No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALLYSON LEE,
Petitioner,
-v-
BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

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

CAPITAL CASE

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Cited
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Lee v. GDCP Warden

United States Court of Appeals for the Eleventh Circuit

February 11, 2021, Decided; February 11, 2021, Filed

No. 19-11466

Reporter
987 F.3d 1007 *; 2021 U.S. App. LEXIS 3931 **; 28 Fla. L. Weekly Fed. C 2424; 2021 WL 507897

JAMES ALLYSON LEE, Petitioner-Appellant, versus GDCP WARDEN, Respondent-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Georgia. D.C. Docket No. 5:10-cv-00017-LGW.

Core Terms

murder, kill, sentencing, emotional, shot, neglect, truck, court's decision, state court, friends, mitigating evidence, years old, witnesses, beat, present evidence, abandoned, slap, aggravating, mitigation, childhood, records, blood, drove, shoot, hit, reasonable probability, investigating, psychological, disorder, driving

Case Summary

Overview
HOLDINGS: [1]-A federal prisoner was properly denied habeas relief on his ineffective assistance of counsel claim where there was no reasonable probability that the jury would have returned a different sentencing verdict if the additional mitigating evidence that he submitted during the state habeas proceeding had been presented at trial. Specifically, the prisoner's childhood was not so harmful or horrific that it would have reduced his moral culpability, and he failed to make a convincing connection between his childhood and his actins on the night of the murder.

Outcome
The denial of lee's petition for a writ of habeas corpus is affirmed.

LexisNexis® Headnotes

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

Criminal Law & Procedure > ... > Jurisdiction > Custody Requirement > In Custody Requirement

Criminal Law & Procedure > ... > Custody Requirement > Custody Determinations > Satisfaction of Custody

HN1 **Standards of Review, De Novo Review**

Federal courts are authorized to grant habeas corpus relief to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. *28 U.S.C.S. § 2254(a)*. An appellate court reviews a district court's denial of habeas relief under *28 U.S.C.S. § 2254* de novo.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > ... > Standards of Review > Contrary & Unreasonable Standard > Contrary to Clearly Established Federal Law

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

HN2 **Statute of Limitations, Antiterrorism & Effective Death Penalty Act**

As amended by the AEDPA, *28 U.S.C.S. § 2254(d)* limits the power of federal courts to grant relief on a claim that was denied on the merits by a state court to

occasions where the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court or was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. A state court's decision is contrary to clearly established federal law if the state court either reaches a conclusion opposite to the United States Supreme Court on a question of law or reaches a different outcome than the Supreme Court in a case with materially indistinguishable facts. Under the unreasonable application clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from Supreme Court precedents but unreasonably applies that principle to the facts of the prisoner's case.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

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

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

HN3[] Statute of Limitations, Antiterrorism & Effective Death Penalty Act

To grant relief under the unreasonable application clause of *28 U.S.C.S. § 2254(d)*, a federal court must find that the state court's decision was objectively unreasonable, not merely wrong; even clear error will not suffice. This means that to obtain federal habeas relief, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

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

HN4[] Criminal Process, Assistance of Counsel

To prevail on a *Sixth Amendment* ineffective-assistance claim, a defendant is required to make the familiar two-pronged showing required by the Strickland standard: 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. Because the defendant must make the required showing on both prongs of the Strickland test, a court may conduct its inquiry in any order and need not address both components of the test if the petitioner's showing falls short on either one. In particular, where it is easier to avoid assessing counsel's performance and resolve the petitioner's claim on the ground that he has not made a sufficient showing of prejudice, courts are encouraged to do so.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

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

HN5[] Criminal Process, Assistance of Counsel

To show prejudice under the Strickland standard, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. And the likelihood of a different result must be substantial, not just conceivable.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Counsel > Effective

Assistance of Counsel > Sentencing

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN6[] Capital Punishment, Aggravating Circumstances

In evaluating prejudice in a capital sentencing proceeding, the question is whether there is a reasonable probability that, in the absence of counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. The reviewing court must therefore reweigh all of the available mitigating evidence, including the newly gathered evidence presented in the habeas proceedings, against the evidence presented in aggravation.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN7[] Statute of Limitations, Antiterrorism & Effective Death Penalty Act

Under the AEDPA, the question before any federal court is not whether it would reach the same conclusion as the state court if it was to reweigh the evidence itself, but whether there is any possibility fair-minded jurists could disagree that the state court's decision conflicts with relevant United States Supreme Court precedents. If so, then the federal court lacks the authority to grant habeas relief.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Statute of Limitations > Antiterrorism & Effective Death Penalty Act

Criminal Law & Procedure > Habeas Corpus > Review > Scope of Review

HN8[] Statute of Limitations, Antiterrorism & Effective Death Penalty Act

Even a strong case for habeas relief does not mean the state court's contrary conclusion was unreasonable under 28 U.S.C.S. § 2254(d).

Counsel: For JAMES ALLYSON LEE, Petitioner - Appellant: Lynn Damiano Pearson, Tahirih Justice Center, ATLANTA, GA; Michael C. Garrett, Garrett Gilliard & Saul, AUGUSTA, GA; Marcia A. Widder, Georgia Resource Center, ATLANTA, GA.

For GDCP WARDEN, Respondent - Appellee: Sabrina Graham, Attorney General's Office, ATLANTA, GA; Beth Attaway Burton, Attorney General's Office, ATLANTA, GA.

Judges: Before NEWSOM, GRANT, and ED CARNES, Circuit Judges.

Opinion by: GRANT

Opinion

[*1009] GRANT, Circuit Judge:

James Allyson Lee, a Georgia prisoner sentenced to death for the murder of Sharon Chancey, appeals the district court's denial of his federal habeas corpus petition, filed pursuant to 28 U.S.C. § 2254. Lee contends that his attorneys violated his Sixth Amendment right to effective assistance of counsel by failing to adequately investigate and present mitigating evidence in the sentencing phase of his capital murder trial. The Georgia Supreme Court rejected Lee's ineffective-assistance claim in state postconviction proceedings on the ground that he failed to show that **[*1010]** the allegedly deficient performance prejudiced him, as required under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The district court **[**2]** found that the Georgia Supreme Court's decision was not an unreasonable application of federal law and denied Lee's § 2254 petition. After careful consideration, and with the benefit of oral argument, we affirm.

I.

A.

One night in May 1994, after stealing several handguns from a gun shop and driving around for a while with his friend Shannon Yeoman, James Lee decided to steal his father's prized pickup truck, a 1992 Chevrolet Silverado. Lee later told the police that he wanted to kill his father—and probably would have if things had gone as planned—because his father had abused and

abandoned Lee and his mother when Lee was a child. The plan was for Yeoman to lure Lee's father out to a nearby highway by telling him that Lee needed help with a broken-down car. Putting the plan in motion, Lee dropped off Yeoman near the trailer park where his father lived and drove Yeoman's Toyota to the meeting place to wait.

Right away, Lee's plan hit a snag: his father was out of town. The father's live-in girlfriend, Sharon Chancey, was home alone, but refused when Yeoman asked her to drive the truck to help Lee. Lee, meanwhile, had really been "hoping it would be [his] dad"; he had worked himself up thinking **[**3]** about the things that his father "had done to [Lee] when [he] was small and the things that he had done to [Lee's] mother, and the life that she chose from those things." When Yeoman reported that only Chancey was home, Lee "still had those emotions and those feelings going," and he thought, "You'll do."

He sent Yeoman back to try again, telling her to insist that Chancey come out to help him with the supposedly broken-down old Toyota. When Chancey still refused, Lee went into the trailer himself to persuade her. Lee later said that Chancey was reluctant because Lee's father didn't like her driving his truck, but she eventually agreed to help. At trial, the parties disputed whether Chancey left the trailer voluntarily—she was wearing only a nightshirt and panties, had no shoes on, and had left her dentures at home, which was apparently something she never did.

One way or another, at about 4:00 in the morning, Chancey and Yeoman drove in the prized Silverado truck to Highway 84 near Blackshear, Georgia, where Lee had set his trap. After arriving, Chancey got out of the truck and walked over to the Toyota, and Lee used one of his stolen guns to shoot her in the face.[1]

Lee picked up Chancey's **[**4]** apparently lifeless body and threw her in the back of the Silverado. After stopping for gas—with Chancey still half-naked and bleeding in the truck bed—Lee drove approximately 50 miles to a remote area. He dragged Chancey out of the back of the truck, pulling off her nightshirt in the process, and dumped her in the woods wearing only her panties. Before leaving, Lee began to pull Chancey's rings off her fingers, and she grabbed his hand. Lee took out his gun and fired three more shots, hitting Chancey once more in the face and once in the abdomen.

[*1011] Lee and Yeoman left Chancey's body in the woods and drove the Silverado to Fernandina Beach, Florida, where Yeoman's family lived. Lee mentioned the murder to various friends and acquaintances that day, telling several people that the blood in the back of the truck was from a woman he'd killed, and at one point calling Chancey a "dead bitch[]." Apparently, none of his friends believed him.

The police were easier to convince. That night, as Lee was driving with two of his friends in the Silverado, a Florida state trooper pulled him over for an equipment violation. Lee gave one of his friends a pistol and told him to "get out and shoot the cop," **[**5]** but his friend dropped the pistol on the floor and kicked it under the seat. Meanwhile, the trooper discovered that the tag on the Silverado was registered to Yeoman's 1980 Toyota. He soon determined that the Silverado did not belong to any of its occupants, and that Chancey, whose purse and identification were in the Silverado, was missing. When questioned, Lee eventually confessed that he had killed Chancey and taken the truck.

Lee later gave videotaped statements at the scenes of both shootings, describing how he had shot Chancey once on the side of the highway, and three more times after dumping her in the woods. He told the police that he had planned to kill his father and killed Chancey instead of him because she was there.

Lee was charged with murder, kidnapping, armed robbery, theft by taking, possession of a firearm during commission of a felony, and possession of a firearm by a convicted felon. He pleaded not guilty and proceeded to trial in Charlton County, Georgia, where Chancey's body was found. The state elected not to prosecute the charge of possession of a firearm by a convicted felon, and the trial court granted Lee's motion for a directed verdict for lack of venue on **[**6]** the charges of kidnapping and theft. The jury found Lee guilty of the remaining charges.

During the sentencing phase, the state presented evidence that at the time of the murder, Lee had been on probation for stealing a truck and breaking into a church two years earlier. The state also presented evidence that about two months before the murder, Lee and a man named Doug Gregory stole a car outside

[1] Lee consistently maintained that he walked up behind Chancey and shot her in the back of the head as she bent over to look into the Toyota. But the medical examiner testified that Chancey had been shot in the face, not in the back of the head.

Atlanta and drove it to Florida. There, Lee and four or five of his friends took Gregory out to an area called the Point and brutally beat him. Gregory testified that before the beating, Lee told his friends that there was going to be an "initiation," and that he "wanted to see blood, a lot of blood." Lee started the beating by hitting Gregory with a stick about the size of a baseball bat. He hit Gregory at least four times in the head with the stick, while his friends beat Gregory with more sticks and a metal folding chair until he was covered in blood from head to toe. After the beating, Lee threatened Gregory that if he went to the police, he "wasn't anything but a bullet."

The state also presented evidence that while awaiting trial on the murder charge, Lee escaped from jail in Georgia, **[**7]** stole a car and some clothes, and fled to Florida. After the police recaptured him, Lee gave yet another audiotaped statement in which he confessed to killing Chancey. For the first time, he claimed that he was on "acid" at the time of the murder. He also reiterated, however, that he had wanted to kill his father and insisted that he would still kill him, even if he were sober. He was angry; he said that his father beat his mother when he was little, and his mother turned to drugs when his father left them, so he never really had a mother or father. He also swore that he would kill the investigator and the GBI agent in charge of his murder case if he ever got the chance and **[*1012]** said that he would have shot at the police when he was arrested after the escape if he had had a gun. When asked if Chancey's murder was the first time that he had killed someone, he responded in the affirmative, but added more: "Yep. But, killing's so easy. Now that I've done it once, it wouldn't be hard doing it." He qualified this chilling statement by saying that he "wouldn't go out and do it" and he pointed out that he had not killed anyone besides Chancey, even when he'd had the opportunity.

Lee presented the **[**8]** testimony of seven mitigation witnesses: Denise Baxley, who was one of his elementary school teachers; Johnny Lee, his father; Melton Lloyd, his stepfather; Barbara Lloyd, his mother; Mavis Garrison, his house mother from the Boys' Ranch where he lived from the ages of 15 to 17; Daniel Grant, Ph.D., a psychologist who performed a battery of neuropsychological tests; and Lee himself.

The first witness was Baxley, Lee's special education teacher for two years when he was seven to nine years old. Lee had been evaluated and placed in a class for severely emotionally disturbed students. Lee was very impulsive and had "some basic security problems." He also had trouble paying attention and was being treated with Ritalin for hyperactivity. Baxley testified that she conducted occasional home visits as part of the special education program, and she always found his home to be in "disarray"—whether he lived alone with his mother or with his grandparents. Parental involvement was an integral part of the special education program, but although Lee's mother participated to "the best of her ability probably," she never followed up on Baxley's suggestions for after-school activities, and never really **[**9]** provided any kind of authority figure for Lee. Baxley never observed Lee being cruel or mean to other people.

Lee's father, Johnny Lee, testified that he had six children and had been married seven times. He was married to Lee's mother Barbara, but the two separated when Lee was about five years old. While they were married, Johnny and Barbara did "a lot of drinking" and "had fights," though Johnny testified that he could not remember hitting Barbara in front of Lee. Johnny abandoned Lee after the separation; he never visited him or paid much child support. Johnny did not project a sympathetic picture of himself as a father. But he was not able to project a sympathetic picture of Lee either; in fact, he admitted that if he were asked what Lee's good qualities were, he probably would not be able to name any.

Several months before the murder, Johnny bailed Lee out of jail and Lee moved in with Johnny and Chancey for two or three months. As far as Johnny was aware, Chancey never said an unkind word to Lee.

Lloyd, Lee's stepfather, moved in with Lee and his mother Barbara in 1984, when Lee was ten, and married her three years later. Before he met Barbara, Lloyd was in prison for 12 years **[**10]** for second-degree murder. Lloyd and Barbara had a son, who was Lee's half-brother. According to Lloyd, Lee loved the boy and helped take care of him and look out for him when he was small. Lloyd testified that Lee had a good side and was worth saving.

Lee's mother testified that she had Lee when she was 19 years old. She frequently took narcotic pain medication while she was pregnant with Lee. She admitted that she had a long-term addiction to prescription drugs, but said that she "hope[d]" that she was a good mother to Lee despite her addiction.

Lee's father left when Lee was young and never provided financial support. His **[*1013]** mother testified that she did the best she could on welfare, and that there was always enough food to eat. Lee and his

mother lived with her parents until Lee was about six, and at one point, his mother left Lee with her parents for about a year and a half when she moved to Florida with a boyfriend.

Lee was extremely hyperactive as a child and was placed in the special education program because of it. He couldn't sit still or concentrate; he barked like a dog and didn't talk until he was six years old. He took Ritalin until he was seven years old, when someone at the **[**11]** county mental health center told Barbara that the Ritalin was actually making Lee's condition worse.

When Lee was about 13 years old, his mother contacted the Sheriff's Boys' Ranch and began the process to have Lee admitted to the program. Lee spent two years at the Boys' Ranch, from age 15 to age 17. After the Boys' Ranch, Lee couldn't keep a job and just hung around the house. He never had many friends, but he was not mean or violent. Lee hated his father for abandoning him.

Mavis Garrison, Lee's house mother at the Boys' Ranch, testified that Lee did well in the structured environment there. From what Lee and the social worker told her, Garrison thought that Lee's problems with authority and anger came from his home life, where there were "many problems," including drugs and alcohol. Lee was very angry with his father for abandoning him. He was also angry with his mother, who he thought had rejected him for his stepfather. Lee called Mr. and Mrs. Garrison "mom" and "pop"; he told Garrison that she had been more of a mother to him than anyone ever had. There were times that Lee became defensive or angry at the Boys' Ranch, but Garrison was never afraid of Lee, and he always came back **[**12]** and reconciled with her after an argument, telling her that he loved her. Lee frequently returned to visit the Garrisons at the Boys' Ranch; he was married at the chapel there and the Garrisons held a wedding reception for him. Garrison became emotional during her testimony; she said that she loved Lee, that he was a "very loving and caring person," and that he was "very much worth saving."

Dr. Grant testified that he spent 17 or 18 hours with Lee, conducting neuropsychological tests and interviewing him, and he reviewed school records covering kindergarten through sixth or seventh grade, including two school psychological evaluations. He also reviewed the state psychologist's report from his pretrial evaluation of Lee. Based on his evaluation, Dr. Grant testified that Lee was of low average intelligence and suffered from attention deficit disorder with hyperactivity and polysubstance abuse. Lee's attention disorder meant that he had a hard time staying on task. It also meant that he was restless and impulsive, and had a hard time controlling his behavior. Individuals with ADHD are born that way, he said, although he did not suggest that the condition meant Lee was not responsible for **[**13]** his behavior. Based on the early age of manifestation, Lee had a severe and more refractory case of ADHD; he had not grown out of his disorder. Dr. Grant also noted that people with early-onset ADHD were more likely to develop other psychopathologies—like oppositional defiance disorder, substance abuse, or "shifting of moods"—but adjust very well with a structured environment (such as prison) and medication.

Dr. Grant testified that it would not be uncommon for someone with Lee's condition to lie or boast to project an image of bravado or toughness as a cover for their low self-esteem. In Lee's case, he acted **[*1014]** tough to cover his feelings of abandonment. Lee did not come across as mean or malicious in Dr. Grant's interviews, and Dr. Grant saw nothing in Lee's school records he reviewed to indicate that he had ever been aggressive toward people. When asked whether people with Lee's condition would be more likely to carry out their threats, Dr. Grant reiterated that those with hyperactivity had a hard time regulating and controlling their emotions and behavior.

According to Dr. Grant, Lee's home environment made his condition much worse, because "starting very early in his life, there was **[**14]** deprivation at times, where there wasn't even adequate food in the home, the abandonment by his father, that his father left. There was a lot of abuse, frequent changing and inconsistent rules or caregivers." None of Lee's early caregivers appeared to be a positive influence: "You know, he and his mother lived together for awhile, and she had a problem with substance abuse and was inconsistent in her behavior. A lot of times, he was left alone. Then, you know, they stayed with his grandparents, and there was some physical abuse as well as neglect." Still, Dr. Grant testified that one thing mattered even more to Lee: the absence of his father. As he explained it to the jury, "more importantly, what he talks about when I interviewed him, and what's in several of the school reports, is the fact of his being abandoned, especially, you know, with his father, of not having—And his father had other children later, and his father would participate with those children but wouldn't with Jamie, so there's a lot of—You know, that really had a very powerful negative impact on his development."

Against his attorneys' advice, Lee testified on his own behalf at sentencing. Lee testified that he "thought" **[**15]** that he had killed Chancey, but he recalled shooting her in the back of the head as she leaned over to look into the Toyota, which did not line up with the evidence that she was shot in the face. For the first time, Lee disclosed that he had gone inside his father's home with Yeoman when her attempts to lure Chancey out were unsuccessful; he had previously told the police that he waited nearby while Yeoman finally persuaded Chancey. He said that he told Chancey that a friend (who "didn't want to be known") had given him a ride to the trailer and was waiting outside for him, but he still needed her to bring the Silverado and help him crank the broken-down car.

Lee's testimony at sentencing was otherwise generally consistent with his statements to the police—he admitted that he and Yeoman lured Chancey out to the highway and that he shot her, dumped her body in the woods, and shot her again. This time, however, Lee insisted that Chancey was dead after he fired the first shot; he denied that her hand had moved after he dumped her body. He could not say why he had fired at her three more times, or why he had told the police that Chancey grabbed him.

When asked why he shot Chancey, Lee said **[**16]** that he was upset with his father because of "the things that he had done to [Lee] when [he] was small and the things that he had done to [Lee's] mother, and the life that she chose from those things." Lee said, "It upset me and it hurt me, and when she got there and it wasn't him, I still had those emotions and those feelings going, and they control me." Lee said that he was sorry he killed Chancey, more so since he had been baptized (while in prison) and realized that Christ died for him and for Chancey. He said that he liked Chancey, and that she had never been mean to him or done anything bad that he knew of.

[*1015] Lee also said that he would not really have shot at the police after he was pulled over or when he was recaptured after his escape from jail. He claimed that he had not really told his friend to shoot the police officer who pulled them over; he just told his friends to say that later so that they would not get in trouble. As for his statement to the police that it was easy to kill or that he wanted to kill his father, he denied that he meant that either—although, he added, he probably would have killed his father if he had been home that night. On cross-examination, Lee admitted **[**17]** writing a letter to his girlfriend while he was in jail that said (of his father), "I hate him. I believe he knows it. I'll kill him if I ever get my hands on him, which will be never or in hell."

Lee did admit that he participated in the beating of Doug Gregory, but denied that he said anything about an initiation and explained that Gregory had been spying on girls in the shower in the house where all of them were staying. He asked the jury to show mercy and sentence him to life with the possibility of parole, or at worst, life without parole.

After deliberating for a little more than two hours, the jury returned a sentencing verdict of death. The jury found four statutory aggravating factors: (1) the murder was committed while the defendant was engaged in the commission of another capital felony (kidnapping with bodily injury); (2) the murder was committed while the defendant was engaged in the commission of another capital felony (armed robbery); (3) the defendant committed the murder for himself or for another for the purpose of receiving money or something of monetary value; and (4) the murder was outrageously or wantonly vile, horrible, or inhumane, in that it involved aggravated **[**18]** battery to the victim before death.

The trial court sentenced Lee to death for murder, life in prison for armed robbery, and five years consecutive for the firearm charge. *See* *Lee v. State, 270 Ga. 798, 799 n.1, 514 S.E.2d 1 (1999)*. The Georgia Supreme Court unanimously affirmed Lee's convictions and sentences, and the U.S. Supreme Court denied Lee's petition for certiorari and petition for rehearing. *Id. at 803*; *Lee v. Georgia, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999)* (Mem.), *reh'g denied*, *528 U.S. 1145, 120 S. Ct. 1001, 145 L. Ed. 2d 946 (2000)* (Mem.).

B.

Lee filed a state petition for habeas corpus, arguing, among other things, that his trial counsel was constitutionally ineffective during the sentencing phase. At the evidentiary hearing on his petition, Lee's trial attorneys testified live and Lee presented numerous affidavits, as well as extensive school and medical records, records from the Boys' Ranch, and records from the Department of Corrections.

As relevant to the claim before us, Lee presented affidavits from relatives and neighbors testifying that Lee's mother abused and neglected him throughout his childhood. According to these witnesses, his mother was usually drunk or on drugs, with a different man or group of men at a local bar or hanging around the

house. Lee was described as constantly filthy and stinking, with lice in his hair, wearing filthy **[**19]** rags, and with rotting teeth, a sign of possible malnourishment. He begged for food from neighbors, telling them that he was hungry because he had worms. His home was also described as filthy, with dirty clothes, dishes, beer and prescription bottles, roaches, and garbage strewn everywhere. Lee complained to one relative that he had rats crawling in his bed.

[*1016] As a baby and toddler, Lee jumped and bounced in his crib constantly—likely as self-stimulation or to get his mother's attention—to the extent that he broke the crib more than once. His grandfather eventually reinforced it with two-by-fours nailed to the wall to form a kind of cage. As a toddler and a child, Lee was often left alone in the house, left in the car, or dropped off while his mother went out to bars and stayed out overnight or for days at a time. Other times, Lee's mother sent him outside and told him that he could not come back in until dark.

According to the affidavit witnesses, Lee endured physical and emotional abuse in addition to neglect—and that abuse was described as constant and vicious. Lee's mother frequently "beat the crap" out of him, even as a toddler, slapping him hard enough to leave a mark, punching him, **[**20]** or swinging him around by his hair, usually for little or no reason. She typically called him names like "little bastard" or "fuckhead," and yelled at him, again, with little or no provocation. Neighbors and family members said that they never really heard Lee's mother say anything nice to him or saw her hold him or play with him. One relative could not remember Lee's mother ever speaking to him in a normal voice—she always yelled at him, even if he was a few feet away, and would call him over to the couch to slap him.

Witnesses described several specific instances of physical abuse, including one time when Lee was two years old and his mother slapped him hard across the face, leaving a mark. When his aunt protested, Lee's mother said that he was her child and she could do what she wanted to him—she could "take him by the feet and slap him up against the wall if she wanted to," or "splatter the little motherfucker's brains everywhere" if she felt like it. Another witness described an incident when Lee was little (four or five years old) and grabbed his mother's shirt to get her attention. She responded by punching him in the mouth so hard that he flew backwards, bleeding from his mouth. **[**21]** Other witnesses recalled similar instances of Lee's mother punching him with no provocation, knocking him down and kicking him in the head, or cussing him out, slapping him, and sending him to his room when he asked for a glass of water. Lee's relatives described him as cowering and afraid of his mother, but loving and eager to please when she was not around.

One of Lee's elementary school teachers reported Lee's mother to the state children's services agency after Lee came to school with welts on his arms and face that were "horrifying to view." To the teacher's knowledge, the agency did nothing in response to her complaint.

Affidavits presented to the state postconviction court also indicated that Lee showed signs of emotional damage as a child. He often acted like a dog, panting and crawling on all fours and barking instead of speaking. This behavior went beyond normal play—so much so that it troubled those who saw it. In school, he often talked about how much he hated his father for leaving him and his mother alone, but also said that he wanted to see his father. In kindergarten, he would often slap and hit himself in the face and say that he wanted to kill himself. At home, he would **[**22]** bang his head against the wall. As a preschooler, he once put his head under the tire of his mother's car.

Based on the new information about childhood abuse and additional records provided by habeas counsel, Dr. Grant testified that his earlier diagnosis of ADHD was "wholly inadequate to explain or define Jamie's emotional and mental disabilities and how these disabilities related to the death of his father's girlfriend." Dr. **[*1017]** Grant opined that, at the time of the murder, Lee was suffering from Post-Traumatic Stress Disorder as a result of the "repeated and savage abuse" he suffered at the hands of his own mother.

Lee also presented the affidavit testimony of a new psychological expert, Catherine Boyer, Ph.D., who stated that Lee was "significantly impaired emotionally, psychologically, and cognitively" as a result of the abuse and neglect he suffered, and that "unlike most cases, there is a direct relationship between the neglect and abuse, the resulting impairments and the crime."

The state habeas court granted Lee's petition, finding that Lee's trial counsel "rendered prejudicially deficient performance in investigating Mr. Lee's potential sentencing phase defenses and in preparing **[**23]** and presenting the mitigation defenses counsel did utilize." The state court judge presiding over the habeas proceedings—a different judge than the one who presided over Lee's trial and imposed his sentence—explained that "Mr. Lee's early life bears all the

hallmarks of a strong mitigation case: a boy whose troubles began before he got out of the womb, he was born into a home rife with abuse, neglect, and trauma at the hands of his addicted caregivers. Nearly every aspect of his early life was uniquely troubled; nevertheless, the State was able to argue credibly to the jury that Mr. Lee was like a million other kids with a learning disability and a single mom."

The Georgia Supreme Court reversed in a unanimous opinion. *See* Hall v. Lee, 286 Ga. 79, 684 S.E.2d 868 (2009). The Court discussed counsel's mitigation investigation and strategy with what seemed like approval, but ultimately decided that it need not address counsel's performance under *Strickland* because Lee had not made the required showing of prejudice. *Id. at 81-86*.

C.

Lee filed a petition for federal habeas review in the Southern District of Georgia, pursuant to 28 U.S.C. § 2254. The district court denied Lee's habeas petition but granted him a certificate of appealability on one issue: "whether **[**24]** the Georgia Supreme Court's determination—that Lee was not prejudiced by any deficiency on the part of Lee's trial counsel in investigating, developing, preparing, and presenting mitigating evidence at Lee's sentencing—involved an unreasonable application of clearly established Federal law or was based on an unreasonable determination of the facts in light of the evidence presented."

II.

HN1[↑] Federal courts are authorized to grant habeas corpus relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). We review a district court's denial of habeas relief under § 2254 de novo. *Brooks v. Comm'r, Alabama Dep't of Corr., 719 F.3d 1292, 1299 (11th Cir. 2013)*.

HN2[↑] As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 2254(d) limits the power of federal courts to grant relief on a claim that was denied on the merits by a state court to occasions where 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." **[*1018]** A state court's decision **[**25]** is "contrary to" clearly established federal law if the state court either reaches a conclusion opposite to the Supreme Court of the United States on a question of law or reaches a different outcome than the Supreme Court in a case with "materially indistinguishable facts." *Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle" from Supreme Court precedents "but unreasonably applies that principle to the facts of the prisoner's case." *Id. at 413*.

Lee does not contend that the Georgia Supreme Court's decision was "contrary to" U.S. Supreme Court precedent, and there is no question that the state court correctly identified *Strickland* as establishing the applicable legal standard. *See Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316, 1327 (11th Cir. 2013)* (en banc). We must determine, therefore, whether the state court's decision involved an unreasonable application of the *Strickland* standard to the facts of Lee's case.[2] HN3[↑] To grant relief under the "unreasonable application" clause, we must find that the state court's decision was "'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *White v. Woodall, 572 U.S. 415, 419, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014)* (quoting *Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*). This means that to obtain federal habeas **[**26]** relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

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[2] Lee also argues that the Georgia Supreme Court made unreasonable and clearly erroneous findings of fact. As relevant to our analysis, Lee contends that the Georgia Supreme Court erroneously discounted his new affidavit evidence because it found that "much of it" was properly excluded by the habeas court as hearsay or speculation. Lee concedes that some of the affidavit testimony may be hearsay, but he notes that the habeas court excluded only a small portion of what was challenged, not "much of it." Lee has not pointed to any specific relevant evidence that the Georgia Supreme Court discounted or declined to consider on this ground, however—indeed, the Court's opinion made specific references to its review of the new expert testimony and evidence of abuse that Lee relies on in this Court. Because Lee cannot show that the state court's decision "was based on" the challenged findings, they provide no basis for federal habeas relief whether or not those findings were unreasonable. *28 U.S.C. § 2254(d)(2)*.

fairminded disagreement." *Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*. We proceed, therefore, by setting out the relevant legal standards for ineffective-assistance claims and reviewing the Georgia Supreme Court's application of those standards to the facts of Lee's case.

III.

HN4[] To prevail on his *Sixth Amendment* ineffective-assistance claim, Lee was required to make the familiar two-pronged showing required by *Strickland*: "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." *Strickland v. Washington, 466 U.S. 668, 687, **[*1019]** 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Because the petitioner must make the required showing on both prongs of the *Strickland* test, a court may conduct its inquiry in any order and need **[**27]** not address both components of the test if the petitioner's showing falls short on either one. *Id. at 697*. In particular, where it is easier to avoid assessing counsel's performance and resolve the petitioner's claim on the ground that he has not made a sufficient showing of prejudice, courts are encouraged to do so. *Id.*

That is the route that the Georgia Supreme Court took, and we too "begin and end our analysis with *Strickland*'s prejudice prong." *Brooks, 719 F.3d at 1301*. HN5[] To show prejudice under *Strickland*, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington, 562 U.S. at 111-12* (quoting *Strickland, 466 U.S. at 693, 697)*. And the "likelihood of a different result must be substantial, not just conceivable." *Id. at 112*.

HN6[] In evaluating prejudice in a capital sentencing proceeding, the question is whether there is a reasonable probability **[**28]** that, in the absence of counsel's errors, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland, 466 U.S. at 695*. The reviewing court must therefore reweigh all of the available mitigating evidence, including the newly gathered evidence presented in the habeas proceedings, against the evidence presented in aggravation. *Wiggins v. Smith, 539 U.S. 510, 534, 536, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. The Georgia Supreme Court conducted this exercise and concluded that it saw no reasonable probability that the jury would have returned a different sentencing verdict if the additional mitigating evidence that Lee submitted during the state habeas proceeding had been presented at trial. *Lee, 286 Ga. at 87-97*.

Lee argues that this decision was an unreasonable application of *Strickland* because in reaching its conclusion, the state court unreasonably discounted his new mitigating evidence and overstated the evidence in aggravation. HN7[] We do not agree—and we reiterate that under AEDPA, the question before any federal court is not whether we would reach the same conclusion as the state court if we were to reweigh the evidence ourselves, but whether there is any "possibility fairminded jurists could disagree that the state court's decision conflicts **[**29]** with" relevant Supreme Court precedents. *Harrington, 562 U.S. at 102*. If so, then we lack the authority to grant habeas relief. *Id. at 102-03*; *see Brooks, 719 F.3d at 1300*.

Here there is, at the very least, room for debate. To begin, this is not a case where the jury had no mitigation evidence to consider at sentencing. Although Lee's trial presentation lacked the vivid detail provided by his habeas witnesses, the jury heard that Lee was disadvantaged, neglected, and abused throughout his childhood. They learned that Lee's parents drank heavily and fought violently when he was little, and that Lee's mother abused prescription drugs, smoked marijuana, **[*1020]** and neglected Lee to the point that he didn't always have enough to eat. They heard about Lee's placement in a class for severely emotionally disturbed children, his basic security issues, and his behavioral problems. Dr. Grant testified that Lee endured "a lot of abuse," including physical abuse as well as neglect, and that his emotional and behavioral problems were made much worse by his home environment. The jury also heard that people with Lee's condition tended to be boastful, and had difficulty controlling their emotions and behavior.

In addition to describing Lee's impoverished and difficult

childhood **[**30]** and psychological condition, some of Lee's sentencing-phase witnesses also gave positive testimony about his character as an adult. Lee's stepfather testified that Lee was close to and helped care for his young stepbrother, and Lee's housemother from the Boys' Ranch spoke of him with genuine and tearful affection.

The affidavit testimony submitted to the state habeas court added to this somewhat basic picture by providing graphic and horrifying descriptions of the physical and emotional abuse and neglect Lee endured at his mother's hands—details showing a frequency and severity of abuse that was only hinted at during Lee's trial presentation. These details led Dr. Grant to retroactively diagnose Lee with PTSD, and Lee's new expert witness testified that Lee's emotional problems likely contributed to his involvement in the murder.

Still, the Georgia Supreme Court's decision that the combined weight of Lee's mitigating evidence would not have changed the sentencing verdict was not objectively unreasonable. The state court discussed Lee's mitigating evidence, old and new, in detail and concluded that the frequent slaps, occasional punches or kicks, neglect, and verbal abuse described by **[**31]** Lee's witnesses did not establish that his childhood was "so harmful or horrific" that it might be expected to reduce Lee's moral culpability in the eyes of a jury. *Lee, 286 Ga. at 87-92* (citing *Wiggins, 539 U.S. at 538*, in which the U.S. Supreme Court held that the defendant's evidence of torture, severe deprivation, and sexual abuse was reasonably likely to change the outcome at sentencing).

The state court also pointed out that Lee's new expert testimony failed to make a convincing connection between the psychological impact of his childhood abuse and his actions on the night of the murder. Dr. Grant testified that the additional evidence of abuse would have enabled him to diagnose Lee with PTSD and explain the connection between Lee's PTSD and his crimes, but he never actually provided any such explanation. And Dr. Boyer's opinion that his "impaired impulse control, impaired emotional control, high levels of distress, and his inability to structure or stabilize his own life" made him "particularly vulnerable to involvement in the murder" was not meaningfully different from Dr. Grant's trial testimony that people like Lee with ADHD were impulsive and overactive, had problems with planning and organization, and had difficulty **[**32]** controlling their emotions and behavior.

Moreover, the aggravating evidence presented to the jury was substantial. This included evidence that Lee had planned to kill his father, and that when he found out that his father was not home, he decided that Chancey would make a good enough substitute—despite her past kindness to him. Lee's testimony at sentencing also revealed that when Yeoman was unable to convince Chancey to help, Lee himself went into the home to talk to her. The story that Lee says he gave Chancey to account for his presence—that he had a **[*1021]** mysterious friend with a car who did not want Chancey to see him and who was willing to drive Lee back and forth from the broken-down Toyota but was inexplicably unable to help him jump start it—was exceedingly flimsy. Lee's testimony that this unlikely tale persuaded Chancey to come out in the middle of the night cast a sinister light on the evidence that she left her home in panties and a nightshirt, barefoot and without her dentures, and it opened the door to the prosecutor's argument that she did not go voluntarily.

The evidence also showed that, however Chancey got to the scene, the murder itself was cold-blooded and brutal—after **[**33]** coaxing Chancey out of her home by telling her that he needed her help, Lee shot her in the face, drove her wounded and bleeding to the middle of nowhere, dumped her in the woods, and shot her again when she grabbed his hand. Lee showed no remorse for killing Chancey—and indeed, bragged about it to his friends—until after he was caught. And finally, the state presented evidence that Lee had brutally beaten a man months before the murder because he wanted to "see blood, a lot of blood," that he had tried to convince one of his friends to shoot a state trooper after the murder, that he said he would have shot at the police after his escape from jail if he had had a gun, and that he threatened to kill his father and the officers who investigated Chancey's murder if he ever had the chance.

In short, it was not unreasonable for the Georgia Supreme Court to conclude that there is no reasonable probability of a different result if Lee's trial attorneys had collected and presented the mitigating evidence proffered to the state habeas court. That is all that AEDPA requires. *HN8*[↑] "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." **[**34]** *Harrington, 562 U.S. at 102*. And because the state court's decision was at least arguably correct, we are precluded from granting Lee's petition for federal habeas relief. *See id. at 102-03*; *Brooks, 719 F.3d at 1300*.

IV.

The denial of Lee's petition for a writ of habeas corpus is **AFFIRMED**.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11466-P

JAMES ALLYSON LEE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

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

BEFORE: NEWSOM, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

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

ORD-46

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

David J. Smith
Clerk of Court

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

April 19, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11466-P
Case Style: James Lee v. Warden GDP
District Court Docket No: 5:10-cv-00017-LGW

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

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

Sincerely,

DAVID J. SMITH, Clerk of Court

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

REHG-1 Ltr Order Petition Rehearing

In the United States District Court for the Southern District of Georgia Waycross Division

JAMES ALLYSON LEE,

Petitioner,

v.

STEPHEN UPTON, Warden,

Respondent.

No. 5:10-CV-17

ORDER

State capital prisoner James Allyson Lee petitions for habeas corpus. The petition is due to be **DENIED** for the following reasons.

BACKGROUND

The Underlying Crime and Conviction[1]

> Lee and an accomplice broke into a gun store in Toombs County[, Georgia] on May 25, 1994, and stole several guns, including a ten millimeter Glock pistol. Lee and his girlfriend then drove to Pierce County[, Georgia] planning to kill Lee's father and steal his Chevrolet Silverado pickup truck. After learning that his father was not home but that his father's live-in girlfriend, Sharon Chancey, was there, Lee had his girlfriend lure Chancey from the home in the early morning hours of May 26 by claiming that Lee was stranded nearby in his girlfriend's broken down Toyota automobile. When Chancey pulled up to the Toyota in the Silverado and

[1] This Court presumes the Georgia Supreme Court's factual determinations to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

> got out, Lee shot her in the face and threw her in the back of the Silverado. After driving the Silverado to a secluded area in Charlton County, [Georgia,] he dragged Chancey into the woods, removed two rings from her fingers, and shot her two more times when she grabbed his arm. After replacing the Silverado's license plate with the license plate from the Toyota, Lee and his girlfriend drove the Silverado to Florida. While traveling in the Silverado with two male friends at about 11:30 that night, Lee was stopped by law enforcement for a broken taillight.

Hall v. Lee, 684 S.E.2d 868, 871-72 (Ga. 2009). "[W]hen Lee was stopped . . ., he placed a cocked, loaded gun that he had stolen in his companion's lap and told the companion to get out and 'shoot the cop' while he 'cover[ed]' the companion with another stolen, loaded gun." Id. at 881. The companion did not do so.

> [Lee] was arrested after a check revealed that the Silverado was stolen. The police recovered from the Silverado Chancey's purse and identification and the Glock pistol, which later was determined to be the murder weapon. Lee made several incriminating statements to police, including videotaped statements at the scenes of the shootings describing how the crimes occurred.

Id. at 872. Lee "was on probation at the time of the crimes for two counts of burglary and for theft by taking for stealing a truck . . . ." Id. at 880.

Fifteen "months after the crimes while awaiting trial, Lee, acting alone, escaped from jail, stole a vehicle, and fled to Florida . . . ." Id. at 880-81. When he was recaptured, Lee "made several threatening statements to

police, including that he still wanted to kill his father and that, if he were ever given the opportunity, he swore that he would kill the detective and the [Georgia Bureau of Investigation] agent assigned to his case." Id. at 881.

A jury convicted Lee of malice murder, armed robbery, and possession of a firearm during the commission of a crime on June 4, 1997.[2] Lee v. State, 514 S.E.2d 1, 2 (Ga. 1999); see also Dkt. No. 11-14 at 46:22-25, 53. Lee was sentenced to death on June 6, 1997. Hall v. Lee, 684 S.E.2d at 871; see also Dkt. No. 12-3 at 85:10, 94. Lee moved for a new trial on July 3, 1997, and amended that motion on February 19, 1998. Lee v. State, 514 S.E.2d at 3 n.1. The motion was denied on April 15, 1998. Id. Lee's conviction was unanimously upheld by the Georgia Supreme Court on direct appeal. See generally id. The U.S. Supreme Court denied Lee's petition for a writ of certiorari on November 15, 1999, and denied rehearing on January 24, 2000. Lee v. Georgia, 528 U.S. 1006 (1999), reh'g den'd 528 U.S. 1145 (2000).

Habeas History

Lee filed a petition for a writ of habeas corpus in the Superior Court of Butts County on August 4, 2000. Dkt. No. 20-16 at 2. He amended it on April 16, 2001. Id. The Superior Court held an evidentiary hearing on August 17, 2001.

[2] His conviction for felony murder was vacated by operation of law. Lee v. State, 514 S.E.2d 1, 3 n.1 (Ga. 1999).

Id. It granted Lee's petition on March 12, 2009. See generally id. The Georgia Supreme Court unanimously reversed on November 2, 2009. Hall v. Lee, 684 S.E.2d 868.

Lee filed his federal habeas petition on February 5, 2010. Dkt. No. 1. He amended it on September 16, 2010. Dkt. No. 29. Lee filed his merits brief on March 16, 2015. Dkt. No. 80. The State filed its response in opposition on July 28, 2015. Dkt. No. 87. Lee replied on October 13, 2015. Dkt. No. 90. He filed a supplemental brief on October 22, 2015. Dkt. No. 92. The petition is now ripe for disposition.

LEGAL STANDARD

Because Lee's federal petition was filed after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Payne v. Allen, 539 F.3d 1297, 1312 (11th Cir. 2008). Under AEDPA, state courts' determination of factual issues are "presumed to be correct" unless the petitioner rebuts them "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Their legal determinations can only be rejected if they "resulted in a decision that . . . 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." Id.

§ 2254(d). The first prong is only satisfied if the state court "unreasonably applies [the governing legal] principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. 362, 413 (2000). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. at 410. "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 v. Richter, 562 U.S. 86, 101 (2011) (quotation marks and citation omitted).

AEDPA deference does not apply to claims that the state habeas courts do not reach—these are reviewed de novo. Cone v. Bell, 556 U.S. 449, 472 (2009).

DISCUSSION

Lee's petition must be denied. Lee alleges five errors: (1) ineffective assistance of counsel; (2) improper jury instructions; (3) a violation of Brady v. Maryland, 373 U.S. 83 (1963); (4) trial-court errors; and (5) violations of the Eighth and Fourteenth Amendments by imposition of the death sentence in this case. Dkt. Nos. 29, 44. This Court finds no basis for granting habeas relief.[3]

[3] Most of Lee's claims fail for reasons other than exhaustion requirements. The State raises exhaustion repeatedly in its brief. Dkt. No. 87 at 162-65, 179-80, 183-86, 224-26. But in its answer to the currently operative petition, the State only characterized one issue—one not pressed upon by Lee here—as unexhausted. Dkt. No. 30 at 8. It specifically classified as

I. LEE'S INEFFECTIVE-ASSISTANCE CLAIMS FAIL.

Lee unsuccessfully raises three issues with the representation he received at trial and on direct appeal: failure to investigate into and adequately present mitigating evidence, failure to object to biblical references in the State's closing argument, and various other shortcomings.

An ineffective-assistance claim cannot succeed unless the petitioner shows both (1) that his attorney's performance was objectively unreasonable, by a preponderance of the evidence, and (2) a reasonable probability that the outcome of his proceeding would have been different but for that deficient performance. Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000) (en banc). The objective reasonableness of an attorney's performance is gauged by "prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688 (1984). This inquiry is commonsensical and holistic, as "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a

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"reviewable" all of the issues it now claims are unexhausted, except for one aspect of ineffective assistance. Id. at 16, 19-20, 22, 24-25. The answer thus expressly waived exhaustion except as to that one issue. See 28 U.S.C. § 2254(b)(3); cf. Dorsey v. Chapman, 262 F.3d 1181, 1186-87 (11th Cir. 2001) (deeming state to have expressly waived exhaustion by expressly declining to raise it in answer, despite raising it in appellate briefing). The Court hereby accepts that waiver. See Thompson v. Wainwright, 714 F.2d 1495, 1508-09 (11th Cir. 1983) (affording district courts discretion to accept waivers of exhaustion).

criminal defendant." Id. at 688-89. It is also "highly deferential," with a "strong presumption" of reasonableness. Id. at 689. Performance is only unreasonable if "no competent counsel would have taken the action" at issue. Chandler, 218 F.3d at 1315.

As for prejudice, the petitioner again bears a high burden. Sullivan v. DeLoach, 459 F.3d 1097, 1109 (11th Cir. 2006). "It is not enough . . . to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Rather, the petitioner has to show "that the decision reached would reasonably likely have been different absent the [counsel's] errors." Id. at 696. Under these standards and AEDPA deference, each of Lee's contentions fails.

A. Lee's Mitigating-Evidence Contention Fails.

Lee unsuccessfully argues that his trial counsel did not adequately research and present mitigating evidence. An application for a writ of habeas corpus will not be granted unless the adjudication of the claim involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)-(2). The Georgia Supreme Court addressed this issue on its merits. Hall v. Lee, 684 S.E.2d 868, 876 (Ga.

2009). This Court can only reject that Court's decision if it was so unreasonable an application of a U.S. Supreme Court holding that no fairminded jurist could agree with it. Hill v. Humphrey, 662 F.3d 1335, 1347 (11th Cir. 2011); see also Bobby v. Dixon, 565 U.S. 23, 32-33 (2011) (per curiam); Schriro v. Landrigan, 550 U.S. 465, 473 (2007).

Here, the decision was within the wide realm of reasonability. The Georgia Supreme Court permissibly sidestepped the question of performance, holding that Lee had not shown prejudice. Hall v. Lee, 684 S.E.2d at 876; see also Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . ., that course should be followed."). It correctly identified the standard as being whether, but for counsel's errors, there was a reasonable probability that the sentencer "'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Lee, 684 S.E.2d at 876 (quoting Strickland, 466 U.S. at 695). It further noted its duty to "reweigh the evidence in aggravation against the totality of available mitigating evidence." Id. at 876-77 (quoting Wiggins v. Smith, 539 U.S. 510, 534 (2003)). It used the right framework.

To apply those standards, the Court began by observing that Lee's trial counsel presented mitigating evidence that

Lee's childhood was characterized by "instability, poverty, violence, abandonment, and alcohol and drug use." Hall v. Lee, 684 S.E.2d at 877. Some of the evidence mentioned neglect and abuse. Id. at 877-78. There was also expert evidence that Lee had attention deficit hyperactivity disorder ("ADHD"), which made him "impulsive," "overly active," and less able to "regulat[e] and control" his emotions and behavior. Id. at 878-79. That condition "was aggravated by [Lee's] feelings of anger, frustration, resentment, and abandonment" toward his father. Id. at 879. The expert testified that Lee could thrive in a structured environment, such as a prison. Id. at 878.

The Court then assessed the aggravating evidence. The State had a strong case against Lee, given his "incriminating statements to his companions and to the police." Id. at 880. The jury specifically found statutory aggravators: "Lee committed the murder while engaged in the commission of armed robbery and kidnapping with bodily injury"; "he committed the murder for himself or another 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 an aggravated battery to the victim before death." Id. at 880 n.7. There was also serious non-statutory aggravating evidence. Most disturbingly, when

Lee was stopped after the murder, he gave his companion a stolen gun and "told the companion to get out and 'shoot the cop' while [Lee] 'cover[ed]'" him "with another stolen, loaded gun." Id. at 881. At the time of the crime, Lee was on probation for two burglary counts and stealing a truck. Id. at 880. Before trial, Lee "escaped from jail, stole a vehicle, and fled to Florida," then threatened to kill his father and law-enforcement officials working his case. Id. at 880-81. Once, Lee "had violated his probation and had stolen a car and viciously beaten a man because he 'wanted to see blood, a lot of blood.'" Id.

The Georgia Supreme Court reweighed the trial evidence together with the habeas evidence. Seeking habeas, Lee had brought forward an affiant testifying that Lee's mother would regularly physically assault him, evidence of four instances where she did so, evidence of her drug-related dysfunction, evidence that this impacted his development by causing him to behave like a dog, and more specific evidence of his childhood poverty. Id. at 879-80. Lee also supplemented his mental-health evidence with a new diagnosis of post-traumatic stress disorder ("PTSD"), based on his childhood. Id. at 881.[4]

[4] The Georgia Supreme Court discounted that diagnosis in part because "Lee's . . . expert failed to connect [it] to the crimes." Id. at 882. At first glance, this appears to be in tension with Tennard v. Dretke, 542 U.S. 274, 287 (2004). ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant

Still, the Court held that there was "no reasonable probability that Lee would have received a different sentence." Id. at 881; see also id. at 882.

This Court cannot find that this holding was so unreasonable an application of U.S. Supreme Court precedent that no fairminded jurist could agree with it. The relevant U.S. Supreme Court precedent establishes only general rules, like the need to deny relief unless there is a reasonable probability that the sentence would have turned out differently and the need to reweigh all of the trial and habeas evidence. This means state courts must use "a substantial element of judgment." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). AEDPA respects this by affording them even "more leeway" than usual. Id.; see also Knowles v.

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also establishes a nexus [between it and] the crime."). But in context, it is clear that the Georgia Supreme Court did not hold that the diagnosis was irrelevant per se. The comment at issue came in response to Lee's argument that the PTSD diagnosis was "more compelling" than the ADHD one. Id. The Court first observed that the expert made a connection between Lee's ADHD diagnosis and the crimes at trial—but did not do so in habeas with regard to the PTSD diagnosis. Id.; see also id. at 881 ("[H]e would have diagnosed Lee as also suffering from [PTSD], would have testified to that diagnosis, and also would have testified to and explained how the chaos, neglect, and abuse in Lee's life 'had a clear nexus to the crimes in this case.' However, [he] did not explain how Lee's PTSD was related to the murder. Although he noted 'the vague flashbacks that [Lee] recalled during [his] interview with him,' [he] did not claim that, at the time of the murder, Lee was experiencing a flashback or was in a disassociative [sic] state as a result of his PTSD."). Only then did it conclude that there was no prejudice from the missing PTSD diagnosis. Id.

The Court takes this to mean that the PTSD diagnosis would not have added any weight because the ADHD one was similar, other than being more closely related to Lee's crime. This Court's confidence in its interpretation is bolstered by the Georgia Supreme Court's explicit reiteration immediately before the statement at issue of the need to reweigh all of the evidence. See id. Therefore, the "connection" comment does not violate Tennard.

Mirzayance, 556 U.S. 111, 123 (2009) (deeming ineffective-assistance claim "doubly deferential"). What is more, this Court's focus is not on the Georgia Supreme Court's *opinion*—it is on "whether the *decision* . . . was an unreasonable application" of U.S. Supreme Court holdings. Bishop v. Warden, GDCP, 726 F.3d 1243, 1255 (11th Cir. 2013); see also Gissendaner v. Seaboldt, 735 F.3d 1311, 1329 (11th Cir. 2013) ("AEDPA focuses on the result . . ., not on the reasoning that led to that result, and nothing in the statute requires a state court to accompany its decision with any explanation, let alone an adequate one." (quotation marks and citation omitted)); cf. Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." (citation omitted)).

U.S. Supreme Court and Eleventh Circuit holdings favoring petitioners do not unambiguously foreclose the decision at which the Georgia Supreme Court arrived. Each was either followed by that Court or is distinguishable:

- The Court in fact applied Strickland's test. Hall v. Lee, 684 S.E.2d at 872-73 & n.1, 876-77.

- Sears v. Upton, 561 U.S. 945 (2010) (per curiam),

was not an AEDPA case. See Wilson v. Warden, Ga. Diagnostic Prison, 834 F.3d 1227, 1243-44 (11th Cir. 2016) (Jordan, J., dissenting), cert. granted, 137 S. Ct. 1203 (2017). It is also distinguishable because the trial mitigation evidence there was entirely different from, and contradicted by, the habeas evidence. There, "[c]ounsel's mitigation theory . . . was calculated to portray the adverse impact of [the petitioner's] execution on his family and loved ones." Sears, 561 U.S. at 947. In particular, counsel "presented evidence describing [the petitioner's] childhood as stable, loving, and essentially without incident." Id. The jury never heard that the petitioner's parents were physically and verbally abusive, they divorced when he was young, a cousin sexually abused him, and his brother—a convicted drug abuser and dealer—introduced him to a criminal lifestyle. Id. at 948, 950. Nor was it told about the petitioner's severe cognitive defects, which "appear[ed] to be [caused by] significant frontal lobe brain damage" and teenage substance abuse. Id. at 945-46.

Here, by contrast, the mitigation evidence at trial was both of the same species as and compatible with what was uncovered in greater detail during the state habeas proceedings: trial counsel readily told the jury that Lee's upbringing was unstable. See Dkt. No. 12-3 at 33:23-34:7 ("We

brought in his mother. The mother, when [Lee] was born, was a 19-year-old welfare mother. She had her own problems, she had a lot of them. She attempted to raise [Lee] the best way she could. I think she tried and failed when it came to giving him a nurturing, enriching home. She failed to give him any kind of discipline or any kind of structure at an early age, but she tried the best she could, and I'm not here to belittle his mama, but it wasn't the most ideal environment . . . ." (emphases added)).

- AEDPA deference did not apply to the prejudice analysis in Johnson v. Secretary, Department of Corrections, 643 F.3d 907, 930 (11th Cir. 2011). That case is further distinguishable for reasons like those presented by Sears. The Eleventh Circuit found prejudice despite more than de minimis mitigating evidence, but it did so in light of contradictions between the trial and habeas evidence—not just the lack of detail present here. Trial counsel there brought forward evidence that the petitioner's parents were "cold and uncaring, something in the nature of the 'American Gothic' couple." Id. at 936. In fact, they were raging alcoholics—so much so that the petitioner was put into an orphanage when his father went on a three-month drinking binge in another state, the petitioner's mother attacked his father with a butcher's knife, and the petitioner was singled out for particularly

severe beatings. Id. at 936-37. The jury never heard anything about the petitioner's mother's repeated suicide attempts—one of them discovered by the petitioner when he was a child. Id. It did not know anything about how the petitioner later found his mother, dead of an overdose, clutching a photograph of his dead brother, who died of an overdose. Id. at 937. The jury also heard that the petitioner's grandparents "were caring and nurturing people," whereas habeas evidence showed them to have inflicted horrifying physical, emotional, and psychological abuse on the petitioner. Id. Here, by contrast, the jury heard that Lee's mother was addicted to drugs, and that parental domestic violence, abuse, and neglect were present in Lee's childhood. It was only deprived of some (undeniably disturbing) details.

- Porter v. McCollum, 558 U.S. 30 (2009) (per curiam), can be distinguished as featuring only de minimis mitigating evidence at trial. The jury there "heard almost nothing that would humanize [the petitioner] or allow them to accurately gauge his moral culpability," although he was a war hero who struggled to readjust to life at home, with childhood abuse and a brain abnormality. Id. at 41. Besides, Porter lacked the sort of aggravating evidence present here, including Lee's attempt to have a police officer shot, death threats against law enforcement, and escape from jail.

- Rompilla v. Beard, 545 U.S. 374 (2005), did not apply AEDPA to the question of prejudice. Id. at 390. It is also distinguishable because the jury there heard only minimal mitigating evidence: "[F]ive of [the petitioner's] family members argued in effect for residual doubt, and beseeched the jury for mercy, saying they believed [the petitioner] was innocent and a good man." Id. at 378. Left unpresented was the petitioner's extensive history of childhood physical abuse, which included being regularly beaten and "locked . . . in a small wire mesh dog pen that was filthy and excrement filled." Id. at 392. There was also no hint of the petitioner's diagnosis of organic brain damage. Id.

- Williams v. Taylor, 529 U.S. 362 (2000), did not apply AEDPA deference to the issue of prejudice because the state supreme court unreasonably applied the law in rejecting what it called "undue 'emphasis on mere outcome determination.'" Id. at 397 (emphasis omitted); see also Cullen v. Pinholster, 563 U.S. 170, 202 (2011) (distinguishing Williams). Besides, Williams featured minimal mitigation: the jury heard that the petitioner was "a 'nice boy' and not a violent person," and that in a robbery, "he had removed the bullets from a gun so as not to injure anyone." Id. at 369. But the petitioner had been so severely abandoned as a child that his parents were imprisoned for criminal neglect, he had

been placed in an abusive foster home, he had a borderline intellectual disability, and he was a model prisoner. Id. at 396.

- Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011), did not apply AEDPA to prejudice. Id. at 1226. It is also distinguishable because the evidence the counsel presented in mitigation was de minimis. The jury there heard five of the petitioner's family members testify for a total of 26 minutes that they did not believe he was guilty, he deserved mercy, and he "had committed himself to Christ before the murders." Id. at 1206. The counsel there failed to discover that the petitioner suffered from extensive mental health problems and diseases including organic brain damage to the frontal lobe, bipolar disorder, and temporal lobe epilepsy. Id. at 1203. They also failed to discover that the petitioner had attempted suicide as a child, that his conduct was not entirely volitional, or that his father physically abused him. Id.

> Neither the jury nor the sentencing judge was ever told, because defense counsel never discovered that [the petitioner] suffer[ed] from extensive, disabling mental health problems and diseases including organic brain damage to the frontal lobe, bipolar disorder, and temporal lobe epilepsy. Nor did they learn that the defendant had attempted suicide at age eleven, or that because of these mental health issues, [he] exhibit[ed] increased impulsivity and decreased sound judgment; that his conduct was not entirely volitional; or that his judgment and mental flexibility were significantly impaired by organic brain damage. Nor, finally were

> they ever told that [his] father was physically abusive to his children, especially to [the petitioner], waking them in the middle of the night to beat them (sometimes after stripping them naked) with razor strops, fan belts, and old used belts; that the family was repeatedly evicted from their homes and hungry, and lived in fear of those to whom the father owed gambling debts; or that [the petitioner's] mother suffered from clinical depression, suicidal ideations, rage blackouts, and urges to physically injure her children.

Id. at 1203.

- Wiggins v. Smith, 539 U.S. 510 (2003), is distinguishable because of de minimis trial evidence, too. The petitioner's jury knew only that he "had no prior convictions." Id. at 537. He had suffered physical abuse, poverty, sexual molestation, several rapes, and homelessness. Id. at 535. Additionally, unlike Lee, the Wiggins petitioner "[did] not have a record of violent conduct." Id.

- DeBruce v. Commissioner, Alabama Department of Corrections, 758 F.3d 1263 (11th Cir. 2014), is distinguishable because it featured relatively little aggravation compared to that present here. Id. at 1286-87 (Tjoflat, J., dissenting) (identifying the two aggravators as a second-degree robbery and the capital murder for which the petitioner was convicted). In addition, the jury there was misled into thinking the petitioner "had an impoverished childhood" that "was otherwise unremarkable" and "had been a successful student who had attended college." Id. at 1276

(majority opinion). Beyond a passing mention of a mental disorder for which the petitioner had been treated, the jury was not made aware of the petitioner's brain-damage diagnosis, his seizure-like blackouts, that he had been regularly attacked by gangs as a child, that he had abused substances as a teenager, his suicide attempts, or that his sister would regularly beat him and punish him by withholding food. Id. at 1270, 1276. Here, counsel did *not* totally "fail[ ] to introduce . . . available mitigating evidence of the defendant's mental impairment and history of abuse." Id. at 1277 (referring to a "complete omission of this type of evidence." (emphasis added)). The jury knew that Lee was diagnosed with ADHD affecting his decision-making and self-control, and had a deprived childhood. Hall v. Lee, 684 S.E.2d at 878-79.

- Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008), did not apply AEDPA to the question of prejudice, as the state appellate court unreasonably applied the law in finding no prejudice "primarily" because "the additional mitigating evidence did not refute the evidence establishing [the petitioner's] responsibility for . . . capital murder." Id. at 1343. The Georgia Supreme Court made no such error here. Hall v. Lee, 684 S.E.2d at 876-77, 882. Beyond that, Williams found prejudice due to five factors, only the first of which

is relevant here: the jury heard that the petitioner was beaten, whipped, and choked by his father, who also drank, used drugs, beat the petitioner's mother, and raped his own intellectually disabled daughter. Id. at 1329. The petitioner later brought forward evidence that "the violence [he] experienced . . . as a child far exceeded—in both frequency and severity—the punishments described at sentencing," and his "parents provided him with inadequate food and clothing, neglected his basic hygiene and medical needs, permitted him to roam the neighborhood unsupervised, and ignored his deteriorating academic performance." Id. at 1342-43. Besides this, his mother was "a neglectful parent who was frequently absent." Id. at 1342. The Eleventh Circuit deemed this evidence "relevant." Id.

But it found prejudice after considering the omitted evidence together with other factors absent here. The jury there recommended against imposition of the death penalty by a vote of nine to three. Id. at 1330. Here, the jury unanimously sentenced Lee to death. In Williams, the judge rejected the jury's recommendation "on the basis of a single statutory aggravating circumstance—one that [wa]s an element of the underlying capital murder charge." Id. at 1343. Here, there were multiple statutory aggravators and a variety of highly significant non-statutory ones. The Williams judge

"discount[ed] the significance of [the petitioner's childhood] abuse at sentencing" because the petitioner had been cared for by his mother and grandmother—a conclusion "contradicted" by habeas evidence of the mother's neglect and her own part in physically abusing the petitioner. Id. at 1342-43. Here, the habeas evidence did not contradict the trial evidence.

• The Eleventh Circuit's decision in Cooper v. Secretary, Department of Corrections, 646 F.3d 1328 (11th Cir. 2011), is also distinguishable for several reasons. There, the petitioner's mother—his sole mitigation witness—testified to abuse *she* suffered at the hands of the petitioner's father, said the father emotionally abused the petitioner by "not being involved in his life," and described the father disciplining the petitioner with a belt so hard that he left marks. Id. at 1336, 1353; see also id. at 1356 (noting that prosecutor argued: "[Y]ou heard that his mother was married to a violent man and that he abused her. What has that got to do with the defendant?"). In fact, the petitioner himself had been subjected to "horrible abuse" from multiple family members. Id. at 1353. This made the state supreme court's finding that "a substantial part" of the petitioner's childhood deprivations came out at trial unreasonable, and so removed AEDPA deference. Id.

Here, Lee had several witnesses who collectively described parental violence, maternal drug abuse, and neglect and abuse visited upon *him*. Besides, the Georgia Supreme Court did not make as broad a factual finding as did the state supreme court in Cooper: it merely found that the jury heard about "the instability, poverty, violence, abandonment, and alcohol and drug use that Lee was exposed to as a child," plus abuse and neglect. Hall v. Lee, 684 S.E.2d at 877-78. This finding, even if arguably oversimplistic, has not been rebutted by clear and convincing evidence—so AEDPA deference applies here.

Besides, in Cooper, the habeas evidence would have qualified the petitioner for two statutory mitigators. Id. at 1354-55. Georgia does not have statutory mitigators. The Cooper habeas evidence also supported a slew of new non-statutory mitigators, including childhood abuse, substance abuse, possible "neurological deficits" from inhalant abuse, maternal abandonment, lack of education, learning deficits, depression, suicidal gestures, and an IQ a mere six points above the intellectual-disability range. Id. at 1355. Here, the habeas evidence only would have added further detail in support of childhood abuse and neglect mitigators, and possibly enhanced the mental-health mitigator based on ADHD with a PTSD diagnosis. What is more, the Cooper court found

that jurors may have interpreted the lack of mitigating witnesses—the petitioner's mother was the only one—as a sign that trial counsel could not find anything good about the petitioner. Id. Lee, by contrast, had several mitigating witnesses, one of whom the Georgia Supreme Court deemed particularly "strong." Hall v. Lee, 684 S.E.2d at 883; see also id. at 877-78.

- Lastly, Penry v. Lynaugh, 492 U.S. 302 (1989), and Eddings v. Oklahoma, 455 U.S. 104 (1982), are not on point. They held that state law cannot prevent consideration of mitigating evidence like Lee's. That is not at issue here.

Beyond these precedents that reached outcomes favorable to petitioners, the Court also notes Cullen v. Pinholster, 563 U.S. 170 (2011). There, the trial mitigation evidence—which was less extensive than that presented to the jury here, and also focused primarily on the petitioner's childhood and mental health—included the petitioner's mother's testimony that the petitioner's stepfather "was abusive, or nearly so." Id. at 199. No elaboration was given. In the state habeas proceedings, the petitioner brought forward testimony that he "was beaten with fists, belts, and even wooden boards" "several times a week." Id. at 201 (majority opinion), 226 (Sotomayor, J., dissenting). The U.S. Supreme Court found no prejudice because that evidence was "largely duplicat[ive]" of

the trial evidence. Id. at 200 (majority opinion). If brutal detail about a single, ambivalent reference to abuse could not establish prejudice in Cullen, it cannot do so here.

The Georgia Supreme Court's prejudice determination was not so unreasonable an application of U.S. Supreme Court holdings that no fairminded jurist could agree with it. Thus, Petitioner's argument that this Court should review the Georgia Supreme Court's decision de novo is without merit. The question of prejudice from ineffective assistance of counsel is fact-intensive. The mandatory guidance on point is general. The precedent either was followed or is distinguishable. Under AEDPA, this means that the Georgia Supreme Court's no-prejudice holding stands. Lee's contention that his trial counsel gave ineffective assistance by failing to present or investigate mitigating evidence fails.

B. Lee's Biblical-References Contention Fails.

Also unconvincing is Lee's contention that his trial and appellate counsel gave ineffective assistance by not objecting to biblical references in the State's closing argument. The Georgia habeas courts did not decide this issue on the merits, so this Court does so de novo. Cone v. Bell, 556 U.S. 449, 472 (2009). The comments to which Lee objects are:

> [Defense counsel] will argue that the defendant is worth saving, that this jury should show mercy and compassion to the defendant because it's in the Bible, and the Bible does teach us that we should show mercy and compassion in certain cases. The defendant himself quoted Scriptures,[5] but, you know, the devil himself can quote scriptures when necessary, the devil himself can do that.[6] But, you know, the Bible also tells us that God gave man the authority to establish laws to protect the innocent and to punish those who violate man's law, and it is God's authority to do that. The Bible tells us - And it says both ways. In Genesis it tells us that whosoever sheds man's blood, so shall man's blood be shed, for in the image of God all men are made, but then it does say about the compassion. But most important here is that God gave man authority to make law, and that's what we've done in this case. . . . There must be accountability in the state of Georgia for people who commit these type crimes [sic].
>
> * * * * [T]he defense may also urge you not to play God in an attempt to make you feel like you are being asked to play God, to sentence him for the rest of his life and let him serve it in prison, in hopes that you will not give him the death penalty, to let God decide when he leaves this earth, but God has given us authority in certain situations. Because He gave us authority to make law, He has given us authority to make those decisions in certain cases.

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[5] See Dkt. No. 12-2 at 197:3-8 ("Christ died for all. He died for you, He died for me and Sharon Chancey, and the way I believe is I stole from God when I did what I did, and I'm sorry, I'm very sorry, but I know that God's forgiven me because, when I did it, I did it in ignorance . . . spiritually speaking."), 209:18-25 ("Christ said He would die for one person, in this whole world just for one person, and Sharon Chancey was one person . . . . Until I die, I have to think about that I sent somebody somewhere, and that was God's child, just like I am."), 214:2-10 (commenting on his jailbreak: "We all backslide for time to time . . . . The Bible says we're supposed to renew our minds every day.").

[6] This quip is not comparable to prosecutorial comparisons of defendants to hated religious figures, which have been held improper. See Dkt. No. 80 at 132 n.61. The prosecutor here did not say Lee was Satan-like, but rather, that the jury should not take Lee's statements to be religiously authoritative.

Dkt. No. 80 at 130-31 (quoting Dkt. No. 12-3 at 16:15-17:6, 17:11-12, 23:1-9 (emphasis omitted)).

An attorney obviously does not give ineffective assistance by failing to make a meritless objection. See, e.g., Freeman v. Att'y Gen., State of Fla., 536 F.3d 1225, 1233 (11th Cir. 2008). Any objection counsel could have made to the biblical references here would have been meritless. Biblical references are unconstitutional when the State cites them "for the proposition that death should be mandatory," in contradiction of American law's allowance of room for mercy. Romine v. Head, 253 F.3d 1349, 1368 (11th Cir. 2001); see also Farina v. Sec'y, Fla. Dep't of Corr., 536 F. App'x 966, 981 (11th Cir. 2013) (holding error: "While elevating his own station as divinely-ordained authority, the prosecutor made clear that the death penalty was the sole acceptable punishment under divine law . . . ."); Cunningham v. Zant, 928 F.2d 1006, 1020 & n.24 (11th Cir. 1991); Carruthers v. State, 528 S.E.2d 217, 221-22 (Ga. 2000), abrogated in part on other grounds by Vergara v. State, 657 S.E.2d 863, 866 (Ga. 2008); Hammond v. State, 452 S.E.2d 745, 753 (Ga. 1995); Todd v. State, 410 S.E.2d 725, 733-34 (Ga. 1991).

But the prosecutor here did not try to foreclose juror considerations of mercy by appealing to divine justice. Rather, the prosecutor tried to downplay *divine* mercy by

appealing to *secular* (and divine) justice. Cf. Ford v. Schofield, 488 F. Supp. 2d 1258, 1310 (N.D. Ga. 2007) ("Countering biblical law with biblical law likely minimized any prejudice . . . ."). This sets the biblical references here apart from those in Romine *et al.* See Greene v. Upton, 644 F.3d 1145, 1158-59 (11th Cir. 2011) (holding reasonable state court finding of propriety in "references to principles of divine law related to the penological justifications for the death penalty, including the concept of retribution and whether, considering the enormity of his crime, [the petitioner] should be extended mercy."); cf. Williams v. Campbell, Civ. A. No. 04-0681, 2007 WL 1098516, at *33 (S.D. Ala. 2007) ("The prosecutor . . . argued generally that Christianity is not incompatible with imposition of the death penalty, without stating that religion cried out for that penalty in this case. The Court does not hold that the comment was proper, but not all religious references are of the same intensity, and the one at issue here ranks closer to the mild end of the scale . . . ."); Hill v. State, 427 S.E.2d 770, 778 (Ga. 1993) ("[W]hile it would be improper . . . to urge that the teachings of a particular religion command the imposition of a death penalty in the case at hand, counsel may bring to his use in the discussion of the case well-established historical facts and may allude to such principles

of divine law relating to transactions of men as may be appropriate to the case." (citation and quotation marks omitted)). An objection would have been meritless, so this is not a basis for finding ineffective assistance.

C. Lee's Other Ineffective-Assistance Contentions Fail.

Lee's six other related contentions also fail.

i. Lee's argument that counsel inadequately cross-examined a state witness fails.

Lee unpersuasively contends that his attorneys were ineffective by failing to adequately cross-examine a state witness, Douglas Gregory. The Georgia habeas courts did not decide this issue on the merits, so this Court does so de novo. Cone, 556 U.S. at 472. Gregory testified that he and Lee stole a car and drove it to Florida in March 1994. Dkt. No. 12-1 at 32:18-22, 33:20-22, 38:7-9. There, Lee and his friends beat Gregory after Lee said "there was going to be an initiation" and "he wanted to see blood, a lot of blood." Id. at 36:4-37:4. Lee personally "busted open" Gregory's head in four different places using a large stick. Id. at 36:25-37:23. On cross-examination, trial counsel elicited that Gregory was sent to boot camp and put on probation for the theft, and that Gregory did not know of any related charges brought against Lee. Id. at 45:21-25. Gregory also admitted that he planned the theft with Lee. Id. at 41:9-42:7.

Lee presented additional evidence in his state habeas proceedings. A police officer said Gregory had initially claimed Lee "had kidnapped him at gunpoint," then forced him to steal the car. Dkt. No. 18-4 at 67. Then, Lee had kept him at gunpoint while the two drove to Florida. Id. Gregory then alleged that Lee held him "captive in a camper trailer for 4 days until he was taken out and beaten." Id. The officer thought Gregory "was being totally untruthful" in making those statements. Id.

Lee argues that his trial attorneys were ineffective for not impeaching Gregory with this. Dkt. No. 80 at 147. Although Gregory's police statements did conflict with what he said on the stand, they still described him being beaten. A competent attorney could have decided that the attempted impeachment would have left Gregory's claim that Lee beat him appearing consistent, or that the impeachment would not have made a difference. This argument fails.

ii. Lee's argument that counsel inadequately prepared witnesses fails.

Lee next says trial counsel did not adequately prepare his lay witnesses and did not give enough information to his mental-health expert. Dkt. No. 80 at 147-48. The lay-witnesses allegation was not addressed by the Georgia habeas courts, so this Court reviews it de novo. Cone, 556 U.S. at

472. Lee has not given any reason for the Court to find prejudice. This contention must therefore fail. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

As to the expert, the Georgia Supreme Court found no prejudice. Hall v. Lee, 684 S.E.2d 868, 881-82 (Ga. 2009). This Court can only reject that holding if it was so unreasonable an application of U.S. Supreme Court precedent that no fairminded jurist could agree with it. Harrington v. Richter, 562 U.S. 86, 101 (2011). It was not. Lee does not argue prejudice other than to say that the expert "was not provided with information that was essential to permit an accurate diagnosis of Mr. Lee's mental health." Dkt. No. 80 at 147. The Georgia Supreme Court noted two possible deficiencies in the expert's preparation: the expert was not given a school record misdiagnosing Lee as mentally retarded, and he did not have the information relating to Lee's childhood abuse that surfaced during the habeas proceedings. Hall v. Lee, 684 S.E.2d at 881-82. As to the first issue, the Court found that "trial counsel actually did obtain and submit to [the expert] as a part of Lee's school records an evaluation of Lee performed in kindergarten that contained the information that Lee's classification of functioning had been in 'the Mild level of Mental Retardation'"—and the expert testified "at trial that he found this kindergarten evaluation

'significant.'" Id. at 881. This factual finding must be accepted unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Lee has presented none. The finding stands, and thus, so does the Georgia Supreme Court's conclusion that Lee was not prejudiced by any failure to give the expert the school record. Hall v. Lee, 684 S.E.2d at 881.

As to the childhood-abuse evidence, the expert did testify that he would have added a PTSD diagnosis. Id. But the Georgia Supreme Court found no prejudice. Id. at 882. As explained in Part I.A above, this holding was not so unreasonable an application of U.S. Supreme Court precedent that no fairminded jurist could agree with it. Harrington, 562 U.S. at 101. Hence, Lee cannot establish ineffective assistance based on failure to prepare witnesses.

iii. Lee's argument that counsel inadequately prepared him to testify fails.

Nor can Lee establish ineffective assistance of counsel based on inadequate help in preparing his own testimony. Contrary to the State's assertion, this issue was not addressed by the Georgia habeas courts, so this Court reviews it de novo. Cone, 556 U.S. at 472. Lee decided to testify on mitigation day, despite earlier conversations wherein he had said he would not. Dkt. No. 14-2 at 72:11-17. Counsel

requested a recess and spoke to Lee for about 35 minutes. Id. at 72:21-22. They tried to dissuade him from testifying. Id. at 72:24. Lee remained "convinced that . . . he should say that he was sorry . . . that he is not a bad person." Id. at 73:16-17. He ultimately did so. Id. at 73:20. Trial counsel thought Lee "came across very genuine and sorry, . . . [he] accomplished what he wanted to accomplish," and there was some benefit to his testimony. Id. at 74:5-14. Lee does not identify any way in which he was prejudiced. None is apparent. This argument fails. See Strickland, 466 U.S. at 687.

iv. Lee's argument that counsel improperly failed to object to sentencing-phase instructions fails.

Lee contends that his trial attorneys wrongly did not object to, or directly appeal, the sentencing-phase jury instructions, as no mitigating-evidence instruction was given. Dkt. No. 80 at 148-49. This contention is unpersuasive. Insofar as it concerns the failure to initially object, it was not addressed by the Georgia habeas courts, so this Court reviews it de novo. Cone, 556 U.S. at 472. An attorney cannot give ineffective assistance by not making a meritless objection. See, e.g., Freeman v. Att'y Gen., State of Fla., 536 F.3d 1225, 1233 (11th Cir. 2008). Any objection counsel

could have made to the instructions would have been meritless, as discussed in Part II.A below.[7]

Any failure to directly appeal fails for the same reason. Lee cannot establish ineffective assistance on this basis.

v. Lee's argument that counsel improperly failed to object to secular prosecutorial comments fails.

Lee unpersuasively claims trial counsel erred in not objecting to the prosecutor's nonreligious sentencing-phase closing arguments: (1) describing this case as "one of the worst"; (2) telling jurors they had to "prevent [Lee] from being able to escape"; (3) saying the option of life with the possibility of parole would mean "knowing that [Lee would] be paroled to walk the streets of this state and this county and this city"; (4) saying execution "is a lawful function of our system" and not revenge, whereas "[t]here was no one there to protect the rights of Sharon Chancey . . . no one to argue for her right to live," as Lee "acted as judge, jury and

[7] Part II.A discusses federal law. As for Georgia law, the relevant statute does require that trial courts "include in . . . instructions to the jury for it to consider[ ] any mitigating circumstances." O.C.G.A. § 17-10-30; see also Ross v. State, 326 S.E.2d 194, 204 (Ga. 1985), abrogated on other grounds by O'Kelley v. State, 604 S.E.2d 509 (Ga. 2004) ("Under Georgia law, a jury should be informed that it can consider all of the evidence presented during both phases of the trial (guilt-innocence and sentence), it should be instructed to consider mitigating circumstances, and it should be clearly and explicitly informed that it may recommend a life sentence even if it finds one or more statutory aggravating circumstances beyond a reasonable doubt." (internal citations omitted)); Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977). But any objection Lee's trial attorneys could have made still would have been meritless, as the instructions here are not meaningfully distinguishable from the ones upheld in High v. Zant, 300 S.E.2d 654, 662-63 (Ga. 1983). Cf. Dkt. No. 12-3 at 45:7-52:2.

executioner all in one"; and (5) "stating Mr. Lee removed Ms. Chancey from her home at gunpoint," without an evidentiary basis for this. Dkt. No. 12-3 at 17:24, 19:5-23, 20:6-7, 22:12-15; Dkt. No. 80 at 140-41.

The Georgia Supreme Court did not decide this issue, so this Court does so de novo. Cone, 556 U.S. at 472. Again, failure to make a meritless objection is not ineffective assistance, and ineffectiveness requires a showing of prejudice. Freeman, 536 F.3d at 1233; Chandler v. United States, 218 F.3d 1305, 1312-13 (11th Cir. 2000). A prosecutorial remark is not reversible error unless it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). The five comments at issue here do not rise to that level.

(1) The comment about this case being "one of the worst" was acceptable. It may be "wrong for the prosecutor to tell the jury that, out of all possible cases, he has chosen a particular case as one of the very worst," as this "suggest[s] that a more authoritative source [than the jury] has already decided the appropriate punishment." Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985) (en banc), vac'd, 474 U.S. 1001 (1985), reaff'd on subsequent determination, 802 F.2d 1293,

1296-97 (11th Cir. 1986) (en banc) (per curiam). But all the prosecutor did here was generically say this was "one of the worst" cases out there. That is permissible. Cf. Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1292 (11th Cir. 2012) (endorsing prosecutorial comment that victim experienced "every woman's worst nightmare," given state's ability to prove murder "was 'extremely wicked or shockingly evil'[or] 'outrageously wicked and vile'" (citation omitted)); Keeton v. Bradshaw, No. 1:05CV0033, 2006 WL 2612899, at *17 (N.D. Ohio Sept. 8, 2006) ("[I]n regard to the prosecutor's comment that the offense was one of the worst crimes ever heard in that courtroom, any prejudice was minimal.").

(2) The invitation to the jury to prevent Lee from escaping was permissible. Future dangerousness "is a proper element in the sentencing jury's decision." Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985) (en banc), vac'd, 478 U.S. 1016 (1986), reinstated, 809 F.2d 700 (11th Cir. 1987) (en banc) (per curiam) (considering prosecutorial suggestion that petitioner "might kill a guard or a fellow prisoner."); see also Jurek v. Texas, 428 U.S. 262, 275 (1976) (plurality opinion) ("[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."). Lee had his required "opportunity to introduce evidence on this

point." Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); see also Dkt. No. 12-3 at 31:2-18 (summarizing, in defense closing argument, evidence that Lee's escape was harmless).

(3) Any error in the prosecutor's comment that a sentence of life with the possibility of parole would result in Lee being free due to parole did not prejudice Lee, as the jury was explicitly given the option of sentencing Lee to life without the possibility of parole. Dkt. No. 12-3 at 50:11-13; cf. Greene v. Upton, 644 F.3d 1145, 1157 (11th Cir. 2011) (holding state court reasonably held curative instruction prevented prejudice arising from improper parole comment).

(4) It is permissible for a prosecutor to argue that "[a petitioner's] execution of [a victim] in a manner much more horrible than a procedurally proper, legal execution demonstrate[s] the [petitioner's] belief in the death penalty." Brooks, 762 F.2d at 1411. The comments Lee criticizes here are just as permissible.

(5) The prosecutor did not manufacture a baseless theory that Lee had taken Chancey at gunpoint. The comments read:

> I submit to you, from what you've heard on the stand, he kidnapped Sharon Chancey from that trailer. Think about what he's told you. He now tells you that he himself entered into the trailer of Sharon Chancey, that he had sent [his girlfriend] up there but [Chancey] would not come with [her] because she didn't know [her] . . . . After midnight of May the 26th, a young girl comes to her door that she had never seen before and says [Lee] needs some

> help, and she says, no, I'm not leaving the home that I'm in; while I'm asleep, you woke me up, I'm not leaving. Yet the defendant himself goes there, according to his own words, enters the trailer, and on two occasion, at least, begs her or asks her to come help him. She finally agrees . . . .
>
> * * * * He wants you to believe . . . that he went to her house and said, Sharon, I need some help, my car has broken down . . . and after a couple of times she finally says, sure, I'll go with you and help you out. Then Jamie, according to his testimony on the stand, says I'll go out here, I've got a friend out here, I'm catching a ride with him back to my car that's broken down. Now does that make any sense at all, that you go to somebody's house, say I need you to help me crank a car, and when they finally agree, say, well, I've got somebody else here I'm catching a ride with?
>
> . . . . I submit to you that Sharon Chancey was taken at gunpoint from that house by Jamie Lee. Other things: Sharon Chancey left her house without her teeth. . . . [S]he left the house with no shoes on, and she left the house in her panties and, according to the defendant, just a nightgown. It's two to four o'clock in the morning. She's walking around supposedly on the side of the road trying to help somebody crank a car, barefooted, in her panties, and in a flimsy nightgown. Does that make any sense at all?

Dkt. No. 12-3 at 11:7-13:7.

This was not a misrepresentation of the evidence. It was an argument based on it. The prosecutor's "conclusion . . . was within the 'considerable latitude in imagery and illustration' granted a district attorney in . . . final argument." Williams v. State, 330 S.E.2d 353, 355 (Ga. 1985) (citation omitted). Trial counsel's failure to object to this and the other comments was not ineffective assistance.

vi. Other ineffective-assistance contentions fail.

Lee raises other ineffective-assistance contentions without briefing them. Dkt. No. 29 ¶ 15(b)-(c), (e), (g)-(j), (n)-(s), (w), (x), (ee). These are too vague to merit relief, refer to withdrawn substantive claims, or are unpersuasive. See Dkt. No. 44; Parts III, IV.A-B infra.

Lastly, Lee complains that trial counsel was ineffective for failing to present issues on appeal. Dkt. No. 29 ¶¶ 15(ii), 19-20. As no issue Lee raises presented a meritorious basis for appeal, this contention fails. Lee has not proven ineffective assistance of counsel.

II. LEE'S JURY-INSTRUCTION CLAIMS FAIL.

Lee's claims that his sentencing and guilt/innocence jury instructions were improper fail.

A. Lee's Sentencing-Instruction Contention Fails.

Lee unsuccessfully contends that the trial court's instruction on mitigating evidence was improper. The Georgia habeas courts did not decide this issue on the merits, so this Court does so de novo. Cone, 556 U.S. at 472; see Dkt. No. 20-16 at 4 (holding contention procedurally defaulted); Dkt. No. 87 at 24 (conceding this to have been error, citing Head v. Ferrell, 554 S.E.2d 155, 160 (Ga. 2001)). The trial court did not define mitigating evidence or instruct the jury to weigh it against aggravating evidence. It did define

statutory aggravating evidence, and instruct the jury that at least one aggravator had to be found before a death sentence could be imposed. Dkt. No. 12-3 at 45:7-48:17. It also explained the jury's ability to impose a lesser sentence:

> You may set the penalty to be imposed at life imprisonment. It is not required and it is not necessary that you find any extenuating or mitigating fact or circumstance in order for you to return a verdict setting the penalty to be imposed at life imprisonment. Whether or not you find any extenuating or mitigating facts or circumstances, you are authorized to fix the penalty in this case at life imprisonment. If you find from the evidence beyond a reasonable doubt the existence in this case of one or more statutory aggravating circumstances as given you in charge by the Court, then you would be authorized to recommend the imposition of a sentence of life imprisonment without parole or a sentence of death, but you would not be required to do so.
>
> If you should find from the evidence in this case beyond a reasonable doubt the existence of one or more statutory aggravating circumstances as given you in charge by the Court, you would also be authorized to sentence the defendant to life imprisonment. You may fix the penalty of life imprisonment if you see fit to do so for any reason satisfactory to you or without any reason.
>
> Members of the jury, you may return any one of the three verdicts as to the penalty in this case; life imprisonment, life imprisonment without parole, or death.
>
> * * * * Whatever penalty is to be imposed within the limits of the law as I have instructed you is a matter solely for you the jury to determine . . . .

Dkt. No. 12-3 at 49:15-50:13, 51:24-52:2.

These instructions were within the bounds of what the U.S. Constitution permits. A jury need not "be instructed on

the concept of mitigating evidence generally, or on particular statutory mitigating factors." Buchanan v. Angelone, 522 U.S. 269, 270 (1998). A state need not "affirmatively structure in a particular way the manner in which juries consider mitigating evidence." Id. at 276. "[C]omplete jury discretion"—such as that authorized by the charge here—"is constitutionally permissible." Id.

The only thing instructions cannot do is "foreclose the jury's consideration of any mitigating evidence." Id. at 277. The instructions here did no such thing. They "informed the jurors that if they found [an] aggravating factor proved beyond a reasonable doubt," they could fix "the penalty at death." Id. They also told jurors they could impose a lesser sentence "for any reason satisfactory to [them] or without any reason." Dkt. No. 12-3 at 50:8-10. "The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved." Buchanan, 522 U.S. at 277. "Moreover, . . . the instructions . . . did not constrain the manner in which the jury was able to give effect to mitigation." Id. This means that the instructions were constitutionally permissible. Id. at 279.

Pre-Buchanan Eleventh Circuit cases do not hold otherwise. To be sure, "the Constitution requires that there be no reasonable possibility that a juror will misunderstand

the meaning and function of mitigating circumstances." Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986) (en banc). And "[w]here a defendant has . . . presented mitigating evidence, the absence of any explanatory instructions on mitigation" creates such a possibility. Cunningham v. Zant, 928 F.2d 1006, 1012 (11th Cir. 1991). But the Court must look to "the context of the entire sentencing proceeding." High v. Kemp, 819 F.2d 988, 991 (11th Cir. 1987). Here, although "[t]he challenged portion of the instruction did not explicitly define 'mitigation,' nor did it allocate the mitigating function to the defendant," there was no reasonable probability that jurors misunderstood their ability to consider mitigating evidence. Waters v. Thomas, 46 F.3d 1506, 1528 (11th Cir. 1995). The Eleventh Circuit reached this conclusion in High because: (1) at the sentencing phase's outset, the judge told the jury that both sides would present whatever evidence they wanted to; (2) the jury knew "that 'mitigating facts' are those . . . which are 'good' and tend to help the defendant"; and (3) "the jury was instructed that it could impose mercy" regardless of mitigators or aggravators. 819 F.2d at 991.

These facts hold true here as well. At the sentencing phase's start, the judge told the jury that "the State and the accused both have a right to submit additional evidence in

aggravation or extenuation and mitigation of the punishment to be imposed. After hearing any such evidence . . ., the jury then goes back to consider the sentence and determine the punishment to be imposed." Dkt. No. 12-1 at 14:3-9. Both sides then said that they had evidence to present. Id. at 14:11-15. This notified the jury that it was going to hear competing sets of evidence before determining the sentence. That information, and the jury's ability to consider the competing evidence, were reinforced by Lee's counsel in closing argument. Counsel began by reminding jurors that "[w]e're deciding whether or not the State of Georgia should take Jamie Lee out and kill him." Dkt. No. 12-3 at 25:5-6, 13-14. He discussed the State's aggravating evidence at length, challenging parts of it and its significance. Id. at 28:6-32:25. He explicitly talked about mitigating evidence, beginning with a reference to his side's "opportunity in the mitigation phase . . . to show you a little bit about Jamie Lee." Id. at 33:1-3. The jury then heard a summary of, and comments upon, the mitigating evidence. Id. at 33:3-40:13.

Thus, the judge told the jurors they could freely decide whether to impose the death penalty after hearing dueling evidence in aggravation and mitigation, and Lee's attorney identified his evidence as being in mitigation. Given these facts, there is no reasonable probability that the jury

misunderstood the nature and function of mitigating evidence.[8] See Waters, 46 F.3d at 1528-29 ("[D]efense counsel clearly indicated that 'mitigating evidence' was that which could aid the defendant by leading a jury to impose a sentence of life, even if it found the existence of one or more aggravating circumstances. This facet of the argument gave the jury . . . enlightenment regarding the nature and role of mitigating evidence. The argument also served to link the function of mitigation to the instruction that the jury could impose a life sentence for any reason or none at all."); Williams v. Kemp, 846 F.2d 1276, 1284-85 (11th Cir. 1988) ("By informing the jurors of their wide discretion to recommend against death, these instructions provided the jury with a clear basis to focus upon and consider evidence of mitigating circumstances."). Lee's contention fails.

B. Lee's Guilt/Innocence-Instruction Contentions Fail.

Lee's contention regarding the guilt/innocence-phase instructions fares no better.[9] The state habeas court found

[8] Nor, apparently, did trial counsel think there was such a probability at the time—no objection was made. Dkt. No. 12-3 at 55:10-18; see also Williams v. Kemp, 846 F.2d 1276, 1285 (11th Cir. 1988) ("An additional indication that all parties present at the proceedings perceived that the instructions did in fact convey to the jury the significance of mitigating circumstances is evidenced by the fact that, at the close of the sentencing instructions, no objections or exceptions were made.").

[9] Lee raised this issue in his federal habeas petition, dkt. no. 29 ¶ 29, but did not brief it. See generally Dkt. Nos. 80, 90, 92. The State argues that Lee has abandoned this contention. Dkt. No. 87 at 214-15.

this issue procedurally defaulted because Lee failed to raise it on direct appeal. Dkt. No. 20-16 at 4. "This Court cannot review claims the state habeas court found to be procedurally defaulted unless [the petitioner] establishes cause for, and actual prejudice from, the default or establishes that failure to review the claim would result in a fundamental miscarriage of justice." Butts v. GDCP Warden, 850 F.3d 1201, 1214 (11th Cir. 2017); see also Lucas v. Warden, Ga. Diagnostic & Classification Prison, 771 F.3d 785, 801 (11th Cir. 2014). Lee has done nothing to unlock the door to federal review. His jury-instruction claims fail.

III. LEE'S BRADY CLAIM FAILS.

Lee unconvincingly claims a violation of Brady v. Maryland, 373 U.S. 83 (1963), in that the prosecution allegedly improperly withheld evidence of Lee's intoxication the night he killed Chancey. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. To establish a Brady violation, a petitioner must show:

But because "the State fails to cite any authority holding that a petitioner can default on a claim in this manner," and the Court is not aware of any, it will not find abandonment. Hammonds v. Allen, 849 F. Supp. 2d 1262, 1299 (M.D. Ala. 2012).

> (1) that the Government possessed evidence favorable to the defense, (2) that the defendant did not possess the evidence and could not obtain it with any reasonable diligence, (3) that the prosecution suppressed the evidence, and (4) that a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense.

Moon v. Head, 285 F.3d 1301, 1308 (11th Cir. 2002) (brackets omitted) (quoting Spivey v. Head, 207 F.3d 1263, 1283 (11th Cir. 2000)).

The Court already decided this issue in the State's favor, holding, among other things, that intoxication evidence was immaterial given Lee's "admission that he would have killed his father (as [he] originally intended) even if [Lee] had been sober." Dkt. No. 74 at 26. That meant Lee could not "show prejudice to overcome [the] procedural default" found by the state habeas court. Id.; see also id. at 15.

Lee seeks reconsideration in light of Hardwick v. Secretary, Florida Department of Corrections, 803 F.3d 541 (11th Cir. 2015). Even assuming this effort to be timely, Hardwick does not invalidate the Court's earlier order. Hardwick did hold that intoxication can be mitigating. 803 F.3d at 562-63. But the Hardwick petitioner never admitted that he would have killed the victim even had he been sober. The circumstances of that case strongly suggested otherwise: over the five days before the offense, the Hardwick petitioner

took 40 to 50 Quaaludes, continually smoked marijuana, drank a fifth of vodka, and shared in several cases of beer; he then killed a seventeen year-old whom he accused of stealing his Quaaludes. 803 F.3d at 546, 557; Hardwick v. Crosby, 320 F.3d 1127, 1131-42 (11th Cir. 2003). Hardwick is too factually distinct from this case to make the Court revisit its prior holding. Lee's Brady claim still fails.

IV. LEE'S TRIAL-COURT-ERROR CLAIMS FAIL.

Lee raises five claims of error by the trial court, two of which are procedurally defaulted. The state habeas court found Lee's claims relating to restrictions on his voir dire of prospective jurors, and to the guilt/innocence-phase jury instructions, procedurally defaulted. Dkt. No. 13-11 at 17-18; Dkt. No. 20-16 at 4. Lee has not carried his burden of showing either cause for and prejudice from the defaults, or fundamental miscarriages of justice. These claims fail.

As for other claims, Lee argues that the trial court erred by admitting his statements of May 26-27, 1994 and July 26, 1995, and refusing to direct an acquittal verdict as to felony murder "based on the improper venue of the . . . charge of kidnapping." Dkt. No. 29 at 23.[10] The Supreme Court of

[10] These contentions are properly before the Court. The State characterizes them as abandoned because Lee did not brief them. Dkt. No. 87 at 214. But again, "the State fails to cite any authority holding that

Georgia addressed all three issues on the merits. Lee v. State, 514 S.E.2d at 3-5. Its conclusions in the State's favor can only be rejected if they were such unreasonable applications of U.S. Supreme Court holdings that no fairminded juror could agree with them. Harrington v. Richter, 562 U.S. 86, 101 (2011). They were not.

A. Admission of Lee's May 26-27, 1994 Statements Was Reasonably Upheld.

The Georgia Supreme Court reasonably decided that Lee's May 26-27, 1994 statements were properly admitted. The statements were made to law enforcement after Lee's initial arrest, were incriminating, and included a videotaped confession. Lee, 514 S.E.2d at 3. Lee contends, without elaboration, that they were "illegally obtained." Dkt. No. 29 at 23. The Georgia Supreme Court made the following findings in concluding that the statements were voluntary and admissible:

> Lee was 19 years old, in police custody only a short time, not under the influence of drugs or alcohol, not subjected to any physical or psychological coercion, and he was informed of and waived his *Miranda* rights on several occasions. After Lee admitted to killing his father's girl friend and stealing the truck, a police officer asked him if he would make another statement on audiotape. Lee agreed, but when the recording began Lee asked the officer, "What should I do? Should I talk?" The officer replied, "That's up to you, man. All you're going to do is help yourself out."

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a petitioner can default on a claim in this manner," and the Court does not know of one. Hammonds, 849 F. Supp. 2d at 1299.

Lee, 514 S.E.2d at 3-4. This Court sees no error, and Lee has not shown one. This is not a ground for relief.

B. Admission of Lee's July 26, 1995 Statement Was Reasonably Upheld.

The same is true regarding the upholding of the admission of Lee's July 26, 1995 statement. The statement was made to an officer who stopped Lee following Lee's jailbreak. Id. at 5. Lee gave his name and said he was "wanted for murder in Georgia." Id. Lee argues that the statement "was the fruit of an illegal investigatory stop and arrest" made without adequate suspicion of criminal activity. Dkt. No. 29 at 23 (citing under United States v. Cortez, 449 U.S. 411, 417-18 (1981) ("Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."). The Georgia Supreme Court held otherwise:

> Officer Rodriguez is an experienced police officer. At 5:00 a.m., he observed a vehicle exiting a business area where no residences were located, at a time when no businesses were open and where he believed there had been previous burglaries. In response to the officer's emergency lights, the vehicle's occupants attempted to flee. . . . Taken together, these facts are sufficient to establish at least an articulable suspicion that Lee was engaged in criminal behavior and that Officer Rodriguez was therefore justified in conducting an investigatory stop.

Lee, 514 S.E.2d at 5 (citing, inter alia, United States v. Briggman, 931 F.2d 705, 708-09 (11th Cir. 1991) (per curiam)).

This Court again detects no error, and Lee has not identified one. This is not a ground for relief.

C. The Kidnapping-Venue Issue Was Reasonably Decided.

Lee's ultimate point of trial-court error is that he should have won a directed verdict of acquittal on his felony-murder charge based on improper venue for the underlying kidnapping charge. Dkt. No. 29 at 23. The Georgia Supreme Court rejected this argument on two grounds: (1) "Lee's murder of Ms. Chancey was within the res gestae of the kidnapping with bodily injury, since Ms. Chancey was under the continuous control of the defendant until she was killed" and (2) the jury convicted Lee of malice murder, so any error as to felony murder was moot. Lee, 514 S.E.2d at 4. Lee has not provided any reason why the Supreme Court of Georgia's analysis can, and should, be reversed. This is not a ground for relief, nor is any other trial-court error raised by Lee.

V. LEE'S EIGHTH AND FOURTEENTH AMENDMENT CLAIMS FAIL.

Lastly, Lee's proportionality claim cannot succeed. The Georgia Supreme Court found that the death penalty was proportional to Lee's crimes, citing nineteen comparator cases. Hall v. Lee, 684 S.E.2d at 884; Lee v. State, 514 S.E.2d 1, 6 & app'x (Ga. 1999). This form of review is permissible. Meders v. Chatman, No. CV 207-90, 2014 WL 3973912, at *40 (S.D. Ga. Aug. 14, 2014) (citing McCleskey v.

Kemp, 481 U.S. 279, 306 (1987)).[11] Lee's proportionality claim fails.

CONCLUSION

For the reasons above, Lee's Amended Petition for Writ of Habeas Corpus, dkt. no. 29, is **DENIED**.

SO ORDERED, this 19TH day of September, 2017.

HON. LISA GODBEY WOOD
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

[11] Besides, there is no constitutional right to proportionality review. Pulley v. Harris, 465 U.S. 37, 50-51 (1984). It is merely "an additional safeguard against arbitrarily imposed death sentences." Id. at 50. The Court does not have freestanding reason to suspect arbitrary imposition here, so it will not inquire further. See Walker v. Georgia, 129 S. Ct. 481, 483 (2008) (Thomas, J., concurring in denial of cert.) ("Having elected to provide the additional protection of proportionality review, there can be no question that the way in which the Georgia Supreme Court administered that review in this case raised no constitutional issue.").

In the United States District Court for the Southern District of Georgia Waycross Division

JAMES ALLYSON LEE,

Petitioner,

v.

WARDEN,
Georgia Diagnostic Prison,

Respondent.

CV 5:10-017

ORDER

Before the Court is Petitioner James Allyson Lee's Motion to Alter and Amend the Judgment. Dkt. Nos. 100, 116. In that Motion, Petitioner also renewed his application for a Certificate of Appealability. Id. For the reasons state below, the Motion is **DENIED** and the Application for a Certificate of Appealability ("COA") is **GRANTED**.

BACKGROUND

I. The Underlying Conviction and Direct Appeal

On June 4, 1997, Lee was convicted by a jury of malice murder, armed robbery, and possession of a firearm during the commission of a crime. Lee v. State, 514 S.E.2d 1, 2 (Ga. 1999). He was also convicted of felony murder, but that conviction was vacated by operation of law. Id. at 3 n.1. On June 6, 1997, Lee was sentenced to death. Hall v. Lee, 684 S.E.2d 868, 871 (Ga. 2009);

see also Dkt. No. 12-3 at 85, 91-92. On direct appeal, the Georgia Supreme Court unanimously upheld Lee's conviction. Lee, 514 S.E.2d 1. The United States Supreme Court denied Lee's petition for a writ of certiorari and denied his petition for a rehearing. Lee v. Georgia, 528 U.S. 1006 (1999), reh'g den'd 528 U.S. 1145 (2000).

II. Habeas History

On August 4, 2000, Lee filed a petition for a writ of habeas corpus in the Superior Court of Butts County. Dkt. No. 20-16 at 2. On March 12, 2009, that court granted Lee's petition. See generally id. On November 2, 2009, the Georgia Supreme Court unanimously reversed the granting of the petition. Hall v. Lee, 684 S.E.2d 868 (Ga. 2009).

On February 5, 2010, Lee filed his federal habeas petition in this Court. Dkt. No. 1. In September 2010, he amended it. Dkt. No. 29. The petition argued for relief on five grounds: "(1) ineffective assistance of counsel; (2) improper jury instructions; (3) a violation of Brady v. Maryland, 373 U.S. 83 (1963); (4) trial-court errors; and (5) violations of the Eight and Fourteenth Amendments by imposition of the death sentence in this case." Lee v. Upton, 2017 WL 4158643, at *3 (S.D. Ga. Sept. 19, 2017). The Court denied Lee's petition. Id. The Court also did not rule on Lee's application for a COA. Id.

On October 17, 2017, Lee moved to alter and amend the judgment of the Court that denied his habeas petition arguing that the Court

incorrectly applied federal law when ruling on one of Lee's ineffective-assistance-of-counsel claims. Dkt. Nos. 100, 116. Lee also applied, in the alternative, for a COA. Id.

LEGAL STANDARD

I. Rule 59(e)

"The *only* grounds for granting [a Rule 59(e)] motion are newly-discovered evidence or manifest errors of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (emphasis added) (quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)). "Reconsideration under Rule 59 is an extraordinary remedy that should be employed sparingly." Yulin Ma v. Au, 2009 WL 10702953, at *4 (S.D. Ga. Sept. 29, 2009). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Id. (quoting Michael Linet, Inc., v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005)). Thus, "the Court will only grant Plaintiff's motion if (1) it presents newly-discovered evidence or (2) identifies manifest errors of law or fact." Jolley v. Donovan, 2011 WL 6400306, at *2 (S.D. Ga. Dec. 19, 2011).

II. Certificate of Appealability

Federal Rule of Appellate Procedure 22(b)(1) provides in relevant part: "In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court

. . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a [COA] under 28 U.S.C. § 2253(c)." Under 28 U.S.C. § 2253(c)(2), a COA should be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." The United States Supreme Court has recently reemphasized that "[t]he COA inquiry . . . is not coextensive with a merits analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). Rather, at this stage, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (internal quotation marks and citation omitted).

DISCUSSION

I. Rule 59(e) Motion

For this claim, Lee's Motion argues only that the Court wrongly applied federal law when ruling on Lee's ineffective-assistance-of-counsel claim. Specifically, Lee argues that the Court erred when it held that the Georgia Supreme Court's decision that Lee was not prejudiced by his trial counsel's alleged deficient performance during the sentencing phase was reasonable. Because Lee's Motion to Alter or Amend argues that the Court wrongly applied law, Lee is arguing that the Court committed a manifest error of law.

Lee argues that under Wilson v. Sellers, 138 S. Ct. 1188 (2018), the Court erred by "focus[ing] on the ultimate decision, rather than the predicate reasoning, of the Georgia Supreme Court," in adjudicating one of Lee's ineffective-assistance-of-counsel claims. Dkt. No. 116 at 3. In support, Lee points to the following language in Wilson: "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims,' . . . and to give appropriate deference to that decision . . . ." Id. at 3-4 (quoting Wilson, 138 S. Ct. at 1191-92). Utilizing this language, Lee concludes that "[b]ecause this Court did not 'train its attention' on the Georgia Supreme Court's 'particular reasons – both legal and factual' for reversing the state court's grant of relief – Mr. Lee is entitled to reconsideration" of his ineffective-assistance-of-counsel claim. Id. at 4 (quoting Wilson, 138 S. Ct. at 1191-92). Indeed, Lee goes so far as to state that the Court not only did not "review [ ] the specific reasons given by the state court and defer [ ] to those reasons if they are reasonable," dkt. no. 124 at 4 (quoting Wilson, 138 S. Ct. at 1292), but concluded "the exact opposite . . . : that the rationale underlying the Georgia Supreme Court's decision was irrelevant because AEDPA directs federal

courts to focus on the outcome itself and not the manner in which the outcome was reached." Id. Thus, Lee argues that the Court committed a manifest error of law by allegedly concluding that the reasons of the state court's decision were irrelevant.

The Court did not commit a manifest error of law because the Court, in deciding that the state court's decision did not involve an unreasonable application of law or an unreasonable determination of fact, did train its attention on the particular reasons of the state court's rejection of Lee's claim. A review of the Court's opinion makes this obvious. Before analyzing the state court's reasons for its decision, the Court noted that it could "only reject [the state court's] decision if it was so unreasonable *an application* of a U.S. Supreme Court holding that no fairminded jurist could agree with it." Dkt. No. 98 at 8 (emphasis added). From the outset, then, the Court made clear that its focus was on the state court's *application* of controlling precedent, which entails looking at how the state court applied controlling precedent. The Court's analysis makes this clear. The Court began its analysis of the state court's application of controlling precedent by detailing how that court identified the correct standard for reviewing Lee's ineffective assistance of counsel ("IAC") claim at issue. Id. at 8. The Court then grappled with the particular reasons for the Georgia Supreme Court's decision. First, the Court reviewed the state court's presentation

of the mitigating evidence that Lee's trial counsel presented at sentencing. Id. at 8-9. Then the Court reviewed, in detail, the same with regard to the aggravating evidence the State put forth at Lee's sentencing. Id. at 9-10. The Court then recapped how the "Georgia Supreme Court reweighed the trial evidence together with the habeas evidence." Id. at 10-11. In doing so, the Court detailed the evidence that the state court recognized was presented to the state habeas courts but was not presented by Lee's trial counsel at sentencing. Id. The Court went so far as to explain in a footnote why the Georgia Supreme Court did not fail to consider Lee's post-traumatic stress disorder diagnosis. Id. at 10-11 n.4. Finally, the Court set forth its conclusions in a paragraph that began with the Court's ultimate conclusion that it could not find that the state court's "holding was so unreasonable an application of U.S. Supreme Court precedent that no fairminded jurist could agree with it." Id. at 11.

In that concluding paragraph, the Court quoted language from the Eleventh Circuit that serves as the basis for Lee's Motion for Reconsideration that is now before the Court. Here is that paragraph in its entirety:

> This Court cannot find that this holding was so unreasonable an application of U.S. Supreme Court precedent that no fairminded jurist could agree with it. The relevant U.S. Supreme Court precedent establishes only general rules, like the need to deny relief unless there is a reasonable probability that the sentence would have turned out differently and the need to reweigh

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> all of the trial and habeas evidence. This means state courts must use "a substantial element of judgment." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). AEDPA respects this by affording them even "more leeway" than usual. Id.; see also Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) (deeming ineffective-assistance claim "doubly deferential"). What is more, this Court's focus is not on the Georgia Supreme Court's *opinion*—it is on "whether the *decision* . . . was an unreasonable application" of U.S. Supreme Court holdings. Bishop v. Warden, GDCP, 726 F.3d 1243, 1255 (11th Cir. 2013); see also Gissendaner v. Seaboldt, 735 F.3d 1311, 1329 (11th Cir. 2013)("AEDPA focuses on the result ..., not on the reasoning that led to that result, and nothing in the statute requires a state court to accompany its decision with any explanation, let alone an adequate one." (quotation marks and citation omitted)); cf. Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." (citation omitted)).

Id. at 11-12.

The Court prefaced its quotation of the language at issue with the phrase "[w]hat is more." Id. at 12. That prefatory remark makes clear that the Court's use of the language at issue merely set forth an alternate analysis for the Court's ultimate conclusion. In other words, not only were the state court's application of federal law and determination of fact reasonable, but the determination itself was reasonable. Thus, to say that the Court treated the state court's reasoning as irrelevant is incorrect. Just to be clear, the Court engaged in extensive analysis of the Georgia Supreme Court's reasoning.

Further, the remainder of the relevant portions of the Court's opinion shows that it complied with Wilson. The Court extensively analyzed the cases set forth by petitioner. Id. at 12-24. Before jumping into its analysis of petitioner's cited cases, the Court concluded that "U.S. Supreme Court and Eleventh Circuit holdings favoring petitioners do not unambiguously foreclose the decision at which the Georgia Supreme Court arrived. Each was *either followed by that Court* or is distinguishable." Id. (emphasis added). Again, it is clear that the Court "train[ed] its attention on the particular reasons" of the state court's applications of federal law and determinations of fact. Wilson, 138 S. Ct. at 1191. If the Court had not, then it would not have been focused on whether the state court "followed" controlling precedent; instead, the Court would only have focused on the state court's ultimate determination that Lee was not prejudiced.

For these reasons, Lee's Motion to Alter or Amend the Judgment is **DENIED.**

II. Lee's Mitigative-Evidence Contention Fails

Out of an abundance of caution, the Court will, again, evaluate Lee's claim that the Georgia Supreme Court's adjudication of Lee's mitigating-evidence 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." 28 U.S.C. § 2254(d). The Court in determining "whether [the Georgia Supreme Court's] decision involved an unreasonable application of federal law or was based on an unreasonable determination of fact . . . train[s] its attention on the particular reasons – both legal and factual – why" the Georgia Supreme Court rejected Lee's mitigating evidence claim. Wilson v. Sellers, 584 U.S. ----, 138 S. Ct. 1188, 1191-92, 200 L.Ed.2d 530 (2018) (internal quotation marks and citation omitted). In doing so, the Court does not focus "merely on the bottom line ruling of the decision but on the reasons, if any, given for it." Meders v. Warden, Georgia Diagnostic Prison, 911 F.3d 1335, 1349 (11th Cir. 2019).

The bottom line here is the ruling by the Georgia Supreme Court that the trial counsel's failure to present certain mitigating evidence at sentencing did not amount to ineffective assistance of counsel. The reason the Georgia Supreme Court gave for that ruling is that there was no reasonable probability of a different result if trial counsel had acted as Lee claims they should have. In other words, Lee was not prejudiced. Looking further, there are two sets of mitigating evidence that trial counsel failed to present: (1) affidavit testimony relating to Lee's childhood and young adulthood; and (2) expert testimony relating to Lee's mental health. The Georgia Supreme Court found

that the childhood and young adulthood evidence "fail[ed] to establish that Lee's childhood was so harmful or horrific" to rise to the level of prejudice. Hall, 684 S.E.2d at 880. The Georgia Supreme Court found that the expert testimony did not rise to the level of prejudice because, after weighing "the totality of the evidence," it found that "Lee's trial expert failed to connect his new diagnosis of PTSD to the crimes, and the connection that his habeas expert made between his undiagnosed 'mental impairments' and the crimes is similar to the connection his trial expert made between his diagnosis of ADHD and the crimes," such that there was not a reasonable probability of a different result. Id. at 882.

Turning to Lee's arguments, he does not take "the proper approach" for most of them. Meders, 911 F.3d at 1350. Instead, Lee "appears to implicitly argue either that deference is not due, or perhaps that deference does not mean much." Id. He "does so by engaging in a line-by-line critique of the state court's reasoning, pointing out evidence that . . . was not given the weight he feels it deserves," id., or by mischaracterizing the Georgia Supreme Court's opinion. See, Dkt. No. 116 at 6-7 (contending that the Georgia Supreme Court "dismissed the affidavit testimony submitted in state habeas proceedings on the basis of its conclusion that *most* of the affidavits Mr. Lee submitted" consisted of hearsay and speculation, when the Georgia Supreme Court merely "note[d] that *much* of [the affidavits]

consists of hearsay and speculation," Hall, 684 S.E.2d at 879); id. at 9-12 (arguing that the Georgia Supreme Court improperly "dismissed Dr. Boyer's expert opinion on the ground that it did not materially differ from Dr. Daniel Grant's trial testimony"); id. at 13 (arguing that "[t]he Georgia Supreme Court also unreasonably rejected Mr. Lee's argument that Dr. Grant's failure to diagnose PTSD at the time of trial prejudiced Mr. Lee because the PTSD diagnosis was significantly more mitigating than Dr. Grant's earlier diagnosis of ADHD"); id. (arguing that the Georgia Supreme Court "unreasonably ignored that the trial counsel's 'ADHD and less-than-perfect upbringing' mitigation case lacked any meaningful mitigating force"); id. at 13 n.9 (arguing that the Georgia Supreme Court failed to "take into account that the prosecutor predictably demolished Dr. Grant's testimony that Mr. Lee's ADHD mitigated his crime"); id. at 16-18 (arguing that the Georgia Supreme Court's holding "rested on the court's mistaken conclusion that the crime was more aggravated and Mr. Lee more depraved than the facts actually support"). As the Eleventh Circuit has explained post-Wilson, these arguments are "not the proper approach." Meders, 911 F.3d at 1350. Lee's first argument overemphasizes the "language of a state court's rationale," which "lead[s] to a grading papers approach that is outmoded in the post-AEDPA era." Jones v. Sec'y, Fla. Dep't. of Corr., 834 F.3d 1299, 1311 (11th Cir. 2016). The rest of Lee's arguments are improper

as they "point[ ] out evidence that . . . was not given the weight [Lee] feels it deserves." 911 F.3d at 1350. All of these arguments have been rejected by the Eleventh Circuit and the Supreme Court for their "readiness to attribute error," which "is incompatible with both 'the presumption that state courts know and follow the law' and AEDPA's 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Id. (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2002)).

Lee further argues that this Court erred in its order denying Lee's amended petition, see dkt. no. 98; Lee v. Upton, 2017 WL 4158643 (S.D. Ga. Sept. 19, 2017), when it "rejected Mr. Lee's argument that the Georgia Supreme Court imposed an improper 'nexus' requirement to repudiated Mr. Lee's proffered expert testimony in state habeas proceedings," dkt. no. 116 at 14. Ignoring Lee's premise that the Court by engaging with this argument in its September 19, 2017 order followed Wilson (which is, of course, the basis of Lee's present motion),[1] the Court stands by its conclusion

[1] Lee argues in his Motion to Alter and Amend the Judgment that the Court's September 19 order did not follow Wilson's mandate that a federal habeas court "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." 138 S. Ct. at 1191-92 (citation omitted). However, by realleging the "nexus" argument, Lee recognizes that the Court should address this argument under Wilson, which it did in its September 19 order. Thus, the September 19 order, according to Lee, was not entirely improper

for the reasons articulated in that order. See Dkt. No. 98 at 10 n.4; Lee, 2017 WL 4158643, at *4 n.4. The Court's conclusion on this issue is bolstered by the Georgia Supreme Court's conclusion that "there is no reasonable probability that a jury confronted with the psychiatric mitigating evidence as presented in Lee's habeas proceeding, *including Dr. Grant's new diagnosis of PTSD*, would have returned a difference sentence." 684 S.E.2d at 882 (emphasis added).[2] Turning to Lee's final argument that the Georgia Supreme Court improperly "initially rejected the testimony [of Dr. Boyer] on the ground that Dr. Boyer was not the expert used at trial," dkt. no. 116 at 8, this argument fails because as Lee recognizes, the Georgia Supreme Court also found that this testimony "did not materially differ from Dr. Daniel Grant's trial testimony," id. at 10. Thus, even if this finding was improper, the Georgia Supreme Court rejected that Dr. Boyer's testimony did not prejudice Lee on a different ground that was not improper.

For these reasons, Lee's mitigative-evidence contention fails. Lee's Motion to Alter and Amend the Judgment is thus due to be **DENIED.**

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even though he argues such as the basis of this Motion to Alter and Amend the Judgment.

[2] This statement shows that the Georgia Supreme Court did in fact consider the PTSD diagnosis and did not hold "that none of the state habeas expert testimony was relevant" because of a lack of a "nexus" as Lee argues. Dkt. No. 116 at 14-15.

III. Certificate of Appealability

Turning to whether a COA should be issued, "the only question is whether the applicant has shown that jurists of reason could disagree with the [Court's] resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck, 137 S. Ct. at 773 (internal quotation marks and citation omitted). After Lee's conviction and death sentence were affirmed on appeal by the Georgia Supreme Court, Lee v. State, 514 S.E.2d 1 (Ga. 1999), Lee filed a petition for writ of habeas corpus in a Georgia state court. That habeas court Granted Lee's petition on the ground at issue here, i.e., that Lee's trial counsel had been constitutionally deficient in investigating, preparing, and presenting mitigating evidence. Thus, that habeas court vacated Lee's death sentence. Sitting in review of the habeas court, the Georgia Supreme Court disagreed, and reversed the vacatur of Lee's death sentence. See Hall, 684 S.E.2d 868. The Georgia habeas court's granting of Lee's state habeas petition on this issue is sufficient to satisfy the COA standard because it shows that "jurists of reason could disagree with the [Court's] resolution of his constitutional claims." 137 S. Ct. at 773 (internal quotation marks and citation omitted); see also, Rhoades v. Davis, 852 F.3d 422, 429 (5th Cir. 2017) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a

certificate of appealability should ordinarily be routine.") (quoting Jones v. Basinger, 635 F.3d 1030, 1040 (7th Cir. 2011)). Accordingly, Lee's application for a Certificate of Appealability is **GRANTED** as to the issue of whether the Georgia Supreme Court's determination—that Lee was not prejudiced by any deficiency on the part of Lee's trial counsel in investigating, developing, preparing, and presenting mitigating evidence at Lee's sentencing—involved an unreasonable application of clearly established Federal law or was based on an unreasonable determination of the facts in light of the evidence presented.

CONCLUSION

For these reasons, Lee's Motion to Alter and Amend the Judgment is **DENIED**; Lee's Application for a Certificate of Appealability is **GRANTED** as to the issue of whether the Georgia Supreme Court's determination—that Lee was not prejudiced by any deficiency on the part of Lee's trial counsel in investigating, developing, preparing, and presenting mitigating evidence at Lee's sentencing—involved an unreasonable application of clearly established Federal law or was based on an unreasonable determination of the facts in light of the evidence presented.

SO ORDERED, this 20th day of March, 2019.

HON. LISA GODBEY WOOD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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BY Rhonda Smith
RHONDA SMITH, CLERK

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA)

JAMES ALLYSON LEE,)
Petitioner,)
v.)
)
HILTON HALL, Warden)
Georgia Diagnostic Prison,)
Respondent.)

Habeas Corpus
Case No. 2000-V-475

ORDER ON PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW before the Court, Petitioner's Amended Petition for a Writ of Habeas Corpus challenging his convictions and sentences in the Superior Court of Charlton County, Georgia. Having considered the Petitioner's Petition and Amended Petition, Respondent's answers to the petitions, the record at trial and on appeal, evidence submitted at the habeas corpus hearings, the arguments of counsel as presented in court and in pleading form, the Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and GRANTS the Petition for a Writ of Habeas Corpus as to Petitioner's sentence of death.

I. PROCEDURAL HISTORY

After jury trial in the Superior Court of Charlton County lasting from June 2-6, 1997, James Allyson Lee was convicted of malice murder, felony murder, armed robbery, and possession of a firearm during the commission of a crime in connection with the May 1994 homicide of Sharon Chancey. He was sentenced to death for the murder, to life for the armed robbery, and five years for possession of a firearm during the commission of a felony.

The Supreme Court of Georgia affirmed Mr. Lee's convictions and sentence of death on March 1, 1999. Lee v. State, 270 Ga. 798, 514 S.E.2d 1 (1999). On August 4, 2000, following denial of certiorari review in the United States Supreme Court, Mr. Lee filed a habeas corpus petition in the Superior Court of Butts County, raising claims of ineffective assistance of counsel among other claims. He amended the petition on April 16, 2001.

On August 17, 2001, this Court held an evidentiary hearing at the courtroom of the Georgia Diagnostic Prison in Jackson, Georgia. The hearing focused on Mr. Lee's claims of ineffective assistance of counsel with respect to trial counsel's penalty phase preparation and presentation. Mr. Lee submitted numerous documents and records in support of these claims, including affidavits from Mr. Lee's family members, friends, and teachers, as well as from two mental health experts, a social worker, and numerous records pertaining to Mr. Lee's upbringing and mental impairments. The Respondent presented the live testimony of Mr. Lee's trial attorneys, John Adams and Kelly Brooks, the deposition testimony of Mr. Lee's mental health experts, as well as various documentary exhibits.

Following the hearing and close of evidence, the parties submitted post-hearing briefs. As requested by this Court, Mr. Lee and Respondent submitted proposed orders. This Order follows.[1]

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[1] The Court will refer to the various proceedings and exhibits in this case as: PT (date) ___ = pretrial hearing transcript; TT ___ = trial transcript; HT ___ = habeas transcript; ROA ___ = record on appeal; PX ___ = Petitioner's exhibit; RX ___ = Respondent's exhibit. All other references will be self explanatory.

II. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR HABEAS CORPUS RELIEF

Petitioner's Amended Petition enumerated twelve (12) grounds for relief. As is stated in further detail below, this Court finds: (1) some grounds asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some grounds are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some grounds are non-cognizable; (4) one ground is moot; and (5) some grounds are neither procedurally barred nor defaulted and are therefore properly before this Court for habeas review.

III. CLAIMS THAT ARE NOT PROPERLY BEFORE THIS COURT

A. Claims that are *Res Judicata*

As the following claims were raised and adjudicated adversely to Mr. Lee on direct appeal, Lee v. State, 270 Ga. 798, 514 S.E.2d 1 (1999), this Court is precluded from reviewing such claims. Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986); Roulain v. Martin, 266 Ga. 353, 466 S.E.2d 837 (1996). Accordingly, this Court is precluded from reviewing:

> **That portion of Claim IV**,[2] wherein Petitioner asserts that the trial court erred in allowing the introduction of illegally obtained confessions. See Lee, 270 Ga. at 800 (2);
>
> **That portion of Claim IV**, wherein Petitioner asserts that the trial court's failure to give the jury Petitioner's requested instruction violated his constitutional rights. See Lee, 270 Ga. at 801-02 (6);
>
> **That Portion of Claim XI**, wherein the Petitioner asserts his death sentence is disproportionate. See Lee, 270 Ga. at 803 (10).

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[2] Petitioner's Amended Petition has two sections entitled Claim IV, but this claim is in fact his fifth claim for relief.

This Court is bound by the decisions of the Georgia Supreme Court as to the aforementioned claims and sub-claims, and habeas corpus relief is accordingly denied as to each.

B. Claims that are Procedurally Defaulted

In a number of the claims for relief raised in this petition, Mr. Lee now raises contentions which he failed to on direct appeal. As Mr. Lee has failed to establish cause and actual prejudice sufficient to excuse his procedural default of these claims, this Court may not consider the merits of any such claims in this collateral proceeding. Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4), 373 S.E.2d 184 (1988); White v. Kelso, 261 Ga. 32, 401 S.E.2d 733 (1991). Under this authority, this Court is barred from reviewing the following claims:

> **Claim II,** wherein Petitioner asserts he was denied access to competent mental health assistance under Ake v. Oklahoma, 470 U.S. 68 (1985);
>
> **Claim III**, wherein Petitioner asserts that he was denied his right to due process based on misconduct by the prosecution;
>
> **That Portion of Claim IV**, wherein Petitioner alleges the trial court conducted his trial in a manner that violated his constitutional rights;
>
> **Claim VII**, wherein Petitioner asserts that his due process rights were violated by misconduct on the part of the jurors;
>
> **Claim VIII**, wherein Petitioner argues that he was denied due process of law when the same jurors who convicted him during the guilt-innocence phase were responsible for determining his sentence;
>
> **Claim IX**, wherein Petitioner asserts that he was denied due process by the instructions given to the jury at the guilt-innocence phase of trial;
>
> **Claim X**, wherein Petitioner asserts he was denied due process of law by the instructions given to the jury at the sentencing phase of trial;
>
> **That Portion of Claim XI**, wherein Petitioner alleges that his death sentence was imposed in a discriminatory manner;

Claim XII, wherein Petitioner alleges the Unified Appeal Procedure is unconstitutional.

C. Non-Cognizable Claim

The following allegations raised by Mr. Lee fail to allege grounds which would constitute a constitutional violation in the proceedings which resulted in Mr. Lee's conviction and sentence and are therefore barred from review by this habeas corpus court as non-cognizable under O.C.G.A. § 9-14-42(a):

> **Claim XIII**, wherein Petitioner alleges cumulative error; there is no cumulative error rule in Georgia. Head v. Taylor, 273 Ga 69, 70, 538 S.E.2d 416 (2000).

D. Claim that is Moot

Petitioner's Claim IV[3] asserts that execution by electrocution is unconstitutional as it constitutes cruel and unusual punishment. However, this claim is now moot because the Georgia Supreme Court has found this method of execution unconstitutional and it will not be imposed on the Petitioner. See Dawson v. State, 274 Ga. 327, 333, 554 S.E.2d 137, 143 (2001).

Based on the Court's rulings as to Mr. Lee's other grounds for relief, this Court finds that Petitioner's Claim I, alleging ineffective assistance of counsel is the only claim that is properly before this Court for adjudication.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

This Court finds that although trial counsel performed competently at the guilt-innocence phase of trial, counsel rendered prejudicially deficient performance in investigating Mr. Lee's potential sentencing phase defenses and in preparing and presenting the mitigation defenses

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[3] This Claim is in fact Petitioner's fourth claim.

counsel did utilize. As in Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426 (2003), Mr. Lee's counsel were ineffective for failing to utilize and present two categories of information: "mitigation evidence trial counsel had and did not use and the mitigation evidence trial counsel did not have but which was 'readily obtainable through reasonable diligence.'" Id. at 435.

Counsel's deficient performance stemmed from their failure to carry out basic defense functions of investigation and preparation and their failure to follow up on obvious leads pointing to important sources of mitigating evidence. See, e.g., Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003); Rompilla v. Beard, 125 S.Ct. 2456, 2467-68 (2005). As a result, jurors were deprived of important information which may well have provided a highly mitigating evidence for understanding Mr. Lee's horrific upbringing to put his actions and state of mind at the time of Sharon Chancey's murder, in context of the defense strategy.

In this case, trial counsel failed to support their chosen lines of defense with adequate investigation and presentation of all reasonably available evidence in mitigation, including the lay and expert affidavit testimony and documentation presented by Mr. Lee in this proceeding. Counsel chose a mitigation strategy involving Mr. Lee's mental impairments and troubled upbringing. HT at 52-53. Having chosen this strategy, counsel "had every reason to develop the most powerful mitigation case possible" along these lines. Wiggins, 123 S.Ct. at 2538. However, despite ample leads, counsel presented very little of the available evidence detailing Mr. Lee's nightmarish upbringing and resultant mental illness, as well as the relation of that evidence to the crime itself. Counsel's neglect of thorough mitigation preparation deprived the jury of critical information regarding the implications of all of these factors for Mr. Lee's capacity to conform his actions to the law.

This Court finds trial counsel's investigation and preparation for the penalty phase of Mr. Lee's trial unreasonable in light of 1) their strategy of presenting mitigation; 2) the multitude of leads and red flags indicating that further investigation would be fruitful; and 3) the guidance they received from materials and colleagues on the subject of capital litigation that clearly put them on notice of the importance of compiling a client's life history in preparing a mitigation defense. Had counsel conducted a reasonable investigation along these lines, they could have presented the jury with a far more compelling story of Mr. Lee's life. Instead, trial counsel "presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death.'" Collier v. Turpin, 177 F.3d at 1184, 1201-1202 (11th Cir. 1990) (quoting Woodson v. North Carolina, 428 U.S. 280, 303 (1976)).

A. Legal Standard

Petitioner alleges that he was denied the effective assistance of counsel at the mitigation/aggravation phase of the trial.[4] In order to prevail on his claim of ineffectiveness, Petitioner must establish (1) deficient performance by trial counsel and (2) the prejudice that resulted from it. Strickland v. Washington, 466 U.S. 668 (1984); Smith v. Francis, 325 S.E.2d

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[4] This claim

> [I]s neither barred nor defaulted, because such claim need not be raised until trial counsel no longer represents the defendant. Petitioner's trial counsel represented him through his direct appeal, and new counsel began representing him on habeas corpus after trial counsel ceased their representation. Since ineffective assistance of trial counsel was raised at the first available opportunity after new counsel came onto the case, it remains a viable claim on habeas corpus.

Head v. Taylor, 273 Ga. 69, 538 S.E. 2d 416, 419 (Ga. 2000) (citation omitted).

362 (Ga. 1985); Turpin v. Lipham, 510 S.E.2d 32, 36 (Ga. 1998); Hall v. McPherson, 663 S.E. 2d 659 (Ga. 2008). If Petitioner demonstrates that he was prejudiced by his attorneys' deficient performance, then his convictions must be vacated.

"The test for determining whether trial counsel's performance was deficient is whether a reasonable lawyer could have acted, under the same circumstances, as defense counsel acted before and during the trial." Head v. Taylor, 273 Ga. 69, 538 S.E. 2d 416, 424 (Ga. 2000); see also Wiggins v. Smith, 123 S.Ct. 2527, 2543 (2003). The purpose of "making this determination 'is not to grade trial counsel's performance but simply to ensure that the adversarial process at trial worked adequately.'" Taylor, 273 Ga. at 79, 538 S.E. 2d at 424 (quoting Turpin v. Lipham, 270 Ga. 208, 217, 510 S.E. 2d 32 (1998)).

As for prejudice, the petitioner's burden in an ineffective assistance claim "is to show only 'a reasonable probability' of a different outcome, not that a different outcome would have been certain or even 'more likely than not.'" Schofield v. Gulley, 279 Ga. 413, 416, 614 S.E.2d 740 (2005) (citing Strickland, 466 U.S. at 693). With regard to the penalty phase of a capital case in a state like Georgia, where non-unanimity on a death verdict results in a life sentence,[5] the test for prejudice has been formulated by the U.S. Supreme Court as "a reasonable probability that at least one juror would have struck a different balance." Wiggins, 123 S.Ct. at 2543.

In capital cases, because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case" (Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976)), counsel has an affirmative obligation to conduct a "thorough" and "diligent"

[5] See O.C.G.A. 17-10-31.1(c); Miller v. State, 237 Ga. 557, 559, 229 S.E.2d 376, 377 (1976) ("if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment.").

investigation into the client's background for potential mitigating evidence even before selecting a trial strategy. Williams v. Taylor, 120 S.Ct. 1495, 1515, 1524 (2000); Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216, 227 (1998). In a Georgia capital case, "[m]itigating evidence, '***anything*** that might persuade the jury to impose a sentence less than death,' is critical in the sentencing phase of a death penalty trial since 'the jury may withhold imposition of the death penalty for any reason, or without any reason.'" Thomason v. Head, 276 Ga. 434, 578 S.E.2d 426, 429 (2003) (citations omitted) (emphasis in original with bolding added).

The U.S. Supreme Court has held that a capital defense attorney must carry out a thorough background investigation because the defendant has a "constitutionally protected right" to have his attorney "present[] and explain[] the significance of all the available evidence [in mitigation]." Williams, 120 S. Ct. at 1513, 1516; accord Lockett v. Ohio, 438 U.S. 586, 604 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982). That is because "the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence." McKoy v. North Carolina, 494 U.S. 433, 442 (1990) (internal quotation marks omitted).[6] "[W]ell-defined norms" of capital defense practice as of 1994-1997 involved efforts to uncover "'*all reasonably available* mitigating evidence.'" Wiggins, 123 S.Ct. at 2537 (quoting 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases).[7]

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[6] See also, Penry v. Lynaugh: "Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" 109 S.Ct. 2934, 2951 (1989) (citations omitted) (emphasis in original).

[7] That the ABA standards and guidelines are valid sources of guidance in determining the reasonableness of trial counsel's performance is unquestionable in light of Wiggins v. Smith, 123 S.Ct. 2527 (2003) and Rompilla v. Beard, 125 S.Ct. 2456 (2005). See also Franks v. State, 278 Ga. 246, 261, 599 S.E.2d 134 (2004) (endorsing Wiggins and use of the ABA Guidelines as a guide to reasonable attorney performance in capital cases). The Guidelines "enumerate the minimal resources and practices necessary to provide effective assistance of counsel" in capital cases. ABA Guidelines (1989), Introduction. Standards for capital case representation are higher than for non-capital criminal defense.

The Standards, which have been endorsed by both the Georgia and United States Supreme Courts, further provide: "at every stage of a capital case [counsel] have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation."[8] Hall v. McPherson, 284 Ga. 219, 233, 663 S.E.2d 659 (2008) (citations omitted). See also PX 121 (Southern Center for Human Rights Capital Defense Manual) ("To develop a theory of mitigation which can save the client's life, counsel will need first and foremost to uncover the history of the client's life. In that history, counsel will, in most cases, discover a background of family dysfunction, poverty, childhood neglect and abuse, unmet needs, and other trauma.").

"[C]ompetent counsel ... present[s] and explain[s] the significance of *all the available evidence* [in mitigation]." Williams, 120 S.Ct. at 1516 (italics supplied). "'By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence." Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002) (emphasis original) (citations omitted). Thus, "[t]he failure to conduct a reasonable investigation into possible mitigating circumstances may render counsel's assistance ineffective." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994).[9]

> Where counsel invokes a strategic judgment to justify a failure to investigate or present certain evidence, the deference this Court owes such a judgment is

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See Guideline 11.2; Amadeo v. Zant, 259 Ga. 469, 384 S.E.2d 181, 182 (1989) (citing the 1989 ABA Guidelines and explaining that "special skills are necessary to assure adequate representation of defendants in death penalty cases.").

[8] The ABA Standards for Criminal Justice, Defense Function, were cited as a source for "prevailing norms of [defense] practice" in Strickland v. Washington, 466 U.S. 668, 688 (1984).

[9] See also Hardwick v. Crosby, 320 F.3d 1127, 1162-63 (11th Cir. 2003) (same); Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216, 227 (1998) (same); Turpin v. Lipham, 270 Ga. 208, 510 S.E.2d 32, 40 (1998) (same).

> "defined ... in terms of the adequacy of the investigations supporting those judgments." Wiggins, 123 S.Ct. at 2535. The question is not whether counsel should have developed and presented the new evidence, but "whether the investigation supporting counsel's decision not to introduce ... evidence ... *was itself reasonable.*" Id. at 2536 (quoting Strickland, 466 U.S. at 690-91) (citations omitted).

Furthermore, "[a]n attorney's failure to investigate is unreasonable where ... it resulted from inattention, and not from reasoned strategic judgment." Martin v. Barrett, 279 Ga. 593, 595, 619 S.E.2d 656 (2005) (citing Wiggins, 123 S.Ct. at 2537, 2541-42). See also, Hardwick v. Crosby, 320 F.3d 1127, 1185 (11th Cir. 2003) ("'counsel's failure to present or investigate mitigation evidence' cannot result from 'neglect'") (citations omitted). Again, the question then becomes whether, but for counsel's failure to investigate and present the newly uncovered evidence, there is "a reasonable probability that at least one juror would have struck a different balance." Wiggins, 123 S.Ct. at 2543.

In considering whether new mitigating evidence introduced in post-conviction proceedings would within a reasonable probability have altered the verdict at sentencing, it is important to consider that "the presentation of some mitigating circumstance evidence [at sentencing does not] always insulate counsel's performance from being condemned as ineffective." Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995). See, e.g., Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991) (although counsel had presented evidence regarding Cunningham's head injury and good character, "the failure by trial counsel to present and argue ... readily available additional evidence regarding Cunningham's head injury, his socioeconomic background, or his reputation as a good father and worker, fell outside the range of professionally competent assistance."); Stephens v. Kemp, 846 F.2d 642, 653-54 and n.6 (11th Cir. 1988) (deficient performance found where defendant's mother testified about his apparent

mental instability, but counsel failed to substantiate mental health condition with evidence of psychiatric hospitalization).[10]

In making the determination whether counsel rendered deficient performance, "every effort [must] be made to eliminate the distorting effects of hindsight" and counsel's actions must be afforded deference when supported by sound strategy. Strickland, 466 U.S. at 689; Lipham, 270 Ga. at 218, 510 S.E. 2d at 41. By the same token, courts must avoid substituting a "post-hoc rationalization of counsel's conduct [for] an accurate description of their deliberations prior to [trial]." Wiggins, 123 S.Ct. at 2538.

In this case, the Court has not resorted to hindsight, but has analyzed the circumstances facing trial counsel at the time of counsel's representation of Mr. Lee's from 1994-1997 in light of applicable legal precedent, specifically Strickland and the Georgia, federal appellate and U.S. Supreme Court cases applying that precedent, particularly in capital cases. The circumstances which counsel faced at the time reasonably include relevant case law and performance standards[11] of which counsel was actually and constructively on notice as of 1994-1997, as well

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[10] See also Turpin v. Christenson, 269 Ga. 226, 497 S.E.2d 216, 226 (1998) (counsel failed adequately to investigate and present mitigating life history evidence despite presenting nineteen mitigation witnesses, "including Christenson's parents, grandfather, aunts, uncles, cousins and Little League baseball coaches," at sentencing); Head v. Taylor, 273 Ga. 69, 538 S.E.2d 416 (2000) (counsel failed adequately to investigate and present mental health evidence despite presenting numerous clinicians from Taylor's past treatment and retaining a psychologist specifically to present mental health testimony at trial); Curry v. Zant, 258 Ga. 527, 371 S.E.2d 647 (1988) (counsel ineffective for inadequately exploring mental health issues despite conscientiously utilizing family members in the mitigation presentation); Collier v. Turpin, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (counsel ineffective despite presenting numerous witnesses who testified that Collier "had a 'good' reputation, ... was generally known as a hard worker who took care of his family, and ... had a good reputation for truth and veracity"); Williams v. Taylor, 120 S.Ct. 1495 (2000) (counsel ineffective despite presenting evidence of defendant's mental health status, including his borderline level of intellectual functioning (see Williams v. Warden of Mecklenburg Correctional Center, 487 S.E.2d 194, 196 (Va. 1997)), and presenting Williams' mother and neighbors to testify to his good character (see Williams v. Taylor, 120 S.Ct. at 1500).

[11] Those standards include the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter "ABA Guidelines") and relevant local

as evidence reasonably available to counsel during this period. With regard to prejudice, this Court followed the United States Supreme Court's instruction to analyze the "totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000); see also Terry v. Jenkins, 280 Ga. 341, 347, 627 S.E.2d 7 (2006) (habeas court "juxtapose[s] the evidence presented at trial with the evidence that trial counsel failed to discover.").

B. Counsel's Penalty Phase Strategy

During state habeas proceedings, trial counsel outlined their penalty phase strategy as one where they sought to present mitigating evidence regarding Mr. Lee's upbringing, mental health, and other circumstances Mr. Lee had "no control over." Trial counsel made clear that they were aware of the important role the sentencing phase would play in this case and that they sought to present evidence in mitigation. Lead counsel, John Adams, testified regarding his goal and theory for the penalty phase:

> Well, first of all, we had to decide what our theory was going to be in mitigation. The theory was to engender sympathy for Mr. Lee, to show that Mr. Lee was a victim of things that he had no control over, and that Mr. Lee, generally, deep down inside, is a good person, a person that should be saved, a person who is not dangerous.

HT at 52.

Kelly Brooks reiterated this theory, testifying that "[b]ecause of the nature of the case, we felt it important to begin mitigation from the drop of the gavel" and explaining that they sought

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performance standards. See Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003); Hall v. McPherson, 284 Ga. 219, 663 S.E.2d 659 (2008).

to show that "Jamie was a young man who was really just a thrown-away kid who never had a chance." HT at 126; HT at 135. However, Mr. Adams further testified during state habeas proceedings that he and Mr. Brooks made a strategic decision not to "trash" Mr. Lee's mother, Barbara Lloyd.

> Although, we decided early on, we were not going to, as a matter of strategy, trash his mother. We didn't think the Charlton County jury was going to be particularly receptive to trying to blame this shooting on the boy's mother. I don't think that ever works. But we wanted to show that through no fault of his own, he was a victim of hyperactivity; through no fault of his own, he didn't have the best of upbringings.

HT at 53.

In reviewing Mr. Adams's statement, he appears to confuse blaming Mr. Lee's crime on his mother with presenting the jury with the evidence of Mr. Lee's traumatic upbringing that necessarily involved the failings of his mother. As Mr. Adams stated explicitly in habeas, he and Mr. Brooks sought to present aspects of Mr. Lee's life over which he had no control, specifically his mental health and upbringing. As is now clear from the habeas record, it was impossible to present a complete picture of either of these defenses without explaining Mr. Lee's mother's addiction and its connection to the neglect and abuse she inflicted on Mr. Lee. Trial counsel did not have to "blame" Barbara Lloyd for the murder; however, in order to support their chosen strategy, trial counsel did have to investigate and present relevant evidence of her role, as Mr. Lee's primary caregiver, in his traumatic and chaotic life. See Turpin v. Lipham, 270 Ga. 208, 216, 510 S.E.2d 32, 40 (1998) (once counsel has chosen a defense strategy, "the strategy that is selected must be supported by adequate investigation"); Terry v. Jenkins, 280 Ga. 341, 627 S.E.2d 7, 11 (2006) (counsel must adequately investigate "primary defense"); Fortenberry v.

Haley, 297 F.3d 1213, 1226 (11th Cir. 2002) (counsel must conduct a "substantial investigation" in support of chosen strategy).

Moreover, the trial record indicates that counsel did attempt, albeit minimally, to tell the jury of Barbara Lloyd's maternal failings. Trial counsel started down this road by eliciting from her on the stand that she had been addicted to prescription drugs. TT Vol. 9 at 143.[12] However, counsel ultimately failed to explain to the jury how Mrs. Lloyd's problems led to Mr. Lee's uniquely traumatic upbringing for the simple reason that they didn't know about it. Indeed, both Mr. Adams and Mr. Brooks conceded that they were unaware of the severity of the abuse that Mr. Lee suffered as a child. HT at 136. Further, Mr. Adams testified that had they known they would have presented it.

> I mean, had we known that she physically abused him, I think we certainly would have. You know, physically abused like beating him up, or cutting him, or something like that, we may have placed that into evidence, certainly.

HT at 57.

Accordingly, this court finds that any decision not to introduce evidence of the extent of Mr. Lee's mother's substance abuse and her neglectful and abusive tendencies is either a post-hoc rationalization or a decision based on an unreasonable investigation, both of which are proscribed by the Georgia and United States Supreme Courts. Wiggins, 123 S.Ct. at 2538, Christenson, 269 Ga. 226; see also Strickland, 104 S.Ct. at 2066 ("[S]trategic choices made after

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[12] This was not the only reference to Mrs. Lloyd's shortcomings as a mother that trial counsel presented to the jury without further explanation. Trial counsel questioned Jamie's teacher, Denise Smith-Baxley about the condition of Mr. Lee's home and what kind of mother Mrs. Lloyd was. TT Vol. 9 at 107-108. Trial counsel also asked Mavis Garrison about how Mr. Lee used to tell her she was the only real mother he had ever had. TT Vol. 9 at 160. However, the jury never learned *why* Jamie would say this because trial counsel never learned or presented readily available evidence Mr. Lee's mother's inadequacies.

less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.)

There is little Mr. Lee could have had less control over than who his parents were and how they treated him. In Mr. Lee's case, trial counsel had only to review the records in their possession and talk to any number of witnesses who knew him as a child to understand the devastating circumstances of his childhood over which he had no control. Thus, once Mr. Lee's attorneys had chosen a defense strategy involving Mr. Lee's upbringing and mental health, they "had every reason to develop the most powerful mitigation case possible" along these lines. Wiggins, 123 S.Ct. at 2538. To the extent that this defense included evidence pertaining to his mother, counsel had no reason not to pursue it and present it to the jury.[13] Accordingly, this Court finds the mitigating evidence presented during state habeas proceeding regarding Mr. Lee's background consistent with trial counsel's chosen strategy.

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[13] During closing arguments, trial counsel addressed Mr. Lee's mother in describing Mr. Lee's upbringing:

> We brought in his mother. The mother, when Jamie was born, was a 19-year-old welfare mother. She had her own problems, she had a lot of them. She attempted to raise Jamie the best way she could. I think she tried and failed when it came to giving him a nurturing, enriching home. She failed to give him any kind of discipline or any kind of structure at an early age, but she tried the best she could, and I'm not here to belittle his mama, but it wasn't the most ideal environment, but it was what happened.
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> TT Vol. 10 at 33-34.

Presenting additional evidence of Ms. Lloyd's maternal failings would have only strengthened trial counsel's argument that Mr. Lee had a difficult life. Indeed, would have allowed counsel to argue that his childhood was not merely less than ideal, his upbringing was downright "abysmal." See PX 1 at 197 (Affidavit of Catherine Boyer Ph.D.) Further, it would not have precluded counsel from arguing that she tried, albeit failed, to be a good mother. See Hall v. McPherson, 284 Ga. 219, 663 S.E.2d 659 (2008) (evidence of mother's abuse and neglect consistent with trial counsel's strategy where counsel argued that mother had done "her best.").

C. Failure to Investigate and Present Life History Mitigation

Because of counsel's failure to make an adequate mitigation inquiry using available background materials, their penalty phase presentation omitted critical information. At sentencing, trial counsel elicited only the briefest hints that Mr. Lee's life growing up under his mother's "care" was not good. Yet, Mr. Lee's early life bears all the hallmarks of a strong mitigation case: a boy whose troubles began before he got out of the womb, he was born into a home rife with abuse, neglect, and trauma at the hands of his addicted caregivers. Nearly every aspect of his early life was uniquely troubled; nevertheless, the State was able to argue credibly to the jury that Mr. Lee was like a million other kids with a learning disability and a single mom. TT Vol. 10 at 6. Ample leads should have alerted trial counsel to the extent of their client's horrific childhood, and their failure to investigate those leads led to their prejudicially deficient performance. Wiggins, 123 S.Ct. at 2537.

Trial counsel's investigation was indeed limited. Billing records reflect that they spoke to few potential mitigation witnesses other than those who actually testified. [14] In the state habeas evidentiary hearing, counsel further testified that they may have talked to others

[14] Trial counsel spoke on the phone to Don Garrison, the husband of Mavis Garrison, who did testify on Mr. Lee's behalf. He and Mrs. Garrison lived with Jamie Lee in a cottage at Florida Sheriff's Boys' Ranch, and he likely had similar information about Jamie as his wife. PX 102 at 4048. Similarly, trial counsel's investigator talked to other Boys' Ranch employees. PX 103 at 4057. Billing records further indicated that trial counsel talked to Karen Lee, one of Mr. Lee's father's ex-wives, the same day as counsel's first appearance in Mr. Lee's case in June of 1994. At this point, trial counsel could not have had much background information about the case. PX 102 at 4032. Trial counsel also had a brief phone conversation with Christina Smith, Mr. Lee's half-sister in 1994. PX 102 at 4033. As both she and Karen Lee were related to Mr. Lee through his father, who abandoned him at a young age, they would not have been able to provide any early life mitigation about Mr. Lee.

informally.[15] Trial counsel further conceded in state habeas that an investigator assisted them to a "limited extent." HT at 129. Indeed, he billed for approximately four day's work in February of 1995 and less than one day's in June of 1996, the latter date still a year before the trial began. While this investigation might have sufficed if trial counsel reasonably believed they had gathered all the mitigating evidence regarding Mr. Lee from these sources, red flags and leads in his records put them on notice that more investigation was needed.

Neither Mr. Adams nor Mr. Brooks had previously been involved in a capital case. While they initially took appropriate steps to learn how to prepare for the penalty phase of his trial, they ultimately failed to use any of these resources to investigate their mitigation defense. Thus, both attorneys not only had ample notice of the prevailing standards for capital representation in Georgia, they also had specific guidance on how to go obtain mitigating evidence. Had they followed the instructions provided by the written materials and specialists they themselves initially sought out, they could have easily obtained the substantial mitigating evidence presented by habeas counsel during this proceeding.

For example, both records and trial counsel's habeas testimony indicate that as a preliminary matter, they ordered a manual entitled, "Defending a Capital Case in Georgia," published by the Southern Center for Human Rights.[16] PX 112 at 4083 (Letter to Southern Center); HT at 51. Both Adams and Brooks testified that they reviewed and referenced the manual. HT at 51; HT at 152-153. The chapter titled, "Investigation for Mitigating

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[15] Trial counsel's testimony indicates they spoke to one of Mr. Lee's school principals, Steven McQueen, in casual conversation and that it was "possible" that they spoke to Mr. Lee's grandmother based on her address being in their file. HT at 84.

[16] The Georgia Supreme Court has recognized the Southern Center Manual as a reliable source for evaluating trial counsel's performance in capital cases. See McPherson, 663 S.E.2d at 661.

Circumstances," provided detailed information about the prevalence of trauma in the early lives of capital defendants, as well as instructions for how to gather evidence of it.

> The best way to uncover the client's past is to talk to the people who knew him, and collect the paper records of his life. *As counsel does so, he or she is looking for specific evidence of trauma and its effects on the client.* Trauma takes many forms. It may be physical (being abused), it may be psychological (witnessing mother being abused by father).[17]
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> * * * * *
>
> *Counsel must talk to individuals from all aspects of the client's life.* Immediate and extended family members are of course critical. In addition, neighbors, baby sitters, teachers, counselors, coaches, school mates, friends, employers, coworkers, ministers, doctors, mental health professionals and former lawyers should be consulted.

PX 121 at 4321; 4323 (emphasis supplied).

This manual provided clear instructions on how to identify leads such as those contained in Mr. Lee's evaluations and how defense attorneys should go about investigating them. Many of the types of witnesses listed in the manual are ones that could have provided compelling information about Mr. Lee's traumatic childhood and adolescence. Further, nearly all of the

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[17] The Manual continues with more examples of trauma, many of which were present in Mr. Lee's case:

> Some examples of traumas commonly suffered by the clients include: *prenatal exposure to toxins (alcohol, street drugs, prescription medicines)*; prenatal malnourishment; *malnourishment during developmental years*; exposure to toxins (lead, pesticides, household poisons, air pollution) during developmental years; high fevers; sickness and other medical problems; alcohol and substance abuse or ingestion; head injuries; oxygen deprivation; *impoverished living conditions*; *abandonment*; *neglect of physical needs*; *neglect of emotional needs*; *physical child abuse*; *psychological child abuse*, including taunting, frightening, threats of death against child and loved ones; sexual abuse; sleep deprivation; *witnessing of arguments between caretakers*; *witnessing physical violence at home*; witnessing death by violence; loss of a significant attachment figure; ostracism; racism; and *periods of homelessness*.

PX 121 at 4321 (emphasis supplied).

witnesses presented by habeas counsel lived in Charlton County, Georgia, where counsels' practice is located, or in surrounding counties in Georgia and Florida.

Trial counsel also had in their files a document entitled "Life History Checklist" which listed a number of the necessary steps to a compile a complete life history of a capital defendant. PX 104 at 4061-4065. The checklist included advice on what records to gather and which persons to interview, as well as describing things to look for in both the client and his background that could lead to mitigating evidence. This list echoed much of the information and instructions set forth in the Southern Center's manual. One of the few items of many on the checklist that trial counsel did do was obtain school records. Once again, trial counsel had guidance and instruction as to how to identify and pursue the leads that Mr. Lee's records revealed, yet inexpectably failed to do so.

Trial counsel's additional act of preparation for the sentencing phase of the case was contacting Pamela Leonard, a mitigation specialist at the Multi-County Public Defender's Office. PX 102 at 4039 (Counsel's Billing Records); HT at 126. Trial counsel testified that she emphasized the importance of having a mitigation theme that ran throughout both phases of trial and suggested hiring a social worker to assist them. During state habeas proceedings, trial testified that after discussion with their mental health expert, Dr. Daniel Grant, they declined to hire a social worker. HT 126-127. While that decision did not render them ineffective, it again shows the limited steps they took in their penalty phase investigation. Whether they chose to hire a social worker, to assign additional tasks to their investigator, or through their own investigative efforts, prevailing professional norms required them to investigate "all reasonably

available mitigating evidence,"[18] which includes gathering an accurate life history of their client. See, e.g. PX 3 at 222-58 (Prejean, MSW Aff.).

This is not a case where there appeared to be severe limitations on funding or time. The trial occurred three years after the crime. Mr. Adams had been on the case since the beginning and Mr. Brooks was appointed shortly thereafter. HT at 36; 122. Trial counsel had funds to hire a mental health expert and an investigator. In sum, this court finds that trial counsel had the time, resources, and guidance to conduct a reasonable investigation and to follow up on the numerous leads pointing to Mr. Lee's traumatic upbringing.

1. Counsel's Failure to Follow Up on Leads

Counsel were placed on notice of mitigating factors in Mr. Lee's background, which were consistent with and relevant to their strategy to present Mr. Lee as a victim of circumstances over which he had no control, and yet were never presented to the jury. One of their few acts in support of their mitigation strategy was to obtain Mr. Lee's school records. These records revealed that as early as kindergarten, Mr. Lee was referred for a psychological evaluation. The ensuing report provided substantial mitigating evidence and a number of red flags as to other avenues of investigation that would have led to additional details of the abuse, neglect and addiction that pervaded Mr. Lee's family and early life. Another crucial source of mitigation was the State evaluation conducted by Drs. D'Alesandro and Ifill prior to trial. While adding no aggravation to the State's case, this report instead pointed trial counsel directly to the trauma in Mr. Lee's childhood, a point of inquiry in line with trial counsel's chosen defense.

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[18] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 11.4.1 (C) (1989).

Accordingly, this court finds that their failure to conduct further investigation based on these leads was unreasonable.

a. The Charlton County School Evaluation

According to billing records, trial counsel obtained Mr. Lee's school records in January of 1995. PX 103 at 4056 (Investigator Billing Records). Contained therein were numerous records indicating Mr. Lee's mental and behavioral problems as a child, including an evaluation conducted by a social worker when Mr. Lee was five years old upon referral by his kindergarten teacher. PX 71 at 914-918 (Charlton County School Evaluation). The report details not only Mr. Lee's significant impairments that were evident by age five but also reveals his mother's own serious problems at this time. The report begins by describing Mr. Lee's mother, Barbara, and her willingness to be forthcoming with her own troubled past in an effort to help her son:

> Ms. Barbara Rewis Lee is a rather hard looking 25 year old caucasian female who has experienced considerable turmoil and anxiety during her short but turbulent life. In an effort to help us help Jamie, she has been cooperative and willing to discuss the unpleasant details of the past although she is obviously hurt and embarrassed by them. She is honest and admits to having made many mistakes, but she does seem to love Jamie and to be concerned for his welfare.

PX 71 at 914.

Mr. Lee's mother continued to explain her own difficulties in coping with her life and raising Jamie.

> In discussing her past, Mrs. Lee states that for a few months, she was the town drunk, the town clown, and had a smart mouth ... Mrs. Lee is an extremely nervous person and states that frequently, she just has to get out. So, she goes to the local bars. She now feels as though she is about to become an alcoholic and can be viewed as inadvertently asking for help.

PX 71 at 915.

In addition to the leads indicating his mother's substance abuse and neglect, the report further details the extent of Mr. Lee's own developmental problems and hyperactivity.

> Mrs. Lee is probably correct in saying that Jamie has been "drug" up. During infancy, he was a good baby but bounced the bottoms out of 2 cribs. As he got older, Jamie would be found climbing curtains, and getting up during the night and doing such things as: 1) breaking a dozen eggs on the floor and then playing in them, 2) spreading mayonnaise all over the living room, 3) putting cucumbers in his mother's pocketbook, and 4) making his puppy swim in broken eggs. He seemed to have a fixation for eggs (which Dr. Perea indicated to be a sign of hyperactivity). At one point Mrs. Lee even had to padlock Jamie's bedroom door at night because she was afraid that he would get out in the road and hurt himself. Growing up, Jamie has never had any friends because they have never lived near children. Consequently, Mrs. Lee bought Jamie a dog. He then began to act like the dog, barking at and chasing cars. Often, Jamie would simply sit and stare, and then begin rocking as if in a trance.

PX 71 at 915.

The report also notes that that Mr. Lee was taken to psychiatrists and medicated from a very early age. PX 71 at 917.

The report further contained repeated references to both Jamie Lee's physical condition and the state of his home that clearly indicated neglect. The social worker who authored the report described Mr. Lee's appearance and health. "Jamie does have a severe case of dental caries. His teeth are obviously rotting. Mrs. Lee states that she already has false teeth and whereas she is not as concerned about Jamie's baby teeth, she will make an effort to properly care for his permanent ones." PX 71 at 917. She further observed, "Jamie's appearance was shabby. His face was dirty and he was sloppily dressed with his shirt tail hanging out and his pant legs dragging the ground." PX 71 at 918. Upon visiting Mr. Lee's home, the social worker noted:

> The Rewis' and Lees live about 2 miles out of Folkston in an old, somewhat rundown house. The day I visited, the place was a mess (Mrs. Lee apologized as

> she had been in bed for 4 days) and it retained a foul odor. The inside was dark, very small and was furnished with what was obviously old furniture.

PX 71 at 916.

> The report concludes by noting the severity of Mr. Lee's impairments.
>
> Whereas Jamie could, and probably does, have some severe emotional problems, he does display academic potential. His progress should be closely observed and if he fails to respond to the LD class and/or does not show any improvement in his regular class, he should then be considered for placement in an SED class.

PX 71 at 918.[19]

This evaluation, which was obtained by trial counsel over two years before Mr. Lee's capital trial, clearly outlines his traumatic upbringing and the extent of his resultant mental impairments. Had trial counsel followed up on the leads in this report by interviewing additional family members, friends, neighbors, and/or teachers, they could have presented a vivid picture to the jury of the horrific environment in which Mr. Lee was raised.

b. The D'Alesandro/Ifill Report

The State's evaluation in this case provided leads to mitigating evidence for the defense, as well as being itself mitigating. Significantly, the report did not find a personality disorder or other information that is generally aggravating in capital cases. See e.g., Schofield v. Cook, 663 S.E.2d 221, 285 Ga. 240 (2008) (trial counsel's decision to forego mental health presentation found reasonable where evaluation contain negative evidence including a diagnosis of antisocial personality disorder). Instead, the report outlined all the mitigating aspects of Mr. Lee's troubled

[19] Ultimately, Mr. Lee was placed in the SED class, which was a class dedicated to children to with Severe Emotional Disturbances. While trial counsel did have Mr. Lee's SED teacher testify at the trial, there was no explanation of the traumas that led to his need to be placed in this class. See TT Vol. 9 at 102-110.

life, and most importantly, noted that additional evidence of his early life history would be mitigating and should be sought out.

> The accused also gives a history of having been physically and emotionally abused by both is [sic] father and his mother, although he has little direct recollection of abuse by his father since his father was not involved in his day to day rearing and did not even contribute financially to his care. Independent verification of these experiences would be valuable as far as documentation of childhood trauma and the effect which this can have on his subsequent emotional development. These factors may be considered by the Court as mitigating factors in the disposition phase of this case.

PX 100 at 4007 (Report of Nic D'Alesandro, Ph.D. and Gordon Ifill, M.D.).

The findings in the State evaluation clearly raised a red flag for defense counsel to investigate Mr. Lee's childhood further. While defense counsel only received the report a week before trial, it clearly alerted trial counsel to the need for further investigation and its findings could have been grounds for a continuance. At a minimum, the report could have been introduced on its own to corroborate the defense theory, since the report provided specific details about Mr. Lee's background that were mitigating.

> His rearing was primarily between his mother and his maternal grandmother. The home environment appeared to have been extremely unstable as his mother for the most part was under the influence of either alcohol or other substances of abuse. This contributed to her inability to provide the nurturing care normally required for the upbringing of a child ... Some of his descriptions seem somewhat protective of his mother and her maternal desire to look out for him, while at the same time he acknowledged that she apparently was quite ill with her substance abuse problem. It would seem from his description that she was barely able to function at times and at other times could not function at all. She would often be out of control and would be physically abusive to him, slapping him, pulling his hair and throwing him out of the house on several occasions.

PX 100 at 4005.

Trial counsel could hardly have been put on clearer notice about the mitigation in Mr. Lee's life history and the need for additional evidence to support it. The report even went so far

as to explain what sources would likely provide additional mitigating evidence of Mr. Lee's life history. "This is a limited evaluation. Records not available for review include school records, records of prior treatments and evaluations, records of interviews with family members which would provide information on childhood experiences." PX 100 at 4005. Yet, inexplicably, counsel failed to use this highly mitigating report or follow up on its multitude of leads.

Thus, the kind of information contained in the Charlton County and State evaluations should have triggered a more concerted effort to explore the obviously severe abuse and neglect attending Mr. Lee's upbringing and to develop such evidence for presentation at sentencing. In Wiggins v. Smith, the Supreme Court held that when counsel has records that contain potential leads to mitigating evidence, reasonable counsel will follow up on those leads. 123 S.Ct. at 2537. In that case, counsel had social service records documenting severe abuse and neglect of their client. The Court held that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." 123 S.Ct. at 2537.[20]

More recently, in Rompilla v. Beard, (125 S. Ct. at 2467-69) the Supreme Court held that counsel has an obligation to go forward with a background investigation using available leads pertaining to the client's abuse and neglect-ridden life history. In Rompilla, those leads were contained in records of his prior convictions, which competent counsel should have obtained. Id. at 2467-68. Once counsel had such records, "*they could not reasonably have ignored mitigation*

[20] See also PX 121 at 4324. ("The clues to a theory of mitigation are often found in written records [i.e., medical, social service, school].... Counsel should obtain these records and review them carefully.")

evidence or red flags." Id. at 2468 n.8 (emphasis supplied).[21] Furthermore, the Court held that competent counsel follows up on the red flags by investigating: i.e., locating and talking to witnesses who can flesh out the information contained in a given lead. Id. at 2468.[22] The Court found that with the information contained in the records, competent counsel

> would unquestionably have gone further to build a mitigation case. Further effort would presumably have unearthed much of the material postconviction counsel found, including testimony from several members of Rompilla's family, whom trial counsel did not interview.

Id. at 2468.

This case does, however, differ from Rompilla in that trial counsel in this case did not have to attempt to get details of the defendant's history from his uncooperative client and client's family. 125 S.Ct. at 2462. In contrast, this is a case where counsel ignored mitigating information in their possession and neglected to ask obvious questions of, or even seek out, critical witnesses, using the available documentation as a springboard. See, e.g., Schofield v. Gulley, 279 Ga. 413, 415, 614 S.E.2d 740 (2005) (counsel ineffective for failing to take "obvious avenues" of investigation, such as interviewing Gulley's brother). Further, Mr. Lee was cooperative and reported information that could have led counsel to evidence that supported their mitigation strategy even before they received the State's report. While the record indicates that

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[21] Rompilla's court files featured highly mitigating information which resembles Mr. Lee's life history: "Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. They lived in a house with no heat or indoor plumbing, and the children were not given clothes and attended school in rags." Rompilla, 125 S.Ct. at 2468-69.

[22] See also Turpin v. Christenson, 269 Ga. at 234-35 (competent counsel subjects records to "careful reading" for leads or information of mitigating significance); Head v. Thomason, 276 Ga. 434, 435-36 & n.1, 578 S.E.2d 426 (2003) (counsel ineffective where they "unreasonably failed to make use of considerable information in counsel's possession, [and] made no effort to secure other information readily available").

most of trial counsel's interviews with Mr. Lee focused on guilt-innocence issues, their notes from three years before trial contain phrases such as "remembers mom messed up" and "mom—passed out," and "age—4 saw Dad smash Mom in nose." RX 111 at 4077-78.[23] Yet even if counsel believed they had a complete picture of Mr. Lee's troubled upbringing up to that time, they could not ignore the red flags in the State evaluation that clearly indicated there was additional evidence of trauma in Mr. Lee's background.

Mr. Lee's case is similar to McPherson v. Hall, 284 Ga. 219, 663 S.E.2d 659 (2008). There, the Georgia Supreme Court recently found the trial attorneys' investigation unreasonable where two mental health evaluations should have alerted them to abuse and neglect by McPherson's mother. In failing to follow up on these leads, trial counsel unreasonably relied on McPherson's mother in gathering information about his life history. Much like in Mr. Lee's case, a court-ordered evaluation as well as another evaluation clearly pointed to the mother's alcoholism, abuse, and neglect. Id. at 661-62. Trial counsel testified in habeas that he simply "failed to make the connection" in interviewing mitigation witnesses. Significantly, the Court further found the early life mitigation was not inconsistent with trial counsel's strategy in that counsel argued in opening statements that McPherson's mother did "the best she could," but failed due to economic circumstances. Id. at 669.

In Mr. Lee's case, trial counsel equally did not follow up on leads that Mr. Lee's mother was abusive and neglectful. In so doing, they relied on her to provide an accurate history of Mr. Lee and spoke to few other sources that could corroborate or refute her account of his childhood. Moreover, much like in McPherson, trial counsel's argument that Barbara Lloyd did her best as a

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[23] Medical records obtained by habeas counsel confirm that Barbara Lloyd was treated for a nasal fracture in 1978. PX 80 at 2250.

mother was not inconsistent with presenting additional evidence of her abuse and neglect of Mr. Lee. Thus, because counsel had no rational strategy or reason for failing to develop this mitigating evidence, this Court finds their performance fell below an objective standard of reasonableness.

2. Failure to Investigate and Present Evidence of Mr. Lee's Traumatic Upbringing

Trial counsel performed deficiently in failing to pursue the leads in the reports by interviewing and presenting mitigation witnesses. Counsel was on notice from these leads that further investigation would not be fruitless. Wiggins, 123 S.Ct. at 2537. Further, trial counsel emphasized during state habeas that Folkston and the surrounding areas was a small community. HT at 100. Nevertheless, trial counsel spoke to very few witnesses other than those who actually testified at Mr. Lee's penalty phase. This, despite numerous people in the area who had compelling mitigation to share about Mr. Lee's troubled life and background. As a result of this failure to fully investigate Mr. Lee's traumatic upbringing despite numerous leads, trial counsel's performance fell below prevailing professional norms. See id.

Trial counsel did not have to look far to locate and interview potential mitigation witnesses. Many of Mr. Lee's family members lived in Folkston area where trial took place, and none lived any further than Vidalia, GA.[24] For example, an obvious person for trial counsel to have spoken with was Mr. Lee's only maternal aunt, Catherine Owens, who lived in Vidalia. As Barbara Lloyd's sister, she had personal knowledge of both Mr. Lee's disturbing upbringing, as well as the violence and substance abuse problems of the preceding generations. Thus, her

[24] Counsel was aware that Mr. Lee had family in the Vidalia area because Mr. Lee was at his grandmother's house there earlier on the night of the crime.

testimony could have provided vivid details of the multi-generational dysfunction in Mr. Lee's family.

Trial counsel could equally have spoken to Leo Pravatt, a cousin of Mr. Lee's and a Charlton County resident who Mr. Lee affectionately referred to as "Aunt Leo."[25] PX 10 at 324-332. Not only could Ms. Pravatt could have provided family history as far back as Mr. Lee's maternal great-grandfather, she could have testified to Barbara Lloyd's instability while pregnant with Mr. Lee, her addiction to pharmaceuticals, Mr. Lee's childhood behavioral problems, as well as Mr. Lee's kindness and good nature. Further, Mr. Lee's great-uncle, William Beecher Rewis, who lived in Folkston for many years, could have provided details about Mr. Lee's grandparents, with whom Mr. Lee lived for several years as a child, as well as Barbara's uncontrollable temper.[26] Ms. Lloyd's cousins, Jean Davis and Dianne Woolard, each could have provided powerful anecdotal examples of Barbara's drug addiction and abuse of Mr. Lee.[27] Each of these witnesses would have been able to testify to Mr. Lee's history and trauma that stemmed from neglect, abuse, and abandonment.

In addition to other family members, neighbors, friends, and school teachers who provided additional details of Mr. Lee's life, trial counsel had another obvious yet untapped source of information, Barbara Lloyd herself. While trial counsel spoke to her several times prior to trial, they gathered few details about her life when Mr. Lee was a child, despite her

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[25] While Ms. Pravatt was technically Mr. Lee's third cousin, counsel had notice that she was close to Mr. Lee because counsel noted in an interview that she had come to visit him in jail while he awaited trial. See RX 10 at 5782.

[26] Mr. Beecher's name was in trial counsel's investigator's notes from an interview with Mr. Lee's mother. PX 103 at 4058.

[27] Trial counsel had Ms. Woolard's husband's name, Kenny, in their interview notes from a meeting Mr. Lee. This lead could easily have led them to Ms. Woolard. PX at 111 at 4077.

willingness to be forthcoming with such information, as was evidenced by Mr. Lee's evaluation as a child and her affidavit testimony in state habeas proceedings.[28] These sources reveal a parent who was particularly willing to admit to many of her problems and her testimony could have provided a first-hand account of Mr. Lee's childhood. See McPherson, 663 S.E.2d at 661 (counsel's investigation unreasonable where despite interviewing mother numerous times and having leads regarding her abuse and alcoholism, trial counsel failed to inquire about it or to elicit such evidence at trial.)

a. Family History of Violence and Substance Abuse

Counsel could have presented any number of Mr. Lee's relatives who could have testified to his family's addiction, dysfunction, and brutality that spanned multiple generations. Such evidence could have decreased Mr. Lee's moral culpability for the crime by illustrating that, unlike most, he was raised in an environment where violence and intoxication were a regular part of life.

Unrebutted evidence presented in habeas revealed that Mr. Lee's maternal family history of alcoholism and violence goes back at least as far back as Mr. Lee's great-grandfather, who

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[28] The Southern Center for Human Rights Manual that trial counsel acquired and referenced during their representation of Mr. Lee also provided guidance in preparing mitigation witnesses to testify.

> Witness preparation requires extensive work with the witnesses after counsel is fully informed of the facts through a thorough investigation. Much more work is involved in preparing witnesses to testify for the sentencing phase of a capital case than in any other type of legal proceeding. In most court proceedings, a witness testifies about an incident lasting a few minutes, or, at most, a few days. However, at the sentencing phase of a capital case, mitigation witnesses are called upon to testify about a whole life. In order to do this counsel must carefully prepare the questions to take the witness through the life, bringing our particular incidents which are important.

PX 121 at 4261.

was himself a violent alcoholic who was known to expose himself to children. PX 10 324-25 (Pravatt Aff.); PX 11 at 333-34 (W.B. Rewis Aff.). Mr. Lee's grandfather, with whom Mr. Lee lived for several years during his childhood, was a man known for his drinking and violent temper. He abused his children frequently and brutally and was known to cheat openly on his wife and even pull guns on relatives. PX 12 at 341 (Woolard Aff.); PX 7 285-86 (B. Lloyd Aff.). A number of Mr. Lee's relatives could have testified in detail to his grandfather's excessive drinking and his violent physical abuse of his children, especially Barbara. PX 9 at 315-16 (Owens Aff.); PX 7 at 284-85 (B. Lloyd Aff.); PX 4 at 260 (Akers Aff.). Catherine Owens, Barbabra Lloyd and other family members could also have testified to Mr. Lee's grandmother's dependence on pharmaceuticals to cope with her nerves and her husband's drinking, physical abuse, and promiscuity. PX 9 at 316; PX 7 at 286; PX 4 at 259-60. "There were plenty of times when I would go over and see Nellie and she would be sitting in her rocking chair with a glazed-over look in her eyes and a pill bottle in her hand." PX 5 at 272 (Davis Aff.).

After being raised in this brutal home environment, coupled with the sudden death of her brother, Barbara Lloyd began drinking at a young age. PX 7 at 288 (B. Lloyd Aff.). She began hanging out in bars and at the local truck stop where she soon met Johnny Lee. PX 4 at 262 (Akers Aff.); PX 11 at 334-35 (W.B. Rewis Aff.). Their relationship was a dysfunctional one involving alcohol and drug abuse, promiscuity, and violence. Still a teenager but already a heavy drinker, Ms. Lloyd became pregnant shortly after she married Johnny Lee. PX 7 at 288-89; PX 10 at 327 (Pravatt Aff). Her pregnancy did nothing to improve the marriage: Johnny Lee continued to abuse her, and she continued to abuse alcohol. PX 7 at 291. At one point, she had a breakdown and had to be hospitalized and sedated, while throughout the pregnancy she

received regular shots of Demerol for tooth pain. PX at 7 at 291. The abuse in the relationship continued unabated after Mr. Lee was born.

> So before no time at all, there we were again -- back to where Johnny was gone in the truck or at home beating me. It breaks my heart to say it, but there were times when Jamie was in his crib and Johnny would be wailing on me. Jamie would take to crying and carrying on, yet neither me or Johnny went to him. We were both seeing red and too busy screaming at each other.

PX 7 at 292-93 (B. Lloyd Aff.).

During this time, Johnny Lee fathered a child with another woman. PX 7 at 295; TT Vol. 9 at 116. After a few more years of escalating violence, including Barbara Lloyd's being hospitalized for a broken nose, and Ms. Lloyd's attempting to run over Johnny and Jamie while they were on a motorcycle, the marriage ended. Jamie was about four years old at the time and Johnny had minimal contact with his son until after he reached adulthood. While the jury heard some evidence about Mr. Lee's abandonment by his father, it was not presented with the family background in which this occurred. Thus, testimony about his family history would have given the jury a perspective on the home Jamie Lee was born into and could have illustrated to them the continuing cycle of violence and substance abuse that plagued all of his adult caregivers.

b. Barbara Lloyd's Substance Abuse

Trial counsel performed deficiently in failing to present the extent of Barbara Lloyd's addiction to the jury. Ms. Lloyd's alcohol and substance abuse had a devastating impact on her parenting abilities for which Mr. Lee suffered significant consequences. While trial counsel elicited from Ms. Lloyd at trial that she had once had a problem with prescription drugs, the jury had no way of knowing the extent of her addiction or its direct effects on Mr. Lee. Nearly everyone who knew Barbara during this time was aware of her substance abuse, and many were willing to discuss it and testify to it. Ms. Lloyd's addiction appears to have begun as during her

marriage to Johnny Lee and continued throughout Mr. Lee's childhood and adolescence. Her substance abuse was therefore necessary to understand the extreme privation and trauma that Mr. Lee experienced as a child.

Barbara Lloyd's substance abuse involved ingesting significant amounts of prescription drugs and alcohol. Not only did her intoxicated condition make her unable to care for Mr. Lee, but the time spent drinking in bars and procuring and using drugs significantly contributed to her neglect of Mr. Lee. Ms. Lloyd would routinely go to physicians in Folkston, Waycross, and points beyond who were illegally dispensing prescriptions in exchange for cash. PX 7 at 293-294 (B. Lloyd Aff.); PX 5 at 271-72 (Davis Aff.). Her addiction was to the extent that she would beg for drugs from friends and strangers as well as sell them to earn money for more drugs. PX 7 at 302; PX 5 at 271 (Davis Aff.); PX 9 at 321-22 (Owens Aff.); PX 10 at 329-330 (Prevatt Aff.). She developed a reputation as a "pill junkie." PX 5 at 271 (Davis Aff.).

The lifestyle that accompanied Ms. Lloyd's substance dependence further impaired her ability to care for Mr. Lee. As Ms. Lloyd readily admitted, and many others could confirm, she often went out to local bars, leaving Jamie either home or even in the car. PX 71 at 917 (Charlton County School Evauation). Ms. Lloyd would often meet men at the bars and stay out all night. This behavior was the norm for her at least during the years she and Jamie lived with her parents. However, her drug using and dealing does not appear to have at all subsided when she moved into the Pine Point Apartments, at which point she was Mr. Lee's primary caretaker. Both family members and neighbors could have testified to her continuing to use and sell drugs at the apartment and often being hardly able to function as a result of her perpetual intoxication. Yet, the jury in this case never knew the extent of Ms. Lloyd's addiction and its effect on Mr. Lee's childhood.

c. Mr. Lee's Developmental Delays and Impairments

Trial counsel failed to present substantial mitigating evidence of Mr. Lee's developmental delays and impairments during his childhood and adolescence. In addition to the chaos and neglect he experienced at home that would likely have traumatized any child, Mr. Lee's hyperactivity exacerbated problems in the home. Evidence regarding Mr. Lee's bizarre behavior as a result of his mental impairments and abysmal home environment was crucial for a jury to understand the extent of Mr. Lee's traumatic childhood and its impact on his ability to conform his ability to the law when he reached adulthood. Numerous relatives and neighbors could have provided stark details of Mr. Lee's developmental problems.

By following up on the leads in the Charlton County School Evaluation as discussed above, trial counsel could have found numerous witnesses who could have told the jury in vivid details about Mr. Lee's early behavioral issues. For example, Mr. Lee would bounce up and down constantly in his crib, to the point that he destroyed several cribs, one of which had to be reinforced with two by fours and nailed to the floor and resembled a cage. PX 9 at 318 (Owens Aff.); PX 11 at 336 (W.B. Rewis Aff.); PX 4 at 263 (Akers Aff.). During the night, Mr. Lee would get out of his crib and wander around the house or even outside. So acute was his hyperactivity that the first psychiatrist who treated him at the age of two prescribed him Phenobarbital, a powerful sedative and barbiturate. PX 71 at 917.

One of Mr. Lee's most bizarre behaviors as a child that speak to both his mental impairments and the severe neglect in the home was his acting like a dog. One time at trial, Barbara Lloyd mentioned once during the trial that Mr. Lee would sometimes bark like a dog when he was a child. TT Vol. 9 at 145. However, this was only one aspect of his behavior, and which may have struck the jury as simply a child playing. Moreover, the matter only came up in

the context of Mr. Lee's hyperactivity, which, while perhaps being a part of the cause of this behavior, ignores that it was just as much a result of his neglect by his drug-addicted mother. By talking to any number of family members, neighbors, or friends who knew Mr. Lee as a child, they could have presented testimony that Mr. Lee walked around on all fours panting; that he scratched behind his ears; that he would bite people's ankles; that he spent most of the time outside and was constantly filthy; that he would chase after cars while barking incessantly; and, that he would even eat dog food. PX 10 at 338-39 (Prevatt Aff.); PX 17 at 374 (McIntyre Aff.); PX 5 at 274 (Davis Aff.); PX 7 at 300 (B. Lloyd Aff.). While it is unknown what specifically caused Mr. Lee to take on dog-like traits, many family members would have testified that it related to the excessive amount of time Mr. Lee spent outside playing with his dog. PX 5 at 274; PX 12 at 344 (Woolard Aff.); PX 11 at 331 (W.B. Rewis Aff.). As one put it, "I think Jamie got more attention and love from Deogee, the mangy dog he had, than he did from his own mama." PX 5 at 274 (Davis Aff.).

Perhaps the most disturbing of Mr. Lee's early behavioral problems were his masochistic and suicidal tendencies. While this behavior began at a remarkably early age, it continued through Mr. Lee's teenage years. Barbara Lloyd first saw her son's suicidal tendencies at the age of three when he placed his head under the tire of her car as she was driving away. PX 7 at 299 (B. Lloyd). Trial counsel's notes indicate that the family physician, Dr. Perea, found Mr. Lee to be suicidal at age three. PX 106 at 4072. Mr. Lee's kindergarten teacher, Marward Howard, could have provided the jury with a vivid first hand account of this troubling behavior:

> Immediately after he started kindergarten, I noticed that Jamie would frequently slap and hit himself in the face while sitting in class. It was not a behavior that I've seen out of a child before or since Jamie. I was really scared that he was going to hurt himself, so I moved his desk right next to mine at the front of the classroom so I could monitor him as much as I could with thirty or so other children in the classroom. When I would see Jamie doing this, I would call a time

> out and take Jamie aside. I would get on Jamie and tell him that hurting himself wasn't acceptable behavior in my classroom. His usual response was to say, "I'm gonna kill myself" and start crying. After much reassurance from me that everything was going to be fine and that I loved him and didn't want him to hurt himself, he would calm down and get back to his work. To this day, I have never heard another child of that age talk like that. Five year old children just don't talk like that. I always wondered where Jamie learned that type of language and that it was alright to say or feel things like that.

PX 36 at 476-77 (Howard Aff.).

Shortly thereafter, Ms. Howard felt compelled to refer Mr. Lee for a psychological evaluation, which led to his placement in special classes for severely emotionally disturbed children.[29] PX 71 at 914. As late as 1993, a year before the crime occurred, Mr. Lee was still engaging in this self-destructive behavior. When he was taken in by an old family friend after leaving the Florida Sheriff's Boys' Ranch, she came home and "found [Jamie] sitting in the rocking chair, rocking and hitting himself in the head with his fists. I didn't know what to make of it." PX 20 at 386 (B. Morgan Aff.).

d. Neglect of Mr. Lee

Trial counsel unreasonably failed to present to the jury the dire neglect Mr. Lee experienced as a child. Much of Mr. Lee's developmental and behavioral problems were likely a product of the neglect. PX 1 at 171-74 (Boyer Aff.). Yet, the term "neglect" was uttered but once during the penalty phase of Mr. Lee's trial without any example, anecdote, or explanation as to why this term applied to Jamie Lee's life. TT Vol. 9 at 179. This is a direct result of trial counsel's unreasonable investigation. The Charlton County school evaluation provided trial counsel with numerous red flags in its description of his childhood home as a "mess" with a

[29] Ms. Howard's name appears on the Charlton County evaluation that trial counsel obtained prior to trial. She was still a teacher in Folkston at the time of Mr. Lee's trial. PX 36 at 475.

"foul odor" and that Barbara Lee's explanation was that she had been in bed the preceding four days. PX 71 at 916. It also noted Mr. Lee's dirty appearance and that his teeth were completely rotten. PX 71 at 917. These observations were obvious red flags of neglect in Mr. Lee's childhood, but were simply ignored due to their inattention in preparing their mitigation case.

Had trial counsel followed up on these leads by talking to Mr. Lee's family members, they would have learned vivid details about the extent of the neglect that would have been compelling to any jury. Barbara Lloyd appeared incapable of caring for her home. Numerous witnesses could have testified to it being constantly filthy and crawling with cockroaches. PX 12 at 343 (Woolard Aff.); PX 15 at 357 (N. Chapple Aff.); PX 21 at 392 (P. Morgan Aff.); PX at 22 at 397 (Petty Aff.). Plates of rotting food lay about. The Rewis home was also perpetually smoky from Barbara and her mother's heavy smoking. Yet, Barbara's habits did not improve when she left her parents' home and moved to the Pine Point apartment and the trailer in Hilliard, Florida, which were equally filthy. Mr. Lee's cousin, Dianne Woolard described the apartment. "Roaches were crawling everywhere and there was crusty food all over the place, along with beer and prescription pill bottles." PX at 343-244 (Woolard Aff.)

The physical neglect of Mr. Lee himself was equally appalling. Family members, neighbors, and teachers all recall Mr. Lee as being perpetually filthy as a child. He spent most of his time outside and was always dirty from head to toe. He was sent to school in this state and was teased by his classmates about his appearance and odor. PX 36 at 478 (Howard Aff.); PX 17 at 373 (McIntyre Aff.). Mr. Lee's only neighborhood friend when he and Ms. Lloyd lived his grandparents was not allowed to invite him inside because of Mr. Lee's lice, which he caught

from Mr. Lee at least once.[30] PX 14 at 354 (B. Chapple Aff.). Nevertheless, his friend's grandmother would pass Mr. Lee sandwiches out the back door because Mr. Lee was constantly starving. Id. Other family members and neighbors recall Mr. Lee's hunger and would try to feed him whenever they could. PX 10 at 330 (Pravatt Aff.); PX 21 at 390 (P. Morgan Aff.).

Presenting these dire circumstances of Mr. Lee's childhood was directly in line with trial counsel's mitigation strategy. Indeed, it was a critical aspect of Mr. Lee's upbringing and most certainly out of his control. Accordingly, counsel was deficient in their failure to investigate this strong evidence of neglect and present it to the jury.

e. Physical and Emotional Abuse of Mr. Lee

Unreasonably, trial counsel failed to present critical mitigating evidence of abuse. In addition to the substance abuse and neglect, Ms. Lloyd also perpetuated another multi-generational family behavior, child abuse. As Mr. Brooks conceded during state habeas, he and Mr. Adams were unaware of the extent of the physical abuse in Mr. Lee's background and that

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[30] While Jamie's childhood friend, Bradley Chapple, had moved to Oklahoma by the time of Mr. Lee's trial, his parents continued to live in Charlton County. Not only could they have assisted counsel in locating Bradley, his mother, having been Jamie's neighbor and a friend of Barbara's, could also have offered vivid accounts of Jamie's childhood neglect.

> Jamie would show up, say that he was alone, and ask for something to eat. Jamie was about the same age as my son Bradley, so he would ask whether Bradley would come out to play as well. We would not let Jamie in the house, as he frequently had lice, but my mama would pass him sandwiches while he was standing outside the door. The boy's appetite really stands out to me. He could eat sandwich after sandwich. Jamie would say that he could eat a lot because he had worms. I hesitated to send Bradley out to play with him because of his lice — which he gave to Bradley a few times — but we all felt sorry for the boy because of what was going on at home. My mama treated Jamie a few times for his lice when it got really bad. We talked, too, about how we wished we could do something about his rotted-out teeth. The boy was always dirty, too. It was clear to me that no one was looking after his basic needs.

PX 15 at 361 (N. Chapple Aff.).

they only knew of "some isolated incidents" of abuse. HT at 136. However, they were clearly on notice that this could be a valuable avenue of inquiry in support of their mitigation defense. Again, any strategic decision trial counsel made not to "trash" Mr. Lee's mother could not have been made reasonably without a thorough investigation of her physical and emotional abuse of Mr. Lee. Strickland, 466 U.S. at 690-91. Moreover, trial counsel specifically testified that he would have presented evidence of abuse had he been aware of it. HT at 57.

Like the other aspects of Mr. Lee's life that trial counsel failed to investigate, trial counsel did not have to look far to find witnesses who could describe harrowing incidents of abuse by Barbara Lloyd. Ms. Lloyd's temper and frustration with Jamie boiled over frequently and in plain view of friends, neighbors, and relatives. There are a multitude of examples that could have confirmed and described the severity and frequency of Ms. Lloyd's abuse. For example, his aunt, Catherine Owens, could have provided chilling details about an incident where Mr. Lee was assaulted by his mother for little reason all the while cursing him repeatedly.

> There was a coffee cup on the kitchen table, and Jamie reached up and grabbed for it. He really wasn't that tall and never got a good grip on it, and he dropped it on the floor and it shattered. Barbara immediately started hollering about her son, that 'no good motherfucker' and chased after Jamie. She caught him and smacked him hard across the face and left a mark. I couldn't believe what I saw. I wondered whether Barbara had learned anything by the way we were raised. I told him not to do her boy like that. Barbara told me to shut up, that she could do her youngun [sic] any way she wanted to, that she could 'take him by the feet and slap him up against the wall if she wanted to.' She said that she could 'splatter the little motherfucker's brains everywhere' if she felt like it because he belonged to her and there was nothing I could do about it.

PX 9 at 319 (Owens Aff.).

Other family members, such as Jean Davis, could have confirmed the frequency with these incidents occurred. PX 5 at 272-73 (Davis Aff.).[31] It was not uncommon to see Mr. Lee with bruises. Id.; PX 26 at 399 (Smith Aff.); PX 38 at 489 (Ruis Aff.). Another relative, Dianne Woolard, eventually felt the need to call child services after she observed Ms. Lloyd continued physical and emotional abuse of Mr. Lee after they had moved to Florida. Id. Dorothy Ruis, Mr. Lee's teacher at Hilliard Middle School, was also compelled to contact child services after Mr. Lee came to class covered in bruises and welts and, after probing, that his mother had beaten him. PX 38 at 489-90 (Ruis Aff.)[32] The abuse frequently involved verbal as well as physical assaults: "I have never heard Barbara talk to Jamie in a normal tone of voice: she always yelled at him, even if he was a few feet away from him." PX 12 at 244 (Woolard Aff.) In addition to cursing Mr. Lee and calling him names, Ms. Lloyd's verbal abuse included yelling at Mr. Lee for being like his father and blaming him for her failed relationships. PX 5 at 274 (Davis Aff.); PX 20 at 384 (B. Morgan Aff.).

In addition to family members and a teacher, numerous friends and neighbors bore witness to verbal and physical abuse. PX 26 at 418 (M. Smith Aff.) ("There was one time when

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[31] "There were plenty of other times when I saw Barbara slap Jamie silly for no reason. I mean she would haul off and slap him right across the face. As I remember back, nearly every time Barbara was around Jamie you knew it wouldn't be long before there was a knock-down drag-out beating. When you get right down to it, Barbara would simply beat him up. I know because I watched. There were other times when all I had to do was take a look at the bruises on Jamie's body and face and knew she was at it again."

PX5 at 272-73 (Davis Aff.).

[32] The Georgia Department of Family and Child Services (DFACS) records obtained by habeas counsel indicate an anonymous complaint was made when Jamie and Ms. Lloyd lived at the Pine Point Apartments, which alleged that Jamie's mother was pulling him by the hair and jerking him around. The case was closed when Jamie denied abuse. PX 76 at 1312-1316. However, family specifically described incidents in which Ms. Lloyd pulled Jamie by his hair. PX 5 at 273 (Davis Aff.); PX 12 at 345 (Woolard Aff.).

Jamie was over at my sister[]'s house and Barbara hit him in the face as hard as I've ever seen someone hit a child. Jamie must have been about four or five years old and Barbara got mad and gave Jamie a backhanded swipe, with a closed fist, right in the mouth went flying and landed flat on his back. Jamie was crying and bleeding all over the place.); PX 22 at 398-99 (Petty Aff.) ("[Barbara] was mean to Jamie in many different ways. There were times when Barbara would call Jamie all sorts of horrible names and there were other times when she would beat the crap out of him ... to see Jamie with bruises. I remember one time when there was a get together down at Scott's Landing and Barbara started hitting on Jamie and after knocking him down, she kicked him right in the head. Stuff like this happened so often, it is hard to remember every specific instance of abuse Jamie suffered at the hands of his mother. But it was a common sight when I was around her. As Jamie got older the beatings got worse. Yet I never saw Jamie hit her back.") PX 20 at 384 (B. Morgan Aff.); see also PX 21 (P. Morgan) at 391; PX 24 (S.H. Rewis Aff.) at 408. The evidence of the abuse Mr. Lee endured as a child is powerful and was important for the jury to consider.

Further, numerous family members and teachers could have testified that despite the abuse he experienced at home, Mr. Lee was a likable and loving child and teenager, quick with a smile and a hug. PX 20 at 388 (B. Morgan Aff.); PX 21 at 394 (P. Morgan Aff.); PX 28 at 430 (Bailey Aff.). When he spent time with other adults, Mr. Lee was described as good, helpful, obedient, trying to do things right. He responded to kindness and positive attention, of which he received little or none of at home. Numerous witnesses could have testified to his desire to please and his efforts to abide by rules. PX 5 at 273 (Davis Aff.); PX 21 at 392. In sum, Mr. Lee was a child in desperate need of attention who showed promise when he received it. Testimony about his goodness in light of his difficult life was also consistent with counsel's

strategy. "[Jamie] is a good kid. Deep down inside, he is a good kid. You know, in a structured environment, when he has got something to do, he is very good, loveable." HT at 66. However, the trial record indicates that the jurors heard little about Mr. Lee's good character. Neither were they fully informed of the horrific abuse he endured as a child.

f. Mr. Lee's Life Leading Up to the Crime

Trial counsel failed to present the jury with mitigating evidence regarding the time Mr. Lee spent homeless prior to the crime. After Mr. Lee completed the program at the Florida Sheriff's Boys' Ranch, where he spent two years during his teens and showed marked improvement in his behavior, he briefly returned home. While his mother's addiction and temper had not changed, the situation had worsened in that his stepfather had also become addicted to prescription drugs. PX 8 at 310 (M. Lloyd Aff.) ("I was taking about twenty to thirty pills a day by the time Mr. Lee came home from the Boys' Ranch.") Within a month or two, Mr. Lee moved out. PX 7 at 306 (B. Lloyd Aff.). He was seventeen years old and spent the following two years that preceded the crime essentially homeless.

At trial, the prosecution argued that during this time Mr. Lee became a hardened criminal and was no longer the kind boy that his former teacher or former housemother at the Boys' Ranch recalled in their testimony. See TT Vol. 10 at 8. Moreover, trial counsel knew the prosecution would introduce evidence that Mr. Lee had been involved in other criminal activity during this time period. Unreasonably, trial counsel presented nothing to rebut the prosecution's theory. Counsel had a duty to rebut aggravation in addition to presenting mitigation. Rompilla, 125 S.Ct. at 2465. Yet, had they investigated, they could have presented credible testimony that Mr. Lee tried to succeed on his own and was for a time a valued and trusted employee, but that ultimately his mental impairments and lack of coping skills as a result of his horrific sent him

into a downward spiral that culminated in the murder of Sharon Chancey. In addition, evidence of Mr. Lee's difficulties during this stage of his life would have helped the jury to understand how he ultimately came to commit the crime. However, the jury never heard nothing mitigating about this period of Mr. Lee's life.

Trial counsel had the name Rick Pope in his interview notes from a meeting with Mr. Lee, but did not speak him prior to trial. PX 23 at 406 (Pope Aff.) Mr. Lee not only worked for Mr. Pope in his cleaning service, but also lived with him when Mr. Pope and his family decided to take him in. Mr. Pope could have testified to Mr. Lee's good work ethic, his respectfulness, and how Mr. Lee responded well to attention and positive feedback while living and working with Mr. Pope. Id. at 404-05. Moreover, he could have described his dismay when Mr. Lee fell in with the wrong crowd and began using drugs. Id. at 405-06.

In addition, Brenda Morgan could have similarly testified to Mr. Lee's good work at the cleaning service. Ms. Morgan was an old acquaintance of Barbara Lloyd who picked Mr. Lee up from the side of the road and ended up offering him a job and a place to stay. Her impressions of him could have rebutted the prosecution's argument that Mr. Lee had become a violent criminal: he obeyed all the rules at work and never stole anything from the places he cleaned. PX 20 at 386 (B. Morgan Aff.). Moreover, "... I never thought twice about leaving Jamie alone with our daughter, who adored him. He was like a member of the family." Id.

Yet, shortly before the crime occurred, Mr. Lee found himself once again homeless and unemployed. He went to his mother for help. She refused to help him and told him to ask his father Johnny for help because "it was Johnny who was living the high life all these years while we fought for our lives." PX 7 at 307 (B. Lloyd Aff.). Barbara was incredibly angry during this conversation and told Mr. Lee that Johnny owed him a great deal of support payments and that

he should get the support. Id. Barbara also told Jamie that Johnny's Silverado was "[Jamie's] child support." PX16 at 370 (Drury Aff.).

In failing to present any evidence of Mr. Lee's life leading up to the crime, trial counsel not only unreasonably failed to present additional mitigating evidence, but further failed to test the State's case in aggravation. Rompilla, 125 S.Ct. at 2465; see U.S. v. Cronic, 104 S.Ct. 2039, 2045-46 (1984) (Effective assistance of counsel requires meaningful adversarial testing of the prosecution's case.) Trial counsel had a duty to present evidence that subjected the State's case to meaningful testing. Testimony of these witnesses could have undermined the prosecution's theory that Mr. Lee was nothing more than a violent criminal. Instead, trial counsel failed to present anything to the jury about the phase in Mr. Lee's life so that they were left only with the State's evidence that Mr. Lee was involved in stealing a car and beating up an acquaintance. His employers at this time, both of whom welcomed him into their homes, paint a starkly different picture that the jury should have heard before deciding whether Mr. Lee should live or die.

D. Failure to Investigate and Present Psychiatric Mitigating Evidence

One of trial counsel's most serious omissions in their representation of Mr. Lee was the failure to present psychiatric mitigating evidence in the form of documentation and expert testimony pertaining to Mr. Lee's mental health disorders. Trial counsel's failure to conduct a reasonable investigation of Mr. Lee's background led to an incomplete presentation of this evidence during the penalty phase of his trial. Specifically, counsel's failure to provide their expert, Dr. Daniel Grant, with Mr. Lee's life history resulted in his inability to accurately diagnose Mr. Lee. As result, the jury failed to hear a mental health expert explain the significance of Mr. Lee's traumatic upbringing on his mental health or that he suffered from Post-Traumatic Stress Disorder (PTSD). Instead, the jury heard only that he suffered from

Attention Deficit Hyperactive Disorder (ADHD), a disease that as the State pointed out, afflicts "millions of children." TT Vol. 10 at 8. Further, while the jury heard some testimony that Mr. Lee's crime was related to his anger towards his father, they did not have expert assistance necessary to understand how Mr. Lee's troubled life and mental impairments could have culminated in Ms. Chancey's tragic death. Trial counsel's failure to investigate and present such evidence was extremely prejudicial to Mr. Lee's chances of obtaining a sentence less than death.

Psychiatric mitigating evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior. 'Thus, psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors.'" Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (citations omitted). See also Turpin v. Christenson, 269 Ga. 226, 241, 497 S.E.2d 216, 229 (1998) (endorsing and quoting Middleton on this point).

Experts are critical in helping to tie the various aspects of a defendant's life history into a coherent picture of the defendant's state of mind throughout his life path leading up to the crime. The Georgia Supreme Court has repeatedly held that the average capital juror is hindered in her sentencing deliberations when available psychiatric opinion testimony or other psychiatric mitigating evidence is not presented in court. For example, in Turpin v. Lipham, the Court found counsel ineffective for failing to present the testimony of a mental health expert to help the jury understand the mitigating significance of Lipham's troubled upbringing and mental disorders: "*[T]he average juror is not able, without expert assistance, to understand the effect [the defendant]'s troubled youth, emotional instability and mental problems might have had on his culpability for the murder.*" 270 Ga. 208, 219, 510 S.E.2d 32, 42 (1998) (emphasis supplied). In this case, the jury was inexcusably deprived of expert testimony regarding Mr. Lee's

impairments stemming from his childhood traumas which was critical to informed deliberation as to sentence.

Further, the failure to locate and present available documentation of a client's life history and mental health status, or to have it adequately explained by a qualified expert, can also fall below prevailing professional norms for capital representation. See Williams v. Taylor, 120 S.Ct. at 1514 (failure to introduce juvenile records); Lipham, 270 Ga. at 216-17 (failure to have mental health expert interpret mental health treatment records); Martin v. Barrett, 279 Ga. 593, 619 S.E.2d 656 (2005) (same). Here, trial counsel failed to obtain Mr. Lee's records from the Charlton County Training Center, where he was diagnosed as a being mildly mentally retarded as a child. Further, they failed to introduce, through their mental health expert or otherwise, any of the mitigating school records they obtained, or even the State's evaluation of Mr. Lee, which provided mitigating evidence and corroborated their expert's opinion and diagnoses. These omissions stem once again from trial counsel's failure to investigate and present their chosen mitigation strategy.

1. Failure to Obtain Charlton County Training Center Records

In addition to failing to interview witnesses as outlined above, trial counsel failed to follow up on leads that would have pointed them to the Charlton County Training Center Records. These records, which were available in the same county where this case were tried relate to Mr. Lee's placement there pursuant to a DFACS referral. PX 72 at 1076-1088 (Charlton County Training Center Records). Acknowledging Mr. Lee's severe behavioral, social, and developmental problems, the Training Center sought to prepare Mr. Lee to enter

kindergarten.[33] In addition to confirming Mr. Lee's hyperactivity diagnosis, the psychologist at the Training Center also diagnosed him with mild mental retardation. PX 72 at 1083. While Mr. Lee is not in fact retarded, such a finding is significant to mental health professionals in that it reveals arrested development indicating severe cognitive, social, and behavioral problems. PX 1 at 181 (Dr. Boyer Aff.); PX 3 at 239 (Prejean MSW Aff.). Such records would have alerted a mental health expert to the severity of Mr. Lee's impairments at an early age and pointed to the devastating impact the childhood abuse and neglect had on his overall development.

> [W]hen Jamie was enrolled in the Charlton County Training Center, he was considered mildly mentally retarded. After being exposed to the stimulation of an academic and normal, healthy social setting, he progressed and no longer was considered mentally retarded. However, his early presentation as mentally retarded demonstrates the significant negative effects of his deprived environment.

PX 1 at 181.

In addition to being readily available in Charlton County, counsel was on notice of Mr. Lee's early developmental and behavioral problems from the Charlton County school evaluation. Thus, as in Wiggins v. Smith, the information available to counsel at the time bore "no evidence ... to suggest that [inquiry into the Training Center records] would have been counterproductive, or that further investigation would have been fruitless." Wiggins, 123 S.Ct. at 2537. Quite the opposite, the Training Center records would have provided counsel's mental health experts with the information and corroboration to have supported their theory that Mr. Lee's was less culpable as a result of his childhood and impairments.

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[33] Though, as previously discussed, his problems persisted in Kindergarten such that his teacher referred him for a full psychological evaluation, Mr. Lee was the youngest child the teacher had a referred in her decades of teaching. See PX 36 at 478 (Howard Aff.).

2. Failure to Investigate and Present Mr. Lee's Post-Traumatic Stress Disorder Diagnosis

In neglecting to provide their mental health expert with the Training Center records as well as witness accounts of Mr. Lee's nightmarish childhood, trial counsel failed to provide the jury with an accurate and complete diagnosis of Mr. Lee's impairments. It caused their expert to omit a crucial diagnosis of Post-Traumatic Stress Disorder (PTSD), as well leaving the jury without a clear explanation of how Mr. Lee's childhood and impairments related to Ms. Chancey's death. As Dr. Grant explained after reviewing them, the records and affidavits obtained by habeas counsel,

> [M]ake it unmistakably clear that Jamie's family was not merely "dysfunctional" or "not the greatest environment." This family was a dangerous one where the caregivers did not hesitate to physically and emotionally abuse one another or their children. Random and extreme violence permeates Jamie's family history, not only in his generation but also in prior generations, and continued unabated through Jamie's childhood and teenage years.

PX 2 at 217 (Dr. Grant Aff.).

But most importantly, after reviewing a more comprehensive account of Mr. Lee's life history, Dr. Grant concluded that he should have diagnosed Mr. Lee with PTSD, consistent with the mental health expert retained by habeas counsel, Dr. Boyer.

> There is no doubt in my mind that this childhood trauma negatively impacted Jamie's development and level of functioning to a great deal. While Jamie exhibited signs of ADHD, the symptoms take on secondary and minor importance when Jamie's life and upbringing is fleshed out. An ADHD diagnosis is wholly inadequate to explain or define Jamie's emotional and mental disabilities and how these disabilities related to the death of his father's girlfriend.

Id. at 218.

While one test in the battery performed by Dr. Grant pretrial had indicated possible trauma, (the Trauma Symptoms Inventory), the new evidence presented in habeas provided a

context for that test result, and thus corroborated a PTSD diagnosis. PX 2 at 218 (Dr. Grant Aff.). Both experts now agree that the severity of Mr. Lee's abuse and neglect as a child, his post-traumatic symptoms in childhood, as well as his high score on the Trauma Inventory, strongly support this diagnosis. PX 1 at 188 (Dr. Boyer Aff.); PX 2 at 214. Post-traumatic symptoms include outbursts of anger and lack of concentration, which overlap with those of ADHD. Further, both found that Mr. Lee's symptoms of "avoidance" both support a finding of PTSD and help explain why Dr. Grant did not initially make this diagnosis. Essentially, Mr. Lee's tendency to avoid discussion of the traumatic events in his life, a common symptom of PTSD, made it difficult to diagnose Mr. Lee without other sources. Thus, had trial counsel investigated the red flags in Mr. Lee's previous evaluations, they would have learned of these traumas from other people and could have passed it on to Dr. Grant.

During state habeas proceedings, Mr. Adams testified that the PTSD diagnosis was something he would have presented to the jury had he been aware of it. HT at 68-69. Trial counsel further testified that he did not recall Dr. Grant requesting additional materials. HT at 54. However, it is nevertheless the duty of defense to investigate their client's background for possible mitigating evidence. Rompilla, 125 S.Ct. at 2464. Moreover, the Southern Center Manual which trial counsel purchased and referenced specifically warned relying on a client's memories of trauma and advocates conducting additional investigation.[34]

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[34] *The client may be limited in the ability to remember certain events in his past, and in his ability to be honest with himself and counsel about these events.* Victims of trauma, especially in childhood, experience a phenomenon known as memory blocking. Blocking is a coping mechanism that allows continued functioning in the face of psychologically and physically threatening abuse and trauma. It is for this reason that the client may be a poor historian: memories are simply blocked out.

PX 121at 4322 (Southern Center for Human Rights Manual) (Emphasis supplied).

Thus, trial counsel's omissions in their investigation unreasonably deprived the jury of learning of Mr. Lee's complete diagnosis, in which the ADHD ultimately played a minor role as compared to the PTSD. Without being apprised of this mental illness, which also was a result of circumstances completely out of Mr. Lee's control, the jury could not properly weigh Mr. Lee's moral culpability in deciding whether he deserved a death sentence. Indeed, it allowed the State to argue in closing that Dr. Grant was unable to find anything significantly mitigating about Mr. Lee's mental health.

> Then they brought up Dr. Daniel Grant, $120 an hour for 17 or 18 hours' worth of work and then the testimony yesterday, two dollars a minute, and all he can come up with is the defendant is hyperactive and he suffers from attention deficit disorder that afflicts, as again, thousand and thousands, maybe millions, of children and adults in this country.

TT Vol. 10 at 8.

In Rompilla, trial counsel failure to conduct a reasonable investigation similarly led an inaccurate diagnosis of their client's mental health. 125 S.Ct. at 2464. Despite consulting no fewer than three mental health experts, defense counsel's failed to review adequately Rompilla's records that contained red flags indicating his troubled life history. The Court found that because these red flags provided information which led to new diagnoses that could have been used in mitigation, trial counsel's deficient performance was prejudicial. Id. at 2467-68; c.f. Cook v. Schofield, 663 S.E.2d at 221, 284 Ga. 240 (2008) (no deficient performance or prejudice for failing to present mental health where counsel was already aware of information contained in other records and such information would not have changed mental health expert's diagnoses and conclusions). In this case, the background information trial counsel would have obtained through reasonable diligence in following up on leads would have led to additional psychiatric

mitigating evidence. Accordingly, this Court finds that trial counsel's investigation of Mr. Lee's background and mental health constituted deficient performance.

3. Failure to Investigate and Present the Relation of Mr. Lee's Mental Impairments to the Crime

In failing to investigate fully Mr. Lee's life history and provide such history to their mental health expert, defense counsel precluded the jury from hearing a mental health expert explain the significance of Mr. Lee's early life mitigation. Specifically, a mental health expert who was fully informed as to Mr. Lee's background could have provided the jury with a clear explanation of how Mr. Lee's mental impairments related to the crime itself.

> Jamie Lee's childhood and upbringing were abysmal. This case clearly shows the destructive, debilitating and long-term effects that severe neglect and abuse can have on an individual. Jamie was significantly impaired emotionally, psychologically, and cognitively, as a direct result of the neglect and abuse. And, unlike most cases, there is a direct relationship between the neglect and abuse, the resulting impairments and the crime. This is not a case of random violence or a cold-blooded car-jacking. This is a case which begins and ends as a result of the damage done to Jamie by his mother and father.
>
> While Jamie Lee had a myriad of significant emotional problems, some of them made him particularly vulnerable to involvement in the murder of his father's live- in girlfriend. These include, but are not limited to, his impaired impulse control, impaired emotional control, high levels of distress, and his inability to structure or stabilize his own life.
>
> The following long term problems are also relevant: Jamie's mother hated Johnny Lee and throughout the course of Jamie's life made this known him. It is Jamie's belief that his mother wished his father dead. Jamie's history is replete with references to his anger toward his father and extreme negative beliefs about him. Johnny Lee was seen as the cause of everything bad that ever happened to Jamie and his mother. Barbara's hatred fueled Jamie's hatred of his father. Jamie could not permit himself to experience rage toward his mother, due to his neediness and fear of losing her, so this anger is also directed to his father.

PX 1 at 197-98 (Dr. Boyer Aff.).

Instead, the jury was left with an incomplete explanation of the crime based on various pieces of lay testimony. While they heard from Jamie Lee himself that he was angry at his father for abandoning him when he went to his home that night, without understanding the extent of Mr. Lee's childhood trauma and his mental impairments, Ms. Chancey's murder still seemed random and ruthless. Indeed, the State argued at length that the killing of Ms. Chancey, for whom Mr. Lee harbored no animosity, could not be explained by his anger towards his father. TT Vol. 10 at 18. Without an informed mental health expert to explain otherwise, the jury had no basis to refute this.

4. Failure to Introduce Mitigating Mental Health Records

Trial counsel performed deficiently in failing to present mitigating records that supported their penalty phase defense. As detailed above, trial counsel possessed numerous records that would have been mitigating, particularly when introduced through an expert as part of a comprehensive mental health presentation. In addition to providing leads that would have pointed trial counsel to additional sources of mitigating evidence, the State evaluation and the Charlton County school evaluation were in themselves compelling sources of mitigation. Moreover, other portions of Mr. Lee's school records revealed the extent of his behavioral problems and his inability to keep up in regular classes. Such details included falling out of his chair 50 times a day. PX 71 at 880. While trial counsel only informed the jury of Mr. Lee being in special classes when at a very young age, he was in fact in special education courses throughout his school career, which ended in seventh grade. Through Dr. Grant, trial counsel could have introduced and explained these mitigating records to the jury.

Defense attorneys may be been found ineffective for failing to present records to a jury. Williams, 120 S.Ct at 1514. Indeed, counsel's performance has been held prejudicially deficient

even for introducing records, but failing to have them explained by an expert. Lipham, 270 Ga. at 218, 510 S.E. 2d at 41. Here, counsel simply failed to introduce them at all. Unlike other cases where there is a "downside" to giving such records to the jury, these reports were entirely consistent with trial counsel's strategy and would have provided additional details of Mr. Lee's traumatic childhood that were elicited by penalty phase defense witnesses. While trial counsel could have provided a far more complete picture of Jamie Lee's life history through testimony of an informed expert and lay witnesses, these records were nonetheless crucial to corroborating Mr. Lee's impairments that resulted from the privation and abuse in his early life.

E. Actual Prejudice

Had counsel properly investigated, prepared, and presented a full and accurate picture of Mr. Lee's life, counsel could have offered at least one juror a persuasive reason to vote for life. The United States Supreme Court has emphasized the significance of evidence of a defendant's troubled upbringing in capital cases: "'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" Penry v. Lynaugh, 109 S.Ct. 2934, 2947 (1989) (quoting California v. Brown, 107 S.Ct. 837, 841 (1987)). The Court's resolution of ineffective assistance of counsel cases has held true to this principle.

Further, the harm stemming from the failure to present available psychiatric mitigating evidence in capital cases is clear. It has long been recognized that "evidence of a diminished capacity to fully appreciate the 'cruelty and gravity of his acts' is critical at the penalty phase of a capital case 'because in our system of criminal justice acts committed by a morally mature person with full appreciation of all their ramifications and eventualities are considered more

culpable than those committed by a person without that appreciation.'" Bright v. State, 265 Ga. 265, 275, 455 S.E.2d 37, 50 (1995) (citations omitted); see also Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1993) ("prejudice is clear" where attorney failed to investigate adequately client's mental health and present evidence of client's mental problems in sentencing phase).

A recent Eleventh Circuit case in instructive. Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008). In that case, Williams was convicted of murder for shooting a man three times in the head to steal his Porsche. Williams was pulled over driving the Porsche with the victim's body in the back with weights tied to the ankles. The State introduced evidence of Williams' diary, which indicated that Williams' had planned the crime and that he had targeted the victim, a stranger, because of his Porsche. Williams' mother testified at sentencing that Williams was beaten frequently by his father and that his father drank heavily. In habeas, family members testified in much greater detail about the nature and extent of the abuse in Williams' upbringing, which while in large part pertained to his father, also detailed abuse by the mother. An expert psychologist further testified in habeas that Williams' suffered from extreme emotional and physical neglect as well as depression.

Citing Wiggins, the Eleventh Circuit held that counsel's investigation was unreasonable based on their failure to follow up on leads in several reports and instead relying primarily on Williams' mother for mitigating evidence. "A reasonable investigation into the leads in this case should have included, at a minimum, interviewing other family members who could corroborate the evidence of abuse and speak to the resulting impact on Williams. Counsel, however, failed to contact such witnesses." Id. at 1339. In finding prejudice, the court emphasized that the failure to present evidence that did not rebut aggravation could nevertheless be prejudicial as it, taken as a whole could still have altered the jury's judgment. Id. at 1344. Thus, it held that the

state habeas court erred when it "'failed to evaluate the totality of the available mitigation evidence' in reweighing the aggravating and mitigating circumstances in this case." Id. (quoting Williams v. Taylor, 120 S.Ct. at 1515).

So too might the powerful early life mitigation in Mr. Lee's case have persuaded one juror to vote for life. While more witnesses testified in sentencing at Mr. Lee's trial, far less testimony regarding his neglect and abuse was told to the jury as in Williams. In fact, these terms were only used in passing by Dr. Grant and no first hand accounts were provided by any witness. Thus, there are additional indicators of prejudice in this case because the jury heard even less at trial about abuse and neglect, let alone the breadth and detail that could have been supplied by relatives, neighbors, and teachers. See McPherson, 663 S.E. 2d at 669 (prejudice found where over-reliance on mother for life history left the jury unaware of childhood abuse and neglect, as well as family history of alcoholism and addiction.) Moreover, unlike in Williams, Mr. Lee did not plan to kill Ms. Chancey.

This Court is cognizant of the significant aggravation presented by the State in this case. However, after reviewing the totality of the circumstances, this Court finds that the strength of the mitigation omitted from Mr. Lee's penalty phase would well nonetheless have swayed at least one juror to vote for life. Moreover, in its disposition of ineffective assistance of counsel claims in capital cases, the Supreme Court has never held that early life mitigation evidence is insignificant because there may be a seemingly overwhelming amount of aggravating circumstances to rebut, including evidence of prior crimes and future dangerousness. In Williams v. Taylor, a highly aggravated case, the Court found that a "graphic description of [the defendant]'s childhood, filled with abuse and privation," is critical mitigating evidence with the power to decisively "influence[] the jury's appraisal of [the defendant's] moral culpability." 120

S.Ct. at 1515. Further, it found that this evidence would have been instrumental in helping the jury see the murder as "a compulsive reaction rather than the product of cold-blooded premeditation." Id. at 1516. Acknowledging the ample aggravating circumstances in the case, the Court explicitly held that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, *even if it does not undermine or rebut the prosecution's death-eligibility case.*" Id. (italics supplied). See also Wiggins, 123 S.Ct. at 2542 (prejudice where defendant robbed and killed an elderly in her home where defendant had an alcoholic mother, was abused in foster care, and spent time homeless); Rompilla, 125 S.Ct. at 2568 (prejudice where aggravation found for torture and prior criminal record and trial counsel presented five witnesses in mitigation, but failed to present evidence of his troubled childhood and mental disorder). Thus, in reweighing the evidence presented at trial with that presented in this proceeding, this Court finds that Mr. Lee was actually prejudiced by his attorneys' unreasonable investigation.

DISPOSITION

Based on the foregoing findings of fact and conclusions of law, this Court HEREBY ORDERS that the writ of habeas corpus is GRANTED with respect only to the death sentence imposed by the jury in Criminal Case No. 94-R-096 in the Superior Court of Charlton County, Georgia, and Petitioner's death sentence is hereby VACATED. The Clerk of the Superior Court of Butts County is directed to serve copies of this Order upon Petitioner's counsel of record, Respondent's counsel of record, and the Habeas Law Clerk of the Council of Superior Court Judges.

SO ORDERED this 12 day of March, 2009.

David Barrett, Judge
Superior Court of Butts County
(sitting by designation)

xc: Thomas H. Dunn, Attorney for Petitioner
Sabrina D. Graham, Assistant Attorney General

Positive
As of: September 15, 2021 3:15 PM Z

Hall v. Lee

Supreme Court of Georgia

November 2, 2009, Decided

S09A1344, S09X1345.

Reporter
286 Ga. 79 *; 684 S.E.2d 868 **; 2009 Ga. LEXIS 670 ***; 2009 Fulton County D. Rep. 3449

HALL v. LEE; and vice versa.

Prior History: Habeas corpus. Butts Superior Court. Before Judge Barrett from Enotah Circuit.

Lee v. State, 270 Ga. 798, 514 S.E.2d 1, 1999 Ga. LEXIS 172 (Mar. 1, 1999)

Disposition: [*1]** Judgment affirmed in Case No. S09X1345 and reversed in Case No. S09A1344.

Core Terms

trial counsel, mitigation, mitigating evidence, diagnosis, abandonment, investigate, murder, childhood, habeas proceeding, present evidence, sentencing phase, death sentence, records, school records, social worker, sentence, kill, mental impairment, time of the crime, hyperactivity, kindergarten, aggravating, ineffective, girlfriend, reasonable probability, physical abuse, years old, emotional, assistance of counsel, proportionality

Case Summary

Procedural Posture
Petitioner was convicted of malice murder and other crimes, and he was sentenced to death for the murder. He filed a petition for writ of habeas corpus. Following an evidentiary hearing, the habeas court (Georgia) vacated petitioner's death sentence based upon its finding that his trial counsel had been prejudicially deficient in investigating, preparing, and presenting mitigating evidence. Respondent warden appealed.

Overview
Petitioner and an accomplice broke into a gun store and stole several guns. Petitioner and his girlfriend then drove to a neighboring county, planning to kill petitioner's father and steal his pickup truck. However, his father was not home; petitioner shot his father's girlfriend and stole the truck. There was evidence that petitioner came from a deprived home, that both of his parents abandoned him, that his mother was abusive and a prescription drug addict, and that he had severe attention deficit hyperactive disorder that lasted into adulthood. The court held that the habeas court erred by requiring that counsel investigate and present all available mitigating evidence. Trial counsel reasonably relied on information from petitioner that his childhood history of abuse and neglect was not constant and severe, their interviews with family members, and the records in counsel's possession. Moreover, there was no prejudice given the substantial mitigation evidence that the jury did hear. Although petitioner's trial expert stated he would have diagnose post-traumatic stress disorder (PTSD) had he known the additional information of neglect, he failed to connect the PTSD to the crimes.

Outcome
The court ordered petitioner's death sentence reinstated, reversing the habeas corpus court's decision.

LexisNexis® Headnotes

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

HN1[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was not reasonable under the circumstances and that there is a reasonable probability that, but for counsel's errors,

the result of the proceeding would have been different.

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

HN2 **Standards of Review, De Novo Review**

An appellate court accepts the habeas court's factual findings and credibility determinations unless clearly erroneous, but the appellate court independently applies the legal principles to the facts.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN3 **Counsel, Effective Assistance of Counsel**

Trial counsel's decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

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

HN4 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

While it is appropriate to measure counsel's performance in a death penalty case against prevailing norms of practice as reflected in publications such as the manual, "Defending a Capital Case in Georgia," published by the Southern Center for Human Rights, as well as American Bar Association standards like the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, such publications are only guides in determining the reasonableness of counsel's performance, as no set of rules can adequately allow for the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN5 **Counsel, Effective Assistance of Counsel**

Counsel's knowledge of local attitudes and evaluation of the jury are intangible factors that are considered by most effective counsel in making decisions.

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

HN6 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

If it is easier to dispose of an ineffectiveness of counsel claim on the ground of lack of sufficient prejudice, that course should be followed.

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

HN7 **Effective Assistance of Counsel, Sentencing**

To determine prejudice in the sentencing phase of a case challenging 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. In conducting this review, the appellate court must reweigh the evidence in aggravation against the totality of available mitigating evidence, being mindful that a verdict with overwhelming record support is less likely to have been affected by errors than one only weakly supported by the record.

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

HN8 **Effective Assistance of Counsel, Sentencing**

The critical issue in a case in which trial counsel is alleged to be inefficient for failing to provide its expert with full information regarding a defendant's background for purposes of mitigation evidence at sentencing is what the expert consulted at the time of trial would have been willing to testify to had that expert been provided the materials trial counsel allegedly failed to provide.

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

HN9[] **Effective Assistance of Counsel, Trials**

In determining prejudice flowing from trial counsel's deficient performance, an appellate court evaluates the totality of the evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding.

Criminal Law & Procedure > ... > Order & Timing of Petitions > Filing of Petitions > Pleadings

HN10[] **Filing of Petitions, Pleadings**

O.C.G.A. § 9-14-44 states that the contents of a habeas petition must clearly set forth the respects in which the petitioner's rights were violated.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

HN11[] **Appeals, Proportionality & Reasonableness Review**

The method by which the Supreme Court of Georgia conducts its proportionality review satisfies Georgia statutory requirements and is not unconstitutional. O.C.G.A. § 17-10-35(c).

Counsel: Thurbert E. Baker, Attorney General, Sabrina D. Graham, Assistant Attorney General, for appellant.

Thomas H. Dunn, Brian Kammer, Lynn M. Damiano, for appellee.

Judges: BENHAM, Justice. All the Justices concur.

Opinion by: BENHAM

Opinion

[871] [*79]** **Benham**, Justice.

James Allyson Lee was convicted in 1997 of malice murder, felony murder, armed robbery, and possession of a firearm during the commission of a felony, and he was sentenced to death for the murder. This Court unanimously affirmed Lee's convictions and death sentence. Lee v. State, 270 Ga. 798 (514 SE2d 1) (1999). In 2000, Lee filed a petition for writ of habeas corpus, and he filed his amended petition on April 18, 2001. An evidentiary hearing was held on August 17, 2001, and, in its final order of March 16, 2009, the habeas court vacated Lee's death sentence based upon its finding that his trial counsel had been prejudicially deficient in investigating, preparing, and presenting mitigating evidence. The Warden appeals the habeas court's vacation of the sentence in Case No. S09A1344, and Lee cross-appeals in Case No. S09X1345. In the Warden's appeal, this Court reverses and reinstates Lee's death sentence. In Lee's cross-appeal, this Court affirms.

I. Factual Background

The evidence presented at trial showed that Lee and an accomplice broke into **[***2]** a gun store in Toombs County on May 25, 1994, and stole several guns, including a ten millimeter Glock pistol. Lee and his girlfriend then drove to Pierce County planning to kill Lee's father and steal his Chevrolet Silverado pickup truck. After learning that his father was not home but that his father's live-in girlfriend, Sharon Chancey, was there, Lee had his girlfriend lure Chancey from the home in the early morning hours of May 26 **[**872]** by claiming that Lee was stranded nearby in his girlfriend's broken down Toyota automobile. When Chancey pulled up to the Toyota in the Silverado and got out, Lee shot her in the face and threw her in the back of the Silverado. After driving the Silverado to a secluded area in Charlton County, he dragged Chancey into the woods, removed two rings from her fingers, and shot her two more times when she grabbed his arm. After replacing the Silverado's license plate with the license plate from the Toyota, Lee and his girlfriend drove the Silverado to Florida. While traveling in the Silverado with two male friends at about 11:30 that night, Lee was stopped by law enforcement for a broken taillight. He was arrested after a check revealed that the Silverado **[***3]** was stolen. The police recovered from the Silverado Chancey's purse and identification and the Glock pistol, which later was determined to be the murder weapon. Lee made several incriminating statements to police, including videotaped statements at the scenes of the shootings describing how the crimes occurred.

[*80] *Case No. S09A1344*

II. Ineffective Assistance of Counsel Claims

In Case No. S09A1344, the Warden appeals the habeas court's determination that trial counsel were ineffective for failing to adequately investigate and present life history and psychiatric mitigating evidence.

A. The Standard of Review

HN1[] To prevail on an ineffective assistance of counsel claim, Lee must show that counsel's performance was not reasonable under the circumstances and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (III) (80 L. Ed. 2d 674, 104 S. Ct. 2052) (1984); Smith v. Francis, 253 Ga. 782 (1) (325 SE2d 362) (1985). HN2[] "[W]e accept the habeas court's factual findings and credibility determinations unless clearly erroneous, but we independently apply the legal principles to the facts. [Cit.]" Turpin v. Lipham, 270 Ga. 208, 211 (3) (510 SE2d 32) (1998).

*B. **[***4]** Failure to Investigate for Mitigating Evidence*

1. The appropriate rule under Strickland. We first address the Warden's contention that the habeas court erred as a matter of law by creating and utilizing an improper standard in its determination that trial counsel were deficient in investigating and presenting mitigating evidence. The habeas court stated in its order that "the defendant has a 'constitutionally protected right' to have his attorney 'present[ ] and explain[ ] the significance of all the available evidence [in mitigation]'" and that "'[c]ompetent counsel . . . present[s] and explain[s] the significance of *all the available evidence* [in mitigation].'" (Emphasis in order) (quoting Williams v. Taylor, 529 U.S. 362, 393 (IV), 399 (V) (146 L. Ed. 2d 389, 120 S. Ct. 1495) (2000)).

Although the habeas court's order ostensibly quoted the United States Supreme Court's decision in Williams, the order omitted a portion of the Supreme Court's statement and lifted phrases out of context. In doing so, it "mischaracterized at best the appropriate rule, made clear by th[e Supreme] Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution." **[***5]** Williams v. Taylor, supra, 529 U.S. 397. See id. at 390 (stating that the merits of the petitioner's ineffective assistance of counsel claim were "squarely governed" by *Strickland*). After its decision in *Williams*, the Supreme Court "emphasize[d] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence" or even "to present mitigating evidence at sentencing in every case." Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (II) (B) (3) (2003). **[*81]** Therefore, the habeas court erred by requiring that counsel investigate and present all available mitigating evidence in order that their performance not be deemed constitutionally deficient. HN3[] Trial counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to **[**873]** counsel's judgments." Strickland v. Washington, supra, 466 U.S. at 691. With that standard in mind, we now review counsel's investigation for mitigating evidence.

2. Trial counsel's investigation. Our review of the record shows that, shortly after Lee was arrested, John Adams was appointed to represent him. At that time, Adams had been practicing law **[***6]** in Charlton County for almost 20 years. While Adams was experienced in criminal litigation and had represented defendants accused of murder, Lee's case was his first death penalty case. Kelly Brooks, Adams' law partner and a Charlton County native, was appointed as co-counsel. Brooks had also never tried a capital case. The record supports the habeas court's finding that, because of the nature of the case and the strength of the State's evidence against Lee, counsel were aware of the important role the sentencing phase would play and immediately took appropriate steps to learn how to prepare a mitigation defense for Lee. Trial counsel testified that they consulted with several well-respected criminal defense attorneys in the area, including those who were experienced in death penalty litigation, and that Brooks observed a death penalty trial. The habeas court's order noted the fact that both Adams and Brooks testified that they reviewed and referenced the manual, "Defending a Capital Case in Georgia," published by the Southern Center for Human Rights. [1]

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[1] After quoting extensively from the Southern Center's manual and noting the presence in counsel's files of a document entitled **[***7]** "Life History Checklist" that "echoed" much of the manual's information, the habeas court found that counsel failed to follow the "guidance and instruction" contained in those documents. HN4[] While it is appropriate to measure counsel's performance against prevailing norms of practice as reflected in publications such as the Southern Center's manual, as well as American Bar Association standards like the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, we remind habeas courts that such publications "are *only guides*" in determining the

Trial counsel, who shared in the development and presentation of the mitigation defense, testified at the habeas evidentiary hearing that they asked Lee if he suffered any physical abuse during his childhood and that Lee told them that only isolated incidents of **[***8]** abuse occurred. Counsel stated that they never felt that Lee was not being forthright with them concerning his upbringing and that his statements to them were consistent with the information gleaned **[*82]** from their interviews with Lee's mother and stepfather. According to counsel's testimony and the record, at a minimum counsel also spoke with Lee's elementary school special education teacher, his elementary school principal, his father, his half-sister, his ex-wife, [2] his co-defendant who was also his former girlfriend, his current girlfriend, and his cottage parents at the Florida Sheriffs Boys Ranch where Lee spent two years. In addition, the defense investigator spoke with the unit director, the farm manager, and the family social worker assigned to Lee's case at the Boys Ranch and other "family or family friends" and reported back to counsel. Counsel also obtained Lee's school records from Charlton County and Nassau County, Florida, and his records from the Boys Ranch.

From their investigation, counsel learned that Lee's father had for all practical purposes abandoned Lee and his mother when Lee was a toddler, that Lee was diagnosed as being hyperactive when he was two and a half years old, that he had difficulty throughout his school career, and that, when at the age of fourteen, he was in the sixth grade and still experiencing academic and behavioral problems at home and at school, his mother pursued and eventually gained his admission **[**874]** into the Boys Ranch. Trial counsel also learned that, as a consequence of his being raised by a single mother who was addicted to prescription drugs and living on government assistance, Lee had an impoverished upbringing and suffered some abuse and neglect. However, there is no evidence that counsel discovered any public records that concluded that Lee had been severely abused or neglected.

Trial counsel obtained funds from the trial court to have Lee evaluated for mitigating mental health evidence and hired Dr. Daniel Grant, a psychologist whom Adams **[***10]** had previously retained to assist him on another criminal case. Dr. Grant diagnosed Lee with attention deficit hyperactivity disorder (ADHD). Trial counsel also contacted Pamela Leonard, a mitigation specialist at the Multi-County Public Defender's Office, who suggested to counsel that they hire a social worker to assist them. Counsel testified that Leonard also suggested that they consult with Dr. Grant before retaining a social worker and that, when they did so, Dr. Grant told them that it was not necessary to hire a social worker, as he could "handle the testimony" connecting Lee's diagnosis and his behavior.

3. Trial counsel's sentencing phase strategy. The habeas court **[*83]** found that counsel's sentencing phase strategy was to "present mitigating evidence regarding Mr. Lee's upbringing, mental health, and other circumstances Mr. Lee had 'no control over.'" However, our review of the trial transcript and the habeas record shows that counsel's mitigation strategy was more focused than the habeas court found. Lee admitted to police after being taken into custody that he killed his father's girlfriend and stole his father's truck, and he offered as a reason for his crimes that he wanted **[***11]** to get back at his father because his father had abandoned Lee and his mother. Based on the information trial counsel possessed regarding Lee's life history and because of Lee's statements about the crimes, counsel developed a mitigation strategy that revolved around the following: showing that Lee, who was 19 years old at the time of the crimes, was angry with his father for his abandonment of Lee and his mother when Lee was very young and for the chaotic, difficult life that Lee and his mother endured as a result; that Lee had no control over and was a victim of his ADHD, which impacted not only his behavior on the night of the crimes but also led him to make damaging statements to police; and that Lee's history at the Boys Ranch showed that he could succeed in a structured environment, and, thus, that life in prison, not death, was the appropriate sentence for Lee.

Contrary to the habeas court's order, the record does not support a finding that Adams testified that, had he and Brooks known of the severity of the abuse that Lee

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reasonableness of counsel's performance, as no set of rules can adequately allow for "the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (Emphasis supplied.) *Strickland v. Washington, supra, 466 U.S. at 709*. See *Hall v. McPherson, 284 Ga. 219 (2) (663 SE2d 659) (2008)*.

[2] The habeas court found that trial counsel spoke with Karen Lee, "one of Mr. Lee's father's ex-wives, . . . [who] would not have been able to provide any early life mitigation about Mr. Lee." However, our review of the record shows that **[***9]** Karen Lee was actually Lee's ex-wife and that, according to trial counsel's notes, she provided a limited amount of mitigating information regarding Lee's childhood.

suffered as a child that was presented in the habeas proceeding, they would have presented it. Adams testified that he and Brooks "felt [they] had the best **[***12]** witnesses [they] could get," that they would not have presented the affidavit testimony of family and friends presented in the habeas proceeding, that the jury would have known the people from the area that gave those affidavits to Lee's habeas counsel, and that, for the most part, the affiants were not the type of people that counsel wanted to place in front of a jury.

Adams also testified that he and Brooks had the advantage of "being able to look at a jury that some of whom were [their] clients, or people that [they'd] known for years." He explained that, because he and Brooks did not think a "Charlton County jury was going to be particularly receptive to trying to blame this shooting on the boy's mother," he and Brooks decided as a matter of strategy against defending Lee by "trashing his mother," although they were aware of incidents of physical abuse of Lee by his mother, such as slapping him and pulling his hair. Adams testified that they, instead, strategically decided to focus on Lee's father's abandonment and Lee's ADHD, because that strategy "seemed to dovetail perfectly" with Lee's statements to police that the motivation behind the crimes was getting at his father and with the **[***13]** fact that Lee had made threatening **[*84]** statements counsel considered merely bravado. The habeas court relied on Adams' statement that, "had [counsel] known that [Lee's mother] . . . physically abused [him] like beating him up, or cutting him, or something **[**875]** like that, [they] may have placed that into evidence, certainly." However, when that statement is considered in context with the remainder of Adams' testimony, it is apparent that Adams meant that they would have presented evidence of atrocious abuse of Lee had they been aware of it. Adams' testimony, taken as a whole, shows that he considered the abuse presented in the habeas proceeding, like the abuse that counsel were aware of pre-trial, not to be so shockingly brutal that it would have led them to change their strategy.

The habeas court found that trial counsel acted unreasonably in ignoring indications in documents that were in counsel's possession that should have alerted them that the physical abuse and neglect in Lee's childhood were more severe than counsel believed. The habeas court cited two documents, an evaluation of Lee conducted by a social worker upon referral by Lee's kindergarten teacher (the school evaluation) and the **[***14]** State's mental evaluation of Lee completed one week before Lee's trial (the State evaluation), that it found should have caused counsel to further investigate Lee's childhood.

While the social worker who prepared the school evaluation reported that Lee's mother admitted to having a drinking problem, additional school records contained much positive information about her. The records noted that Lee's mother seemed to love Lee and to be concerned for his welfare; that from infancy she had been concerned about his behavior; that she entered Lee into a program at the Charlton County Training Center just prior to his entering kindergarten because she reasoned that he "needed an opportunity to be with other children"; that she stated that she had never berated Lee's father in front of Lee, because she did not want Lee to grow up hating his father; that she bought Lee a dog to provide him companionship; that throughout Lee's school career she regularly attended Individual Education Program (I.E.P.) conferences to review and approve Lee's special education curriculum; and that, when she was unable to attend the conferences, she made other arrangements, including requesting conferences at her home **[***15]** when she lacked transportation. The school evaluation also contained incidents of Lee's behavior that demonstrated his extreme hyperactivity at a young age; however, school records reported that Lee's mother had sought out and maintained psychiatric care for Lee from the time he was two and a half years old until the attending psychiatrist released him at the age of seven years. While the social worker visiting Lee's grandparents' home noted in the school evaluation that the home was "a mess" and had a foul odor, she also stated that **[*85]** Lee's mother explained that she had been in bed for four days and apologized for the home's condition. The school records contained no other comments regarding the poor condition of Lee's home, although it appears that at least some I.E.P. conferences were held there. The social worker from the Boys Ranch who visited Lee's home in Florida noted that it was "fairly new" and was "well-maintained outside and inside." Although in the school evaluation the social worker described Lee as having a severe case of dental caries, a dirty face, and being "sloppily dressed," a school psychometrist who evaluated Lee during kindergarten noted that he was "neatly dressed **[***16]** and well groomed," "appeared to be socially confident," was "comfortable" in adult company, and "displayed good social skills" and that he stated that he enjoyed playing games with his mother and grandparents at home. [3]

[3] We note that some of this information is contrary to that

The State evaluation reported that Lee gave a history of physical and emotional abuse by both his parents, that his mother's substance abuse prevented her from providing the nurturing care required for a child's upbringing, and that Lee described his mother as being at times unable to function, often out of control, and physically abusive to him by slapping him, pulling his hair, and throwing **[**876]** him out of the house on several occasions. The report concluded that "[i]ndependent verification of these experiences would be valuable as far as documentation of childhood trauma and the effect which this can have on his subsequent emotional development" and that these factors could be considered mitigating. Adams was present during the State's evaluation of Lee and, thus, heard Lee's descriptions of childhood abuse and neglect referenced in the State evaluation. Adams testified in the habeas evidentiary hearing that he was aware of the incidents of physical abuse by Lee's mother **[***18]** that Lee reported to the State psychologist, and that, after discussing with Dr. Grant the State evaluation, which concurred with Dr. Grant's diagnosis of Lee as suffering from ADHD, he and Brooks decided to remain with their original mitigation strategy of focusing on Lee's ADHD and his father's abandonment in presenting their mitigation case. This was not an unreasonable decision. See *Chandler v. United States, 218 F3d 1305, 1314 (XI) (11th Cir. 2000)* (en banc) ("Good advocacy requires 'winnowing out' some arguments, witnesses, evidence, and so on, to stress others."). By that point, **[*86]** counsel had reviewed and provided Lee's school records to Dr. Grant. Dr. Grant testified at trial that he reviewed Lee's school records and that, based on those records and his interviews with Lee, he considered Lee's father's abandonment to have had the most significant negative impact on him. Our review of Lee's school and Boys Ranch records shows that, from kindergarten onward, Lee's relationship with his father was considered to be a significant contributor to Lee's problems.

Trial counsel reasonably relied on the information that Lee provided to them that his childhood history of abuse and neglect was not constant and severe, particularly in light of the evidence reported by the family members counsel spoke with and contained in the records in counsel's possession. See *Strickland v. Washington, supra, 466 U.S. at 691* (stating that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements"). Thus, we conclude as a matter of law that counsel, as "longtime local lawyers who knew their community," acted reasonably in strategically choosing not to focus on Lee's mother's shortcomings at trial based on the information they possessed. *Rogers v. Zant, 13 F3d 384, 387 (11th Cir. 1994)*. See *Waters v. Thomas, 46 F3d 1506 (II) (E) (11th Cir. 1995)* **[***19]** (en banc) (stating that ***HN5***[↑] "counsel's knowledge of local attitudes" and evaluation of the jury are intangible factors that are considered by most effective counsel in making decisions). See also *Turpin v. Mobley, 269 Ga. 635 (3) (D) (502 SE2d 458) (1998)* (whether an attorney's trial tactics are reasonable is a question of law, not fact).

The habeas court found, however, that counsel's decision not to introduce specific incidents of Lee's childhood history of abuse and neglect and his mother's substance abuse was not supported by a sufficient investigation. We need not determine whether counsel's investigation into mitigating evidence in Lee's case constituted deficient performance under the first prong of *Strickland*, because, even assuming the habeas court correctly concluded that counsel's failure to investigate and present the habeas testimony of Lee's childhood history of abuse and neglect constituted deficient performance, we conclude as a matter of law that Lee has not shown prejudice sufficient to warrant success of his overall ineffective assistance of counsel claim. See *Strickland v. Washington, supra, 466 U.S. 668 at 697* ***HN6***[↑] ("If it is easier to dispose of an **[***20]** ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."). See also *Schofield v. Holsey, 281 Ga. 809 (II) n.1 (642 SE2d 56) (2007)* (holding that the combined effect of trial counsel's various professional deficiencies should be considered).

4. Actual prejudice. ***HN7***[↑] To determine prejudice in the sentencing phase of a case challenging a death sentence, "the question is **[*87]** 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." *Strickland v. Washington, supra, 466 U.S. at 695*. In conducting this review, this Court must "reweigh the evidence in aggravation against the totality

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alleged in the affidavit testimony that the habeas court found credible. **[***17]** However, we do not consider this information to establish the truth of the matters asserted but as an indication of the information known to defense counsel at the time they made their decision regarding mitigation strategy. Compare *Waldrip v. Head, 279 Ga. 826, 620 S.E.2d 829 (II) (A) (2005)* (refusing to consider inadmissible hearsay on appeal despite the absence of any objection).

of available mitigating **[**877]** evidence," *Wiggins v. Smith, supra, 539 U.S. at 534*, being mindful that a verdict "with overwhelming record support" is less likely to have been affected by errors than one "only weakly supported" by the record. *Strickland v. Washington, supra, 466 U.S. at 696*.

a. The mitigating evidence presented at trial. We first review the mitigation evidence trial counsel actually presented. Lee's counsel supported their mitigation **[***21]** theory by first presenting the testimony of Lee's former teacher, who testified that, after being referred and tested, Lee was placed in her severely emotionally disturbed class at age seven, where he remained for three years; that he was on Ritalin for his hyperactivity but still was very impulsive and unable to maintain attention, keep a seat, or wait his turn to speak; that he suffered from some basic security problems and followed behind her in the classroom; that Lee's home was usually in disarray during her monthly home visits; that Lee's mother did not respond to suggestions that she get Lee involved in after-school activities and did not provide an authority figure for Lee; and that, after Lee was transitioned out of her classroom, he continued to receive help in a specific learning or brain disabilities class.

Counsel then presented the testimony of Lee's parents to inform the jury of the instability, poverty, violence, abandonment, and alcohol and drug use that Lee was exposed to as a child. Lee's natural father testified that he had been married to seven women and had six children, some of whom were born out of wedlock; that about the time of Lee's birth he had an affair **[***22]** that produced a child; that he and Lee's mother "did a lot of drinking" and had violent fights; that Lee's mother used a lot of marijuana; that he never paid child support for Lee and seldom saw him after he and Lee's mother separated when Lee was a toddler; that he had been "a bad father" to Lee; and that he did not know Lee well enough to name one redeeming quality that Lee possessed that made his life worth saving. Lee's mother likewise testified that Lee's father was never a real father to Lee; that he abandoned her and Lee physically and financially by the time that Lee reached three years of age, which required them to survive on government assistance; and that she was not always able to meet Lee's physical needs. She also testified that she and Lee spent most of Lee's preschool years living with her parents; that, when Lee was five years old, she left him with her parents and moved to Florida with her boyfriend for a year and a half **[*88]** before bringing Lee to live with them; that, after six months, she and Lee moved back to Charlton County; and that they returned to Florida after she married Lee's stepfather. She acknowledged that she frequently took Demerol while she was pregnant **[***23]** with Lee and that for years she had had an "ongoing battle" with taking prescription drugs, intimating that it had affected her ability to be a good mother to Lee. She testified that Lee had always been extremely hyperactive; that he was placed on Ritalin before he was three years old; that as a child Lee could not sit still, could not concentrate, barked like a dog [4] rather than talked, and rocked incessantly; that she ceased giving Lee Ritalin at age seven because it caused him to be even more active; that, although she did not know how to handle Lee's hyperactivity, she tried to deal with it on her own from the time Lee was seven to thirteen years of age when she began the process of gaining his admission to the Boys Ranch; that, while Lee did well at the Ranch, when he returned home at age seventeen, he did not go to school and could not keep a job; and that he soon moved out of the home and did not return there to live.

Lee's stepfather testified that he had served 12 years in prison for a murder committed during an armed robbery when he was 17, that he had never been in any trouble since that time and now ran his own farm, that he and Lee had a good relationship, and **[**878]** that Lee was close to and helped care for his baby brother. Counsel testified that they hoped this testimony would convince the jury that, like his stepfather, Lee could be rehabilitated and become a responsible member of society.

Lee's former house mother at the Boys Ranch testified that the Ranch did not accept boys into the program who had been "in lock-up" but only those who were referred by local sheriffs' departments; that referrals could be for abuse in the home and that Lee was referred because of problems at home and at school; that, as part of the Ranch's structured environment, Lee had household chores and farm work to complete; **[***25]** and that he did well both in school and in the

[4] Lee's habeas counsel submitted a great deal of affidavit testimony about Lee's dog-like behavior when he was young, including the averment that he ate dog food. The habeas order refers to this as one of Lee's most "bizarre" behaviors. However, Dr. Catherine Boyer, **[***24]** one of Lee's habeas mental health experts, testified that she asked Lee about this behavior and that he stated that "[his] best friend was [his] dog," that he would "crawl under the house to be with her," and that he did not have to eat dog food but only tasted it out of curiosity about what it tasted like.

cottage home and was selected by the staff to receive the Ranch's most prestigious award. She became emotional when she testified that Lee had repeatedly told her that she was more like a mother to him than anyone, that she thought that Lee's problems **[*89]** with authority and anger stemmed from his home life, that he was angry with his father for abandoning him and angry with his mother for rejecting him "for her boyfriend or her husband," and that Lee had talked with her about his mother's drug and alcohol use. She also testified that Lee was loving and caring; that she never feared him; that his outbursts of anger were followed by tears and apologies; that she still saw "good" in him; that he still called her "Mom" and her husband "Pop," and that he had last visited them shortly before the crimes. Her testimony showed that she was close to Lee at the time of the crimes, that, while she was aware of his shortcomings, she believed that they were largely due to his background, and that she considered his life worth saving because his time at the Boys Ranch demonstrated that he thrived in a structured environment.

Finally, trial counsel presented **[***26]** Dr. Grant to show how Lee's ADHD affected his behavior on the night of the crimes and to explain threats he had made in statements to police. Dr. Grant testified that, after spending approximately 18 hours with Lee, reviewing Lee's school records from kindergarten through seventh grade, and conducting extensive testing of Lee, he concluded that Lee's IQ fell within the low average range, that Lee "fit[ ] within the diagnostic category of attention deficit disorder with hyperactivity, and substance abuse," and that he agreed with the State's mental evaluation of Lee. Dr. Grant opined that the environment in which Lee grew up exacerbated his problems, because, "starting very early in life, there was deprivation at times, where there wasn't even adequate food in the home"; that, in addition, there was "the abandonment by the father, . . . a lot of abuse, frequent changing [of] and inconsistent rules and caregivers"; that Lee's mother "had a problem with substance abuse"; that she "was inconsistent in her behavior"; and that "there was some physical abuse as well as neglect." Dr. Grant explained that Lee was born with ADHD; that he had received no treatment for it since he was seven years **[***27]** old; that roughly half of the individuals who exhibit ADHD symptoms as an adult will also develop other psychopathology, especially if they are not receiving treatment; that Lee should have continued in treatment, as ninety percent of ADHD sufferers respond well to treatment; and that the treatment of choice for the disorder was a structured environment. Dr. Grant also testified that he had recently completed 15 years of working in the prison system, and he described the structured routine of a prisoner's life.

The habeas court found that Dr. Grant's diagnosis allowed the State to credibly argue to the jury that ADHD afflicts "millions of children"; however, Dr. Grant explained at trial that, while ADHD affects about three to five percent of children in the general population, only one and a half to three percent of the population still **[*90]** exhibits symptoms as an adult, as Lee did. He also testified that, in cases where an individual experiences trauma, as Lee had, and is diagnosed with ADHD as early as Lee was, the disorder is more severe, more resistant to control, and more likely to continue into adulthood and that those individuals are likely to exhibit more severe symptoms in adulthood **[***28]** than individuals who have onset later in life. Dr. Grant testified that adults with the disorder are impulsive and overly active, that they have problems with planning and organization, **[**879]** and that "one of the core issues of the hyperactive individual is the fact of the difficulty regulating and controlling [emotions and] behavior." As previously noted, Dr. Grant also opined that the most significant impact on Lee's life was his father's abandonment of him, especially in light of the fact that his father had other children with whom he was very involved, and that Lee's ADHD was aggravated by his feelings of anger, frustration, resentment, and abandonment. To counter the State's argument that death was the appropriate sentence for Lee because of his future dangerousness, as evidenced by threatening statements he had made to police, Dr. Grant explained that adult ADHD sufferers commonly engage in lying or boasting to "project an image of toughness or bravado," and he opined that Lee did so in order to mask his fears of abandonment and rejection. He also testified that Lee did not seem mean, malicious, or aggressive and that, while Lee's ADHD did not excuse his crimes, it was "a major part **[***29]** of his personality."

b. The mitigating evidence presented in the habeas proceeding. In reviewing the affidavit testimony that Lee presented in the habeas proceeding, we note that much of it consists of hearsay and speculation that would not have been admissible at trial. See *Smith v. State, 270 Ga. 240 (12) (510 SE2d 1) (1998)* (holding that the hearsay rule is not suspended in the sentencing phase), overruled on other grounds by *O'Kelley v. State, 284 Ga. 758 (3) (670 SE2d 388) (2008)*. The habeas court properly sustained the Warden's objections to much of this testimony. See *Whatley v. Terry, 284 Ga. 555, 668*

S.E.2d 651 (V) (A) n.29 (2008) (urging habeas courts to make detailed rulings on admissibility where affidavits are submitted as evidence and where such affidavits are relied upon by expert witnesses in forming their opinions). However, in some instances, the habeas court cited and relied upon testimony it had previously ruled inadmissible to support its findings. [5] Affidavit testimony regarding **[*91]** the "addiction, dysfunction, and brutality that spanned multiple generations" of Lee's family that occurred before Lee's birth or did not directly affect Lee would not have been significantly **[***30]** mitigating. See id. at 566 (noting that affidavits submitted by a habeas petitioner concerned things that affected his family members rather than him).

Our review shows that much of the relevant and admissible affidavit testimony concerning Lee's childhood history of abuse and neglect is similar to what counsel testified that they were aware of pre-trial. While some affiants described Lee's mother as generally beating Lee, more often her treatment of Lee was stated in terms of her having slapped him, punched him, or pulled him by his hair. One affiant did testify that she saw Lee's mother hit him with a belt, knock him down, and kick him in the head and that Lee's mother often behaved this way. However, the remaining specific instances of physical abuse contained in the affidavit testimony that were **[***31]** witnessed firsthand are as follows: (1) that, when Lee was two years old, he dropped a coffee cup, which resulted in Lee's mother's shouting obscenities at him and smacking him hard across the face, leaving a mark; (2) that, when he was about four years old, his mother "clenched her fist and gave [Lee] a backhand right in the mouth," causing his head to hit the terrazzo floor and his mouth to bleed; (3) that, at six years of age, she hit Lee across the face, leaving a "big red hand print"; and (4) that, when he was nine years old, she beat Lee in the chest and pulled his hair. There is also testimony that Lee's mother called Lee obscene names, that she never said nice things about him or showed him affection, and that she begged others for diet or pain pills, exchanged sexual favors for drugs, and sold pills to earn money to buy more drugs. Both Lee's grandparents' home and the apartment where Lee lived as a child with his mother are described as "reek[ing]" of marijuana and cigarette smoke and as being roach-infested, cluttered, **[**880]** and filthy, and Lee is described as being constantly dirty and hungry and frequently having head lice as a child. Lee's father and mother testified in their **[***32]** affidavits that they fought violently in Lee's presence. [6] While there is affidavit testimony that Lee's grandfather drank heavily and his grandmother took Valium, there is no testimony that either of Lee's grandparents mistreated him.

The additional evidence presented in the habeas court is disturbing and certainly shows that Lee came from a dysfunctional family. However, particularly in light of the mitigating evidence that the jury did hear, this additional testimony fails to establish that Lee's **[*92]** childhood was so harmful or horrific as to create a reasonable probability that it would '"have influenced the jury's appraisal' of [Lee's] moral culpability. [Cit.]" Wiggins v. Smith, supra, 539 U.S. at 538 (finding prejudice where counsel unreasonably failed to present mitigating evidence that the petitioner's mother left the petitioner and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage; that she beat the petitioner for breaking into the kitchen, which she kept locked; that she forced **[***33]** his hand against a hot burner, for which he was hospitalized; that she had sex with men while he slept in the same bed; and that the petitioner was placed in foster care at age six, during which he suffered physical torment, sexual molestation, and repeated rape). See Hall v. McPherson, 284 Ga. at 219 (2), 223-226 (663 SE2d 659) (2008) (finding prejudice where counsel failed to present mitigating evidence that the petitioner was beaten with two belts wrapped together, went shoeless in cold weather, rummaged through dumpsters, roamed the street at 3:00 a.m., slept in abandoned cars because he was not allowed home on weekends, and was removed from the home, placed in State custody, and spent his youth in foster homes, detention centers, and group homes).

c. The strength of the State's case against Lee and the evidence in aggravation. The mitigation evidence Lee's habeas counsel has presented is less compelling when considered in light of the strength of the State's case, including Lee's incriminating statements to his companions and to the police. The evidence presented at trial also showed that, when Lee was stopped by a

[5] For instance, the habeas court granted the Warden's objection to affidavit testimony concerning Lee's mother's reputation in the community on the ground that it was based on inadmissible hearsay, yet the habeas court relied on the testimony it previously ruled inadmissible to find that trial counsel failed to present evidence that Lee's mother "developed a reputation as a 'pill junkie.'"

[6] We note that Lee's father indicated at trial that he had struck Lee's mother; however, he testified that he did not "remember" doing so in front of Lee.

highway patrolman after the murder, he placed a cocked, loaded gun that he had stolen **[***34]** in his companion's lap and told the companion to get out and "shoot the cop" while he "cover[ed]" the companion with another stolen, loaded gun. In addition, the habeas court based its determination that Lee was prejudiced in part on its conclusion that Lee did not plan to kill Chancey. However, the evidence presented at trial authorized the jury to find that "Lee and his girl friend decided to drive to Pierce County to kill Lee's father and steal his father's Chevrolet Silverado pickup truck" and that, "[w]hen Lee learned that his father was not home, he decided to kill . . . Chancey." *Lee v. State, supra, 270 Ga. at 799*.

The jury also found the presence of four statutory aggravating circumstances, [7] and the evidence at trial showed that Lee threw **[*93]** Chancey, wounded and bleeding, into the back of the Silverado, drove her for about an hour to a secluded area, dragged her out of the truck bed and "quite a distance from the road," and shot her two more times while removing her jewelry. The non-statutory aggravating evidence the State presented at trial included the testimony that Lee was on probation at the time of the crimes for two counts of burglary and for theft by taking for stealing **[***35]** a truck; that Lee had violated his probation and had stolen a car and viciously beaten a man because he "wanted to see blood, a lot of blood"; that, 15 months after the crimes while awaiting trial, Lee, acting alone, escaped from jail, stole a vehicle, and **[**881]** fled to Florida; and that, upon his recapture, he made several threatening statements to police, including that he still wanted to kill his father and that, if he were ever given the opportunity, he swore that he would kill the detective and the GBI agent assigned to his case. Compare *Williams v. Allen, 542 F3d 1326, 1343 (II) (A) (2) (11th Cir. 2008)* (noting that the fact that the case was not highly aggravated "[f]urther support[ed] a finding of prejudice"). All things considered, we conclude that there is no reasonable probability that Lee would have received a different sentence had the jury heard the additional life history mitigation evidence that he submitted in his habeas proceeding.

C. Failure to Present Psychiatric Mitigating Evidence as Presented in the Habeas Proceeding

The habeas court found that trial counsel's failure to discover and present to Dr. Grant Lee's life history as set out in the affidavit testimony discussed above and the records from the Charlton County Training Center, which Lee attended during the summer prior to entering kindergarten, led to Dr. Grant's incomplete diagnosis of Lee. The habeas court found that the fact that Lee was mistakenly diagnosed as mentally retarded while at the Training Center would have demonstrated the negative impact of his deprived environment and provided Lee's mental health expert with the information to support a theory that Lee "was less culpable as the result of his childhood and impairments." However, our review of the record shows that trial counsel actually did obtain and submit to Dr. Grant as a part of Lee's school records an evaluation of Lee performed in kindergarten that contained the information that Lee's classification **[***37]** of functioning had been in "the Mild level of Mental Retardation" according to previous results of a test administered at the Training Center. Dr. Grant indicated during his testimony at trial that he found this kindergarten evaluation "significant." Thus, we conclude that Lee was not prejudiced by trial counsel's failure to obtain the Charlton County Training Center records. As to the affidavit testimony, Dr. Grant testified in the habeas court that had he possessed the additional information that the **[*94]** affidavits provided, he would have diagnosed Lee as also suffering from post-traumatic stress disorder (PTSD), would have testified to that diagnosis, and also would have testified to and explained how the chaos, neglect, and abuse in Lee's life "had a clear nexus to the crimes in this case." However, Dr. Grant did not explain how Lee's PTSD was related to the murder. Although he noted "the vague flashbacks that [Lee] recalled during [his] interview with him," Dr. Grant did not claim that, at the time of the murder, Lee was experiencing a flashback or was in a disassociative state as a result of his PTSD.

In order to show that "a mental health expert who was fully informed" of Lee's background **[***38]** could have provided the jury with an explanation of how Lee's mental impairments related to the murder, the habeas court quoted extensively from the affidavit of another psychologist retained by Lee's habeas counsel, Dr. Catherine Boyer. However, *HN8*[↑] "the critical issue" in a case such as this is what the expert consulted at the time of trial "would have been willing to testify to had

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[7] The jury found that Lee committed the murder while engaged in the commission of armed robbery and kidnapping with bodily injury, that he committed the murder for himself or another for the purpose of receiving money or any other thing of monetary value, **[***36]** and that the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim before death. *OCGA § 17-10-30 (b) (2), (4), (7)*.

[that expert] been provided the materials trial counsel allegedly failed to provide." *Schofield v. Holsey, supra, 281 Ga. at 813*.

Further, contrary to the implication in the habeas court's order that Dr. Boyer also diagnosed Lee with PTSD, Dr. Boyer made no diagnosis of Lee's mental condition at the time of her interview or at the time of the crimes and, in fact, conducted no psychological testing of Lee. Rather, she testified that, while PTSD "would be a very reasonable diagnosis" of Lee's mental condition at the time of the crimes based upon her interview with Lee and her review of the affidavits, the records Dr. Grant reviewed, and the pre-trial testing of Lee that Dr. Grant performed, she could not make a diagnosis of Lee's pre-trial mental condition, because she did not see Lee at that time. In that portion **[***39]** of her affidavit testimony relied upon by the habeas court to connect Lee's "mental impairments" or "significant emotional problems" with the crimes, Dr. Boyer testified that Lee's "impaired **[**882]** impulse control, impaired emotional control, high levels of distress, and inability to structure or stabilize his own life" made him "particularly vulnerable to involvement in the murder." Even assuming it were proper to allow her testimony connecting Lee's undiagnosed "mental impairments" or "emotional problems" with the crimes to substitute for testimony connecting Dr. Grant's new diagnosis of PTSD and the crimes, we do not find that portion of her testimony significantly different from Dr. Grant's trial testimony regarding the effects of Lee's environment and ADHD upon him that are discussed above.

Lee argues that a diagnosis of PTSD is more compelling than a diagnosis of ADHD, because PTSD is an Axis I diagnosis and this Court has found ineffective assistance of counsel where trial counsel **[*95]** failed at the sentencing phase of a death penalty trial to present evidence of another Axis I diagnosis, major depression. See *Hall v. McPherson, supra, 284 Ga. at 235*. However, ***HN9***[↑] indetermining prejudice, this **[***40]** Court evaluates the totality of the evidence - "both that adduced at trial, and the evidence adduced in the habeas proceeding[.]" *Williams v. Taylor, supra, 529 U.S. at 397*. Here, Lee's trial expert failed to connect his new diagnosis of PTSD to the crimes, and the connection that his habeas expert made between his undiagnosed "mental impairments" and the crimes is similar to the connection his trial expert made between his diagnosis of ADHD and the crimes. Thus, there is no reasonable probability that a jury confronted with the psychiatric mitigating evidence as presented in Lee's habeas proceeding, including Dr. Grant's new diagnosis of PTSD, would have returned a different sentence. Compare *Hall v. McPherson, supra, 284 Ga. at 234-235* (finding prejudice where counsel failed to present evidence of defendant's childhood abuse and neglect by his mother, his early exposure to alcohol and drugs, and readily available expert psychiatric testimony explaining how that background led to his major depression, where the only argument by the State in favor of a death sentence was that the defendant chose his life of drug addiction, although others, particularly his mother, had tried to help **[***41]** him).

D. Alleged Failure to Investigate and Present the Relationship between Lee's Mental Impairments and the Crimes

The habeas court found trial counsel were deficient in failing to investigate and present the relationship between Lee's mental impairments and the crimes. However, as the foregoing discussion shows, trial counsel investigated and presented evidence of that relationship. Thus, the habeas court erred in finding otherwise. Moreover, as discussed above, we conclude as a matter of law that, had trial counsel presented the evidence connecting Lee's mental impairments to the crimes that he presented in his habeas proceeding, there is no reasonable probability that it would have resulted in a different sentence.

E. Failure to Present Evidence of Lee's Life Leading Up to the Crimes

The habeas court found that trial counsel unreasonably failed to present evidence to rebut the State's evidence in aggravation that Lee had been involved in criminal activity during the time period after he left the Boys Ranch up to the time of the crimes. We do not agree with the habeas court's finding that the affidavit testimony of Rick Pope and Brenda Morgan, who testified that Lee worked for their **[***42]** cleaning services for a short time after he left the Boys Ranch, would have undermined the State's theory that Lee adopted a violent life of crime after he left the Boys Ranch or the habeas court's **[*96]** finding that such testimony would have been mitigating because it would have portrayed a sympathetic picture of Lee as homeless and unemployed at the time of the crimes. Their testimony shows that, if Lee was homeless and unemployed at the time of the crimes, it was his choice. Both Pope and Morgan testified that they offered their homes to Lee as a place to live and treated him like a member of the family, that they provided him with employment that he was capable of performing well,

and that Lee chose to leave their **[**883]** homes and their employment after a few months. Pope testified that, after Lee left, he would return periodically in order to earn a little money and would then leave again; that he "sensed a change in [Lee]"; and that, when he tried to talk to Lee about the crowd he was associating with and to warn him "that he would wind up in jail or in prison by the time he was 21 if he continued to go down that road," Lee told him that his new friends made him happy.

Nor do we agree with **[***43]** the habeas court's finding that trial counsel were deficient for not eliciting from Lee's mother at the sentencing phase testimony showing that, shortly before the crimes, she refused Lee's request for financial help and referred him to his father because he had been "living the high life all these years. . . ." [8] Not only has Lee failed to show that he or his mother informed trial counsel of this information, but this testimony would not have been particularly mitigating considering there was no evidence that Lee attempted to ask or even considered asking his father for financial help before killing Chancey and taking his father's truck. Had counsel presented this evidence at trial, the State would likely have argued that Lee's father may have assisted him if Lee had asked, as the evidence showed that Lee's father had provided Lee's bail to secure his release from jail when he was incarcerated on other charges prior to the murder and had provided a home for him for months after his release. Moreover, Lee chose against counsel's advice to testify at the sentencing phase. The affidavit testimony Lee presented would not have significantly mitigated the State's argument that he had chosen **[***44]** a violent criminal path in light of the fact that, on cross-examination, he testified that shortly before the murder he stole six guns, including the one with which he killed Chancey, in order to defend himself from the police from whom he "was on the run" at the time.

F. Failure to Introduce Records

We also conclude that Lee did not suffer constitutionally significant **[*97]** prejudice from his trial counsel's failure to introduce the State's mental health evaluation of Lee, the Charlton County school evaluation, and portions of Lee's school records at the sentencing phase, [9] because Dr. Grant, Lee's mother, and his former teacher provided testimony regarding his mental impairments, deprivation, and abuse. In addition, the State evaluation noted that Lee reported that he was asked to leave the Boys Ranch because of his behavior in school. This information would have undermined counsel's mitigation strategy to show that Lee succeeded at the Boys Ranch and, thus, would do well in the structured **[***45]** environment of a prison, and it also likely would have undermined the credibility of Lee's cottage mother, whom counsel testified, and our review of the trial transcript shows, was a strong mitigation witness for Lee. Further, the information contained in these documents is no more atrocious or adverse than that contained in the affidavit testimony, and, as discussed above, the omission of that testimony did not prejudice Lee.

G. Combined Effect of Individual Ineffective Assistance Claims

Considering the combined effect of the deficiencies assumed in the discussion above, we conclude that those deficiencies would not in all reasonable probability have changed the outcome of the sentencing phase of Lee's trial. See *Schofield v. Holsey, supra, 281 Ga. at 811 n. 1* (holding that the combined effect of trial counsel's errors should be considered).

Case No. S09X1345

III. Proportionality of Lee's Sentence

Lee contends in his cross-appeal that the habeas court erred in denying his claim that his death sentence was disproportionate **[**884]** **[***46]** and that it was imposed arbitrarily and capriciously because the way in which this Court conducts its proportionality review is unconstitutional and violates Georgia statutory requirements. The habeas court correctly found that portion of Lee's claim "wherein he assert[ed] his death sentence [wa]s disproportionate" was res judicata. See *Lee v. State, supra, 270 Ga. at 804*. "[W]e perceive no reason to re-examine the issue [of the proportionality of Lee's death sentence]." *Schofield v. Meders, 280 Ga. 865, 871 (8) (632 SE2d 369) (2006)* (declining to re-examine proportionality on habeas corpus). See *Davis*

[8] We note that the habeas court relied on affidavit testimony it previously ruled inadmissible as hearsay to find that Lee's mother also told him at the time that his father's Silverado was his "child support."

[9] We offer no opinion as to the admissibility of these documents. See *Smith v. State, supra, 270 Ga. at 249* (holding that the hearsay rule is not suspended in the sentencing phase).

v. Turpin, 273 Ga. 244 (2) (539 SE2d 129) (2000) (same).

The habeas court did not rule on the remaining portion of Lee's claim. However, as a review of the record shows that Lee failed to **[*98]** assert in his original petition, his amended petition, or his post-hearing brief a constitutional or statutory challenge to this Court's method of proportionality review as provided in *OCGA § 17-10-35 (c)*, it is waived. See *Harris v. State, 114 Ga. 436, 438 (40 SE 315) (1901)* (holding that a question that is not raised or passed upon in the lower court cannot be considered by a reviewing court). See also ***HN10***[↑] *OCGA § 9-14-44* **[***47]** (stating that the contents of a habeas petition must "clearly set forth the respects in which the petitioner's rights were violated"). Even assuming this claim were not waived, ***HN11***[↑] "the method by which this Court conducts its proportionality review satisfies Georgia statutory requirements and is not unconstitutional." *Davis v. Turpin, supra, 273 Ga. at 245*. See *Gissendaner v. State, 272 Ga. 704 (16) (532 SE2d 677) (2000)*.

Accordingly, we order Lee's death sentence reinstated.

Judgment affirmed in Case No. S09X1345 and reversed in Case No. S09A1344. All the Justices concur.

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Lee v. State

Supreme Court of Georgia

March 1, 1999, Decided

S98P1498.

Reporter
270 Ga. 798 *; 514 S.E.2d 1 **; 1999 Ga. LEXIS 172 ***; 99 Fulton County D. Rep. 859

JAMES ALLYSON LEE v. THE STATE.

Subsequent History: [*1]** Reconsideration denied April 2, 1999. Certiorari Denied November 15, 1999, Reported at: *1999 U.S. LEXIS 7571*.

Reconsideration denied by, 04/02/1999

Writ of certiorari denied *Lee v. Georgia, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388, 1999 U.S. LEXIS 7571 (Nov. 15, 1999)*

Habeas corpus proceeding at, Decision reached on appeal by *Hall v. Lee, 286 Ga. 79, 684 S.E.2d 868, 2009 Ga. LEXIS 670 (Nov. 2, 2009)*

Habeas corpus proceeding at *Lee v. Humphrey, 2013 U.S. Dist. LEXIS 118069 (S.D. Ga., Aug. 20, 2013)*

Prior History: Murder. Charlton Superior Court. Before Judge Jackson. Date of Judgment Appealed: 04-15-98. Notice of Appeal Date: 05-14-98. Lower Ct # : 94R096.

Disposition: Judgment affirmed.

Core Terms

murder, kidnapping, bodily injury, trial court, killing, aggravating circumstances, felony murder, aggravated battery, armed robbery, sentence, felony, investigatory stop, girl friend, circumstances, confession, malice, phase, truck

Case Summary

Procedural Posture
Defendant appealed his murder conviction from the Charlton Superior Court (Georgia), arguing that the incriminating statements he made to police were not voluntary.

Overview
A jury found defendant guilty of malice murder, felony murder, armed robbery, and possession of a firearm during the commission of a crime. For the murder, the jury recommended a death sentence, finding as aggravating circumstances that defendant had committed the murder while engaged in the commission of armed robbery and kidnapping with bodily injury. Defendant appealed. The court noted that the standard for determining the admissibility of defendant's confession was the preponderance of evidence. To determine whether the state had proven that a confession was made voluntarily, the trial court was required to consider the totality of the circumstances. The court noted that defendant was in police custody only a short time, was not under the influence of drugs or alcohol, was not subjected to any physical or psychological coercion, and was informed of and waived his Miranda rights on several occasions. Defendant's conviction was affirmed because considering the totality of the circumstances, the trial court correctly found that defendant's incriminating statements were voluntary and admissible.

Outcome
Defendant's murder conviction was affirmed because the incriminating statements made by defendant while he was in police custody were voluntary.

LexisNexis® Headnotes

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

Criminal Law & Procedure > Commencement of

Criminal Proceedings > Interrogation > Noncustodial Confessions & Statements

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN1[] Clearly Erroneous Review, Confessions & Interrogation

The standard for determining the admissibility of confessions is the preponderance of evidence. To determine whether the state has proven that a confession was made voluntarily, the trial court must consider the totality of the circumstances. Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

HN2[] Interrogation, Voluntariness

Encouraging a suspect to tell the truth is not a "hope of benefit" that would render a statement involuntary under Ga. Code Ann. § 24-3-50.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

Criminal Law & Procedure > ... > Murder > Felony Murder > General Overview

HN3[] Felony Murder, Elements

A person commits the offense of felony murder when, in the commission of a felony, he causes the death of another human being irrespective of malice. Ga. Code Ann. § 16-5-1 (c). A murder may be committed in the commission of a felony, although it does not take place until after the felony itself has been technically completed, if the homicide is committed within the res gestae of the felony.

Criminal Law & Procedure > ... > Crimes Against Persons > Robbery > General Overview

HN4[] Crimes Against Persons, Robbery

It is well-settled that a defendant commits a robbery if he kills the victim first and then takes the victim's property.

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

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN5[] Standards of Review, De Novo Review

The trial court's application of the law to undisputed facts is subject to de novo appellate review.

Criminal Law & Procedure > ... > Warrantless Searches > Vehicle Searches > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > General Overview

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN6[] Warrantless Searches, Vehicle Searches

Flight in connection with other circumstances may be sufficient probable cause to uphold a warrantless arrest or search. Certainly these circumstances give rise to an articulable suspicion that a criminal act may have been occurring so as to authorize a brief investigatory stop.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Crimes Against Persons > Kidnapping > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Kidnapping > Elements

HN7[] Capital Punishment, Aggravating Circumstances

The offense of kidnapping with bodily injury, when sufficiently part of the same criminal transaction, may be considered as and found to be a Ga. Code Ann. § 17-10-30(b)(2) aggravating circumstance of a murder.

Counsel: Adams & Brooks, John B. Adams, James K. Brooks, for appellant.

Richard E. Currie, District Attorney, Thurbert E. Baker, Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, Christopher L. Phillips, Assistant Attorney General, for appellee.

Judges: Carley, Justice. All the Justices concur.

Opinion by: CARLEY

Opinion

[*798] [2]** **Carley**, Justice.

A jury found James Allyson Lee guilty of malice murder, felony murder, armed robbery, and possession of a firearm during the commission of a crime. For the murder, the jury recommended a death sentence, finding the following aggravating circumstances: that Lee had committed the murder while engaged in the commission of armed robbery and kidnapping with bodily injury; that Lee had committed the murder for himself or another for the purpose of receiving money or any other thing of monetary value; and that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in thatit involved an aggravated battery to the **[***2]** victim before death. O.C.G.A. § 17-10-30 (b) (2), **[**3]** (4), (7). Lee's motion for new trial was **[*799]** denied and he appeals. [1]

[*3]** *The Guilt-Innocence Phase of Trial*

1. The evidence presented at trial authorized the jury to find the following: Lee and an accomplice broke into a gun store on May 25, 1994, and stole several guns, including a ten millimeter Glock pistol. Afterwards, Lee and his girl friend decided to drive to Pierce County to kill Lee's father and steal his father's Chevrolet Silverado pickup truck. When Lee learned that his father was not home, he decided to kill his father's live-in girl friend, Sharon Chancey. In the early morning hours of May 26, 1994, Lee's girl friend lured the victim from the house by claiming that her Toyota had broken down nearby. When Ms. Chancey pulled up to the Toyota in the Silverado and got out, Lee shot her in the face and threw her in the back of the pickup. Lee then drove the truck to a secluded area in Charlton County. After dragging Ms. Chancey into the woods, Lee reached down to strip two rings from her. She was still alive, and grabbed his arm. Lee responded by shooting her two more times and killing her.

After swapping the Silverado and Toyota license plates, Lee and his girl friend drove to Florida in the pickup truck. While in Florida, Lee made **[***4]** several incriminating remarks to friends and his girl friend's sister. At about 11:30 p.m. on May 26, 1994, Lee was stopped for a broken taillight and, after a check revealed that the Silverado was stolen, he was arrested. The ten millimeter Glock pistol was recovered from the Silverado, and this gun was determined by a firearms expert to be the murder weapon. The police also found Ms. Chancey's purse and identification in the Silverado. Lee gave several incriminating statements to various law enforcement officials in Florida and Georgia, including a videotaped confession at the crime scenes in Charlton and Pierce counties.

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[1] The crimes occurred on May 26, 1994, and the Charlton County grand jury indicted Lee on September 2, 1994, for malice murder, felony murder, kidnapping with bodily injury, armed robbery, theft by taking, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The State filed its notice of intent to seek the death penalty on November 2, 1994. The trial was held May 28-June 6, 1997. At trial, the trial court directed verdicts of acquittal for kidnapping with bodily injury and theft by taking, and the State nol prossed the charge of possession of a firearm by a convicted felon. Lee was convicted of the remaining counts and, in addition to the death sentence for malice murder, the trial court imposed a life sentence for armed robbery and a consecutive five-year sentence for possession of a firearm during the commission of a felony. The felony murder conviction was vacated by operation of law, Malcolm v. State, 263 Ga. 369 (4) (434 S.E.2d 479) (1993). Lee filed a motion for new trial on July 3, 1997, amended on February 19, 1998, which was denied on April 15, 1998. Lee filed his notice of appeal on May 14, 1998, and the case was orally argued on September 15, 1998.

The evidence was sufficient to enable a rational trier of fact to find proof of Lee's guilt of malice murder, felony murder, armed robbery, **[*800]** and possession of a firearm during the commission of a felony beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979). The evidence was also sufficient to authorize the jury to find beyond a reasonable doubt the four statutory aggravating circumstances which supported his death sentence for the murder. Jackson v. Virginia, supra; O.C.G.A. § 17-10-35 (c) (2).

2. Lee complains **[***5]** that the incriminating statements he made to the police on May 26-27, 1994, were not voluntary. O.C.G.A. § 24-3-50.

"HN1[] 'The standard for determining the admissibility of confessions is the preponderance of evidence. To determine whether the state has proven that a confession was made voluntarily, the trial court must consider the totality of the circumstances. Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal.'" [Cit.]

Gober v. State, 264 Ga. 226, 228 (2) (b) (443 S.E.2d 616) (1994). Lee was 19 years old, in police custody only a short time, not under the influence of drugs or alcohol, not subjected to any physical or psychological coercion, **[**4]** and he was informed of and waived his Miranda rights on several occasions. After Lee admitted to killing his father's girl friend and stealing the truck, a police officer asked him if he would make another statement on audiotape. Lee agreed, but when the recording began Lee asked the officer, "What should I do? Should I talk?" The officer replied, "That's up to you, man. All you're going to do is help yourself out." Contrary **[***6]** to Lee's assertion, the officer's comment was not a "hope of benefit" that would render Lee's statement involuntary under O.C.G.A. § 24-3-50. See Gilliam v. State, 268 Ga. 690, 692 (3) (492 S.E.2d 185) (1997) HN2[] (encouraging a suspect to tell the truth is not a "hope of benefit" under O.C.G.A. § 24-3-50); Gober, supra at 228 (2) (b); Caffo v. State, 247 Ga. 751, 756-757 (3) (279 S.E.2d 678) (1981) (telling a suspect he would "feel better" if he confessed is not a "hope of benefit" under O.C.G.A. § 24-3-50). Considering the totality of the circumstances, we conclude that the trial court correctly found that Lee's incriminating statements on May 26-27, 1994, were voluntary and admissible. Gilliam, 268 Ga. at 692-693 (3); Gober, supra.

3. Lee's contentions that the State failed to prove the identity of the victim or that Charlton County was the proper venue for the murder conviction are without merit. Viewed in the light most favorable to the prosecution, the evidence was clearly sufficient to support a jury finding beyond a reasonable doubt that Sharon Chancey was the murder victim, and that Ms. Chancey was still alive in Charlton County when she was fatally shot two more times. **[***7]** Jackson **[*801]** v. Virginia, supra.

4. After the State rested its case in the guilt-innocence phase, the trial court directed a verdict of acquittal on the charge of kidnapping with bodily injury because the evidence showed that the inception of the kidnapping was in Pierce County. Potts v. State, 261 Ga. 716, 720 (2) (410 S.E.2d 89) (1991) (venue for kidnapping with bodily injury lies within the county where the victim is seized); Krist v. State, 227 Ga. 85, 91 (4) (179 S.E.2d 56) (1970). The trial court, however, refused to direct a verdict of acquittal on the charge of felony murder even though the felony murder indictment specifies that kidnapping with bodily injury is the underlying felony. Lee asserts that this denial was error.

HN3[] A person commits the offense of felony murder "when, in the commission of a felony, he causes the death of another human being irrespective of malice." O.C.G.A. § 16-5-1 (c). "A murder may be committed in the commission of a felony, 'although it does not take place until after the felony itself has been technically completed, if the homicide is committed within the res gestae of the felony.'" Diamond v. State, 267 Ga. 249, 250 (2) (477 S.E.2d **[***8]** 562) (1996). We conclude that Lee's murder of Ms. Chancey was within the res gestae of the kidnapping with bodily injury, since Ms. Chancey was under the continuous control of the defendant until she was killed. To hold otherwise would lead to the absurdity that a defendant who commits kidnapping with bodily injury in one county, and abducts the victim to a second county where he kills her without malice aforethought, could not be charged with felony murder in either county. See O.C.G.A. § 17-2-2 (c) (venue for homicide lies in county where cause of death is inflicted); Potts, supra. The trial court did not err in denying Lee's motion for a directed verdict of acquittal of felony murder. In addition, Lee can show no harm resulting from the denial of this motion. "Since the jury returned a verdict specifying that it found the defendant guilty of 'malice murder,' any issue of felony murder is moot." Holiday v. State, 258 Ga. 393, 398 (12) (369 S.E.2d 241) (1988).

5. The evidence was sufficient to support Lee's conviction for armed robbery, despite Lee's contention that he did not take the victim's rings until after she was dead. *Jackson v. Virginia, supra.* ***HN4***[] It is well-settled **[***9]** that a defendant commits a robbery if he kills the victim first and then takes the victim's property. *Francis v. State, 266 Ga. 69, 70-71 (1) (463 S.E.2d 859) (1995)*; *Crowe v. State, 265 Ga. 582, 594 (21) (458 S.E.2d 799) (1995)*; *Prince v. State, 257 Ga. 84, 85-86 (1) (355 S.E.2d 424) (1987)*. Moreover, as pointed out in Division 3, the evidence was sufficient to authorize the jury to find that Ms. Chancey was alive when the robbery took place.

[5]** 6. Lee requested a charge in the guilt-innocence phase that a corpse is not a person. See *Lawson v. State, 68 Ga. App. 830 (24 S.E.2d [*802] 326) (1943)*, overruled by *McKee v. State, 73 Ga. App. 815 (38 S.E.2d 184) (1946)*. Lee wanted this instruction in order to support his contention that, if Ms. Chancey was dead when her rings were removed, there was no taking from a person, and therefore no armed robbery. Since this charge is not an accurate statement of the law, the trial court correctly declined to give it. *Francis, supra at 70-71* (1); *Crowe, supra at 594* (21).

The Sentencing Phase of Trial

7. While awaiting trial, Lee escaped from jail on July 25, 1995. He stole a Lincoln Town Car and drove to Florida, picking **[***10]** up a hitchhiker on the way. At about 5:00 a.m. on July 26, Boynton Beach Police Officer Jerry Rodriguez, a 17-year police veteran, was on routine patrol when he observed the Lincoln exiting a gravel road that led to a marina and business center. No businesses were open at that time of day in the area from which Lee was emerging and there were no residences in the vicinity. Because the vehicle was coming out of an area "where no one should be" and because he believed there had been previous burglaries in the area, Officer Rodriguez pulled behind Lee's vehicle and attempted to make an investigatory stop. However, when Officer Rodriguez turned on his emergency lights, the Lincoln "jumped and accelerated." After a pursuit of about 800 yards, the Lincoln came to a stop and Lee and the hitchhiker bailed out and fled on foot. Officer Rodriguez pursued Lee, who eventually fell to the ground. The officer approached Lee and asked, "Where is the other guy?" Lee responded, "I don't know who he is, but I'll tell you who I am; I'm wanted for murder in Georgia, my name is James Lee." Lee was arrested and subsequently gave a statement that was used by the State as non-statutory aggravating evidence **[***11]** in the sentencing phase. Lee asserts that the statement should have been suppressed as the fruit of an illegal investigatory stop, because Officer Rodriguez, based upon the totality of the circumstances, did not have a particularized and objective basis for suspecting that Lee was engaged in criminal activity. *United States v. Cortez, 449 U.S. 411, 417-418 (II) (A) (101 S. Ct. 690, 66 L. Ed. 2d 621) (1981)*; *Terry v. Ohio, 392 U.S. 1, 21 (III) (88 S. Ct. 1868, 20 L. Ed. 2d 889) (1968)*; *Vansant v. State, 264 Ga. 319, 320 (2) (443 S.E.2d 474) (1994)*.

The evidence regarding this incident is uncontroverted and there is no question regarding the credibility of the witnesses. Therefore, ***HN5***[] "the trial court's application of the law to undisputed facts is subject to de novo appellate review." *Vansant, supra at 320* (1). We conclude that the trial court properly denied Lee's motion to suppress. Officer Rodriguez is an experienced police officer. At 5:00 a.m., he observed a vehicle exiting a business area where no residences were located, at a **[*803]** time when no businesses were open and where he believed there had been previous burglaries. In response to the officer's emergency lights, the vehicle's **[***12]** occupants attempted to flee. ***HN6***[] "Flight in connection with other circumstances may be sufficient probable cause to uphold a warrantless arrest or search ([cit.]); certainly these circumstances gave rise to an articulable suspicion that a criminal act may have been occurring so as to authorize a brief investigatory stop." *State v. Smalls, 203 Ga. App. 283, 286 (2) (416 S.E.2d 531) (1992)*. See also *United States v. Briggman, 931 F.2d 705, 708-709 (11th Cir. 1991)* (investigatory stop proper when experienced police officer observed suspect parked in a parking lot in a high crime area at 4:00 a.m., when all the nearby commercial establishments were closed, and the suspect drove away from the officer in an evasive manner). Taken together, these facts are sufficient to establish at least an articulable suspicion that Lee was engaged in criminal behavior and that Officer Rodriguez was therefore justified in conducting an investigatory stop. See *Cortez, supra*; *Terry, supra*; *Vansant, supra at 320* (2). The trial court did not err in allowing the admission of Lee's subsequent statement.

8. Even though the trial court directed a verdict of acquittal of kidnapping **[**6]** withbodily **[***13]** injury, the jury was authorized to find the statutory aggravating circumstance that the murder was committed while Lee was engaged in the commission of kidnapping with bodily injury. *O.C.G.A. § 17-10-30 (b) (2)*. ***HN7***[] The

offense of kidnapping with bodily injury was sufficiently part of the same criminal transaction to be considered as and found to be a (b) (2) aggravating circumstance of the murder. See *Potts, supra at 720* (3); *Horton v. State, 249 Ga. 871, 878-879 (11) (295 S.E.2d 281) (1982)*.

9. The evidence was sufficient to support the *O.C.G.A. § 17-10-30 (b) (7)* aggravating circumstance that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. *O.C.G.A. § 17-10-35 (c) (2)*; *Jackson v. Virginia, supra.* Insofar as aggravated battery under the (b) (7) aggravating circumstance is concerned, only facts showing that the aggravated battery occurred before death, and was separate from the act causing instantaneous death, will support a finding of aggravated battery. *Davis v. State, 255 Ga. 588, 594 (3) (c) (340 S.E.2d 862) (1986)*; *Hance v. State, 245 Ga. 856, 861-862 (3) (268 S.E.2d 339) (1980)*. Viewed in the light **[***14]** most favorable to the prosecution, the evidence shows that Lee shot the victim in the face and threw her in the back of the pickup truck, where she lingered for about an hour until he killed her in Charlton County. The jury was authorized to find the existence of the (b) (7) aggravating circumstance.

10. The death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. *O.C.G.A. **[*804]** § 17-10-35 (c) (1)*. Also, the death sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. *O.C.G.A. § 17-10-35 (c) (3)*. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all involve an aggravated battery under the (b) (7) aggravating circumstance, or a deliberate killing during the commission of kidnapping with bodily injury or armed robbery.

Judgment affirmed. All the Justices concur.

Appendix.

Mize v. State, 269 Ga. 646 (501 S.E.2d 219) (1998); *Bishop v. State, 268 Ga. 286 (486 S.E.2d 887) (1997)*; *Jones v. State, 267 Ga. 592 (481 S.E.2d 821) (1997)*; *Carr v. State, 267 Ga. 547 (480 S.E.2d 583) (1997)*; **[***15]** *McClain v. State, 267 Ga. 378 (477 S.E.2d 814) (1996)*; *Greene v. State, 266 Ga. 439 (469 S.E.2d 129) (1996)*; *Crowe v. State, 265 Ga. 582 (458 S.E.2d 799) (1995)*; *Mobley v. State, 265 Ga. 292 (455 S.E.2d 61) (1995)*; *Christenson v. State, 262 Ga. 638 (423 S.E.2d 252) (1992)*; *Ward v. State, 262 Ga. 293 (417 S.E.2d 130) (1992)*; *Meders v. State, 261 Ga. 806 (411 S.E.2d 491) (1992)*; *Todd v. State, 261 Ga. 766 (410 S.E.2d 725) (1991)*; *Potts v. State, 261 Ga. 716 (410 S.E.2d 89) (1991)*; *Miller v. State, 259 Ga. 296 (380 S.E.2d 690) (1989)*; *Moon v. State, 258 Ga. 748 (375 S.E.2d 442) (1988)*; *Holiday v. State, 258 Ga. 393 (369 S.E.2d 241) (1988)*; *Newland v. State, 258 Ga. 172 (366 S.E.2d 689) (1988)*; *Jefferson v. State, 256 Ga. 821 (353 S.E.2d 468) (1987)*; *Hance v. State, 254 Ga. 575 (332 S.E.2d 287) (1985)*.

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No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALLYSON LEE,
Petitioner,

-v-

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

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(a), I certify that a copy of the Appendix to Petition for a Writ of Certiorari was sent via 1st Class Mail to the U.S. Supreme Court and a digital copy was sent to counsel for the Respondent by electronic mail on September 16, 2021. The parties have consented to electronic service. Respondent's counsel's name, address, and telephone number are set forth below:

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