not been preserved. Trial counsel repeatedly questioned police officers about items that had not been tested, such as bloodstains that had not been swabbed, objects that had not been dusted for fingerprints, and items that were not checked for the presence of saliva DNA, such as a pile of cigarette butts in the Wilsons' garage, empty beer cans at the pawn shop, and a soft drink straw in the white cube van. These items, in addition to the “flex cuffs” in the white cube van, were also not preserved by the police. Trial counsel was also able to

establish that a number of people had walked through and possibly contaminated the Hall County crime scene before it was processed.

According to trial counsel, after the children had testified and identified Franks as their assailant, Franks finally agreed to tell his lawyers what had happened on the day of the killings. His story was similar to the defense theory: other men involved in the pawn shop drug deal had killed the two men there and forced Franks to go to the Wilsons' house in Hall County to get cash. They had threatened to harm Franks's family if he did not cooperate. The other men had also killed Debbie Wilson. Franks's version included some memory lapses and other information that made trial counsel believe that he should be examined by a mental health expert. Until that point, trial counsel testified that they had seen nothing to indicate that Franks had any mental health problems and his family had told them he had never ***253** before received mental health treatment. ****142** They obtained a psychiatrist who examined Franks during the trial. The psychiatrist heard Franks's version of events and diagnosed him with post-traumatic stress disorder.

After the State rested its case in the guilt-innocence phase, Franks testified that he had arranged for a drug deal to take place at his pawn shop on the morning of August 5, 1994, between Clinton Wilson and members of the "Dixie Organization." Wilson was supposed to supply $500,000 to buy the drugs and Franks was supposed to receive $100,000 from Wilson for arranging the transaction. Frankie Watts, Franks's girlfriend, dropped him off at the pawn shop at 8:00 a.m., and Wilson and Martin were waiting for him in the white cube van behind the pawn shop. Eventually, four men from the Dixie Organization arrived in a Cadillac. Franks had never seen any of them before. The apparent leader of the four men was named "Gonzo" and one of the other men was named "Reece." Franks never learned the names of the other two men. While the four men and Wilson were talking, Franks left the pawn shop, walked to a nearby convenience store, and bought a soda. He encountered Watts in the parking lot and they made tentative plans to go to Biloxi; this testimony was consistent with Watts's evidence during the State's case. When Franks returned to the pawn shop, the four men and Wilson were engaged in a heated argument because Wilson had not brought the money. The four men drew guns and threatened to harm Wilson's and Franks's families unless they came up with the money. They made Wilson, Martin, and Franks get on the floor and then either Reece or Gonzo shot Martin and Wilson. The men tied Franks up with the flex cuffs and placed him in the white cube van.

They drove him to the Wilsons' house in Hall County and told him to go inside and make sure it was unlocked so they could get in. Franks was let in the house and talked with Debbie Wilson for a while. Then Gonzo and Reece entered and told Debbie that her husband owed them money. Franks tried to distract the children so they would not be present. In the upstairs bedroom, Franks witnessed Reece stab Debbie Wilson in the back. Franks remembered only lights and sirens after that. He was bleeding, was afraid of the Dixie Organization, and did not trust the police, so he ran away until he came to the house where he stole the Mazda 626. He then went to the casino in Biloxi and the motel in Mobile. He did not remember how the nine-millimeter pistol came to be in his motel room or why he had used the name Ty Dare except that he was afraid to use his real name. He said he was afraid to go to the police because the men from the Dixie Organization had threatened his family. He stated that he had only told his lawyers what had happened ten days earlier. He said he did not remember attacking the children.

***254** Trial counsel presented several other guilt-innocence phase witnesses, including a BellSouth custodian of records who testified that a one-minute call had been placed from the Haralson County pawn shop to the Wilsons' house at 1:54 p.m. on August 5, 1994; the police officer in charge of the Hall County investigation, who was shown a notation in a police report about the Haralson County crimes being possibly related to the "mafia" and involving a large drug deal; Franks's ex-wife, who testified that Franks gets dizzy at the sight of blood; Dr. Connell, the defense psychiatrist, who testified that Franks suffered from post traumatic stress disorder, which included some amnesia, and opined that he was not malingering; a witness who testified that she was driving by the pawn shop at 9:45 a.m. on August 5, 1994, saw a Lincoln Continental pull into the pawn shop parking lot, and saw four men get out and push three other men through the pawn shop door; and the clerk at the convenience store who testified that she sold a soda to Franks at 10:00 a.m. on August 5, 1994, which corroborated Franks's testimony.

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On rebuttal, Frankie Watts repeated her earlier testimony that she had gone into Franks's pawn shop after lunch on August 5, 1994 and that Franks was not there. She added to her earlier testimony by stating that she had picked up the phone and hit redial because she was concerned that Franks was being unfaithful to her. A girl answered the phone and Watts hung up.

****143** In the penalty phase, the State presented victim-impact evidence, the crime lab firearms expert, and evidence about an attempted escape from jail by Franks. A Haralson County police officer testified that he had worked on a multi-county drug task force and had never heard of anyone named Gonzo. The family from Mobile, Alabama, whom Franks held at gunpoint and whose car he stole, also testified. Franks's prior convictions for theft by receiving and conspiracy to commit armed robbery were also admitted.

Franks presented nine mitigation witnesses. Franks's aunt, sister, first wife, brother, former mother-in-law, second wife, cousin, and mother testified that Franks was a kind, gentle, nonviolent person, who was good to his 12–year–old son and to his mother. His aunt stated that Franks's father was a severe alcoholic. His brother stated that their father was an alcoholic and was violent, that he was afraid of his father growing up, and that one time their father had fired a gun in Franks's direction. Franks's mother testified that Franks dropped out of school when he was fourteen years old to help support his family. Franks himself apologized to the victims' families for his involvement in the "dealings we was having that night" and to his family. Trial counsel argued Franks's good qualities and residual doubt about the involvement of others. The jury recommended a death sentence.

***255** B. *Trial counsel's alleged errors and omissions.* Franks claims that his trial counsel's performance was deficient in several areas.

1) *The Guilt–Innocence Phase Closing Arguments.*
[8] *The Cronic standard.* Franks argues that trial counsel in the guilt-innocence phase closing argument erroneously conceded his guilt on some of the charged offenses. He avers that this resulted in a complete breakdown of the adversarial process because he had pled not guilty and was entitled to have his lawyer refrain from effectively pleading him guilty without his permission in the argument to the jury. Citing *United States v. Cronic,* [16] he claims that a failure of trial counsel of this magnitude means that prejudice is presumed and a new trial is required. [17]

The record however shows that trial counsel consistently and repeatedly argued that Franks had not committed the murder of Debbie Wilson, the only murder for which Franks was on trial. What trial counsel did say, in discussing the attacks on the children, was that "[t]here's no doubt about what he did to the children," and that Franks was "guilty." When the closing argument is viewed in its entirety, it is clear that trial counsel only conceded that Franks had committed the physical act of attacking the children and that counsel argued that Franks lacked the criminal intent to be convicted of those charges. This argument was not inconsistent with Franks's own testimony. In contrast to Franks's denial on the stand of killing Debbie Wilson, Franks did not deny attacking the children, but had only said he did not remember attacking them.

Although trial counsel's use of the word "guilty" was unfortunate, it is clear that trial counsel did not concede that the jury should convict Franks of *any* crime. Trial counsel instead argued that others had killed the three people that day and forced Franks to go to the Wilsons' house to obtain cash. Trial counsel also argued that Franks suffered from post-traumatic stress syndrome and lacked the criminal intent to be convicted of attacking the children. Trial counsel pointed to evidence adduced at trial that supported this version of events, including that the police fixated on David Franks as the lone assailant due to Debbie Wilson's identification of "David Franks" in her 911 call; the police ignored evidence that could point to the involvement of others; Franks's face on the casino surveillance ***256** videotape appears to be

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devoid of emotion, as if he is in a daze; and that the children had testified that ****144** Franks never said a word when attacking them.

Although acknowledging the children's testimony that Franks was the one who attacked them, trial counsel argued, "That's not the whole truth." With regard to criminal intent for the charges against the children, trial counsel argued:

> One of the things [the judge is] going to tell you that's a difficult concept is the idea that in Georgia, and I would think any state in the country, you can't convict anybody of a crime unless you have two things. You have to have the prohibited act and you have to have intent, intent to commit the act. I don't think that's going to be an issue when it comes to the murder of Debbie Wilson, whether he had intent to commit that act, because David has told us he didn't do it.
>
> David told us he was brought up here against his will, he was tied up with a tie just like in the picture. The problem comes with what happened after David snapped and he went back downstairs with the kids. The evidence is convincing, he did that act. I can't tell you he didn't do that act, he can't tell you that. Did he have the intent to do that act? That's something you're all going to have to figure out, and it's tough, it's not easy.
>
> I would submit to you that the evidence is such that you can consider that he did not have the intent to commit that act.

It is therefore clear that trial counsel did not intentionally concede Franks's guilt on any of the charged offenses, including the attacks on the children.

When determining whether the *Cronic* presumption of prejudice applies because trial counsel's argument constituted a breakdown in the adversarial process, "[t]he focus must be on whether, *in light of the entire record,* the attorney remained a legal advocate of the defendant who acted with 'undivided allegiance and faithful, devoted service' to the defendant." [18] The record shows that trial counsel remained a vigorous advocate of Franks's case throughout the guilt-innocence phase closing argument and that he argued that Franks lacked the ***257** requisite mental state to be convicted of the crimes against the children. Trial counsel's argument in this case is distinguishable from the cases cited by Franks where counsel had clearly and unequivocally asserted to the jury that their client was guilty as charged by the government. [19] Therefore, the *Cronic* presumption of prejudice does not apply.

[9] *The Strickland standard.* Although we have determined that the *Cronic* presumption of prejudice does not apply to the guilt-innocence phase closing argument, we must still consider whether trial counsel was ineffective under the standard announced in *Strickland v. Washington.* [20] At the motion for new trial hearing, trial counsel testified with regard to the guilt-innocence phase argument over the charges involving the children, "[T]here were certain acts that we couldn't get away from. The evidence was overwhelming, and it's always been my policy, which has been fairly successful at trial, not to lie to juries or try to sell them something that's patently ridiculous, and I try to make concessions to preserve my credibility and the client's credibility." Both of Franks's trial lawyers testified that they therefore conceded the commission of the acts, but not the requisite mental state when it came to the crimes against the children. Under the circumstances facing counsel at the time we cannot conclude that this strategy was unreasonable.

[10] Franks also claims on appeal that trial counsel was ineffective for calling Franks a "loser" during the guilt-innocence ****145** phase closing argument. This statement is taken out of context. When making their argument that Clinton Wilson and David Franks had made the mistake of getting involved with the Dixie Organization, trial counsel had argued that Franks was not a "crime czar[,]" that he and Wilson were just a couple of "small-time losers" who had angered some big-time, dangerous drug dealers. This argument was a reasonable attempt to assert that a drug deal involving Franks that resulted in murder must have involved other, more dangerous individuals. The remainder of the guilt-innocence phase argument tracked Franks's testimony about the involvement of the Dixie Organization and challenged the thoroughness of the police investigation into the crimes. Accordingly, we conclude that trial counsel was not deficient in the closing arguments of the guilt-innocence phase.

***258** 2) *The Penalty Phase Closing Arguments.*

[11] In the opening statement in the penalty phase, trial counsel told the jury that they would hear mitigating evidence about Franks's life in order to determine the appropriate punishment to "assure that this type of hell on earth never occurs again as a result of any forces placed in motion by David Scott Franks." Franks complains about the "hell on earth" comment as an example of trial counsel's deficient performance, especially since the prosecutor seized on it to argue in closing that a death sentence would prevent this "hell on earth." However, trial counsel revisited the "hell on earth" comment during his closing argument:

> I ask you to choose life without parole, and I ask it for two reasons. One, life without parole by its terms is nothing but a long term or longer term death sentence, because under either sentence David Scott Franks will live the rest of his natural life in prison and die. But during that time he can know his family, and that verdict, that verdict assures that the hell that visited this earth as you've heard described here does not return.

By the sentencing phase, the jury had already convicted Franks of murdering Debbie Wilson and seriously injuring her children. Although trial counsel continued to argue that others may have been involved in the crimes, it was not unreasonable for trial counsel to also acknowledge Franks's convictions and the ordeal undergone by the victims in this case in the context of urging a life without parole sentence, which would also ensure that it would not happen again. The trial court did not err by finding no deficient performance with the closing arguments.

[12] 3) *The Alleged Failure to Pursue Plea Negotiations.* Franks claims that his trial counsel was ineffective because they failed to effectively pursue a plea bargain with the State. A plea deal allowing Franks to plead guilty in exchange for a sentence less than death would have required the agreement of both parties. The evidence at the motion for new trial hearing failed to establish that either party was interested in such a deal before trial. Trial counsel testified that they pursued a possible plea bargain with the Hall County district attorney, but the district attorney was not willing to enter into a deal. Homans testified that the district attorney said she needed to hear something "substantial" that would justify such a deal, and they were unwilling to give away information about the possible involvement of other suspects in the event she deemed this to be not substantial and ***259** they had to try the case.[21] Moreover, Homans also testified that Franks had instructed them that he was not interested in pleading guilty to avoid a death sentence. Trial counsel pursued a possible plea bargain and the evidence does not show that a plea offer would have been extended by the State under the circumstances or, if extended, that such an offer would have been accepted by the defendant. Trial counsel's performance was not deficient.[22]

****146** **[13]** 4) *Voir Dire.* Franks complains that his trial counsel was ineffective in their conduct of the voir dire at his trial. He claims that they failed to ask sufficient questions to some prospective jurors, that they failed to move to excuse for cause some prospective jurors for bias against Franks, and that they failed to adequately challenge the removal for cause of some prospective jurors. Trial counsel testified at the motion for new trial hearing that they prepared for death penalty voir dire by studying relevant cases and reading seminar materials. The record shows that the trial court asked all the prospective jurors about their opinion of the death penalty and whether they were able to consider and vote for all three sentencing options. The prosecutor and trial counsel were then given an opportunity to question the prospective jurors about the death penalty and other subjects. Although Franks takes issue with the failure of trial counsel to ask follow-up questions about the death penalty to a few prospective jurors, these jurors had already been questioned about the death penalty by the trial court and there is no indication that further questioning by trial counsel would have elicited favorable responses.

[14] With regard to the prospective jurors Franks claims were improperly retained or improperly excused for cause, the record shows that some of them could only have become alternate jurors and no alternate jurors were needed during Franks's trial. Therefore, any argument concerning these potential jurors is moot because no actual prejudice

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could have resulted from trial counsel's actions with regard to them. [23] The record also does not show that any other prospective jurors were erroneously qualified or disqualified because of any actions that trial counsel took or failed to take. Accordingly, we find no ineffective assistance of counsel during the voir dire in Franks's trial.

[15] ***260** 5) *Trial Counsel's Strategy.* Franks claims that his trial counsel failed to formulate a coherent guilt-innocence phase strategy. However, as previously detailed, trial counsel faced an enormous amount of evidence of their client's guilt and did not have their client's full cooperation until during the trial. Trial counsel formed and implemented a strategy that focused on the involvement of dangerous drug dealers who committed the killings and forced Franks to accompany them to the Hall County crime scene. Trial counsel uncovered witnesses and evidence to support this theory, they strongly challenged the thoroughness of the State's investigation, and the theory was consistent with Franks's trial testimony. They also argued Franks lacked the criminal intent that was necessary for a conviction for the attack on the children. Under the circumstances, we conclude that trial counsel's performance in selecting and pursuing their guilt-innocence strategy was reasonable and, therefore, not deficient.

[16] 6) *Trial Counsel's Alleged Conflict of Interest.* Robbins and Homans were appointed to represent Franks on the Hall County charges. Another lawyer was appointed to represent Franks in Haralson County on the two murder charges there, but Franks was not happy with that lawyer, and asked Robbins if he could represent Franks in Haralson County too. Franks had his family contact Robbins and the family agreed to retain Robbins to represent Franks in Haralson County for $25,000. [24] Although the Haralson County crimes were part of the same criminal transaction as the Hall County crimes and would necessarily involve overlapping investigation and litigation, Robbins inexplicably and inappropriately failed to inform the Hall County Indigent Defense Committee that he was being paid by Franks's family for his defense of Franks in Haralson County. [25] Also inexplicably, he did not seek ****147** to be appointed to represent Franks in Haralson County even though he knew Franks was indigent.

[17] **[18]** Franks contends that this fee amounted to a conflict of interest that affected trial counsel's representation of him during the investigation and at trial. However, there is no evidence that Robbins' receipt of a fee from Franks's family for the Haralson County charges distracted him from his zealous representation of Franks or impaired ***261** his loyalty to Franks. To prevail on a conflict-of-interest claim when no objection was raised at trial, a defendant must show an actual conflict of interest by his lawyers that " 'adversely affected [their] performance.' " [26] The conflict of interest must be "palpable and have a substantial basis in fact. A theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence." [27] Because Franks failed to show the existence of an actual conflict of interest "with respect to a material factual or legal issue or to a course of action" [28] or how his lawyers' performance was adversely affected by the alleged conflict, he cannot prevail on this enumeration. [29]

[19] 7) *Trial Counsel's Mitigation Investigation.* Franks alleges that trial counsel's investigation into his background for mitigation evidence was inadequate. This Court has previously recognized the importance of conducting a reasonable investigation into mitigation evidence to be used at the sentencing phase of a death penalty trial: "before selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing." [30] In *Wiggins v. Smith,* [31] the United States Supreme Court measured trial counsel's mitigation investigation against the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Court described these guidelines as "well-defined norms" and noted that they have long been considered as appropriate guides to determining the reasonableness of counsel's performance. [32] The Court in *Wiggins* concluded that trial counsel's mitigation investigation fell short of these standards because trial counsel limited his investigation to a narrow set of sources, did not pursue obvious sources of information, and failed to follow the standard practice of the jurisdiction at the time to have an expert prepare a social history report. [33]

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Robbins testified that he and Homans recognized that the evidence against Franks "seemed overwhelming." They therefore recognized that the penalty phase was critical and their ultimate ***262** strategy was to "save his life." Although they had wanted to pursue a strategy in guilt-innocence that other more culpable people were involved, they were not able "to develop the defense to the extent that we wanted to." Nevertheless, the strategy for the penalty phase was to continue to argue that other more culpable people were involved and also to present testimony from family about Franks's good character and alcoholic father.

Shortly after being appointed in 1994, Robbins met with Franks's family and asked about his background, asked for his school ****148** records, and asked them to gather pictures of Franks's life. [34] Once Homans was appointed, he was principally in charge of the mitigation phase. Homans testified that he first met Franks's family in February 1997 and asked for information about Franks's background. He did not ask for any records because he believed that Robbins had already made that request; he reviewed the school records but saw "nothing remarkable." Homans talked with Franks's family members over the phone to discuss information to be used at sentencing and shortly before trial, he met with some of the family who would testify at the penalty phase. Trial counsel did not engage any experts to assist in preparing a mitigation case, [35] although they had an investigator who interviewed people in the area where Franks had been raised. They studied seminar materials on mitigation issues. Trial counsel learned from Franks's brother about Franks's violent, alcoholic father; they had their investigator look into Franks's father, who was deceased.

Trial counsel had discussed early in the process having Franks evaluated by a mental health expert, but decided not to engage an expert because they were under the erroneous impression that they could not make an ex parte request for funds, and that anything a mental health expert found would have to be turned over to the State, even if it was adverse to Franks and trial counsel decided not to use it. [36] After having Franks evaluated during trial by a psychiatrist who testified that Franks suffered from post-traumatic stress disorder, trial counsel decided not to offer any additional evidence of post-traumatic stress disorder as a mitigating factor. At the penalty phase, ***263** they presented eight family and former-family members, Franks, and a poster showing pictures of Franks's life.

We need not decide whether trial counsel's investigation for the mitigation evidence was reasonable, because Franks has made no showing that he was prejudiced by the investigation taken. [37] At the motion for new trial hearing, appellate counsel presented no competent evidence of what a more thorough mitigation investigation would have uncovered, and instead relied on a detailed summary and evaluation of Franks's life. [38] However, that summary was not offered into evidence, but was presented to the trial court under seal, with no testimony as to who prepared it, and no showing that it, or the evidence it detailed, would be admissible at a trial. Appellate counsel claimed that this procedure was necessary because ineffective assistance of counsel claims are litigated on habeas corpus, [39] and allowing the State to learn about this information would give it an advantage at a possible retrial. However, this procedure dooms the ineffectiveness claims regarding the mitigation investigation because it prevents the trial court and appellate court from evaluating whether prejudice resulted from trial counsel's alleged failure to uncover and present mitigating evidence. Because Franks failed to offer mitigation evidence that should have been presented at trial, he cannot satisfy his burden of demonstrating ****149** prejudice. [40] Therefore, the trial court did not err in denying the motion for new trial on this ground.

8) *The Presentation of Franks's Mental Health Evidence.*

[20] (a) Franks claims that trial counsel conducted a deficient investigation and presentation of his mental health evidence. However, he submitted no additional evidence from any mental health expert at the motion for new trial hearing and instead relies on hearsay. There is no indication in the record that Franks has or had any mental health problems or diagnoses other than what was presented by trial counsel during the guilt-innocence phase. Therefore, Franks failed to show that he was prejudiced by trial counsel's alleged failure to uncover and present any additional mental health evidence.

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[21] (b) Franks also claims that the mental health expert had a conflict of interest because in 1994 he had seen the child victims one ***264** time. Trial counsel testified that it was only during trial when Franks told trial counsel his version of events, which included some memory lapses and a statement that at a certain point everything "went red," that trial counsel became concerned about Franks's mental state.

Trial counsel selected Dr. John Connell, a psychiatrist, with whom they had previously worked and who would be available to evaluate Franks on short notice. Dr. Connell spent about seven hours interviewing Franks and diagnosed him with post-traumatic stress disorder. He testified about this diagnosis at trial, and he informed the jury that this would explain Franks's failure to recall everything that happened on the day of the crimes. Dr. Connell also recited Frank's version of events that day, which was consistent with what Franks had told the jury, and he testified that Franks was not malingering.

On appeal, Franks argues that Dr. Connell had a conflict of interest because he had previously treated the child victims in the case; at trial, the prosecutor argued that Dr. Connell had betrayed the children by testifying. However, Dr. Connell explained that he had not treated the children; he had substituted for an absent colleague in a consultant capacity for a few days in August 1994 when the children were in the hospital. He had briefly spoken with both children in August 1994 and prepared a two-page report, but he had not seen either child since that time. He also explained that he had discussed whether it was improper for him to interview Franks with two other psychiatrists and they had concluded that it was not.

At the motion-for-new-trial hearing, trial counsel testified that they learned about Dr. Connell's contact with the child victims, but they did not believe that this would be a problem; trial counsel also testified that they had very little time as they needed an expert on short notice. They knew Dr. Connell was available and they had worked with him before. Trial counsel's performance is evaluated under the circumstances confronting counsel at the time and their selection of an expert was made under severe time pressure. Franks has not shown that there was another psychiatrist available who would have been willing or able to interview Franks at the jail, as Dr. Connell did, and testify in court within a week's notice. Moreover, Franks does not take issue with the substance of Dr. Connell's testimony, only with the prosecutor's irrelevant and emotional remark in closing argument. Franks has therefore not shown that trial counsel's selection of Dr. Connell was deficient performance.

9) *Alleged Cumulative Error.* Because Franks has not shown ineffective assistance of his trial counsel in any area of his trial, his claim that trial counsel's individual and cumulative errors deprived him of a fair trial is without merit.

***265** OTHER CLAIMS

3. Franks's evidence failed to show that execution by lethal injection is unconstitutional. [41]

****150** **[22]** 4. Franks claims that the State violated *Brady v. Maryland* [42] by not revealing to the defense until her rebuttal testimony that it was Frankie Watts who made the one-minute phone call from the pawn shop to the Wilsons' house on August 5, 1994. In order to prevail on a *Brady* claim, Franks must show:

> that the State possessed evidence favorable to the defendant; the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different. [43]

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Franks's *Brady* claim fails for several reasons: the evidence that Frankie Watts had made that phone call was not favorable to him; Franks and not the State knew about the call before trial so he and his lawyers were in a better position than the State to learn the identity of the caller; and the State did not suppress this evidence as it was presented at trial. [44]

[23] 5. Following Frankie Watts's testimony about her placing the phone call from the pawn shop, Franks sought to challenge her credibility on cross-examination by eliciting that she had been interviewed numerous times by the FBI and police in 1994 without mentioning that she had made that phone call and that she had taken a polygraph test at that time that allegedly indicated deception. The trial court permitted the former questions, but refused to allow questions about a polygraph. [45] On re-direct examination, the prosecutor tried to elicit from Watts that many of these police interviews had occurred when Franks, her then-boyfriend, was on the run before his apprehension. When being questioned about a particular interview with an FBI agent, the following exchange took place:

***266** Prosecutor: Were they looking for David Franks?

Watts: When I took the polygraph, is that when you're talking about?

After the conclusion of the re-direct examination, Franks argued that Watts had opened the door to the polygraph evidence. The trial court refused to allow Franks to ask questions about the polygraph test and denied Franks's subsequent motion for a mistrial. We conclude that this brief, non-responsive reference to a polygraph test did not open the door to the cross-examination of Watts about her polygraph test. Additionally, the polygraph reference did not prejudice Franks because it indicated nothing about the results of the polygraph. [46]

[24] 6. During the 1998 trial, the trial court charged the jury in the guilt-innocence phase:

> You may infer that a person of sound mind and discretion intends to accomplish the natural and probable consequences of that person's intentional acts, and if a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrument in the manner in which the weapon or instrument is ordinarily used and thereby causes the death of a human being, you may infer an intent to kill.

In 2001, in *Harris v. State,* [47] this Court held that giving such a charge was error. The Court also held that this new rule applied to all cases in the pipeline, which includes Franks's case. [48] Therefore, the trial court erred by giving this charge, but we conclude ****151** that the charge was not reversible error under the circumstances. Unlike *Harris*, the evidence of malice was overwhelming in this case and, therefore, it is highly probable that the charge did not contribute to the verdict. [49] The erroneous *Harris* charge was not reversible error.

7. At the beginning of the voir dire process, the trial court inquired of the assembled prospective jurors whether any of them had read, seen, or heard anything about Franks's case. About two-thirds of the prospective jurors, 153 of them, indicated that they had read, seen, or heard something about Franks's case. Franks renewed his motion for a change of venue, arguing that he could not get a fair ***267** trial where so many prospective jurors had knowledge about his case. The trial court reserved ruling on the change-of-venue motion and later announced that it would move the 67 potential jurors [50] who had not heard about the case to the front of the jury venire. Franks did not object. Voir dire then proceeded. Five days later, after approximately 70 prospective jurors had been individually questioned on voir dire, Franks renewed his motion for a change of venue and added the additional argument that the original order of the jury venire be re-instated. Although trial counsel made clear that their main goal was a change of venue, they also, after some debate with the trial court, insisted that the original order of the jury venire be re-instated to preserve the "randomness." The trial court ruled that the objection was late and that they would continue the voir dire and the striking of the jury in the current order.

This ruling was not error. Franks did not object to the altered order of the jury venire for voir dire until five days after the trial court's order making that change, so his belated objection cannot be considered timely so as to preserve this issue for appeal. [51] Moreover, Franks has not shown that he failed to receive an array of impartial, properly drawn prospective jurors from which to pick a jury. [52]

8. The death sentence was not imposed under the influence of passion, prejudice or other arbitrary factor. [53] The death sentence is also not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. [54] The jury found beyond a reasonable doubt five statutory aggravating circumstances: the murder was committed while Franks was engaged in the commission of the aggravated batteries of Brian and Jessica Wilson; the murder was committed while Franks was engaged in the commission of an armed robbery; Franks committed the murder for himself for the purpose of receiving money or any other thing of monetary value; and the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved depravity of mind and torture. [55] Considering the evidence in this case, the cases listed in the Appendix support the imposition of the death penalty in this case, in that all involve multiple killings, murder committed during armed robbery, or the aggravating circumstance involving depravity of mind and torture.

Judgment affirmed.

All the Justices concur.

APPENDIX

Braley v. State, 276 Ga. 47, 572 S.E.2d 583 (2002); *Raheem v. State,* 275 Ga. 87, 560 S.E.2d 680 (2002); *Lance v. State,* 275 Ga. 11, 560 S.E.2d 663 (2002); ****152** *Lucas v. State,* 274 Ga. 640, 555 S.E.2d 440 (2001); *Rhode v. State,* 274 Ga. 377, 552 S.E.2d 855 (2001); *Butts v. State,* 273 Ga. 760, 546 S.E.2d 472 (2001); *Heidler v. State,* 273 Ga. 54, 537 S.E.2d 44 (2000); *Morrow v. State,* 272 Ga. 691, 532 S.E.2d 78 (2000); *Gulley v. State,* 271 Ga. 337, 519 S.E.2d 655 (1999); *Palmer v. State,* 271 Ga. 234, 517 S.E.2d 502 (1999); *Pye v. State,* 269 Ga. 779, 505 S.E.2d 4 (1998); *Jenkins v. State,* 269 Ga. 282, 498 S.E.2d 502 (1998); *DeYoung v. State,* 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State,* 268 Ga. 623, 491 S.E.2d 791 (1997); *Crowe v. State,* 265 Ga. 582, 458 S.E.2d 799 (1995).

All Citations

278 Ga. 246, 599 S.E.2d 134, 04 FCDR 2132

Footnotes

1 The crimes occurred on August 5, 1994. The Hall County grand jury indicted Franks on January 11, 1995, for malice murder, felony murder, armed robbery, aggravated battery (two counts), aggravated assault (two counts), cruelty to a child (two counts), burglary, and theft by taking. The State filed its notice of intent to seek the death penalty on February 3, 1995. Appeals from two pretrial rulings by the trial court resulted in written decisions by this Court: *Franks v. State,* 268 Ga. 238, 486 S.E.2d 594 (1997) (granted interim review in which this Court suppressed Franks's post-arrest statement) and *Franks v. State,* 266 Ga. 707, 469 S.E.2d 651 (1996) (affirming the denial of Franks's motion for discharge and acquittal based on his speedy trial demand). Franks's trial took place from January 7 to February 3, 1998. The jury convicted Franks on all charges on February 2, 1998, and, the following day, found the existence of five statutory aggravating circumstances, OCGA § 17–10–30(b)(2), (4), (7), and recommended a death sentence for the malice murder conviction. In addition to the death sentence, the trial court sentenced Franks to 20 years for armed robbery, 20 years for each count of aggravated battery, 20 years for burglary, and 10 years for theft, with all sentences to be served consecutively. The felony murder conviction was vacated by operation of law, and the remaining convictions merged with other convictions. Franks filed a motion for new trial on February 11, 1998, and amended it on September 24, 1998, and on December 4, 1998. After the trial court denied Franks's initial motion for new trial,

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Franks obtained new lawyers and pursued a claim of ineffective assistance of his trial counsel. He litigated a second motion for new trial, which included the ineffectiveness claim, before a different judge because the trial court had recused itself in the interim. The motion-for-new-trial court denied the second motion for new trial on June 16, 2003; Franks filed a motion for reconsideration, which was denied, and then a notice of appeal on July 14, 2003. The case was docketed to this Court on September 23, 2003, and orally argued on January 20, 2004.

2 This appeal does not involve the charges against Franks arising out of the deaths of Wilson and Martin in Haralson County. The State placed those charges on the dead docket following the imposition of the death penalty for the Hall County crimes at issue in this case.

3 Due to an apparent scheduling conflict, the firearms expert from the state crime lab did not testify until the penalty phase. She testified that bullets and shell casings from the handgun found in the Mobile motel room microscopically matched the bullets and shell casings found near and under the bodies at the pawn shop crime scene.

4 During the penalty phase, the State presented evidence that Franks walked about a half mile from the motel and entered the home of an elderly couple whom he held at gunpoint for several hours (Franks still had a .22 caliber derringer). When the couple's daughter arrived, Franks stole her car and fled.

5 *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

6 Id.; OCGA § 17–10–35(c)(2).

7 *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Francis,* 253 Ga. 782, 783, 325 S.E.2d 362 (1985).

8 *Strickland,* 466 U.S. at 689–690, 104 S.Ct. 2052; *Smith,* 253 Ga. at 783, 325 S.E.2d 362.

9 *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052.

10 *Jefferson v. Zant,* 263 Ga. 316, 318, 431 S.E.2d 110 (1993), quoting *White v. Singletary,* 972 F.2d 1218, 1221 (11th Cir.1992).

11 *Smith,* 253 Ga. at 783, 325 S.E.2d 362.

12 *Turpin v. Lipham,* 270 Ga. 208, 211, 510 S.E.2d 32 (1998).

13 *Franks,* 266 Ga. at 707, 469 S.E.2d 651.

14 Homans believed that it would be better to try the Haralson County case first because it was a weaker case and it would be better to see the State put up its evidence one time before having to counter it in Hall County, where the death penalty was more likely.

15 *Franks,* 268 Ga. at 242, 486 S.E.2d 594.

16 466 U.S. 648, 659–661, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

17 See *Francis v. Spraggins,* 720 F.2d 1190, 1194–1195 (11th Cir.1983); *Wiley v. Sowders,* 647 F.2d 642, 649–651 (6th Cir.1981); *Nixon v. State,* 857 So.2d 172, 174–175 (Fla.2003), writ of certiorari granted by *Florida v. Nixon,* 540 U.S. 1217, 124 S.Ct. 1509, 158 L.Ed.2d 152 (2004).

18 *United States v. Williamson,* 53 F.3d 1500, 1511 (10th Cir.1995) (emphasis supplied).

19 Compare *Francis,* 720 F.2d at 1193, n. 7 ("from the evidence that the State has put up, I think he went in the house and I think he committed the crime of murder"); *Wiley,* 647 F.2d at 645 ("They're guilty as charged by the Commonwealth Attorney's office" and "[the prosecutor] has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime."); *Nixon,* 857 So.2d at 174 ("I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.").

20 466 U.S. at 687, 104 S.Ct. 2052.

21 Franks had not "opted in" to the Reciprocal Discovery Act (OCGA § 17–16–1 et seq.) in this case so he had no obligation to turn over witness statements and other evidence to the State before trial.

22 Trial counsel testified that they managed to convince the Haralson County district attorney, who was also seeking the death penalty, to be willing to agree to a plea deal for life without parole or multiple life sentences for the pawn shop killings. However, after Franks received the death penalty in Hall County, the Haralson County district attorney placed the murder charges there on the dead docket.

23 See *Heidler v. State,* 273 Ga. 54, 57, 537 S.E.2d 44 (2000).

24 In a later fee arbitration hearing, Robbins was ordered to refund $5,000, which was the amount paid for investigative services, because the arbitrator found that Robbins conducted no investigation in the Haralson County case.

25 See *Bryant v. State,* 274 Ga. 798, 800, 560 S.E.2d 23 (2002) (lawyer appointed to represent indigent defendant may commit ethical violation if he also accepts fee to represent same defendant); *Blackshear v. State,* 274 Ga. 842, 843, 560 S.E.2d 688 (2002) (court appointed lawyer who solicits fee to obtain better result commits ethical violation).

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26 *Lamb v. State,* 267 Ga. 41, 42, 472 S.E.2d 683 (1996), quoting *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

27 *Lamb,* 267 Ga. at 42, 472 S.E.2d 683.

28 *Cuyler,* 446 U.S. at 356, n. 3, 100 S.Ct. 1708.

29 See *Bryant v. State,* 274 Ga. at 800, 560 S.E.2d 23 (no conflict of interest shown where appointed lawyer improperly also accepted a fee from defendant's family). For similar reasons, Franks's claim that Homans had a conflict of interest because he rented a house to Franks's family during Franks's month-long trial is without merit. Franks failed to explain why this was an actual conflict or how it affected his trial.

30 *Turpin v. Christenson,* 269 Ga. 226, 239, 497 S.E.2d 216 (1998).

31 539 U.S. 510, 123 S.Ct. 2527, 2537–2538, 156 L.Ed.2d 471 (2003).

32 539 U.S. at 524, 123 S.Ct. at 2536–2537.

33 539 U.S. at 524–526, 123 S.Ct. at 2536–2538.

34 At the motion for new trial hearing, there was a conflict in the evidence regarding trial counsel's contact with family members and the information sought from the family. In denying the motion for new trial, the trial court did not address this conflict and made no factual findings.

35 Compare *Turpin v. Lipham,* 270 Ga. 208, 219, 510 S.E.2d 32 (1998) ("average juror is not able, without expert assistance, to understand the effect of [defendant's] troubled youth, emotional instability and mental problems might have had on his culpability for the murder.").

36 Compare *Brooks v. State,* 259 Ga. 562, 565, 385 S.E.2d 81 (1989) (indigent defendant's request for funds for expert assistance may be made ex parte); *Bright v. State,* 265 Ga. 265, 276–277, 455 S.E.2d 37 (1995) (error to deny funds for experts to assist in preparing mitigation evidence).

37 *Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 (court may dispose of ineffectiveness claim solely on prejudice prong).

38 Compare *Wiggins,* 539 U.S. at 515–516, 123 S.Ct. at 2532–2533 (post-conviction counsel presented testimony of licensed social worker who prepared detailed social history).

39 But see *Williams v. State,* 258 Ga. 288, 368 S.E.2d 742 (in direct appeal of death penalty case considering ineffectiveness of counsel); *Hammond v. State,* 264 Ga. 879, 887, 452 S.E.2d 745 (1995) (same); *Colton v. State,* 266 Ga. 147, 148, 465 S.E.2d 279 (1996) (same).

40 *Williams,* 258 Ga. at 288, 368 S.E.2d 742 (1988) (where mitigation witnesses do not testify at motion for new trial hearing, defendant cannot establish prejudice stemming from counsel's deficient performance in failing to present those witnesses).

41 See *Dawson v. State,* 274 Ga. 327, 334–335, 554 S.E.2d 137 (2001).

42 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

43 *Mize v. State,* 269 Ga. 646, 648–649, 501 S.E.2d 219 (1998), quoting *Burgeson v. State,* 267 Ga. 102(2), 475 S.E.2d 580 (1996).

44 See *Pace v. State,* 271 Ga. 829, 838, 524 S.E.2d 490 (1999) (there is no *Brady* violation when the alleged exculpatory evidence is presented to the jury at trial).

45 See *Butts v. State,* 273 Ga. 760, 766, 546 S.E.2d 472 (2001) ("Polygraph evidence, absent the stipulation of the parties, has been consistently and recently held inadmissible in Georgia courts.")

46 See *Gulley v. State,* 271 Ga. 337, 348, 519 S.E.2d 655 (1999).

47 273 Ga. 608, 610, 543 S.E.2d 716 (2001).

48 Id.

49 See *Scott v. State,* 275 Ga. 305, 308, 565 S.E.2d 810 (2002).

50 Several prospective jurors were excused for hardship reasons between the time the trial court asked about knowledge of the case and its announcement that it would move these jurors to the front of the venire.

51 See *Page v. State,* 249 Ga. 648, 651, 292 S.E.2d 850 (1982).

52 See *Dampier v. State,* 245 Ga. 427, 433, 265 S.E.2d 565 (1980) (trial court did not err by replacing excused prospective jurors with randomly selected prospective jurors from the back of the venire, rather than the next name on the list).

53 OCGA § 17–10–35(c)(1).

54 OCGA § 17–10–35(c)(3).

55 OCGA § 17–10–30(b)(2), (4), (7).

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