No. ________

IN THE
Supreme Court of the United States

ASKIA MUSTAFA RAHEEM,
Petitioner,
v.

GDCP WARDEN,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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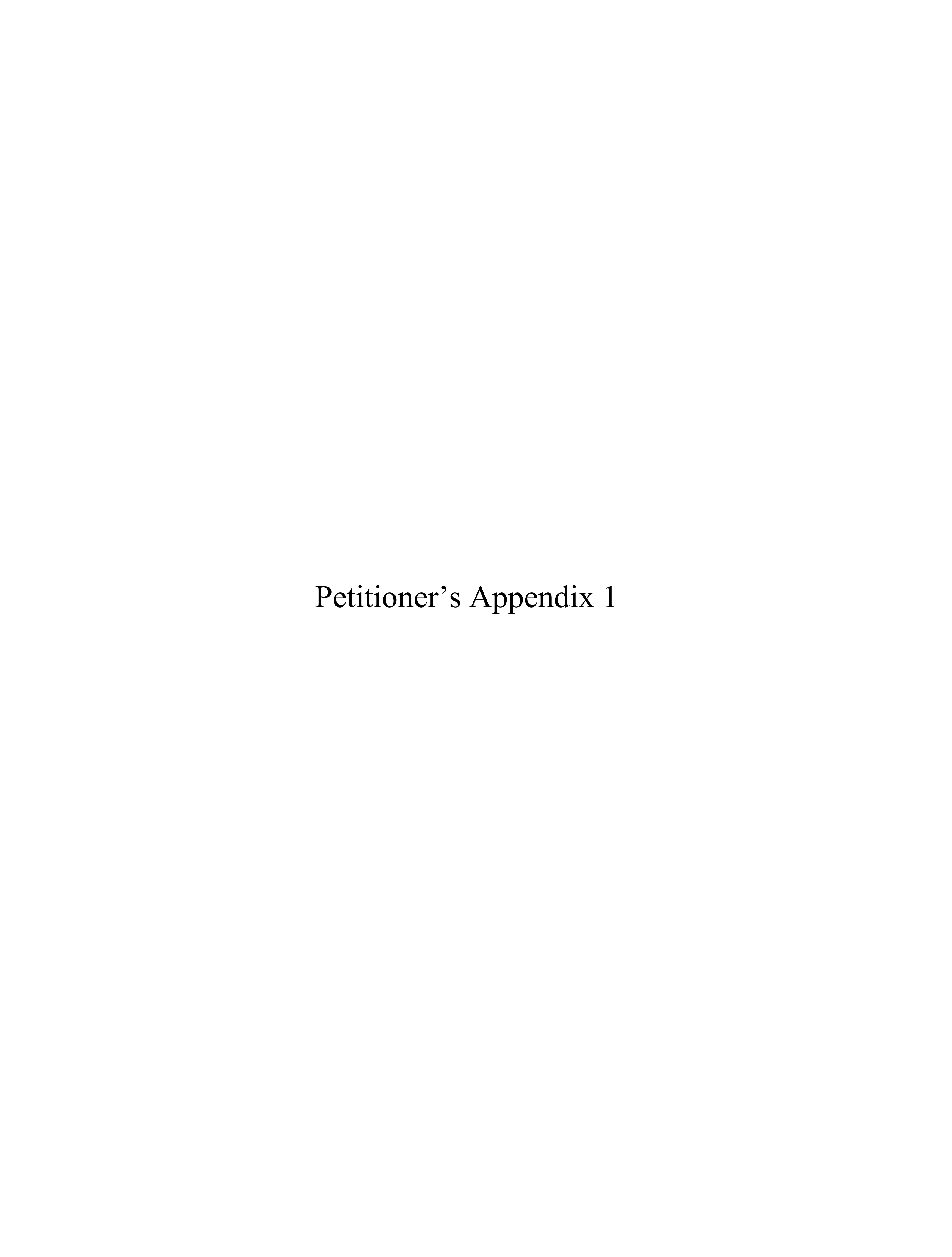

Petitioner’s Appendix 1

995 F.3d 895
United States Court of Appeals, Eleventh Circuit.

Askia Mustafa RAHEEM, Petitioner - Appellant,
v.
GDCP WARDEN, Respondent - Appellee.

No. 16-12866
|
(April 26, 2021)

Synopsis
Background: State prisoner convicted of multiple murders and sentenced to death filed petition for federal habeas relief. The United States District Court for the Northern District of Georgia, No. 1:11-cv-01694, Amy Totenberg, J., 2015 WL 13899724, denied petition, and prisoner appealed.

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

[1] state court's determination that experienced defense counsel were not deficient in their mitigation investigation or presentation was not an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of clearly established federal law;

[2] claim that a state prisoner seeking federal habeas relief never raised on direct appeal, that state trial court had violated his procedural due process rights by failing to sua sponte hold a competency hearing, was procedurally defaulted;

[3] it was neither contrary to nor an unreasonable application of *Strickland* for state habeas court to find no constitutionally deficient assistance of counsel sufficient to overcome, on cause-and-prejudice theory, petitioner's procedural default;

[4] district court did not clearly err in finding that state prisoner petitioning for federal habeas relief was competent at time of his trial, and that state trial court did not violate his substantive due process rights by requiring him to stand trial; and

[5] prosecutor's improper comment, in passing, on defendant's failure to testify when commenting on his videotaped statement could not have had a substantial and injurious effect or influence on jury's verdict, as required to provide basis for federal habeas relief.

Affirmed.

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

West Headnotes (53)

[1] **Habeas Corpus** Review de novo

Court of Appeals reviews de novo a district court's denial of petition for habeas relief. 28 U.S.C.A. § 2254.

[2] **Habeas Corpus** Federal or constitutional questions

State court's decision is "contrary to clearly established federal law," so as to permit federal habeas relief on a ground rejected on the merits by state court, only if the state court arrived at conclusion opposite to that reached by the United States Supreme Court on a question of law, or if state court decides a case differently than the Supreme Court on materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1).

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

State court's decision represents an "unreasonable application of clearly established federal law," so as to permit federal habeas relief upon a ground rejected on merits by state court, only if state court identifies the correct governing legal principle from Supreme Court case law, but unreasonably applies that principle to the facts of the petitioner's case. 28 U.S.C.A. § 2254(d)(1).

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

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Habeas Corpus Issues and findings of fact; historical facts; credibility

Second prong of the Antiterrorism and Effective Death Penalty Act's deferential standard for federal habeas review of arguments rejected on the merit by state courts, pursuant to which federal habeas court considers whether state court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court proceeding, also requires a federal habeas court to accord substantial deference to state court. 28 U.S.C.A. § 2254(d)(2).

1 Cases that cite this headnote

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

If reasonable minds reviewing the record might disagree about a state court's finding, then federal habeas must defer to that determination. 28 U.S.C.A. § 2254(d)(d).

[6] **Habeas Corpus** Review de novo

Habeas Corpus Clear error

Court of Appeals reviews for clear error the factual findings made by district court in rejecting a substantive competency claim as basis for federal habeas relief, and reviews the court's legal conclusions de novo. 28 U.S.C.A. § 2254.

[7] **Criminal Law** Questions of Fact and Findings

Finding of fact is "clearly erroneous" when, though there is evidence to support it, a reviewing court on the entire evidence is left with definite and firm conviction that mistake has been made.

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

To demonstrate that he was denied his Sixth Amendment right to effective assistance of counsel, defendant must establish that his counsel's performance was constitutionally deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that this deficient performance prejudiced him by depriving him of fair trial, i.e., a trial whose result is reliable. U.S. Const. Amend. 6.

15 Cases that cite this headnote

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

To succeed on Sixth Amendment ineffective-assistance claim, defendant must show both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of proceeding would have been different. U.S. Const. Amend. 6.

1 Cases that cite this headnote

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

Defendant's failure to meet either prong of the *Strickland* test is fatal to an ineffective-assistance-of-counsel claim. U.S. Const. Amend. 6.

10 Cases that cite this headnote

[11] **Criminal Law** Deficient representation in general

Judicial scrutiny of counsel's performance, under the first, or "deficient performance," prong of *Strickland* test for ineffective assistance of counsel, must be highly deferential. U.S. Const. Amend. 6.

[12] **Criminal Law** Presumptions and burden of proof in general

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Criminal Law Deficient representation in general

Under the first, or "deficient performance," prong of *Strickland* test for ineffective assistance of counsel, court applies a strong presumption that counsel performed competently and asks only whether any identified acts or omissions were outside wide range of professionally competent assistance. U.S. Const. Amend. 6.

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

Habeas Corpus Counsel

On federal habeas review of an ineffective-assistance-of-counsel claim rejected on the merits by state court, federal court is doubly deferential, extending deference both to trial counsel's choices and to the state court's assessment of their reasonableness. 28 U.S.C.A. § 2254(d)(1).

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

Pivotal question for federal court, on federal habeas review of an ineffective-assistance-of-counsel claim rejected on the merits by state court, is whether the state court's application of the *Strickland* standard was unreasonable, which is different from asking whether defense counsel's performance fell below the *Strickland* standard. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

1 Cases that cite this headnote

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

Evaluating whether a state court's rules application was unreasonable, so as to permit federal habeas relief on a ground rejected on the merits by state court, requires consideration of the rule's specificity; the more general the rule, the more leeway state courts have in reaching outcomes in case-by-case determinations. 28 U.S.C.A. § 2254(d)(1).

[16] **Criminal Law** Strategy and tactics in general

Habeas Corpus Adequacy and Effectiveness of Counsel

Just as *Strickland* allows for a range of strategic choices by trial counsel, so too is there considerable latitude for state courts to determine the reasonableness of those choices without having their decisions rejected on federal habeas review. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

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

State court's determination that a claim lacks merit precludes federal habeas relief, as long as fair minded jurists could disagree on the correctness of the state court's decision. 28 U.S.C.A. § 2254(d)(1).

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

To successfully advance, as ground for federal habeas relief, an ineffective-assistance-of-counsel claim rejected on the merits by state courts, petitioner would have to show that no reasonable jurist could find that his counsel's performance fell within the wide range of reasonable professional conduct. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

1 Cases that cite this headnote

[19] **Criminal Law** Adequacy of investigation of sentencing issues

Counsel's Sixth Amendment obligation to render competent performance includes duty to make reasonable investigations of potential mitigating

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evidence or to make reasonable decision that makes particular investigations unnecessary. U.S. Const. Amend. 6.

[20] **Criminal Law** Preparation for trial

On any ineffective-assistance claim, attorney's decision not to investigate must be directly assessed for reasonableness under all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S. Const. Amend. 6.

[21] **Criminal Law** Preparation for trial

Counsel's duty to investigate, in order to render constitutionally effective assistance, does not necessarily require counsel to investigate every evidentiary lead. U.S. Const. Amend. 6.

[22] **Criminal Law** Preparation for trial

Under *Strickland*, strategic choices made by attorney after less than complete investigation are reasonable precisely to extent that reasonable professional judgment supports the limitations on the investigation. U.S. Const. Amend. 6.

[23] **Criminal Law** Presumptions and burden of proof in general

When courts are examining the performance of experienced trial counsel, for purposes of deciding an ineffective-assistance claim, the presumption that counsel's conduct was reasonable is even stronger. U.S. Const. Amend. 6.

[24] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

State court's determination that experienced defense counsel were not deficient in their mitigation investigation or presentation in capital murder case, in not uncovering and introducing additional evidence of defendant's mental illness, cognitive deficits, brain damage, and seizure disorder, or additional evidence of his troubled background and social history, was not an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of clearly established federal law, and would not be disturbed on federal habeas review; defense counsel conducted a substantial investigation both into defendant's mental problems and into his background and social history, such as by consulting with four different mental health experts and seeking and obtaining funds for multiple mental evaluations and tests, and presented significant evidence to jury on both fronts. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1, 2).

1 Cases that cite this headnote

[25] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

Even if defense counsel performed in constitutionally deficient manner at sentencing phase of capital murder case, in not discovering and presenting additional evidence of defendant's mental illness, cognitive deficits, brain damage, and seizure disorder, and in not presenting additional evidence of his troubled background and social history, state court's determination that defendant had suffered no prejudice on account of any of these alleged deficiencies in counsel's performance was neither contrary to nor an unreasonable application of clearly established federal law, nor was it based on unreasonable determination of the facts in light of the evidence presented, and thus did not warrant federal habeas relief; additional evidence was largely cumulative of evidence presented at defendant's trial, and aggravating evidence against him was substantial. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1, 2).

[26] **Criminal Law** Prejudice in general

To satisfy the “prejudice” prong of the *Strickland* test for ineffective assistance of counsel, it is not enough for defendant to show

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that counsel's errors had some conceivable effect on outcome of proceeding. U.S. Const. Amend. 6.

13 Cases that cite this headnote

[27] **Criminal Law** Prejudice in general
Criminal Law Strategy and tactics in general
Simple mistakes or strategic errors by counsel, or even serious errors, are insufficient to support a Sixth Amendment ineffective-assistance claim if, absent those errors, there is no reasonable probability that the outcome of case would have been different. U.S. Const. Amend. 6.

[28] **Criminal Law** Prejudice in general
"Reasonable probability" of a different result, of kind sufficient to satisfy the "prejudice" prong of the *Strickland* test for ineffective assistance of counsel, is a probability sufficient to undermine confidence in the outcome. U.S. Const. Amend. 6.

[29] **Criminal Law** Prejudice in general
"Prejudice" prong of the *Strickland* test for ineffective assistance of counsel asks whether it is "reasonably likely" that the result would have been different but for deficiencies in counsel's performance; 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 rarest case. U.S. Const. Amend. 6.

[30] **Criminal Law** Prejudice in general
Likelihood of a different result, of kind sufficient to satisfy the "prejudice" prong of the *Strickland* test for ineffective assistance of counsel, must be substantial and not merely conceivable. U.S. Const. Amend. 6.

[31] **Criminal Law** Death penalty cases
In capital sentencing context, *Strickland* "prejudice" inquiry asks whether there is reasonable probability that, absent counsel's errors, the sentencer would have concluded that balance of aggravating and mitigating circumstances did not warrant death. U.S. Const. Amend. 6.

[32] **Criminal Law** Presentation of evidence in sentencing phase
In applying the "prejudice" prong of the *Strickland* test for ineffective assistance of counsel in the capital sentencing context, courts reweigh the evidence in aggravation against the totality of available mitigating evidence; they examine all of the good and all of the bad, what was presented during the trial and what was offered later, to determine whether, viewed as a whole and cumulative of mitigation evidence presented originally, there is a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence. U.S. Const. Amend. 6.

[33] **Criminal Law** Prejudice in general
To determine whether a reasonable probability of a different outcome exists, of kind sufficient to satisfy the "prejudice" prong of the *Strickland* test for ineffective assistance of counsel, courts presume a reasonable decisionmaker. U.S.C.A. Const. Amend. 6.

[34] **Habeas Corpus** Federal Review of State or Territorial Cases
When state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, federal habeas court may not disturb state

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court's decision unless its error lies beyond any possibility for fair minded disagreement. 28 U.S.C.A. § 2254(d)(1).

[35] **Criminal Law** Curing error by other evidence of same fact

No prejudice can result from the exclusion of cumulative evidence.

[36] **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

Mitigating evidence that counsel did not discover or present at the penalty phase of capital murder case is merely cumulative, for purposes of ineffective-assistance claim, when it tells a more detailed version of the same story told at trial or simply provides more or better examples or amplifies the themes previously presented to the jury. U.S. Const. Amend. 6.

[37] **Habeas Corpus** Direct review; appeal or error

Claim that a state prisoner seeking federal habeas relief never raised on direct appeal, that state trial court had violated his procedural due process rights by failing to sua sponte hold a competency hearing, was procedurally defaulted and did not have to be addressed by federal habeas court, absent a showing of cause and prejudice or of a fundamental miscarriage of justice. U.S. Const. Amend. 14.

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

Habeas Corpus Cause and prejudice in general

When state court determines that a claim was defaulted on procedural grounds, federal habeas court reviews it on the merits only when petitioner shows either cause and prejudice for the default or a fundamental miscarriage of justice, i.e., that a constitutional violation has resulted in the conviction of someone who is actually innocent.

[39] **Habeas Corpus** Particular issues and problems

It was neither contrary to nor an unreasonable application of *Strickland* for state habeas court to find that state trial counsel did not perform in a constitutionally deficient manner in not contesting defendant's competency to stand trial, and that there was thus no prejudicially ineffective assistance of counsel sufficient to overcome, on cause-and-prejudice theory, petitioner's procedural default in not raising, on direct appeal, a claim that state trial court violated his procedural due process rights by not sua sponte holding a competency hearing; state habeas court reasonably rejected mental health expert's testimony that he advised defense counsel that prisoner was incompetent, as contrary to counsel's testimony and inconsistent with that expert's other statements, and absent anything to alert defense counsel to competency issue, it was not unreasonable to conclude that there had been no prejudicially ineffective assistance. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d)(1).

[40] **Habeas Corpus** Issues and findings of fact; historical facts; credibility

Determining the credibility of witnesses is the province and function of state courts, not of a federal court engaging in habeas review.

3 Cases that cite this headnote

[41] **Habeas Corpus** Mental competency, claims relating to

Habeas Corpus Mental competency; examination

Federal habeas petitioner's claim, that state trial judge violated his substantive due process rights by allowing him to stand trial when he

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was in fact incompetent, was separate from his claim that state trial judge violated his procedural due process rights by not sua sponte holding a competency hearing, and unlike the procedural claim, the substantive incompetency claim could not be procedurally defaulted. U.S. Const. Amend. 14.

[42] **Mental Health** Mental disorder at time of trial

Substantive test for competency to stand trial is whether defendant, at time of trial, had sufficient ability to consult with lawyer with reasonable degree of rational understanding, and whether he had a rational as well as factual understanding of the proceedings against him.

1 Cases that cite this headnote

[43] **Habeas Corpus** Mental competency; examination

Habeas petitioner raising substantive due process claim, that state trial judge violated his rights by allowing him to stand trial when he was in fact incompetent, bore the burden of demonstrating his incompetency at time of trial by preponderance of evidence. U.S. Const. Amend. 14.

[44] **Habeas Corpus** Particular issues and problems

Substantive due process claim on which state habeas court did not make a ruling would be reviewed de novo by the federal district court on federal petition for habeas relief. U.S. Const. Amend. 14.

[45] **Habeas Corpus** Clear error

Court of Appeals reviews factual finding made by district court on petition for federal habeas relief for clear error.

[46] **Habeas Corpus** Mental competency; examination

District court did not clearly err in finding that state prisoner petitioning for federal habeas relief was competent at time of his trial, and that state trial court did not violate his substantive due process rights by requiring him to stand trial; while it was true that prisoner did not always act in his own best interests, his state trial attorneys, who spent a significant amount of time with him, both believed him to be competent at time of trial, and of the many mental health experts who evaluated his condition at time of trial, only one opined that he was incompetent. U.S. Const. Amend. 14.

[47] **Criminal Law** Evidence

Contemporaneous assessment of trial counsel is particularly probative of defendant's competency to stand trial, because competency is primarily a function of defendant's role in assisting counsel in conducting the defense and defense counsel is thus in the best position to determine whether the defendant's competency is suspect.

[48] **Mental Health** Mental disorder at time of trial

Test for competency to stand trial is not whether defendant always acts in his own best interests; rather, it is whether he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding.

1 Cases that cite this headnote

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

Habeas Corpus Particular issues and problems

It was neither contrary to nor an unreasonable application of *Strickland* for state habeas court to find that state trial counsel did not perform in a constitutionally deficient manner in failing to object to trial court's decision

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to require him to wear a hidden stun belt under his clothing, and that there was thus no prejudicially ineffective assistance of counsel sufficient to overcome, on cause-and-prejudice theory, petitioner's procedural default in not raising, on direct appeal, a claim that state trial court violated his procedural due process rights by requiring him to wear the stun belt. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

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

Habeas Corpus Particular issues and problems

It was neither contrary to nor an unreasonable application of *Strickland* for state habeas court to find that state trial counsel did not perform in a constitutionally deficient manner in capital murder case in not objecting to allegedly improper comments by prosecutor, and that there was thus no prejudicially ineffective assistance of counsel sufficient to overcome, on cause-and-prejudice theory, petitioner's procedural default in not raising prosecutor's allegedly improper comments as issue on direct appeal; to extent that there were comments to which defense counsel should have objected, such as prosecutor's statement that petitioner was a cold-hearted, cold-blooded individual who could escape, and who would kill the jurors, state habeas court reasonably concluded that the petitioner was not prejudiced, given the overwhelming evidence against him. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d)(1).

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

Criminal Law Inferences from and Effect of Evidence

Prosecutor may argue both facts in evidence and reasonable inferences from those facts.

[52] **Habeas Corpus** Deprivation of fundamental or constitutional rights; miscarriage of justice

In federal habeas proceedings, district court must assess the prejudicial impact of an alleged constitutional error in a state criminal trial under the *Brecht v. Abrahamson* standard, 113 S.Ct. 1710 which asks whether an error had a substantial and injurious effect or influence on jury's verdict, regardless of whether the state appellate court applied the *Chapman* “harmless beyond a reasonable doubt” standard.

1 Cases that cite this headnote

[53] **Habeas Corpus** Prosecutorial and police misconduct; argument

Prosecutor's improper comment, in passing, on defendant's failure to testify when commenting on his videotaped statement could not have had a substantial and injurious effect or influence on jury's verdict, as required to provide basis for federal habeas relief, given the strength of the evidence against defendant, given the prosecutor's failure to urge or suggest that any negative inference should be drawn, and given the charge given to the jury by trial court, that the jury was not permitted to draw any negative inference from the defendant's failure to testify. U.S. Const. Amend. 5.

***902** Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:11-cv-01694-AT

Attorneys and Law Firms

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Before JORDAN, ED CARNES and MARCUS, Circuit Judges.

Opinion

MARCUS, Circuit Judge:

In this double homicide case, Askia Mustafa Raheem was convicted of murdering Brandon Hollis and his mother, Miriam Hollis, and sentenced to death by a Superior Court judge in Georgia. He urges us to overturn his convictions and the ensuing death sentence arguing, among other things, that he received ineffective assistance of counsel at the sentencing phase of his trial because his lawyers failed to investigate and present to the jury additional mitigating evidence about his mental health and social history. Alongside this claim, Raheem says the state trial court violated procedural due process by failing to hold a hearing to determine whether he was competent to stand trial. Because this claim was never raised in the trial court, he attempts to overcome his default by arguing that his counsel were ineffective in not raising the claim. He adds that regardless of the failure to conduct a hearing, his substantive due process rights were violated because he was in fact tried while incompetent.

Raheem also says that his due process rights were violated when he was forced to wear a stun belt during trial, and when the prosecutor made impermissible arguments about his future dangerousness. Because these claims were procedurally defaulted too, he argues again that his counsel were prejudicially ineffective. Finally, Raheem argues that the prosecutor improperly mentioned his failure to testify at trial, denying him the privilege against self-incrimination ***903** afforded by the Fifth Amendment.

The Georgia Supreme Court denied Raheem's Fifth Amendment claim on direct review. The state habeas court then denied on the merits Raheem's ineffective-assistance-of-counsel claims and found that his claims about competency and being required to wear a stun belt were procedurally defaulted. The denial of these claims was neither contrary to nor an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the overwhelming evidence presented by the state. The district court reviewed for the first time Raheem's substantive due process claim. It did not clearly err when it found that Raheem was competent to stand trial. Accordingly, we affirm.

I.

These are the essential facts and procedural history surrounding this § 2254 petition. In the afternoon of April 2, 1999, Raheem was driving his girlfriend Veronica Gibbs's blue Honda in and around Clayton County, Georgia, just south of Atlanta. He stopped to pick up his friends Michael Jenkins and Dione Feltus from their homes. Later, he dropped Feltus off at work at five o'clock in the afternoon. Raheem decided to go target shooting with Jenkins and another friend, Brandon Hollis, whom Jenkins had never met. Raheem and Jenkins drove to Gibbs's apartment, where Raheem was living, and retrieved a .380-caliber handgun from his bedroom. As this tragic story developed, Raheem then pulled to the side of the road and twice fired his weapon outside the window. Raheem claimed that he wanted to be sure the weapon would not jam.

On his way to pick up Brandon Hollis, Raheem stopped at a Kroger supermarket, where he purchased a box of black trash bags. Raheem and Jenkins picked up Brandon. They drove down a dirt road in Henry County, Georgia, some five minutes from Brandon's home, and they walked into the woods as it started to get dark. Raheem shot the firearm at a tree, but missed his target. Jenkins then took the weapon, intending to fire it. But Brandon suggested that they find another location because the gun was "loud." As Brandon turned and started to walk to the car, Raheem grabbed the firearm. Raheem instructed Brandon not to walk so quickly because he did not have a flashlight and Brandon might step in a puddle and get mud in his girlfriend's car. Jenkins looked down at his shoes to see if they were muddy. When he looked up, Raheem "had the gun at the back of Brandon's head, and he shot him." Brandon fell to the ground. Jenkins asked if Brandon Hollis was dead. Raheem responded, "No, but he is on his way out." Raheem stopped to take Brandon's watch, remarking, "I guess you ain't going to be needing this watch no more." He also stole Brandon's keys and his wallet. When Raheem and Jenkins returned to the car, Raheem told his friend, "I'm glad you didn't run."

Raheem and Jenkins proceeded to Brandon Hollis's home. Raheem used Brandon's keys to open the door. Before entering, Raheem told Jenkins to bring a trash bag into the house. When they walked in, Brandon's mother, Miriam Hollis, was sitting in a chair reading a book. As Raheem entered brandishing the firearm, Miriam jumped up. Raheem fired at her and jumped behind a wall. Raheem yelled, "Get down, this is a robbery." As Miriam started to lie down on

the floor on the other side of the chair, Raheem reached over the chair and shot her. Miriam Hollis fell, blood seeping out of her head onto the carpet. Jenkins handed the garbage bag to Raheem, who placed it over her head to ***904** contain the flow of the blood. After making sure no one else was in the house, Raheem grabbed the keys to Miriam's Lexus. Raheem explained that he killed Miriam Hollis because he had paid her $8,000 for the Lexus and she refused to give him the car. Raheem popped the trunk of the Lexus, and he and Jenkins placed Miriam's body inside. Raheem tried to clean the blood off the carpet with a mop.

Later, Raheem and Jenkins visited Raheem's girlfriend, Veronica Gibbs, at a B.P. gas station where she worked. Raheem brought Gibbs outside the station, popped the trunk of the Lexus, and showed her Miriam's body. Raheem and Jenkins then went to eat at a Wendy's, but Jenkins could not keep any food down. The two rode around in Miriam's Lexus until midnight and then picked up Gibbs from work. She, Raheem, and Jenkins drove back to the Hollis home in the Lexus. Gibbs and Raheem proceeded to burglarize the house.

At around 4 a.m., Raheem and Jenkins disposed of Miriam's body. They drove to some train tracks and took her body out of the trunk. Raheem dragged the body along the tracks. They covered Miriam Hollis with wood and debris. Raheem said he wanted to burn the body, but Jenkins advised against it. Nevertheless, Raheem doused Miriam's body with alcohol or gasoline -- Jenkins was not sure which -- struck a match, and set the body ablaze. The two of them then drove back to Gibbs's house and went to sleep. A few days later, Raheem gave the firearm to a friend (Tamika Woods), asking her to hide it. She threw the weapon into a sewer, where it was later recovered by the police.

Raheem was indicted in Henry County, Georgia on two counts of malice murder, four counts of felony murder (each of the murders were committed in the course of an aggravated assault and both were committed with firearms while Raheem was a felon in possession of a firearm), two counts of armed robbery, and one count of burglary. See Ga. Code Ann. §§ 16-5-1(a), (c), 16-7-1(a), 16-8-41(a) (1999). During the guilt phase of Raheem's trial, the state presented extensive evidence of the brutal crimes, much of it from the testimony of Michael Jenkins. Veronica Gibbs and Dione Feltus testified that Raheem had confessed to murdering both Brandon and Miriam Hollis, and Gibbs confirmed that Raheem had shown her Miriam's body in the trunk of the Lexus on the night of the murders.

The prosecution also called a number of police officers, crime scene investigators, and forensic analysts to corroborate the lay witnesses' accounts. Among other things, the state presented evidence that Brandon and Miriam Hollis were both killed by gunshot wounds to their heads, that the firearm used in the crimes was the one Woods had dumped in the sewer, that a box and ammunition for the type of handgun used in the murders was found in Raheem's bedroom in Gibbs's apartment, and that DNA from Brandon and Miriam Hollis was found in blood on shoes known to be worn by Raheem. The state further introduced evidence that missing items from the Hollis home (including Miriam Hollis's checkbook) were found in Gibbs's apartment, that Miriam Hollis's stolen Lexus was found within walking distance of Gibbs's apartment, and that Miriam Hollis's burned body was discovered at the railroad tracks across the street from the home of Raheem's cousin.

In addition, the prosecution introduced a videotape of an interview conducted on April 6, 1999, between Raheem and the police. Raheem described substantially the same chain of events that Jenkins had recounted, but, notably, Raheem claimed that Jenkins was the shooter. Detective ***905** Renee Swanson testified that after Raheem made the videotaped statement, he took her to the location of Brandon's body in the woods. The jury convicted Raheem on all counts.

At the penalty phase, the prosecution called a number of jail officers who testified about various contraband items that had been found in Raheem's possession at the jail. The defense offered mental health experts Dr. Charles Nord and Dr. Jack Farrar in mitigation. Farrar had testified on Raheem's behalf at the guilt phase as well. Raheem's father, Askia Raheem, and his mother, Elaine Raheem, also gave testimony on behalf of their son. The jury unanimously recommended that Raheem be sentenced to die for the malice murder of Miriam Hollis. On each remaining murder count, the jury recommended life in prison without parole. The trial judge sentenced Raheem to death for the malice murder of Miriam Hollis, to life in prison for the remaining murder counts and the armed robbery counts, and to twenty years in prison for the burglary count, all sentences to run consecutively to one another.

Raheem directly appealed to the Georgia Supreme Court. Georgia's high court affirmed his convictions and the ensuing sentences on March 11, 2002. Raheem v. State, 275 Ga.

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87, 560 S.E.2d 680, cert. denied, Raheem v. Georgia, 537 U.S. 1021, 123 S.Ct. 541, 154 L.Ed.2d 429 (2002), reh'g denied, 537 U.S. 1150, 123 S.Ct. 957, 154 L.Ed.2d 858 (2003).[1] Relevant for our purposes, the Georgia Supreme Court considered Raheem's claim that his Fifth Amendment right had been violated when the prosecutor commented, in closing argument, that Raheem had failed to testify at trial. Id. at 685. The Georgia Supreme Court concluded that although his constitutional right had been violated, the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Id.

Raheem first collaterally attacked his convictions in Butts County, Georgia. The state habeas court conducted an extensive evidentiary hearing in late January 2008. Raheem offered additional mental health evidence. First, Dr. Ruben Gur testified. Another defense expert, Dr. James Evans, presented an affidavit and the test results from his examination of Raheem. Additional affidavits were offered from other mental health experts who had consulted with the defense team before the trial: Dr. Jack Farrar (the primary mental health expert who aided the defense), Dr. Charles Nord, and Dr. Dennis Herendeen. Raheem's habeas counsel also presented a supplemental affidavit from Dr. Melissa Carran. In rebuttal, the state called its own mental health expert, Dr. Daniel Martell. The state habeas court took live testimony from Raheem's trial lawyers -- Gregory Futch and Wade Crumbley -- as well as from the state's chief investigator, Renee Swanson, and from the district attorney who prosecuted Raheem, Tommy Floyd. Finally, the court reviewed affidavits offered by Raheem's family members and friends.

On February 13, 2009, the Superior Court judge denied Raheem's petition, adopting nearly verbatim a 106-page proposed order submitted by the state. In relevant part, the state habeas court determined that defense counsel were not deficient in investigating or preparing for the guilt or penalty phases of his trial, nor was Raheem prejudiced by counsel's performance. ***906** The court found that trial counsel had "conducted a thorough investigation" into the available mitigation evidence and "developed a reasonable strategy of mitigation." It concluded that "while there is some evidence [in the postconviction record] that Petitioner's brain does not function normally, contrary to Petitioner's assertions, there is not consensus as to what that actually means and what, if any, affect [sic] that has on Petitioner's behavior on the night of the crime, nor its influence on the decision of the jury." The state court also rejected the claim that defense counsel were ineffective for not offering the additional theory that Raheem suffers from some kind of seizure disorder. The court observed that multiple mental health experts did not discern any evidence of the disorder. Nor was the proffered evidence conclusive. Finally, the state habeas court rejected Raheem's claims about the use of a stun belt at trial, again finding no deficient performance nor any prejudice.

The Georgia Supreme Court summarily denied Raheem's application for a certificate of probable cause to appeal the denial of his habeas petition, and, on May 23, 2011, the Supreme Court denied his petition for writ of certiorari. Raheem v. Hall, 563 U.S. 1010, 131 S.Ct. 2905, 179 L.Ed.2d 1250 (2011).

The next day, Raheem turned his sights on the federal district court, filing this § 2254 petition in the United States District Court for the Northern District of Georgia, raising many of the same claims. Applying the deference mandated by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the district court concluded that none of the state court's findings were contrary to or an unreasonable application of clearly established Supreme Court law, nor were they the product of unreasonable determinations of fact in light of the evidence presented.

The district court reviewed de novo one remaining claim -- that Raheem was not competent to stand trial. First, the district court determined that Raheem was not entitled to an evidentiary hearing on the claim, pursuant to 28 U.S.C. § 2254(e)(2). Then, after examining all of the evidence placed in the record, it concluded that Raheem was competent to stand trial.

The district court granted a certificate of appealability ("COA") on these issues:

1. Ineffective assistance of counsel at the penalty phase of his capital trial by his counsel unreasonably failing to investigate and present evidence of Raheem's mitigating background and brain damage.

2. Violation of his Fifth Amendment privilege against self-incrimination when the prosecutor commented, during closing arguments, on Raheem's failure to testify.

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3. Ineffective assistance of counsel in failing to object to the prosecutor's invoking his own expertise, injecting non-record evidence into the proceedings, and telling the jurors that petitioner would kill them if he was not sentenced to death.

4. Raheem was incompetent to stand trial, the trial court failed to hold a competency hearing, and counsel were prejudicially ineffective for failing to raise the claim at trial or on direct appeal.

5. Prosecutorial misconduct deprived Raheem of due process and a fair trial, specifically through the prosecutor presenting false testimony and withholding Brady evidence at the guilt and penalty phases. [2]

***907** This Court granted in part a motion to expand the COA, adding one issue:

> Whether the district court erred in denying Appellant's Sixth Amendment claim that his trial counsel unreasonably, prejudicially, and falsely showed and told the jurors that Petitioner was dangerous.

II.

[1] We review de novo a district court's denial of a habeas corpus petition. McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). Because Raheem filed his federal habeas petition after April 24, 1996, this case is governed by AEDPA. [3] "Under AEDPA, if a state court has adjudicated the merits of a claim -- as the state court did here -- we cannot grant habeas relief unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1309 (11th Cir. 2015) (quoting 28 U.S.C. § 2254(d)).

[2] **[3]** "Under § 2254(d)(1)'s 'contrary to' clause, we grant relief only 'if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.' " Jones v. GDCP Warden, 753 F.3d 1171, 1182 (11th Cir. 2014) (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "Under § 2254(d)(1)'s 'unreasonable application' clause, we grant relief only 'if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' " Id. (alteration in original) (quoting Williams, 529 U.S. at 413, 120 S.Ct. 1495).

[4] **[5]** The second prong of § 2254(d) -- that an adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding -- also "requires that we accord the state trial court substantial deference." Brumfield v. Cain, 576 U.S. 305, 314, 135 S.Ct. 2269, 192 L.Ed.2d 356 (2015). "If '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.' " Id. (alteration and ellipsis in original) (quoting Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). In addition, on AEDPA review, "a determination of a factual issue made by a State court shall be presumed to be correct" -- a presumption the petitioner has ***908** the burden of rebutting "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). [4] "Clear and convincing evidence is a demanding but not insatiable standard, requiring proof that a claim is highly probable." Nejad v. Att'y Gen., State of Ga., 830 F.3d 1280, 1289 (11th Cir. 2016) (quotations omitted). "Highly probable is a standard that requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt." Id. (quotations omitted, alteration adopted).

[6] **[7]** As for Raheem's substantive competency claim, we review the district court's factual findings for clear error, and its legal conclusions de novo. See Lawrence v. Sec'y, Fla. Dep't of Corr., 700 F.3d 464, 481 (11th Cir. 2012) (setting forth the standard for a substantive competency claim raised on federal habeas and reviewed by the district court de novo,

and noting that the petitioner "has not met that high burden, especially because he must show that the district court's finding that [petitioner] was competent was not just wrong, but clearly erroneous"). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Jenkins v. Comm'r, Ala. Dep't of Corr., 963 F.3d 1248, 1264 (11th Cir. 2020) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

III.

The main thrust of Raheem's arguments on appeal is that his trial attorneys were prejudicially ineffective by failing to further investigate and present to the jury evidence of his mental illness, cognitive deficits, and brain damage, and by failing to investigate and present evidence of additional mitigating family background and social history. The state habeas court disagreed. So do we. The state court's rejection of these claims was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

[8] [9] [10] To successfully show ineffective assistance of counsel, Raheem must establish that counsels' performance was constitutionally deficient -- that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" -- and that the deficient performance prejudiced the defendant, depriving him of a "fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In other words, Raheem must show that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 688, 694, 104 S.Ct. 2052; accord Knowles v. Mirzayance, 556 U.S. 111, 124, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009); Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); Williams, 529 U.S. at 390, 120 S.Ct. 1495; Darden v. Wainwright, 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The failure to meet either Strickland prong is fatal to the claim. Strickland, 466 U.S. at 700, 104 S.Ct. 2052.

[11] [12] [13] [14] As for the first prong -- counsel's performance -- "[j]udicial scrutiny ... ***909** must be highly deferential." Id. at 689, 104 S.Ct. 2052. We apply a "strong presumption" that counsel performed competently and ask only whether any "identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 689–90, 104 S.Ct. 2052. And our review under AEDPA is doubly deferential: we extend deference both to the trial counsel's choices and to the state court's assessment of their reasonableness. Harrington v. Richter, 562 U.S. 86, 105, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). Harrington therefore affords "double deference to the state court ruling on counsel's performance." Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d 1248, 1262 (11th Cir. 2016). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable[,]" which "is different from asking whether defense counsel's performance fell below Strickland's standard." Harrington, 562 U.S. at 101, 131 S.Ct. 770.

[15] [16] [17] [18] Indeed, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Just as Strickland allows for a range of strategic choices by trial counsel, so too is there considerable latitude for state courts to determine the reasonableness of those choices. See Shinn v. Kayer, ––– U.S. ––––, 141 S. Ct. 517, 523, 208 L.Ed.2d 353 (2020). Accordingly, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 562 U.S. at 101, 131 S.Ct. 770 (quoting Yarborough, 541 U.S. at 664, 124 S.Ct. 2140). For Raheem to prevail, then, he would have to show that no reasonable jurist could find that his counsel's performance fell within the wide range of reasonable professional conduct.

[19] [20] [21] [22] In addition, it is well established that counsel's obligation to render competent performance includes "a duty to make reasonable investigations" of potential mitigating evidence "or to make a reasonable

decision that makes particular investigations unnecessary." Wiggins, 539 U.S. at 521, 123 S.Ct. 2527 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). In any ineffectiveness case, an attorney'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." Id. at 521–22, 123 S.Ct. 2527 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). But counsel's duty to investigate "does not necessarily require counsel to investigate every evidentiary lead." Williams v. Allen, 542 F.3d 1326, 1337 (11th Cir. 2008). "Under Strickland, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. (quotations and citations omitted); compare Strickland, 466 U.S. at 699, 104 S.Ct. 2052 (stating that counsel's "decision not to seek more character or psychological evidence than was already in hand was ... reasonable"), with Porter, 558 U.S. at 40, 130 S.Ct. 447 (noting that counsel "failed to uncover and present any evidence of [the petitioner's] mental health or mental impairment, his family background, or his military service," and "[t]he decision not to investigate did not reflect reasonable professional judgment").

A.

1.

[23] **[24]** We begin by painting a full picture of trial counsel's extensive investigation ***910** of the available mitigating evidence and the presentation of this evidence to the jury. Raheem's lawyers, Wade Crumbley and Gregory Futch, aided in the investigation by attorney Tom Carr, were experienced trial attorneys who each had some familiarity with death penalty cases. "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc); see also Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("[T]he more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.") (quotations omitted).

Futch and Crumbley had each been practicing law for over fifteen years. Crumbley had worked on five death penalty cases and investigated or supervised investigations in each one, though he had never tried a death penalty case. He had also defended a number of non-capital murder trials, and had experience handling habeas cases. Futch had worked as an assistant district attorney and in private practice doing criminal defense, and had handled over one hundred felony trials, including "several murder cases," and "countless misdemeanors." Futch had also handled two death penalty cases -- one as a prosecutor and one as a defense attorney.

When defense counsel were appointed in July 1999, they quickly began investigating Raheem's background and mental health. Crumbley testified that he and Futch "tried to get all of the records we could from his educational past, his medical past, and his counseling past," in addition to his prison records; "[w]e got every kind of record we could think of." Crumbley added that he "tried to find every member of his family [he] could, to see if they were willing to cooperate." Crumbley also "tried to go back and ... interview or at least talk to all of the mental health professionals and counselors who had talked to [Raheem] in the past," and "[s]ome of those people became part of the defense team."

To learn about Raheem's family life, counsel met with Raheem's father, Askia, his mother, Elaine, his sister, Jameelah, his grandfather, and other family members on multiple occasions. Crumbley testified that Raheem's family "indicated willingness to do anything they could to try to help save him." Crumbley talked "at length" with Raheem's parents about "everywhere he'd been to school, everywhere he'd ever been to the doctor, everywhere he'd ever been for counseling." At one point a few months after an initial appointment, trial counsel spoke with Raheem's father Askia because they were concerned about Raheem's "apparent lack of concern." Askia said that he and Elaine had "always been concerned [and] tried to help him."

During their meetings, Askia told counsel about several troubling instances when Raheem was growing up. First, Askia recounted that when Raheem was in kindergarten, he left school and caught a bus that took him downtown. When he arrived downtown, he told people that he was from out of state and needed to get home. Counsel further learned from Askia that Raheem shot himself in the leg about three

years before murdering Brandon and his mother. Raheem claimed that someone jumped him and shot him. Askia added that several times Raheem took a loaded nine-millimeter gun to school on the bus, carried the weapon around other children, stole money from a safe and then came up with "tall tales." Askia, Elaine, and Jameelah said that as a child, Raheem had injured ***911** his head on three occasions. His family also reported that he had "always been strange," had "multiple personalities," and described him as "kindhearted but careless [and] heartless." Raheem's paternal aunt offered that Raheem's behavior changed from a "respectful, loving child" to having "a love of guns [and] violence" when he was about twelve. Family members also told counsel that he had attempted suicide three or four times.

Trial counsel generally were aware that Raheem's mother Elaine had been ill, and Raheem's medical records reported that Elaine had a "history of depression." Counsel also knew that Raheem had attempted suicide after his mother's mental breakdown. The defense lawyers further learned that Askia had resisted the treatments doctors recommended for Raheem when he was hospitalized following that suicide attempt. Elaine explained that Askia had "faded out of the picture after the marriage broke down."

At the same time counsel were gathering information about Raheem's family life and upbringing, they also undertook an investigation into his mental health and medical history. As early as October 1999 -- some fifteen months before trial -- counsel met with their first mental health expert, licensed psychologist Dr. Jack Farrar, who had treated Raheem after a suicide attempt at age fifteen. Before Raheem's trial, Farrar met with him "on many occasions" and told counsel that, based on these interactions, he "believed that there was some sort of abnormality with [Raheem's] brain." Farrar recommended that defense counsel retain a neuropsychiatrist to do a full battery of neuropsychological testing. Acting upon this recommendation, in April 2000, counsel sought and obtained funds from the trial court to retain Dr. Jeffrey Klopper, a neurologist and psychiatrist, whom Farrar described as an "ideal candidate" to conduct further investigation. In August 2000, Klopper met with Raheem and evaluated him.

Around the same time, Dr. Dennis Herendeen, still another licensed psychologist retained by defense counsel, met with Raheem and administered several tests designed to reveal evidence of organic brain damage. Dr. Herendeen used the Kaufman Short Neuropsychological Assessment Procedure ("K-SNAP"), which tests five or six areas of brain function; an Aphasia Screening Test, which "looks for impairment in language" -- namely, the "ability to understand what people are saying" and express oneself through language and writing; and the Trail Making Test, Parts A and B. In addition, defense counsel contacted yet another licensed psychologist, Dr. Charles Nord, who had performed tests on Raheem's brain functioning when he was fifteen years old at Charter Peachford Hospital. They asked Nord to "express an opinion" about whether these tests suggested neurological damage. Herendeen and Nord both conducted the Bender-Gestalt test, which assesses cognitive development and screens for brain damage.

After the testing and evaluations were completed, about two months before trial, defense counsel spoke with Drs. Klopper and Farrar, who informed them that Klopper and Herendeen had not found evidence that Raheem suffered from brain damage. Rather, the doctors suggested that, in order to look further for evidence of brain damage, Raheem should take a magnetic resonance imaging ("MRI") scan and then a positron emission tomography ("PET") scan. Counsel's contemporaneous notes indicated that an MRI was needed to "check for possible brain lessions [sic]," which could cause Raheem's impulsivity and could affect "the ability to distinguish between ***912** right [and] wrong." These notes also mentioned the possibility of a bipolar disorder diagnosis and the possible need for a quantitative electroencephalogram ("EEG"), though there is no testimony that this test was ever recommended. Klopper admitted to counsel that it was unlikely the MRI and PET scan would show anything further, but counsel "thought [they] needed to do it anyway and not rely solely on that."

Defense counsel again sought funds from the trial court and scheduled an MRI and a PET scan. At the collateral hearing, counsel told the judge that they were looking for evidence of organic brain damage: "[Dr. Klopper] and Dr. Farrar have consulted and the feeling is that there is a need to have a diagnostic test done, which is referred to as a PET scan ... of Mr. Raheem's brain, to determine whether there is any evidence of brain damage or of impaired functions of certain parts of the brain which might be attributable to head trauma in his past and which might in some way have a causal link with some of the psychiatric problems that he's experienced."

The MRI was performed on January 19, 2001, at Henry Medical Center. The interpreting physician concluded his report with the overall impression that Raheem had a "normal

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brain MRI with no evidence of acute intracranial injury." Thereafter, Dr. Klopper ordered the PET scan to be conducted at Emory Hospital, noting on the order forms that the "[p]atient has history of major depression, suicide attempts, and delusional thought processes. History also indicates childhood head trauma. Rule out functional abnormality." The PET scan was scheduled at Emory for 11:30 a.m. on February 6, 2001, during voir dire. That day, however, Raheem refused to get out of the transport at Emory to have the PET scan done. Crumbley unequivocally testified at the state postconviction hearing that aside from the PET scan, there were no "evaluations or tests that the mental health experts told [counsel] needed to be done that [counsel] did not do."

By the time of trial, all four of defense counsel's mental health experts had performed testing, Raheem had undergone an MRI, and the experts had analyzed the results of the tests. All four experts and their testing and reports indicated that the doctors had nothing helpful to offer the defense about organic brain damage. At that point, according to Crumbley, the defense team chose to forego Klopper's testimony because he would have testified that he found no evidence of organic brain damage and because he was "very skeptical" that the MRI or PET scan would have revealed anything. Counsel did, however, call Drs. Farrar and Nord to testify on Raheem's behalf.

During the guilt phase of the trial, defense counsel called Dr. Farrar, who testified extensively about Raheem's serious mental illnesses -- including major depressive disorder, multiple suicide attempts, borderline personality disorder, and narcissistic and antisocial features -- largely in support of a theory that Raheem had falsely confessed to the crimes due to his mental health problems. [5] Farrar told the jury he first met Raheem at Fairview Day Hospital in August 1994 after Raheem had attempted suicide at age fifteen and had ***913** been released from Dr. Nord's care at Charter Peachford Hospital. Dr. Farrar described Raheem's program at Fairview as "a very intense outpatient hospital program," that Raheem attended instead of school. Farrar summarized the psychological tests he had performed in 1994, and noted that Dr. Nord had administered similar tests around that time.

Dr. Farrar retested Raheem about five years later, after his arrest for the murders, and found that the results were "extremely parallel, almost identical over time" and the "personality problems were almost exactly the same." Farrar described Raheem as "a young man that is very, very depressed," and who exhibits "a great deal of suspiciousness and paranoia," including "hypervigilance." Farrar added that individuals like Raheem with borderline personality disorder sometimes "push themselves away" from others, and when they do so, "they get real angry and sometimes real verbally hostile or get the other person to be verbally hostile with them."

According to Farrar, Raheem's personality disorder also led him to tell stories, including his involvement in committing crimes. Farrar told the jury that Raheem "is so depressed, so much dislikes himself, that he attempts to get people to take him on, to beat him up," by exhibiting a "real false bravado." Farrar said:

> He puts out this persona, or this kind of image of himself, that he wants people to buy that is supposed to be scary, that is supposed to be frightening. And he tries to make people back off. And so he tries to control situations by being outlandish, by developing these crazy, often times frightening stories and often times admitting to crimes which I don't believe he has conducted or he has done to feel bigger than he is.

When asked by Raheem's counsel whether it was plausible that Raheem would falsely admit to his girlfriend that he had committed a murder that he did not in fact commit, Farrar responded, "Oh, absolutely. That is part of his modus operandi, yes. Exactly." Finally, Raheem's counsel asked whether there was a delusional component to Raheem's mental illness, which Farrar confirmed: Raheem "has a whole world that sounds delusional [if] you listen to it. He calls it the place that he goes to."

During the penalty phase of Raheem's trial, defense counsel called both Drs. Nord and Farrar. Dr. Nord, who had treated Raheem at Charter Peachford Hospital after his 1994 suicide attempt, had diagnosed Raheem with major depression and oppositional defiance disorder. Nord's impression of Raheem at fifteen was of a deeply troubled young man: "[Raheem] is a young man at risk. He's depressed, continues to have suicidal ideation, gets disorganized easily and is quite impulsive. At times he doesn't care what happens to him. He will continue

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to be at risk until one gets control of his depression, agitation, and suicidal ideation."

Nord testified that he evaluated Raheem again in January 2001, in preparation for trial. Nord told the jury that Raheem's mental illness had worsened since 1994; he was still depressed, but by 2001 he showed "borderline personality characteristics, because he would dissociate, he would go into himself." He was "more distant and distractible," and would "zone out and move into another world, which he had control of." Nord explained that "borderline" means "he's on the verge of becoming more psychotic [meaning he hallucinates], but he's still within some range of reason." Raheem felt he could "disappear into that world," which he found comforting.

On cross-examination, Nord agreed that Raheem's other world was like a "daydream" or a "fantasy world," and that most people in jail charged with crimes are ***914** depressed. The state pressed Nord on his oppositional defiance disorder diagnosis, asking, "That's pretty self-descriptive, isn't it? He's defiant of authority?" Nord replied, "Yes. He had a lot of issues with authority." When Nord told the prosecutor he had not observed vindictiveness in Raheem, the prosecutor asked if Nord was aware that Raheem had threatened to kick a jailer in the "rear end" and had threatened to kill the prosecutor and his own girlfriend for their roles in the trial.

The defense recalled Dr. Farrar at the sentencing phase. Farrar testified that he'd been deeply frustrated when the managed care company stopped paying for Raheem's treatment at Fairview Day Hospital back in 1994, and he even insisted that the clinic start treating Raheem for free, because Raheem was still suicidal and had "severe problems" the clinic could address. Nevertheless, Raheem's treatment was curtailed and the clinic discharged him. Farrar told the jury that Raheem wanted to die, that he "just doesn't want to live, hasn't wanted to live for a very long time." Farrar opined that if Raheem could have stayed at the center for further treatment, "we would have gotten this young man well." Farrar added that although Raheem played the "tough guy," he had a softer side, a concern for other people, and an ability to attach to people.

The defense also called Raheem's father, Askia, and his mother, Elaine, to testify at the sentencing phase. Notably, Raheem initially had barred counsel from putting his parents on the stand. And Raheem never allowed counsel to call his sister. According to Raheem's counsel, Raheem "put some restrictions on me as to who I could call and what I could ask at the sentencing phase," and "limited me severely in what I was able to present." Only after "a lot of begging" and persuading members of the press not to film Raheem's relatives did Raheem agree to let Crumbley call his parents to testify.

While on the stand, Askia expressed how sad he was about the crimes his son committed, adding that he loved his son and did not want him to die. He agreed with Dr. Farrar that Raheem wanted to die and said that although he had "given a lot of thought about this," he did not know why. He relayed that he and his wife had been separated for about three years. When prompted by counsel to "tell the [j]ury something good about" Raheem, Askia recounted a time when he had a cat and Raheem fought him "harder than anything" about keeping the cat in the garage rather than outside. He also said that Raheem could not stand to see him hit a squirrel in the road. He testified, "I can't remember him talking back to me. That's the truth. ... I don't ever remember him having an act of violence against anybody."

Askia also described the incident when five- or six-year-old Raheem had boarded a city bus instead of going home from school, and how a bus driver had informed Askia that they were holding a boy at the transit center who claimed to have caught a bus from out of state. It was at that time that Askia first noticed "something wasn't quite right" with his son. On cross-examination, the prosecutor brought out that Askia had lived in the home with Elaine during "most of [Raheem's] life," but Askia noted that Raheem left home when he was about fifteen or sixteen and Askia "sort of lost track of him" after that.

Raheem's mother Elaine testified next. During her testimony, she became emotional, which prompted Raheem to yell at her in an attempt to get her to step down. When Elaine regained her composure, she testified that the crimes were extremely unlike Raheem, that he had always been well-mannered to her, had never raised a hand against her, and had never used profanity. ***915** She said that Raheem had helped her whenever she was sick, cooking for her and driving her. When he was a child, he had always been "very loving, very loving, even more loving than my daughter was." Elaine was shocked that Raheem would have committed the crimes he was charged with. After Elaine finished testifying, Crumbley asked all of Raheem's family members in the courtroom to stand up so the jury could see them.

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In closing argument at the penalty phase, Raheem's counsel expressly argued that the unrebutted testimony of Drs. Nord and Farrar established that Raheem was mentally ill and that the jury should consider this as a mitigating factor. Counsel conceded that Raheem was not incompetent or insane, but said he was "not as blameworthy as a normal person who was not mentally ill, who had committed these same crimes. Sometimes his thinking is delusional and confused. Sometimes he believes things that aren't real. And a lot of times he hates himself so much that he wants to die." Counsel noted that Raheem had never gotten the mental help he needed because his insurance would not cover it. Counsel urged that Raheem had "good in him," was "capable of concern for others," and could potentially get the medical help he needed in prison. Finally, counsel pleaded with the jury to sentence Raheem to life in prison without the possibility of parole rather than to death.

2.

At the state postconviction hearing, Raheem's counsel presented newly obtained evidence of mental illness in order to challenge his trial counsel's performance. The strongest opinion testimony came from Dr. Ruben Gur, a neuropsychologist and professor at the University of Pennsylvania, who testified in part based on a battery of neurophysical tests he conducted. He also reviewed the testing done by Drs. Farrar, Herendeen, and Nord, as well as MRI data collected by a radiologist in 2006, and neuropsychological testing performed by another defense expert, Dr. James Evans, in 2005.

Analyzing the MRI data, Dr. Gur opined that Raheem's temporal lobe exhibited severe abnormality. His left hippocampus was between two and two-and-a-half standard deviations smaller than normal, and his amygdala was between three and four standard deviations smaller than normal. His whole frontal lobe was "reduced in volume." Notably, however, this MRI data had produced a normal initial reading. Only in later analysis of the MRI did Gur uncover evidence of brain damage, contrary to the reading he'd done using the visual image produced by the MRI. Gur explained that this could happen with MRI images of diffuse brain abnormalities. Gur opined that Raheem's brain deficits could have affected his culpability for the crimes and his competence at trial because they impaired his "ability to correctly perceive events, interpret events, exercise suitable judgment, and to plan and respond appropriately." He also concluded that "Raheem suffers from schizophrenia or schizophrenic-like psychosis, which results in distorted perceptions of reality and renders him incapable of interpreting and responding appropriately to the world around him."

Another expert, Dr. Evans, performed postconviction neuropsychological testing on Raheem and submitted an affidavit agreeing that Raheem suffers from brain damage. Evans opined that the neuropsychological testing he performed in May 2005 showed "clear indications of brain damage/dysfunction," that his testing was "indicative of rather widespread cortical dysfunction, probably greatest in temporal areas."

***916** Drs. Herendeen and Nord also offered postconviction affidavits, in which they claimed that their pretrial and 1994 results were "consistent" with a finding of organic brain damage. Herendeen noted: "When screening tests produce results consistent with organic brain damage, usually a full neuropsychological battery is then administered by a neuropsychologist, not a psychologist." Yet Herendeen did not say he recommended further testing to Raheem's counsel before trial. Indeed, defense counsel's notes from a December 4, 2000 meeting indicate that Herendeen had gone to see Raheem the day before "according to [Farrar]" and that "[Farrar] didn't think that [Herendeen] found anything to help [the defense]." As for Nord, he claimed in his postconviction affidavit that his 1994 tests were consistent with brain damage, but he never mentioned brain damage at Raheem's trial, where he admittedly "testified regarding [his] impressions" of Raheem. Rather, Dr. Nord's trial testimony reflected his opinion that Raheem was depressed and showed characteristics of borderline personality disorder. Moreover, Nord's 1994 psychological report does not make any mention of brain damage.

The state's mental health expert, Dr. Daniel Martell, agreed that there was some evidence of organic brain damage, opining that "the impairment that he does have appears to be mild to moderate and specific to [several] focal areas ... : the tapping deficit, particularly with his right hand, implicating the left motor strip, the mathematic learning disability and the possibility of an attention deficit disorder." Martell nevertheless concluded that Raheem's organic brain abnormality did not affect his behavior or his functioning in any of the ways that Gur had posited. Martell admitted that Raheem's deficits in temporal lobe functioning would "be of interest" to a jury considering how to sentence Raheem --

and that had he been on the defense team and seen Dr. Gur's testing, he would have told them to present it in mitigation. But Dr. Martell also said that he did not see any evidence that Raheem was "unable to control his behavior," or that he lacked the ability to understand the world around him, or, finally, that he had impaired executive functioning (i.e., problems with decision making and judgment). In his report, also submitted as an exhibit at the state habeas hearing, Martell concluded, "Raheem does not suffer from significant brain damage, and he is neither psychotic nor delusional."

Beyond the issue of organic brain damage, the petition offered evidence, discovered for the first time postconviction, that Raheem suffers from a seizure disorder, which causes brief "absence seizures." Dr. Martell noted that they were ten to thirty seconds in duration. Martell added that Raheem's sister and father's affidavits in the postconviction record describing periods when Raheem would be "conscious but unresponsive" as a child "suggest[ed] to [him] that this may be a longstanding disorder."

Dr. Martell explained that when Raheem came out of one of these periods, he was extremely self-conscious, was "aware that he had been gone," and "would make up stories to cover it up." This behavior suggested to Martell an epileptic phenomenon. Martell explained that if Raheem was having one of these absences at the time of trial, he could "zon[e] out for 30 seconds at a time," and although Martell "d[idn]'t see that as particularly disabling," he conceded that "it's certainly conceivable that he could zone out at a moment when there's critical testimony and miss that testimony." When habeas counsel told Martell that Raheem had experienced two fainting episodes while in jail, Martell testified that this behavior is "quite consistent with a seizure disorder."

***917** However, Dr. Martell squarely said that Raheem was competent to stand trial: "I think he was competent then, and I think he's probably competent now." What's more, Martell testified that even if Raheem had absence seizures, this would not have affected his responsibility for his crimes. Martell "doubt[ed]" that Raheem could shoot someone during one of these seizures, because he was unfocused during the seizures, "which would be inconsistent with focusing, aiming, and shooting a gun at some distance," and a seizure lasting for ten hours would be "rare."

Dr. Gur also reviewed Raheem's videotaped interview with Martell and concluded that it evidenced a "seizure disorder." When asked why he had not arrived at this diagnosis himself, he replied, "Well, I didn't spend a lot of time with him. I only spent about three or four hours, and most of this time was taken up by testing. And if he had those absences during my interview I have to admit, embarrassingly, that I didn't notice them." He then noted that "these are not easily picked up and there are also days when they don't happen." Gur added that Raheem exhibited psychosis, characterized by flat and inappropriate affect as well as a delusional belief in the existence of parallel universes. However, during the habeas hearing, Dr. Gur expressly said he was not diagnosing Raheem with epilepsy or as having absence seizures.

Dr. Gur gave conflicting testimony about whether these absences might have affected Raheem's competency to stand trial. Gur agreed with counsel that if Raheem had an absence seizure during the trial, his mind would be "literally absent": he would not be able to hear the proceedings in the courtroom; he would "not be able to respond," and someone could shake him and he would not know. Gur said that Raheem's "jocular behavior during the trial, his inappropriate affect and his refusal to acknowledge that there is anything wrong with him mentally" could interfere with the ability of his attorneys to defend him. When the state habeas court asked Gur for anything specific that led him to conclude that Raheem was incompetent, Gur responded: "I think mostly his lack of contact with reality, his confabulations, memory distortions, his mannerisms. I think when you put them together it puts [an] obstacle in the relationship between the lawyer and the client." But Gur acknowledged that he did not talk to Raheem's trial counsel about their communications with Raheem. Further, Gur admitted that Raheem was able to participate in tests and gave valid test results, working with many doctors. Gur added that Raheem understood him and his role, and that Raheem was able to communicate with Gur and was "apparently oriented to time, place, and person."

As for whether the absence seizures could have affected Raheem's behavior during the commission of the crimes, Gur acknowledged that having epilepsy would not directly cause someone to kill people. Indeed, that would be "ridiculous," but "[h]aving epilepsy can be a condition where under certain circumstances [it] can contribute to behavior of the kind that can end up killing people." Asked whether a seizure could last for as long as ten hours, Gur responded that "there is a situation called status epilepticus that can last for several hours," although what he saw in a videotape of Raheem were thirty-second to two-minute "staring spells."

When the state habeas judge directly asked Gur whether it was his position that "either or both of these murders was caused by a seizure," Gur testified that he did not know, and that Raheem would need to be evaluated by an epileptologist to see if he has epilepsy. Finally, Gur ***918** concluded that generally, Raheem knew right from wrong.

Raheem also submitted an affidavit from Dr. Melissa Carran, a neurologist and epileptologist. Carran reviewed the record and diagnosed Raheem with epilepsy, noting that while she could not precisely identify the type of seizures Raheem suffers from, his presentation in the videos she watched was "consistent with a person suffering from either absence seizures, or brief complex partial seizures." However, Dr. Carran did not meet with Raheem and did not conduct electrophysiology, which Dr. Gur testified was necessary to diagnose an individual with epilepsy.

Attorneys Futch and Crumbley both agreed in their postconviction testimony that they saw some evidence of Raheem's absence seizures -- though they did not identify them as that at the time -- during their representation of Raheem at trial. Crumbley testified that "there were times when he was not responsive. There were times when he, you know, avoided my efforts to engage with him in a conversation." However, Crumbley made clear that he "never saw anything that seemed, that suggested any sort of psychiatric abnormality, or anything of that nature." By contrast, attorney Futch testified that he had in fact observed the behavior now described as absence seizures. Futch noted that when Raheem would "drift off," counsel would "get him back on task and then he could become communicative" again. Futch elaborated:

> In our many meetings and interactions with each other, he would, for lack of a better way to explain it, like, go off somewhere else in his mind. We'd have to bring him back to where we were. Where he went, what he was thinking about, I have no clue but he was hard to focus, hard to pin down on things that obviously would be helpful to his defense team, to try to investigate. And just in the personal interactions with him, it was apparent that he, I thought there was something wrong with him.

But Futch also testified that Raheem's behavior generally was "appropriate during the trial."

In addition, both attorneys testified that they were never told that Raheem was incompetent. Futch said:

> I can't for the life of me think that, you know, Wade Crumbley and myself, who defended countless defendants in cases, would not have taken our only expert at the time telling us he's not competent and not have some kind of hearing on that. ... I mean, we're just the lawyers, and we had the Court appoint an expert to help us in that regard, and we're going to take his or her opinions as they come.

Futch was clear that "my opinion would be that he was competent to stand trial, otherwise, I would have ... fought very vigorously to have his trial postponed." Crumbley agreed: "I didn't have any mental health expert telling me that [Raheem] was insane or that he was incompetent .... No one ever suggested to me that [Raheem] was not competent. My own impression was that he was competent."

B.

On this record, Raheem argues that his trial counsel were ineffective for failing to further investigate and present to the jury evidence of his mental illness, cognitive deficits, brain damage, and seizure disorder. The state habeas court rejected this claim, finding that counsel "reasonably investigated [Raheem's] mental health" and were not deficient in their presentation of mitigating evidence during the guilt and sentencing phases of Raheem's trial. These decisions were not based on unreasonable determinations of the facts in light of the ***919** evidence presented, nor were they contrary to or an unreasonable application of clearly established federal law.

As we've detailed, Raheem's counsel conducted an extensive investigation into his mental health before trial, and offered a fulsome presentation of mitigating evidence at trial. Counsel consulted with four different mental health experts, seeking and obtaining funds from the trial court for evaluations and

tests on multiple occasions. Each expert administered testing and provided their findings to counsel, and Crumbley and Futch followed up on each suggestion from these experts.

The record further reflects counsel's and Dr. Farrar's particularly active roles in investigating and evaluating Raheem's mental health. Farrar testified that even though he had tested and treated Raheem when he was younger, in the year before trial, on average, he met with Raheem at the jail about "once every three weeks." After Raheem was arrested, Farrar not only administered more tests and met with Raheem "multiple times," but also met members of Raheem's family "several times." Crumbley likewise testified that counsel spoke with Farrar often: he said he met with Farrar "at least ten or 12 and ... maybe more, like, 20 or 30" times.

Then, two doctors -- Farrar and Nord -- ultimately testified in detail at Raheem's trial, offering not only an explanation for his admissions, but also providing the jury with ample mitigating evidence of his troubled mental health, including major depressive disorder, multiple suicide attempts, borderline personality disorder, and narcissistic and antisocial features. Further, over Raheem's initial objection, trial counsel succeeded in calling Raheem's mother and father as well. They described his unusual behavior as a child and pleaded with the jury to spare his life. Raheem's counsel ended their arguments highlighting his mental illnesses and the possibility of rehabilitation in prison. They also rebutted the prosecutor's claim of future dangerousness, and finally, offered a residual doubt theory. [6]

Raheem nonetheless claims that the mental health investigation undertaken by counsel was "too little and too late." Importantly, however, he agrees that the investigation proceeded along this timeline: soon after counsel were appointed, they quickly began investigating Raheem's background and mental health, meeting with Raheem's family and Dr. Farrar. Trial counsel sought funds from the court and officially hired Farrar more than a year before trial. And on Farrar's recommendation, Drs. Klopper and Herendeen were hired by counsel, and then, upon the experts' further recommendations, imaging tests were promptly scheduled. [7] The record reflects nothing but speed and diligence from trial counsel, and Raheem has given us nothing to suggest otherwise.

Raheem similarly disputes the state habeas court's determination that "[t]rial counsel followed up on each suggestion from the mental health professionals," ***920** since Farrar told counsel that "a full battery of neuropsychological testing was needed." But trial counsel unequivocally testified that there were no tests specifically suggested -- with the exception of the PET scan that Raheem refused to take -- that weren't conducted. See Darling v. Sec'y, Dep't of Corr., 619 F.3d 1279, 1284 (11th Cir. 2010) ("Nor could a reasonable jurist debate the conclusion that [the defendant's] attorneys were entitled to rely on the psychological evaluation performed by [their expert], which did not recommend that [the defendant] be further evaluated for brain damage."). To the contrary, counsel diligently pursued each test and recommendation. When Farrar suggested that neuropsychological testing was needed, defense counsel hired Drs. Klopper and Herendeen to conduct further tests. Klopper and Farrar then suggested in a December 2000 meeting -- after Klopper and Herendeen had both examined Raheem and found nothing "real clear" or helpful -- that an MRI and a PET scan might help. Again, counsel pursued this advice, scheduling both procedures. As the record reveals, counsel followed up at every turn.

As for the failure to ask for a continuance when Raheem refused to take the PET scan, it's notable that Raheem never submitted to a PET scan in postconviction. It's hard to find that this was so critical a test that no reasonable attorney would have failed to seek a continuance in order to reschedule it, when in all the years since Raheem's convictions, his attorneys apparently never had him take a PET scan.

Raheem also blames trial counsel for failing to investigate and present evidence of a seizure disorder. The record reveals, however, that trial counsel actually introduced some evidence of the absence seizures at trial, when Drs. Farrar and Nord "appeared to correlate the 'absences' to [Raheem's] fantasy world." Nord expressly testified that as part of Raheem's mental illness, he would "zone out and move into another world, which he had control of," and that "he's on the verge of becoming psychotic [meaning he hallucinates], but he's still within some range of reason." Farrar too described Raheem's fantasy world at trial.

As we see it, trial counsel did not disregard evidence of the seizure disorder, but instead, presented the evidence about Raheem's absences known to them at the time of trial -- after consulting with four experts, none of whom diagnosed Raheem with a seizure disorder. As for Dr. Martell's opinion at the habeas hearing that the absence seizures were different from Raheem's fantasy world, Martell clarified that he was

unsure, and that Raheem was "a very unusual case that the medical center would love to have lots of doctors do a grand rounds about." Even Dr. Gur admitted he did not arrive at the seizure disorder diagnosis himself despite spending some time with Raheem. He added that if Raheem suffers from this disorder, it would be hard even for an expert to spot it. In light of the difficulties Raheem's experts had in noticing his absence seizures, we cannot fault the state habeas court for finding that Raheem's trial counsel were not deficient to the extent that they too were unaware of the absence seizures.

Indeed, as the state court found, "Dr. Martell merely presented a theory of 'absence seizures' possibly linked with epilepsy," but "there is no conclusive evidence" that Raheem actually suffers from a seizure disorder, namely epilepsy. This is consistent with the record. Dr. Martell said that Raheem's behavior merely "raised the possibility" that Raheem had absence seizures and noted that additional testing would be necessary to determine ***921** this conclusively. And although Dr. Carran was an epileptologist who diagnosed Raheem with epilepsy, she did not conduct electrophysiology tests or even meet with Raheem, and none of the other experts diagnosed Raheem with epilepsy. On this record, Raheem has not met his burden of rebutting the state court's factual determinations "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Nor can we say that the state habeas court's conclusions concerning counsel's investigation into or presentation of Raheem's possible epileptic disorder -- or other mental health issues, for that matter -- were based on an unreasonable determination of the facts in light of the evidence presented, nor were they contrary to or an unreasonable application of clearly established federal law.

C.

Raheem also takes issue with counsel's investigation into and presentation of his background and social history at trial. The state habeas court found that "trial counsel conducted a thorough mitigation investigation," including "obtain[ing] all of Petitioner's school, medical, mental health, court and juvenile records that were in existence," "attempt[ing] to locate all of Petitioner's family members to see if they would be cooperative," and "tr[ying] to interview all of the mental health professionals and counselors who had previously treated Petitioner." The court concluded that Raheem failed to establish that his counsel's investigation into mitigating background evidence and the presentation of that evidence during sentencing was deficient or that he was prejudiced. We cannot say that the state court's determination on this score was contrary to or an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

As the record reflects, counsel's investigation into Raheem's background and social history was substantial. Counsel met with Raheem's parents and sister on multiple occasions and other family members at least once, and Crumbley testified that Raheem's family was cooperative and wanted to help counsel. Crumbley talked "at length" with Raheem's parents about "everywhere he'd been to school, everywhere he'd ever been to the doctor, everywhere he'd ever been for counseling." This investigation was thorough -- counsel attempted to get all of Raheem's available school, medical, and prison records, testifying that "[w]e got every kind of record we could think of."

Raheem claims, nevertheless, that the investigation raised red flags, counsel did not follow up, and if counsel had done so, they would have discovered evidence of a troubled childhood. They would have offered evidence that his father Askia was "militaristic, brutal, and abusive," and that he beat Raheem. They would have also maintained that Raheem's home environment was a hostile one.

In support of this claim, Raheem relies on his family's postconviction affidavits, including a statement from Raheem's father that he whipped Raheem, and a statement from his sister that their father "beat [Raheem] often, even for little things." In addition, Raheem points to Crumbley's testimony that while Raheem's father was "a very nice man, very articulate, very well-mannered," he was also "guarded" and "seemed to be a very proud person." Crumbley said that because of this, he "wondered whether if there was some terrible secret in the family whether he would tell it or let anybody tell it."

Raheem argues that there was in fact something else there and counsel should have looked further. But Crumbley's account makes clear that he and Futch did ***922** look, and were disappointed to learn that there was not as much mitigating evidence as they hoped to find. See Gissendaner v. Seaboldt, 735 F.3d 1311, 1329–30 (11th Cir. 2013); Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999).

Moreover, the information that defense counsel did elicit contradicts much of the new abuse allegations contained in the postconviction affidavits. Crumbley testified during

postconviction proceedings that none of Raheem's family members ever indicated to him that Raheem's father was abusive to him. Raheem's records from Charter Peachford Hospital also note that Raheem "denie[d] a history of physical or sexual abuse." The hospital records even report that Raheem's mother relayed that Raheem had "a friend in his father," and that the two had a "special relationship"; their disciplinary methods (a realm "mostly" reserved for Raheem's father) included taking away privileges and talking with Raheem. And while his mother denied any physical abuse of Raheem, she noted that Raheem had made verbal threats to his sister. Similarly, records drawn from Raheem's stay at Baldwin State Prison revealed that Raheem denied ever having experienced any sexual or physical abuse. In fact, he described having "a good relationship with his parents." Raheem has given us nothing to suggest that trial counsel had any reason to be on alert of the physical abuse he now claims he suffered.

Furthermore, if counsel had elicited this new information in mitigation, they might have strategically chosen not to present it because it would have been powerfully contradicted at trial. What's more, much of it is cumulative to what was uncovered during counsel's investigation and presented at the penalty phase. See Darling, 619 F.3d at 1284 ("No reasonable jurist could debate the holding that the fact that [the petitioner] now has gathered additional evidence about his background that differs in some minor respects from the evidence actually presented at trial does not render his attorneys' performance deficient and certainly does not render the decision of the [state supreme court] objectively unreasonable.").

As we've noted, counsel knew that Raheem had exhibited troubling behavior from a young age, that people close to him noticed these things, that he had experienced head injuries as a child, and that he had attempted suicide on several occasions. They also knew that Raheem's parents' marriage had broken down, that Raheem had attempted suicide after his mother's mental breakdown, and that Raheem's father resisted putting Raheem on any medication after his suicide attempt. Counsel sought all of Raheem's school, medical, and court records as well. And then, at trial, counsel presented a full overview of the evidence gathered, including testimony about his parents' marriage, his father's belief that "something wasn't quite right" with Raheem from a young age, and Farrar and Nord's opinions on Raheem's suicide attempt, further suicidal ideation, and his delusional behavior. Farrar described Raheem's "family history of depression," noting that Raheem's mother "had chronic depression for years." He also told the jury that the apparent cause of Raheem's "acting out" and first suicide attempt was his mother's breakdown and depression.

We also cannot ignore that Raheem placed limits on the witnesses counsel could call in mitigation and the information counsel could elicit from them. Only after "a lot of begging" and persuading members of the press not to film Raheem's relatives on the witness stand did Raheem agree to let Crumbley call his parents to the stand. And Raheem never allowed Crumbley to call his sister. Raheem also ***923** interrupted and tried to "cut short" his mother's testimony when she became emotional. Raheem yelled in court, "get off the stand." She continued to testify. Crumbley later explained that this interruption "probably worked in his favor," because he thought "it suggested to the jury at least that he had concern for some other person."

Because of the limits Raheem placed on his counsel's ability to call witnesses in mitigation, it was not unreasonable for the state court to conclude that counsel was not deficient for not calling more members of Raheem's family to testify. This is especially true since Raheem's counsel did thoroughly investigate and present substantial mitigating evidence, including the testimony of mental health experts Drs. Farrar and Nord. Moreover, counsel even persuaded Raheem to permit them to call his parents to the stand during the penalty phase of trial. See Krawczuk v. Sec'y, Fla. Dep't of Corr., 873 F.3d 1273, 1293–94 (11th Cir. 2017) ("When a competent defendant clearly instructs counsel either not to investigate or not to present any mitigating evidence, ... 'the duty to investigate does not include a requirement to disregard a mentally competent client's sincere and specific instructions about an area of defense and to obtain a court order in defiance of his wishes.' ") (citations and quotations omitted); Blankenship v. Hall, 542 F.3d 1253, 1277 (11th Cir. 2008) ("Significant deference is owed to failures to investigate made under a client's specific instructions not to involve his family."); Newland v. Hall, 527 F.3d 1162, 1202 (11th Cir. 2008) ("We have also emphasized the importance of a mentally competent client's instructions in our analysis of defense counsel's investigative performance under the Sixth Amendment.").

Based on all of the evidence we have seen, we conclude that the state court's determination that counsel were not deficient in their mitigation investigation or presentation was not an unreasonable determination of the facts in light of the

evidence presented, nor was it contrary to or an unreasonable application of clearly established federal law.

D.

[25] **[26]** **[27]** **[28]** **[29]** **[30]** In any event, even if Raheem could show that his counsel were somehow deficient, the state court's determination that Raheem suffered no prejudice on account of any of the alleged deficiencies in counsel's performance was neither contrary to nor an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. To show prejudice, "it must be established that, but for counsel's unprofessional performance, there is a reasonable probability the result of the proceeding would have been different." Putman v. Head, 268 F.3d 1223, 1248 (11th Cir. 2001). " 'It is not enough for the [petitioner] to show the errors had some conceivable effect on the outcome of the proceeding ...,' because '[v]irtually every act or omission of counsel would meet that test.' " Id. (quoting Strickland, 466 U.S. at 693, 104 S.Ct. 2052) (alterations and ellipses in original). Simple mistakes or strategic errors are not enough, nor are serious errors if, absent those errors, there is no "reasonable probability" that the outcome would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The Supreme Court has explained:

> Strickland asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice ***924** standard and a more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Harrington, 562 U.S. at 111–12, 131 S.Ct. 770 (citations omitted).

[31] **[32]** "In the capital sentencing context, the prejudice inquiry asks whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 522–23, 123 S.Ct. 2527 (quoting Strickland, 466 U.S. at 695, 104 S.Ct. 2052). Thus, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins, 539 U.S. at 534, 123 S.Ct. 2527 (emphasis added). We examine all of the good and all of the bad, what was presented during the trial and what was offered later, collaterally. The question is whether, "viewed as a whole and cumulative of mitigation evidence presented originally," there is " 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399, 120 S.Ct. 1495.

[33] **[34]** In determining whether a reasonable probability of a different outcome exists, we presume a reasonable decisionmaker. See Nix v. Whiteside, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) ("[I]n judging prejudice and the likelihood of a different outcome, 'a defendant has no entitlement to the luck of a lawless decisionmaker.' " (alteration adopted) (quoting Strickland, 466 U.S. at 695, 104 S.Ct. 2052)). Additionally, "[w]hen a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court's decision unless its error lies 'beyond any possibility for fairminded disagreement.' " Shinn, 141 S. Ct. at 520 (quoting Harrington, 562 U.S. at 103, 131 S.Ct. 770).

We start with what is indisputable: the evidence in aggravation was very substantial. First, the brutality of the crimes was thoroughly explicated at trial. Raheem committed a cold-blooded double homicide, first shooting his friend Brandon Hollis in the back of the head for no apparent reason and then telling Jenkins that he was not dead "but he is on his way out." After shooting Brandon, Raheem took his keys and wallet and he and Jenkins went to the Hollis home, where Raheem used Brandon's keys to go inside. Once in the home, Raheem twice shot at Brandon's mother Miriam Hollis, who had been sitting in a chair reading a book, killing her with the second shot. Raheem placed a garbage bag he had purchased earlier over Miriam's head to contain her blood as it seeped onto the carpet. He then stole Miriam's car keys, stuffed her body in the trunk of her vehicle, and took her car. Hours later, Raheem returned to Miriam's house -- her body still in the trunk of the car -- with his girlfriend and Jenkins, and they burglarized Miriam's house. Raheem desecrated

Miriam's body, first parading it around in the trunk of the car for hours and showing it off, and then dousing her body with gasoline or alcohol and burning it on train tracks.

Indeed, six statutory aggravators were argued to the jury, and all of them were found beyond a reasonable doubt, including that: (1) the murder of Brandon Hollis was committed while in the commission of the armed robbery of Brandon Hollis; (2) the murder of Brandon Hollis was committed for the purpose of receiving things of monetary value; (3) the murder of Miriam ***925** Hollis was committed during the course of another capital felony, the murder of Brandon Hollis; (4) the murder of Miriam Hollis was committed in the course of a burglary; (5) the murder of Miriam Hollis was committed during the armed robbery of Miriam Hollis; and (6) the murder of Miriam Hollis was committed for the purpose of receiving things of value. Ga. Code Ann. §§ 17-10-30(b)(2), (4).

In addition, during the penalty phase, the prosecution presented substantial evidence of future dangerousness. The state introduced court records showing that Raheem carried a weapon on school property when he was fifteen and stole an automobile and fled from police when he was seventeen.

The prosecutor also called a number of jail officers who testified about contraband that had been found in Raheem's cell. First, an officer testified that officials found a "large shank" and razor blade that were "stuck to the frame of his bed," as well as another shank in the smoke detector. The officer explained that a shank is a sharpened "homemade tool," and said that the larger one -- at least a foot long -- was one of the largest that she had ever seen as an officer. Another officer testified that during a separate search of the cell, officials found hidden under a bunk a chair leg that had been ripped off. A third officer testified that he also found a detailed map of the jail in Raheem's cell, with Raheem's name on it, as well as a sock filled with rocks and a golf ball.

A fourth officer testified that he spoke with Raheem about the murders and Raheem said he "had to do what [he] had to do. It was just business." This officer "asked if [Raheem] ever thought about anything that happened or if he could go back and change anything," and Raheem "said no." On another occasion, Raheem threatened the officer, telling him he knew who he was, and saying, "I also know you're a witness in my case, you little snitch. ... I'll kill you." Raheem told the officer that he knew the officer had pepper spray, and if he sprayed Raheem with it, Raheem would kill him. The officer further testified that Raheem "practically ran the [cell] block."

Finally, the prosecution called a jail inmate, who testified that Raheem told him that Raheem planned to kill his girlfriend, "because she was testifying against him," and that he also planned to kill the prosecuting district attorney -- Tommy Floyd -- saying that "Tommy Floyd didn't know who he was messing with."

Not only did the jury hear extensive aggravating evidence about the murders and about Raheem's future dangerousness, Raheem's attorneys, as we've detailed, presented substantial evidence about his mental health in mitigation. See supra discussion at 26-32 (summarizing testimony from Dr. Farrar, Dr. Nord and Raheem's parents about Raheem's borderline personality disorder, his depression, his oppositional defiance disorder, his impulsivity and hostility towards others, and his suicide attempts).

[35] **[36]** "[N]o prejudice can result from the exclusion of cumulative evidence." Dallas v. Warden, 964 F.3d 1285, 1310 (11th Cir. 2020) (quotations omitted). "Mitigating evidence in postconviction proceedings is cumulative when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." Id. at 1308 (quotations omitted). The Supreme Court has found evidence cumulative where it "substantiate[s]," "support[s]," or "explain[s]" more general testimony provided at trial. Cullen v. Pinholster, 563 U.S. 170, 200–01, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). Here, much ***926** of the additional mitigation evidence about Raheem's brain damage and seizure disorder would have only "substantiate[d]," "support[ed]," or "explain[ed]" more general testimony offered at trial, and therefore would have been at least somewhat cumulative. Id.

As for the remaining new evidence about Raheem's brain damage, psychosis, and seizure disorder, we cannot ignore the circumstances surrounding the crimes he committed, which would have undermined the probative value of this additional evidence. The state habeas court explained that the "cognitive deficits" and "organic brain impairment" Raheem pointed to showed that he "may act impulsive, use poor judgment and had trouble with decision-making." But, it found, "[e]ven viewing [Raheem's] proposed evidence in its most 'mitigating' light, ... there is no reasonable probability that the jury or the courts would have rendered a different

determination had it been presented. The crimes were horrific and cold-blooded, showing calculation, planning and execution over a 10-hour period."

The state court's decision was not contrary to or an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. It is supported by the evidence showing that Raheem had "extensive opportunities to consider his actions": after Raheem picked up the gun from Gibbs's apartment, he pulled to the side of the road and twice shot out of the window, telling Jenkins he wanted to make sure it would not jam; on the way to pick up Brandon Hollis, Raheem, with obvious forethought, stopped at Kroger and bought a box of trash bags; after shooting Brandon, Raheem took his keys and wallet, and used the keys to open the front door of Brandon's house; he told Jenkins to bring in a trash bag before they entered Brandon's house, and used it to contain the blood after he shot Miriam Hollis in the head; he attempted to mop up the blood that seeped onto the carpet; Raheem and Jenkins went to dispose of Miriam's body many hours later after keeping her body in the trunk of her Lexus and showing it off to Raheem's girlfriend; Raheem instructed a friend to hide the murder weapon; and when questioned by the police after the double homicide, he claimed that Jenkins was the shooter. Shinn, 141 S. Ct. at 525.

At virtually every stage of this ten-hour crime spree, Raheem attempted to conceal and disguise the crimes he had committed. On this record, the state court did not unreasonably weigh the potential brain damage evidence against the full slate of aggravating evidence introduced. See Franks v. GDCP Warden, 975 F.3d 1165, 1183 (11th Cir. 2020) (noting that the petitioner's background and "facts of the case powerfully undercut the equivocal expert testimony about [the petitioner's] cognitive deficits -- specifically that he suffered from impaired executive functioning").

And even assuming that Raheem did have absence seizures, this would not explain his crimes. Dr. Martell "doubt[ed]" that Raheem would shoot someone during one of these seizures, because he was unfocused during them, "which would be inconsistent with focusing, aiming, and shooting a gun at some distance," and a seizure lasting ten hours would be "rare." Even Dr. Gur admitted he did not know if either murder was caused by a seizure, noting that Raheem would need to be evaluated for epilepsy by an epileptologist, and he thought that Raheem generally knew right from wrong. Thus, the state court's prejudice rationale is not "so obviously wrong" as to be "beyond any possibility for fairminded disagreement." Shinn, 141 S. Ct. at 526 (quotations omitted).

***927** What's more, the experts' postconviction testimony about Raheem's mental health would have been substantially undermined by Martell's other testimony. Dr. Martell testified that Raheem did not have "significant" brain damage, the brain damage did not impact his executive functioning, and Martell was unconvinced that his cognitive defects "caused him to be unable to control himself when he did the things he did." His report concluded that Raheem was "neither psychotic nor delusional."

We've previously found that petitioners were not prejudiced where the expert mental health testimony was equivocal. See Dallas, 964 F.3d at 1310 ("Introducing the ADHD diagnosis would have opened the door to [an expert's] testimony that [the petitioner] was of 'average intelligence' -- testimony that would have been harmful to [the petitioner] since it would have undermined [the other expert's ADHD] assessment."); Franks, 975 F.3d at 1182–83 (finding no prejudice where "the expert testimony was far more equivocal" than other cases where "the evidence was unequivocal and powerfully contextualized otherwise inexplicable crimes"). "Indeed, both the Supreme Court and this Court have consistently rejected the prejudice argument where mitigation evidence was a two-edged sword or would have opened the door to damaging evidence." Dallas, 964 F.3d at 1310–11 (quoting Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1296 (11th Cir. 2012)) (quotations omitted, alterations adopted). In light of the conflicting expert opinions offered, a reasonable jury easily could have rejected Raheem's evidence about brain damage, or more importantly, any suggestion that brain damage somehow contributed to or explained the double homicide and the other crimes. See Darling, 619 F.3d at 1285.

As for new evidence about Raheem's social history or background, what came out in Raheem's postconviction proceedings comes nowhere near the extreme abuse and deprivation elicited in cases where the Supreme Court has found prejudice as a result of counsel's failure to offer mitigating evidence. The additional evidence about his background was largely that his parents were unwilling or unable to help in his mental health treatment, and the allegation that Raheem's father was physically abusive to him.

But in cases where the Supreme Court has found prejudice, "the disparity between what was presented at trial and what was offered collaterally was vast. In other words, the balance between the aggravating and mitigating evidence at trial and in postconviction proceedings shifted enormously, so much so as to have profoundly altered each of the defendants' sentencing profiles." Dallas, 964 F.3d at 1312. The allegations Raheem has presented collaterally, while disturbing, do not paint a picture of abuse like that in those cases and would not have "profoundly altered" Raheem's profile at the penalty phase. See, e.g., Wiggins, 539 U.S. at 535, 123 S.Ct. 2527 (trial counsel introduced no evidence about the "severe privation and abuse in the first six years of [the petitioner's] life while in the custody of his alcoholic, absentee mother," and later "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care").

The testimony concerning Raheem's father's claimed abuse would have been undermined by contradictory information available to counsel at the time of trial, including Crumbley's testimony that none of Raheem's family members ever indicated to him that Raheem's father was abusive to him; Raheem's records from Charter Peachford Hospital indicating that Raheem and his mother denied a history of physical abuse; and Raheem's Baldwin ***928** State Prison records indicating that he denied suffering from any sexual or physical abuse, and reported having "a good relationship with his parents."

What we are left with is the powerful aggravating evidence and substantial mitigating evidence actually presented at trial, weighed against the additional mitigating, though substantially cumulative evidence about mental health, along with some evidence about brain damage, and arguably contradictory evidence of childhood abuse. We cannot conclude, on this record, that it was contrary to or an unreasonable application of Strickland for the state habeas court to find no prejudice. As we've said, it is not enough for Raheem to convince this Court that we would review this body of evidence differently under a de novo Strickland review; rather, he is required to establish that the state habeas court's weighing was unreasonable. This he cannot do.

IV.

We are similarly unpersuaded by Raheem's procedural and substantive claims of incompetency to stand trial.

[37] **[38]** First, he says the state trial court violated his procedural due process rights under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), by failing to sua sponte hold a competency hearing. Because Raheem did not raise this claim on direct review, the claim is procedurally defaulted. See James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992) ("Pate claims can and must be raised on direct appeal."). When "a state court determines that a claim was defaulted on procedural grounds," we review it on the merits only when a petitioner shows that cause and prejudice exist for the default or a "fundamental miscarriage of justice -- i.e., that a constitutional violation has resulted in the conviction of someone who is actually innocent." Ledford v. Warden, Ga. Diagnostic Prison, 975 F.3d 1145, 1160–61 (11th Cir. 2020) (quotations omitted). Raheem does not invoke the fundamental-miscarriage-of-justice exception; instead, he argues he can overcome his default by showing cause and prejudice -- in this case, by demonstrating that his counsel were ineffective in failing to raise his procedural due process claim. See id. (noting that ineffective assistance of counsel may constitute cause to overcome a procedural default). Second, Raheem says that regardless of the failure of the state court to hold a hearing, his substantive due process rights were violated because he was in fact tried while incompetent. The state habeas court did not address this question, and we review the district court's ruling on this issue for clear error. See Lawrence, 700 F.3d at 477.

[39] Applying Strickland, the state habeas court concluded that there was no deficiency of counsel and no prejudice in failing to ask for a competency hearing, and, therefore, that Raheem could not overcome the procedural default of his Pate claim. Because "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim," to succeed now, Raheem must overcome the double deference of AEDPA review of the performance prong of Strickland claims. Edwards v. Carpenter, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (emphases in original). That is, he must show that it was objectively unreasonable for his attorneys to fail to raise the claim -- by failing to ask for a hearing -- and that reasonable jurists could not disagree on that question.

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Raheem first argues that his counsel were ineffective for failing to seek a competency hearing because, according to Farrar's ***929** postconviction affidavit, he told counsel around the time of trial that Raheem was incompetent. The state habeas court made a factual finding, however, that Farrar did not do so. Both attorneys testified unequivocally that they did not recall Farrar telling them Raheem was incompetent and that if they had been told, they would have investigated it or asked for a continuance and a hearing. The state court credited the testimony of Futch and Crumbley and discounted Farrar's testimony.

The record lends support to the state court's treatment of this claim. At an April 2000 pretrial hearing on a motion requesting additional funds, the defense called Dr. Farrar. Dr. Farrar told the trial court that he recommended that Raheem be put on certain psychiatric medications. Trial counsel noted that "obviously, Mr. Raheem ... would have to agree to do that. I mean, he is mentally competent, is he not, to make his own decision about that?" Farrar unequivocally responded, "Yes, sir, he is." We recognize that competency concerning medical decisions is not quite the same thing as competency to stand trial. But this testimony is surely probative of what Farrar believed at the time, when Raheem was preparing for trial, and suggests that Farrar did not believe that Raheem was incompetent to stand trial.

[40] "Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review." Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 845 (11th Cir. 2011). Furthermore, "[w]e consider questions about the credibility and demeanor of a witness to be questions of fact." Id. Applying the AEDPA presumption of correctness to the state habeas court's factual determination that Farrar's testimony was less credible than the attorneys', we cannot find that Raheem has rebutted the presumption by clear and convincing evidence. See id.; 28 U.S.C. § 2254(e)(1). This is especially true since Farrar's testimony appears to have been inconsistent over time.

The state habeas court made further factual determinations supporting the conclusion that counsel were not ineffective for failing to seek a competency hearing, none of which were unreasonable. The state court credited defense counsel's testimony that no mental health expert -- neither Farrar nor anyone else - - told them that Raheem was incompetent, and they believed Raheem to be competent. It also credited Dr. Martell's testimony at the habeas hearing that Raheem's erratic behavior before and during trial was not indicative of incompetency. Raheem has not rebutted these credibility determinations by clear and convincing evidence. Accordingly, it was not contrary to or an unreasonable application of Strickland to conclude, as the state habeas court did, that there was no prejudicially ineffective assistance of counsel to overcome the procedural default of Raheem's Pate claim.

[41] **[42]** **[43]** **[44]** Raheem also argues that his substantive due process rights were violated because he was in fact incompetent to stand trial. This is a separate question from whether the trial court erred by not sua sponte holding a competency hearing, and the parties agree that a substantive incompetency claim like Raheem's cannot be procedurally defaulted. See Lawrence, 700 F.3d at 481 (adhering to "both pre–and post-AEDPA precedent ... holding that substantive competency claims generally cannot be procedurally defaulted"). The substantive test for competency is whether a defendant has, at the time of trial, "sufficient ... ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." ***930** Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). A petitioner raising this kind of claim bears the burden of demonstrating his incompetency at the time of trial by a preponderance of the evidence. See James, 957 F.2d at 1571. Because the state habeas court did not make a ruling on this claim, the federal district court reviewed it de novo.

In so doing, the district court considered all the evidence in the record about Raheem's competency and found that Raheem had not established by a preponderance of the evidence that he was incompetent. The court further held that Raheem did not establish by clear and convincing evidence that he was entitled to an evidentiary hearing on the claim in federal court. The district court summarized its findings this way:

> Based on its review of the record, the Court assumes, arguendo, that [Raheem] did suffer brief absence seizures at the trial. But the Court also bears in mind the narrow test of competency to stand trial -- whether the petitioner "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "whether he has a rational as well as a factual understanding of the proceedings against him." Dusky, 362 U.S. at 402 [80 S.Ct. 788]. Given the narrowness of the competency

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standard, and the totality of the evidence presented in this case, this Court concludes that [Raheem] has not demonstrated his incompetence at the time of trial by a preponderance of the evidence, nor has he established by "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his competence that he is entitled to an evidentiary hearing. Lawrence, 700 F.3d at 481. Cf. Humphrey v. Walker, [294 Ga. 855] 757 S.E.2d 68 (2014).

[45] **[46]** **[47]** We review the factual finding made by the district court for clear error. See Lawrence, 700 F.3d at 477. There was no clear error. First, Raheem's lawyers spent a significant amount of time with Raheem and both believed him to be competent at the time of trial. Crumbley said, "[m]y own impression was that he was competent"; Futch confirmed, "he was competent to stand trial." The contemporaneous assessment of trial counsel is particularly probative because competency is "primarily a function of defendant's role in assisting counsel in conducting the defense" and the defendant's counsel is thus "in the best position to determine whether the defendant's competency is suspect." Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996).

Moreover, of the many mental health experts who evaluated Raheem's condition at the time of trial, only Farrar opined that he was incompetent, and Farrar did not say so at trial, but rather only years later, in a postconviction affidavit. In any event, as we've noted, Farrar's testimony is not particularly compelling since he admitted before trial that Raheem was competent at least to make decisions about his medication. Further, Dr. Martell affirmatively asserted that Raheem was competent. As for Dr. Gur's postconviction testimony on the issue of competency, Gur opined that Raheem's behavior during trial could have interfered with the ability of his attorneys to defend him, but he conceded that he did not speak with Raheem's trial counsel about their communications with Raheem. Gur also testified that Raheem was cooperative and successfully completed the neuropsychological testing and evaluations. Raheem has failed to show how the district court's ruling constituted clear error.

As for Raheem's claim that his absence seizures rendered him incompetent, the ***931** district court assumed, arguendo, that Raheem suffered these seizures at trial, but found that his absence seizures were "brief," and that they did not establish his incompetency by a preponderance of the evidence taking the record as a whole. This included evidence that Raheem was able to assist his counsel and participate in the proceedings. Futch testified that "for the most part, [Raheem] was appropriate during the trial."

The trial court also conducted colloquies of its own with Raheem before trial -- for example, during pretrial hearings, Raheem told the court he had no objections to defense counsel or the way in which they were conducting his defense, and Raheem explained to the court that he refused to get out of the transport to take the PET scan because of the attention that he would receive, telling the court he didn't want to be placed on display. As the state habeas court concluded, when ruling on the procedural due process claim, there was "nothing in these colloquies that indicates Petitioner was incompetent at trial." Additionally, during the sentencing phase, Raheem ultimately agreed to allow counsel to call his parents.

Raheem also points to Dr. Carran's affidavit as evidence of incompetence. Carran said that seizures "likely affect Mr. Raheem's ability to both assist his attorneys and understand the proceedings against him," and "necessarily effect [sic] his ability to follow narrative, to respond appropriately, and to understand fully what is taking place." The district court assumed for its analysis, however, that Raheem did suffer absence seizures at his trial, even noting that the record "supports his contention that he suffers from absence seizures of brief duration." The district court therefore considered Carran's opinion, but after reviewing the "totality of the evidence," it concluded that Raheem was competent.

[48] Undoubtedly, Raheem did not act in his own best interests at all times, including when he refused to get out of the car for the scheduled PET scan and when he told his mother to "get off the stand." But the test for competency is not whether he always acted in his own best interests; rather, it is whether he had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky, 362 U.S. at 402, 80 S.Ct. 788 (quotations omitted). The district court rightly described the competency standard as a "narrow" one. And our review is only for clear error. See Lawrence, 700 F.3d at 477. We can discern none.

V.

[49] Raheem's next claim alleges violations of the Due Process Clause. He says his rights were violated when he was required to wear a stun belt at trial, which unfairly

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communicated to the jury that he was extremely dangerous and, to overcome his default of that claim at trial and on direct review, he argues that his attorneys were prejudicially ineffective for failing to protect him from that unfair inference. See Ledford, 975 F.3d at 1160–61; Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754, 755 (1985) (finding that Georgia state law provides that "a failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus," unless the petitioner shows cause and prejudice) (emphasis in original). The state habeas court found no deficiency of counsel and found no prejudice as well.

As for Raheem's claim that defense counsel unconstitutionally allowed him "to be restrained with shackles and/or a stun belt throughout trial," the record clearly reflects that a hidden stun belt, and not shackles, was used. And under our caselaw, Raheem's counsel could not have been ***932** ineffective for allowing Raheem's restraint with a stun belt because that measure did not violate his due process rights.

We addressed a similar claim that a petitioner's constitutional rights were violated when the state trial court required him to "wear a stun belt under his clothes during the resentencing trial without holding a new evidentiary hearing to determine whether the restraint was necessary" in Nance v. Warden, Georgia Diagnostic Prison, 922 F.3d 1298, 1303 (11th Cir. 2019), cert. denied sub nom. Nance v. Ford, ––– U.S. ––––, 140 S. Ct. 2520, 206 L.Ed.2d 470 (2020). We explained in Nance that the Georgia Supreme Court's decision could not have been contrary to or an unreasonable application of clearly established law because no Supreme Court case was on point: "[t]he Supreme Court has never addressed whether and under what circumstances a trial court may require a defendant to wear a stun belt." Id. at 1304. Commenting on the same three Supreme Court decisions Raheem relies on here, we noted that they "all involve visible security restraints and the unique constitutional problems they present -- namely, the impact that they have on the jury's perception of the defendant and the public's perception of the judicial process." Id. (emphasis in original); see Deck v. Missouri, 544 U.S. 622, 630–33, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); Holbrook v. Flynn, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); Illinois v. Allen, 397 U.S. 337, 343–44, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). "[V]isibility of the security measure at issue was central to the reasoning of all three of those decisions, and the Court limited its holdings accordingly." Nance, 922 F.3d at 1304. In Deck, for example, the Supreme Court held that "the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is justified by an essential state interest -- such as the interest in courtroom security -- specific to the defendant on trial." 544 U.S. at 624, 125 S.Ct. 2007 (quotations omitted, emphasis omitted).

In finding that Raheem's stun belt was not visible to the jury, the state habeas court quoted from the Georgia Supreme Court decision in Nance, defining a stun belt: "[u]nlike shackles, it is worn under the prisoner's clothes and is not visible to the jury." See Nance v. State, 280 Ga. 125, 623 S.E.2d 470, 473 (2005). This definition, the state habeas court found, conformed with Crumbley's testimony that the stun belt was a "battery pack thing that he wore, that was under his clothing," (emphasis added). We accept this factual determination. Raheem has not rebutted it. Therefore, the trial court could not have violated Raheem's due process rights by requiring him to wear a security measure that was not visible to the jury. Nor was it contrary to or an unreasonable application of Strickland, nor based on an unreasonable determination of the facts, for the state court to have concluded that Raheem's counsel were not ineffective for failing to raise a stun belt due process claim.

The state habeas court's decision also was consonant with Deck when it found that the use of the stun belt was proper under the circumstances of Raheem's case. In Deck, the Supreme Court provided an exception to its holding concerning visible shackles -- when the trial court determines, "in the exercise of its discretion," that a state interest specific to the particular trial justifies the shackles. 544 U.S. at 629, 125 S.Ct. 2007. This determination may "take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." Id. The state habeas ***933** court made this connection in Raheem's case:

> The record establishes that [Raheem] has been charged with the violent murder of Miriam and Brandon Hollis. In addition, the State elicited testimony

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> during the sentencing phase of trial that jailers had searched [Raheem's] jail cell and found a shank, razor blade and a detailed map of the jail that was to be used in an escape attempt. Furthermore, the State presented evidence that [Raheem] had threatened to kill one of the jailers at the Henry County Sheriff's Office.

The use of the stun belt was tied to the particular circumstances of Raheem's case.

Raheem argues in the alternative that even if the stun belt was not visible, the jury became aware of it through two other prejudicially ineffective errors by his counsel. First, Raheem claims that counsel were ineffective for failing to warn him not to stand when he stood up during his mother's testimony at the penalty phase, the stun belt began to beep, and he turned to a guard and said, "go ahead and shock me." Raheem also says that Crumbley himself ineffectively and prejudicially told the jurors about the stun belt in his closing argument at sentencing. Each argument was addressed by the state habeas court, which found neither deficient performance nor prejudice for either alleged error. Unlike the due process claim, Strickland requires finding both ineffectiveness and prejudice.

First, Raheem says the jurors became aware of the stun belt when his mother took the stand during the penalty phase. Her testimony began with "Mustafa is my baby," she became emotional, and Raheem stood up and said, "get off the stand." At that point, because he stood, the stun belt was activated and began to beep. The state habeas court noted, however, that the trial transcript did not reflect that Raheem said "[g]o ahead and shock me" and there was no evidence to support a finding that the jurors actually heard the stun belt being activated or Raheem's alleged comment. Raheem has not rebutted the presumption of correctness as to those factual findings -- the trial transcript does not reflect the comment, which by itself suggests it was not audible enough for the court reporter, or possibly the jurors to hear it. Raheem's counsel was sitting right next to him, so just because he heard the comment does not mean everyone in the courtroom heard it. With those unrebutted findings, the state habeas court's decision was not based on an unreasonable determination of the facts, nor was it contrary to or an unreasonable application of clearly established law.

Raheem next claims that Crumbley performed ineffectively when he made these closing remarks at sentencing:

> You need to understand that [Raheem] is not a threat any longer. The Sheriff has had him locked up for almost two years. He is in chains, or wearing an electric shock belt, as he is today, everywhere he goes. He has talked some, but he hasn't done a single violent thing since he has been in jail. He is headed for the state prison system, into maximum security, into a setting which is far more sophisticated and severe in its security measures than the Henry County jail. It is not at all likely that he'll ever hurt anyone else in that setting. There's no reason any longer to be afraid of him and there's no reason to kill him. Killing him will just demean us.

Raheem says that telling the jurors he was wearing a stun belt was prejudicially ineffective because it was like telling the jurors that he is dangerous. But the state court concluded that this closing argument ***934** "was not unreasonable in light of counsel's theory of no future dangerousness."

As we've described, the prosecution relied heavily on future dangerousness in its sentencing phase presentation. It called prison officials who described death threats Raheem had made and the discovery of weapons and an escape plan in his cell. In response, defense counsel argued that Raheem was not actually a danger, nor would he be one, because the security measures surrounding him were comprehensive and tight. Raheem has not established that counsel's strategy was an unreasonable one. Ultimately, the state court's findings were neither contrary to nor an unreasonable application of clearly established Supreme Court law.

The state habeas court also concluded that counsel's remark was not prejudicial, finding "no reasonable probability that had trial counsel not referenced the stun belt in closing argument the result of Petitioner's sentencing would have been different." We agree. We already have detailed the powerful evidence surrounding these brutal murders. Beyond

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that, because the state had relied so heavily on evidence of future dangerousness, counsel's comment about the stun belt plainly was aimed at communicating to the jury that adequate security measures were in place and they had no reason to fear him. This determination was not contrary to or an unreasonable application of clearly established Supreme Court law.

VI.

[50] Raheem also raises several claims of prosecutorial misconduct. His first one attacks comments the prosecutor made to the jury during closing arguments at sentencing. As with the stun belt claims, Raheem's claim that "the State made misleading, improper and unconstitutional closing arguments at both the guilt/innocence phase and sentencing phase" was not raised at trial or on direct review, and therefore was procedurally defaulted. See Black, 336 S.E.2d at 755. So Raheem argues now -- as he must -- that ineffective assistance of counsel provides cause to overcome the procedural default, claiming that his counsel unreasonably failed to object to the comments the district attorney made during closing arguments. See Ledford, 975 F.3d at 1160–61. We again conclude that the state habeas court's rejection of Raheem's ineffective assistance claim was not contrary to or an unreasonable application of Strickland, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

According to Raheem, the district attorney improperly drew on his own expertise as a prosecutor to argue to the jury that he knew that people escape from prison, and that Raheem would be a threat if he escaped. The prosecutor invoked his own position and expertise, Raheem reasons, by repeatedly using the pronoun "I," in statements such as "I filed a notice of intent to seek the death penalty," and "I made the decision to seek the death penalty," (emphasis added). The state habeas court found that Raheem's counsel were not deficient in failing to object to the use of the pronoun "I," but that in any event, there was no reasonable probability that if trial counsel objected, Raheem would not have been convicted or sentenced to die. The court observed that the prosecutor was "merely making a proper assertion that the State had sought the death penalty in Petitioner's case and had given proper notice to Petitioner," and it was undisputed that the prosecutor had sought the death penalty. We cannot conclude that this determination was contrary to or an unreasonable application of clearly established law, nor that it amounted to an unreasonable determination of the facts.

***935** **[51]** The prosecutor then commented on the unconsummated escape plan found in Raheem's cell, arguing, "I'll bet you one thing, I'll bet you he hasn't given up." Raheem says the prosecutor again improperly drew on his own position and expertise by positing, "Whether he's smart enough to do it, I don't know. There have been folks that have, I know that," (emphasis added). "It has long been held that a prosecutor may argue both facts in evidence and reasonable inferences from those facts." Tucker v. Kemp, 762 F.2d 1496, 1506 (11th Cir. 1985). After introducing evidence to the jury about the jail map and contraband found in Raheem's cell at trial, the prosecutor's suggestion that Raheem would try to escape was not an unreasonable one. Moreover, the brief statement that people do escape from prison, a known fact, does not impermissibly inject evidence into the record. Nor, for that matter, has the Petitioner established prejudice. The state habeas court's determination that the prosecutor's use of the "I" pronoun "clearly does not constitute error," was not contrary to or an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented.

Raheem next challenges this statement from the prosecutor: "This man is just mean, ladies and gentlemen, in just plain, old country English, he's mean. He's cold-hearted. He's cold-blooded. And let me tell you something, he'll kill you. And I'm not having to guess." The state habeas court held that the prosecutor's future dangerous argument -- as a whole -- was not improper because the prosecutor made a "reasonable deduction from the evidence in suggesting that [Raheem] would pose a future danger based on the evidence presented at the sentencing phase of trial," and that Raheem failed to establish that trial counsel were deficient or that he was prejudiced by the prosecutor's arguments.

Reviewing this determination, the district court described the prosecutor's comment as "very troubling," noting that if the jurors heard the prosecutor's comment "as articulating a specific threat to them, it was so highly improper it could potentially impermissibly taint the proceedings." The court said, however, that "[o]n a cold record ... it is not possible to determine with certitude whether the Prosecutor was using 'you' to mean the jurors, or using it to suggest general future dangerousness." Applying the double deference mandated by AEDPA, the district court found "some support" for the state

habeas court's holding that defense counsel's performance was not deficient in failing to object. The district court also agreed with the state habeas court that Raheem was not prejudiced by the comment, especially since Crumbley addressed it in his closing argument.

We need not and do not reach the question whether defense counsel were deficient for failing to object to the prosecutor's comment, although we readily accept that it likely was erroneous for the prosecutor to tell the jury that Raheem will "kill you" and for defense counsel not to object. Nevertheless, considering the full record before the jury, we are satisfied that Raheem cannot establish that he was prejudiced by defense counsel's failure to object to the prosecutor's comment. See Dallas, 964 F.3d at 1306 ("A court may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied.") (quotations omitted).

As we have seen, the state offered overwhelming evidence, including strong evidence concerning Raheem's future dangerousness. And although defense counsel did not object to the prosecutor's remark at ***936** the time it was made, as the district court noted, Crumbley addressed it in his closing argument:

> Fear is our real enemy here. It's the State's ally. That's why Mr. Floyd [the prosecutor] got up close to you and yelled at you that we know one thing for sure, and that is that he'll kill you. [Raheem] is responsible for getting all that fear started, but you can stop it. The State wants you to give in to it.

On this record, the state court's finding that Raheem was not prejudiced by his counsel's failure to object at the time this comment was made was not contrary to or an unreasonable application of clearly established law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. As a result, Raheem's claims of prosecutorial misconduct remain procedurally defaulted.

VII.

Finally, Raheem claims that it was contrary to or an unreasonable application of clearly established law for the Georgia Supreme Court to have concluded, on direct review, that the prosecutor's violation of Raheem's Fifth Amendment rights by commenting on his failure to testify was harmless beyond a reasonable doubt. We disagree.

In closing argument, the prosecutor said: "Raheem didn't take the stand but you heard his video taped statement. And I submit to you that it ain't true." Raheem's counsel immediately moved for a mistrial. The trial court denied the motion for a mistrial, explaining:

> I don't know that it is a comment on his failure to take [the stand]. I took it as how that information was coming from him. I certainly think it would have been better left unsaid. But I don't take it to be any argument, for instance, that they should hold that against him that he failed to take the stand. It was mainly pointing out to the jury the source of the evidence you were about to tell them about, it was a video tape.

The trial judge then declined the prosecutor's suggestion that he give a curative instruction, relying instead on the general instruction at the close of the evidence that the jury was not permitted to draw any negative inference from the defendant's failure to testify.

The Georgia Supreme Court concluded that the constitutional rule that "a prosecutor may not make any comment upon a criminal defendant's failure to testify at trial" was violated in Raheem's case. It nevertheless found the violation harmless beyond a reasonable doubt:

> [U]pon considering the firsthand observation of the trial court that the comment in question did not appear designed to or likely to urge any negative inference, the strength of the evidence against the defendant, the charge given to the jury by the trial court, and the context in which the comment was made, this Court

> concludes that the violation here was harmless beyond a reasonable doubt.

Raheem, 560 S.E.2d at 685.

Raheem's claim is based on the Supreme Court ruling in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which held that the Fifth Amendment privilege against self-incrimination "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Id. at 615, 85 S.Ct. 1229. However, in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court clarified that Griffin violations are subject to harmless error review, explaining that "before a federal constitutional error can be held harmless, the ***937** court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24, 87 S.Ct. 824. That is exactly what the Georgia Supreme Court did here: it found a Griffin violation, but held, under Chapman, that the violation was harmless beyond a reasonable doubt. Raheem, 560 S.E.2d at 685.

[52] In § 2254 proceedings, a federal court must assess the prejudicial impact of an alleged constitutional error in a state-court criminal trial under the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which asks whether an error had a " 'substantial and injurious effect or influence' " on the jury's verdict, regardless of whether the state appellate court applied the " 'harmless beyond a reasonable doubt' standard set forth in Chapman." Fry v. Pliler, 551 U.S. 112, 116, 121–22, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007). As the Supreme Court explained in Brecht, "collateral review is different from direct review," and, therefore, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." 507 U.S. at 633–34, 113 S.Ct. 1710 (quotations omitted).

[53] Applying Brecht here, Raheem's claim fails. The prosecutor's comment was made in passing to explain the videotaped testimony; the evidence of Raheem's guilt was overwhelming; and the trial court clearly instructed the jury that it was barred from drawing any inference from Raheem's failure to testify.[8] There is no way to conclude from the record that this passing comment, in context, had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht, 507 U.S. at 623, 113 S.Ct. 1710. Accordingly, Raheem cannot succeed on this claim either.

* * *

At the end of the day, we hold that the district court properly denied Raheem's § 2254 habeas petition and **AFFIRM** its judgment.

All Citations

995 F.3d 895, 28 Fla. L. Weekly Fed. C 2785

Footnotes

1 The court noted that "[t]he trial court properly vacated the felony murder convictions [as duplicative] and imposed the jury's sentences for the malice murders." Id. at 682 n.1 (citing Malcolm v. State, 263 Ga. 369, 434 S.E.2d 479, 482 (1993); Ga. Code Ann. § 16–1–7(a)(1)).

2 Although this claim was included in the COA, Raheem never argued it on appeal and, therefore, it has been abandoned. Isaacs v. Head, 300 F.3d 1232, 1238 (11th Cir. 2002).

3 As for Raheem's claim that AEDPA deference does not apply to the state habeas court order because the court ignored the evidence he presented, he is mistaken. In the cases Raheem relies on, the courts began

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their analyses with AEDPA deference -- not de novo review -- and only later concluded that the state court had "unreasonably" ignored or discounted evidence. See Porter v. McCollum, 558 U.S. 30, 42–44, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009); Guzman v. Sec'y, Dep't of Corr., 663 F.3d 1336, 1351–52 & 1347 n.13 (11th Cir. 2011); see also Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1353 (11th Cir. 2011) (noting that "we do not owe the state court's findings deference under AEDPA," and apply a de novo standard of review, only when we first find that "a state court unreasonably determines the facts relevant to a claim") (quotations omitted, emphasis added). In this case, the state court did not unreasonably determine the facts.

4 "The Supreme Court has not yet defined § 2254(d)(2)'s 'precise relationship' to § 2254(e)(1)," and we need not do so here. Tharpe v. Warden, 834 F.3d 1323, 1337 (11th Cir. 2016) (quoting Burt v. Titlow, 571 U.S. 12, 18, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013)).

5 When asked to clarify at trial the relevance of Farrar's testimony to the guilt phase, Crumbley explained that "[t]he theory of relevance of this testimony is purely that there has been evidence presented that [Raheem] made statements to various people about his involvement in these crimes. And we think that it is relevant on the issue of whether the jury ought to believe that or not. And that is our sole theory of relevance here."

6 As for the argument Raheem raises in his reply brief to this Court -- challenging, for the first time, counsel's residual doubt strategy -- we decline to consider it. "As we repeatedly have admonished, arguments raised for the first time in a reply brief are not properly before a reviewing court." Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005) (quotations omitted, alteration adopted).

7 The MRI took place several weeks before trial, and the PET scan that Raheem ultimately refused to take was scheduled during voir dire. During a pretrial conference, Crumbley explained that he had diligently tried to schedule the PET scan earlier, but that Emory was simply unable to accommodate them at any earlier date.

8 The trial court instructed the jury this way: "[T]he defendant in a criminal case is under no duty to produce any evidence tending to prove innocence and is not required to take the stand and testify in the case. If the defendant elects not to testify, no inference hurtful, harmful, or adverse to the defendant shall be drawn by the jury, nor shall such fact be held against the defendant in any way." Raheem, 560 S.E.2d at 685.

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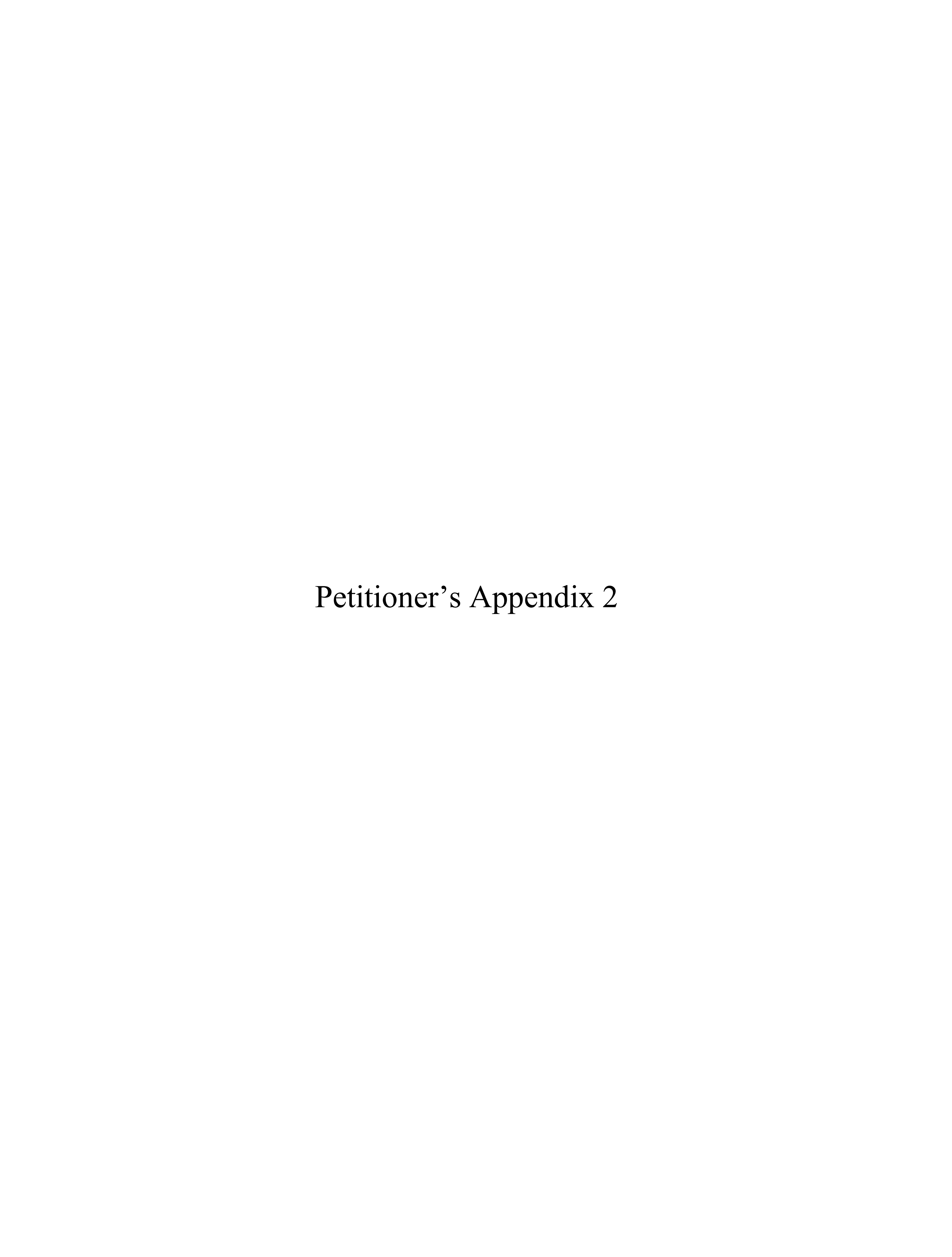


Petitioner’s Appendix 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12866-P

ASKIA MUSTAFA RAHEEM,

Petitioner - Appellant,

versus

GDCP WARDEN,

Respondent - Appellee.

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

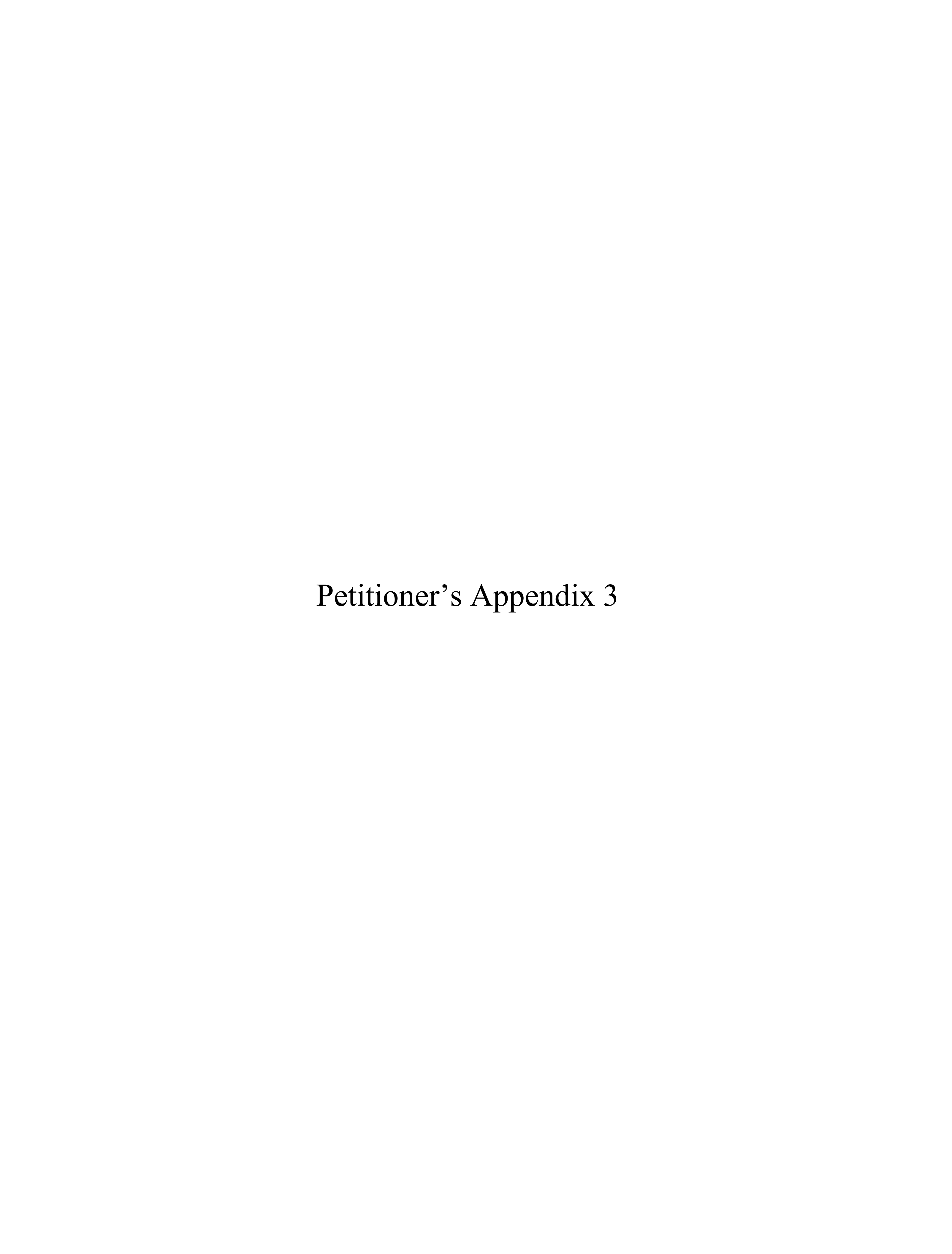
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, ED CARNES and MARCUS, Circuit Judges.

PER CURIAM:

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

ORD-46



Petitioner's Appendix 3

2015 WL 13899724
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division,
Atlanta Division.

Askia Mustafa RAHEEM, Petitioner,
v.
Carl HUMPHREY, Warden, Georgia Diagnostic Prison, Respondent.

Civil Action No. 1:11-CV-1694-AT
|
Signed 09/24/2015

ORDER

Amy Totenberg, United States District Judge

***1** Petitioner, Askia Mustafa Raheem, filed the instant habeas corpus petition pursuant to 28 U.S.C. § 2254 seeking relief from alleged constitutional violations during his trial and sentencing. A Henry County, Georgia, jury convicted Raheem of double homicide on February 15, 2001, and sentenced him to death on February 17, 2001. He appealed to the Georgia Supreme Court, which affirmed the conviction and sentence on March 11, 2002. *Raheem v. State*, 560 S.E.2d 680 (Ga. 2002). The United States Supreme Court denied certiorari on November 12, 2002. *Raheem v. Georgia*, 537 U.S. 1021 (2002), *reh'g denied*, 537 U.S. 115 (2003). Petitioner filed a habeas petition in the Superior Court of Butts County, Georgia, on April 3, 2003, and an amended petition on October 23, 2006. The state habeas court held a hearing January 28-30, 2008, and denied relief on February 19, 2009. *Raheem v. Hall*, 2003-v-319 (2009). The Georgia Supreme Court denied Raheem's application for a certificate of probable cause to appeal, and the United States Supreme Court denied certiorari. *Raheem v. Hall*, Case No. S09E1506 (2010); *Raheem v. Hall*, 131 S. Ct. 2905 (2011) (mem.) This petition followed on May 24, 2011.

I. AEDPA STANDARD OF REVIEW

In reviewing the Petitioner's claims in the instant federal habeas petition, this Court is constrained by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Under AEDPA, the Court may not grant habeas relief on any claim that was adjudicated on the merits in state court proceedings unless the state court adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court acts contrary to clearly established federal law if it "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court makes an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. "An unreasonable application of federal law is not simply an erroneous or incorrect application; it must be objectively unreasonable." *Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) (citing *Breedlove v. Moore*, 279 F.3d 952, 961 (11th Cir. 2002) and (*Williams*, 529 U.S. at 409). Similarly, the Court may not overturn a state court merits adjudication on factual grounds unless the decision was "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

In this case, the Respondent wrote the order that the state habeas court adopted almost verbatim [1] as the decision of the court. While the Court recognizes that "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact" is significant, when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985); *see also Rhode v. Hall*, 582 F.3d 1273, 1282 (11th Cir. 2009).

II. Factual Background

A. Indictment and Pretrial Preparation

***2** On May 6, 1999, a Henry County grand jury indicted Raheem on two counts of malice murder, four counts of

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felony murder, two counts of armed robbery, and one count of burglary related to the shooting deaths of Brandon Jamal Hollis and his mother Miriam Diane Hollis. (RX 1 at 4-8.) [2]

Raheem was nineteen years old at the time of the indictment and two years older by the time of trial in 2001. He had a history of severe mental disorders, intermittent hospitalizations, and at least four suicide attempts. [3] Experts speculated that his mental health problems might have arisen in part from organic brain damage caused by a closed head injury during his childhood. (RX 108 at 654, 673, 848, 871.) Raheem's prior criminal history consisted of petty and property-related crimes. He had a pattern of committing "pointless crimes," like stealing a cement truck and driving it around and breaking into a house and then waiting outside in a car while calling the police. (*Id.* at 782; *id.* at 724-25.) In July of 1996, he was adjudicated delinquent for burglary and sentenced to 90 days in boot camp. Records from that time show reveal that Raheem was confused and suffering from clinical depression. He served time for forgery and financial transaction card fraud beginning in the fall of 1997, (RX 17 at 2543-44), during which time he attempted suicide in jail. (RX 111 at 1715.) Up to the date of the events in question, he had no reported history of violence directed at anyone other than himself.

Henry County Superior Court Judge William H. Craig appointed Wade Crumbley and Gregory Futch to represent Raheem. (RX 106 at 224; RX 107 at 402.) Wade Crumbley had approximately twenty-one years and Gregory Futch had approximately sixteen years of experience practicing law prior to being appointed to represent Petitioner. (RX 107 at 392; RX 106 at 223.) At that time, each was carrying a case load about one-fourth to one-third criminal defense cases, the balance civil litigation. (RX 106 at 225-26, RX 107 at 394.) Both had some experience handling capital cases prior to being appointed to represent Raheem, although neither had presented a death penalty mitigation case at trial. Futch's death penalty litigation experience, prior to representing Raheem, included second-chairing a capital trial for the prosecution and representing a defendant for whom he was eventually able to negotiate a plea for life without parole. (RX 106 at 224-25.) Crumbley had worked on three capital cases at the initial trial level prior to representing Raheem. Two of these cases ended with pleas to life without parole; in the third, the defendant's family hired another attorney just before trial. (RX 107 at 396-98.) Thus, as Crumbley testified in the state habeas hearing, "[T]his was the first death penalty sentencing phase that I had actually had to try." (*Id.* at 436.)

Crumbley and Futch had received some training on litigating death penalty cases and understood the importance of developing mitigation evidence in preparation for the sentencing phase, including the relevance of mental health issues and organic brain damage. (*Id.* at 400, 412.) The trial court appointed attorney Tom Carr to help with investigation for the case, and Carr's role mostly involved gathering documents. (*Id.* at 403.) Crumbley and Futch did not have a separate mitigation specialist on the case. (RX 106 at 256.) No single person on the trial team was responsible for developing mitigation evidence. (*Id.* at 256.)

***3** Crumbley described a "very difficult" relationship with his client. (RX 107 at 405.) It was "problematic," he said, in that Raheem "sent [him] on wild goose chases about things," telling him things to investigate that turned out to be "a waste of time." (*Id.* at 406.) Crumbley also described a "struggle of the wills" over the goals of the representation. (*Id.*) Crumbley thought the chances of an acquittal were close to zero, and wanted to focus on the mitigation phase. (*Id.* at 407.) Raheem, however, "had no concern about that aspect of it and was not interested in that part of it." (*Id.*) His goal was to be acquitted. (*Id.*)

Crumbley faced the additional challenge that Raheem made a number of statements to the police taking credit for atrocious crimes he did not actually commit. As Crumbley explained to the state habeas court:

> Even after I was appointed and explained to him why he should not keep talking to the police, he continued to call the chief investigator and invite her to come back over and talk to him some more. And he talked about numerous other crimes that he claimed to have committed, some of which were, you know, very heinous, from his descriptions of them. There was no evidence any of those had ever happened. It appeared they were all complete fabrications and that he was sort of doing to her the same thing he did to me, at times, which was to, you know, make things up and to send

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> people on wild goose chases about things.

(*Id.* at 408-09.)

Trial counsel retained four mental health experts to examine Raheem prior to trial in an attempt to develop mitigation evidence related to mental health and possible organic brain damage: licensed psychologists Dr. Jack Farrar, Dr. Charles Nord, and Dr. Dennis Herendeen, and neurologist/psychiatrist Dr. Jeffrey Klopper. (RX 108 at 671, 677, 714, and 881.) Crumbley and Futch knew Dr. Farrar and knew that he had treated Raheem when Raheem was admitted to the Fairview Day Hospital for a period of time after a suicide attempt at age fifteen. (RX 107 at 416.) Farrar became part of the defense team, meeting with trial counsel and Raheem on numerous occasions throughout pre-trial preparations. (*Id.*) Counsel also brought in Dr. Nord, another psychologist who had previously treated Raheem when he was hospitalized after his first suicide attempt. (RX 108 at 677.) Farrar and Nord had both diagnosed Raheem with depression and borderline personality disorder. (RX 17 at 2568; RX 18 at 2895.)

The defense team was aware of evidence that Raheem might have suffered from a traumatic brain injury when he was a child. (RX 107 at 411.) Based on information from Raheem's family, his own observations, and a fainting episode Raheem had in his cell prior to trial where the guard observed that Raheem's eyes rolled back in his head, Farrar recommended that defense counsel should retain a psychiatrist with a specialization in neurology to conduct testing for possible brain damage. (RX 108 at 877-81.) Farrar recommended Dr. Jeffrey Klopper. (*Id.*) Defense counsel filed a motion for expert funds for this purpose, and the court approved hiring Dr. Klopper on April 18, 2000. (*Id.* at 885.) Crumbley sent Klopper a letter on June 12, 2000, asking him to evaluate Raheem. (RX 109 at 893-94.) Klopper met with Raheem and conducted tests in August of 2000. (RX 107 at 430; RX 109 at 896.) Counsel met with Klopper and Farrar to discuss his assessment on December 4, 2000, two months prior to trial. (RX 109 at 901.)

At that meeting, Klopper informed trial counsel that he had not found conclusive evidence that Raheem suffered from brain damage. (RX 107 at 425-30.) Futch's contemporaneous notes state, "[N]othing real clear as a result of his time with Mustafa. Normal psychological exam doesn't exclude problems. Neuropsychological exam by neuropsychologist would help." (RX 109 at 901.) In the same meeting, the defense team discussed the fact that Dr. Dennis Herendeen had met with Raheem on December 3, 2000. (*Id.*) Herendeen, a psychologist but not a neuropsychologist, had administered several screening tests designed to reveal evidence of organic brain damage. (RX 108 at 715.) Futch's notes state, "Jack didn't think that Dennis found anything to help us." (RX 109 at 901.) However, Dr. Klopper suggested that in order to further investigate the issue, Raheem should have an MRI and a PET scan. (RX 107 at 430.) Defense counsel sought funds for these tests and arranged them. The MRI produced a normal clinical reading. (RX 105 at 153.) On the day Raheem was scheduled to have the PET scan, he refused to get out of the transport at Emory Hospital to have it done. (RX 107 at 412.) The Court will discuss the circumstances of his refusal in greater detail *infra.*

B. Guilt-Phase Evidence

***4** The evidence the prosecution presented at trial included testimony from lead detective Rene Swanson, detective Tim Ferguson, and three individuals who were originally suspects in the case: Michael Jenkins, Dione Feltus, and Veronica Gibbs.[4] Michael Jenkins was separately charged for his involvement in the murders and agreed to a plea deal of life plus fifteen years, to run concurrently, in exchange for his testimony against Raheem. (RX 16 at 2341-42.)

At the trial, Jenkins testified that he, Dione Feltus, and Raheem were all friends prior to April 2, 1999. (*Id.* at 2350-52.) On that Friday, he and Dione Feltus paged Raheem to come pick them up. (*Id.* at 2356.) Raheem came to pick them up in his girlfriend Veronica Gibbs' blue Honda. (*Id.* at 2357.) Raheem and Jenkins dropped Feltus off at work at five o'clock at the Church's Chicken at Lake Harbin and Maddox Road. (*Id.* at 2359-60.)

Jenkins testified that after they dropped Feltus off at work, Raheem wanted to pick up his friend Brandon Hollis to go target shooting. (*Id.* at 2361-62.) Jenkins had never met Brandon Hollis prior to that day. (*Id.*) Raheem and Jenkins first drove to Veronica Gibbs' apartment, where Raheem was living, and retrieved the gun from Gibbs' bedroom. (*Id.* at 2363.) As they were driving down the road, Raheem shot the gun out the window to make sure it would not jam. (*Id.* at 2368-69.)

On their way to pick up Brandon, Raheem stopped at Kroger and bought a box of trash bags. (*Id.* at 2374.) Then they went

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across the street to a gas station and Raheem called Brandon from the payphone. (*Id.* at 2375.) They drove to Brandon's house, but he was not waiting outside when they got there. (*Id.* at 2377.) They returned to the gas station and called Brandon from the payphone again, and the second time they drove to his house, Brandon was waiting out front. (*Id.* at 2378.)

Jenkins testified that they drove to a dirt road about five minutes from Brandon's house. (*Id.* at 2379.) They walked back into the woods as it was starting to get dark; it was about 6, going on 6:30 p.m. (*Id.* at 2381-82.) Jenkins understood that they were going target shooting. (*Id.*) Raheem shot at a tree and missed. (*Id.* at 2385.) Jenkins took the gun, intending to shoot it. (*Id.* at 2386.) Brandon remarked that the gun was loud and maybe they should find somewhere else to go. (*Id.* at 2385.) As Brandon turned and started walking back toward the car, Raheem took the gun back, and he and Jenkins both followed. (*Id.* at 2386-87.) Raheem commented that Brandon should not walk so fast because he did not have the flash light and might step in mud and get mud in the car. (*Id.* at 2389.) Jenkins looked down at his shoes to see if they were muddy, and when he looked up, Raheem "had the gun at the back of Brandon's head, and he shot him." (*Id.*)

Brandon fell to the ground. (*Id.* at 2390.) Jenkins asked if he was dead, and Raheem responded, "No, but he is on his way out." (*Id.*) Raheem took Brandon's watch and said, "I guess you ain't going to be needing this watch no more." (*Id.* at 2392-93.) Raheem also took Brandon's keys and wallet. (*Id.*) Jenkins testified that Raheem's shoes got blood on them when Brandon's head fell on his foot. (*Id.* at 2397.) When they got back to the car, Raheem said to Jenkins, "I'm glad you didn't run." (*Id.* at 2401.)

***5** Jenkins testified that they drove back to Brandon's house and Raheem used Brandon's keys to open the front door. (*Id.* at 2402.) Before they went in, Jenkins testified, Raheem told him to bring a trash bag. (*Id.* at 2403.) Prosecutor Tommy Floyd asked him why, and Jenkins responded, "I figured if somebody was in there, he was going to shoot them." (*Id.* at 2403.)

When they walked into the house, Miriam Hollis was sitting in a chair reading a book. (*Id.* at 2405.) Raheem had the gun out as they walked in. (*Id.*) Ms. Hollis jumped up, and Raheem fired a shot at her and jumped behind a wall. (*Id.*) Raheem then said, "Get down, this is a robbery," and Ms. Hollis started to get down on the other side of the chair. (*Id.* at 2406.) When she got down, Raheem reached over the chair and shot her. (*Id.* at 2407.) Ms. Hollis fell, and blood seeped out of her head onto the carpet. (*Id.* at 2408.) Jenkins handed the garbage bag to Raheem, who put it over Ms. Hollis' head to contain the blood. (*Id.* at 2409.) Raheem ran through the house, checking to make sure no one else was there. (*Id.* at 2410-11.) He grabbed the keys to Ms. Hollis' Lexus. (*Id.*) Later, Raheem told Jenkins that he killed Ms. Hollis because he had paid her $8,000 for the Lexus some time before, and she refused to give it to him. (*Id.* at 2412-13.) Raheem popped the trunk of the Lexus, and he and Jenkins carried Ms. Hollis' body and put it in the trunk of the car. (*Id.* at 2413-14.) After they put the body in the trunk, Raheem tried to clean the blood off the carpet with a mop. (*Id.* at 2416.) Jenkins could not drive the Honda, which was a manual transmission, so he got in the Lexus with Raheem and they drove off. (*Id.* at 2417-18.)

Raheem and Jenkins went to see Raheem's girlfriend, Veronica Gibbs, at the B.P. gas station where she worked. (*Id.* at 2425.) Raheem went in to talk with Gibbs, brought her outside with him, and popped the trunk of the Lexus to show her the body. (*Id.*) Then Raheem and Jenkins went to Wendy's, where Raheem ate, but Jenkins could not keep any food down. (*Id.* at 2427-28.) Afterwards they rode around until midnight, when they went back to pick up Gibbs. (*Id.* at 2429.) When Gibbs got off work, she, Raheem, and Jenkins drove back to Ms. Hollis' house in the Lexus, and Gibbs and Raheem burglarized the house. (*Id.* at 2434-39.) Raheem and Jenkins then drove back to Gibbs' house in the Lexus, and Gibbs drove the Honda. (*Id.* at 2439.)

Jenkins testified that at about 4 a.m., he went with Raheem in the Lexus to dispose of Ms. Hollis' body. (*Id.* at 2441-42.) They drove to some train tracks and got Ms. Hollis' body out of the trunk. (*Id.* at 2442.) Raheem dragged the body along the tracks for a ways. (*Id.* at 2447.) They covered her body with wood and debris. (*Id.* at 2448.) Raheem said he wanted to burn the body, and Jenkins said he did not think they should. (*Id.* at 2448-49.) As they started to walk back to the car, Raheem turned back, doused the body with alcohol or gasoline – Jenkins was not sure which – struck a match, and set the body ablaze. (*Id.* at 2449.) They drove back to Gibbs' house and went back to sleep. (*Id.* at 2451.)

At the Prosecutor's request, Jenkins identified his shoes and Dione Feltus' shoes for the jury. (*Id.* at 2430-31.) He then testified that on the night in question, Raheem changed into Feltus' black Reeboks at Gibbs' house before they went to dispose of Ms. Hollis' body. (*Id.* at 2431, 2452.) Floyd asked Jenkins if Feltus was with them on the dirt road, when Raheem

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shot Brandon; when Ms. Hollis was shot and killed; or when they went back to burglarize the house; and Jenkins said no. (*Id.* at 2435.) Jenkins testified that he did not see Feltus again that night after they dropped him off at work. (*Id.* at 2435.)

***6** The state also offered testimony from Gibbs that Raheem had confessed to her that he had killed Brandon and Ms. Hollis. (RX 15 at 1909-10.) Gibbs testified that Raheem, accompanied by Jenkins, came to her work around 7:30 p.m. on the evening of April 2, 1999, and showed her the body of a light-skinned black woman in the trunk of a Lexus. (*Id.* at 1901-03.) She testified that Raheem told her he had shot the woman and a young man also. (*Id.* at 1909.) Gibbs had been charged with burglarizing Ms. Hollis' home; she testified in exchange for a plea deal of ten years probation. (*Id.* at 1891.)

Feltus also testified that Raheem had confessed to him about murdering Brandon and Ms. Hollis. (RX 16 at 2218-22.) Feltus had been with Raheem at Gibbs' house on the Monday after the crime when both were arrested. (*Id.* at 2199, 2211.) At the time of his testimony, Feltus was serving time in a boot camp on an unrelated burglary charge. (*Id.* at 2198-99.) Feltus received no deal in exchange for his testimony in this case. (*Id.* at 2237.) On April 2, 1999, he and Jenkins were skipping school and Raheem picked them up in a Honda. (*Id.* at 2205.) Jenkins was scheduled to work at Church's Chicken on the night in question, and Raheem dropped him off at work around 4 p m. (*Id.* at 2207-08.) Feltus testified that he worked until closing, about 10 or 11 p m., and then walked home. (*Id.* at 2208-09.) He did not see Raheem any more that night. (*Id.*)

Feltus testified that the next day, Saturday, Raheem came to his house in a white Lexus. (*Id.* at 2213.) Raheem took Feltus and his brother Damiene to Shoe Carnival to get some new shoes. (*Id.* at 2214.) When Feltus asked Raheem where he had gotten the white Lexus, Raheem told him he got it from Brandon Hollis' mom. (*Id.* at 2217.) Raheem confessed to Feltus that he shot Brandon in the woods and then went back to Brandon's house and shot Ms. Hollis and put her in the trunk of the Lexus. (*Id.* at 2218-22.) Raheem told Feltus he had killed Ms. Hollis because he had paid her for the Lexus and then she refused to give it to him. (*Id.* at 2227-28.) Feltus testified that he did not tell police any of this at first, but decided to come forward when he learned that Raheem was telling police that Feltus and Jenkins had killed Miriam and Brandon Hollis. (*Id.* at 2231-32.) Feltus also testified that he and Raheem sometimes wore each other's shoes. (*Id.* at 2243-45.) Prosecutor Floyd asked him to try on a pair of black Reeboks that were in evidence, and Feltus testified that they were tight and he would not own a pair of shoes that were too small for him. (*Id.*) Jenkins had identified those shoes, which had Ms. Hollis' blood on them, as Feltus'. (*Id.* at 2430-31.)

The state offered testimony from Linda Norals, a manager at the Church's Chicken on Lake Harbin Road. (RX 17 at 2534.) Norals testified that she was the manager on duty at the restaurant on April 2, 1999, and Feltus had worked that night. (*Id.* at 2534-36.) She testified that she had wanted to send him home, because he came to work with facial hair, but she kept him until 9:30 or 10 because they were shorthanded. (*Id.*)

In addition to the testimony of several detectives and other witnesses, the prosecution also introduced a videotape of an interview between Raheem and the police in which he described substantially the same chain of events described by Jenkins, but with Jenkins as the shooter.[5] (RX 15 at 2054; RX 120 at 4467-85.) Detective Rene Swanson then testified that after giving that videotaped statement, Raheem took her to the location of Brandon's body. (RX 15 at 2054.)

***7** The defense recalled one of the detectives, Tim Ferguson, to explain that someone else at Church's Chicken had initially told him and Detective Swanson that Feltus had not worked on April 2, 1999. (RX 17 at 2548.) Ferguson believed the person he had spoken with was a manager, but could not say whether it was Linda Norals. (*Id.*) The defense also called Dr. Jack Farrar to explain Petitioner's psychological diagnoses. (*Id.* at 2556.) Farrar testified that Raheem's mental illness causes him to exude a false bravado and take credit for criminal acts he has not actually committed. (*Id.* at 2572-76.) The jury returned a verdict of guilty on all counts. (*Id.* at 2756-57.)

C. Sentencing-Phase Evidence

At the sentencing phase, the prosecution presented evidence of Petitioner's likely future dangerousness if the jury imposed a sentence other than death. Prosecutors called Deputy Susan Rogers, who testified that during a routine search of Petitioner's cell she had found a large shank and a razor blade stuck in the bed frame and a second shank hidden in the smoke detector. (RX 18 at 2823-28.) Deputy Michael Corley testified that he found a chair leg hidden under Petitioner's bunk on another occasion. (*Id.* at 2837.) Deputy Robert Anderson testified that he found a hand-drawn map of the jail with Petitioner's name on it inside a bible on the top bunk of his cell. (*Id.* at 2847.) Deputy Anderson testified that in his opinion the map was in Petitioner's handwriting. (*Id.* at

2853-54.) He also testified that he found a sock with a rock stuffed into it during this search of Petitioner's cell. (*Id.* at 2854.)

Deputy Gary Walls testified about two conversations with Raheem, one in which Raheem stated that he had no remorse over what happened because it was "just business," and another in which he threatened to kill Walls because Walls was testifying in his case. (*Id.* at 2869-71.) Clyde Hufstetler, an inmate who had been convicted of murdering his wife, testified that Raheem had told him he was going to have Prosecutor Tommy Floyd killed and have his own girlfriend killed for testifying against him. (*Id.* at 2880.) Crumbley cross examined Hufstetler and brought out the fact that Crumbley had previously represented Hufstetler for several years, although not in his murder trial, and they "used to fight the county together." (*Id.* at 2882.) Crumbley's cross examination of Hufstetler focused on the details of Hufstetler's shooting of his wife, his continued claim of innocence of that crime, the medications he was taking at the time of the alleged conversation with Raheem, and Hufstetler's diagnosed psychiatric illnesses. (*Id.* at 2882-84.)

The entire mitigation case for the defense took under one hour to present. Doctors Farrar and Nord testified about Raheem's mental illness. Specifically, Nord testified that he first met Raheem when Raheem was admitted to Charter Peachford Hospital in 1994 after a recent suicide attempt. (*Id.* at 2890.) Raheem was fifteen years old at that time. (*Id.* at 2891.) He interviewed Raheem, performed a battery of psychological tests, and diagnosed Raheem with major depression and oppositional defiance disorder. (*Id.* at 2891-92.) Nord read his impression of Raheem from his notes at the time:

> Mustafa is a young man at risk. He's depressed, continues to have suicidal ideation, gets disorganized easily and is quite impulsive. At times he doesn't care what happens to him. He will continue to be at risk until one gets control of his depression, agitation, and suicidal ideation.

(*Id.* at 2892.)

Nord testified that he had met with Raheem more recently, at his lawyers' request, at the jail on January 25, 2001. (*Id.* at 2893.) Nord testified that Raheem's mental illness had changed some from 1994 to 2001. When he met with Raheem at the jail he continued to be depressed but showed a lot of "borderline personality characteristics, because he would dissociate, he would go into himself." (*Id.* at 2894.) He was "more distant and distractible," and would "zone out and move into another world, which he had control of." (*Id.*) The doctor explained that "borderline" means "he's on the verge of becoming psychotic, but he's still within some range of reason," although he has moments where he is psychotic, meaning he hallucinates. (*Id.* at 2895.) Raheem felt that he could "disappear into that world," and described the other world to Nord in some detail. (*Id.*) He found the other world comforting. (*Id.* at 2896.)

***8** On cross examination, Nord agreed that Raheem's other world was like a "daydream" or a "fantasy world" (*Id.* at 2897), and that most people in jail who are charged with crimes are depressed. Prosecutor Floyd focused intently on the earlier oppositional defiance disorder diagnosis, asking, "That's pretty self-descriptive, isn't it? He's defiant of authority?" To which Nord replied, "Yes. He had a lot of issues with authority." (*Id.* at 2898.) Nord explained that defiance disorder is a diagnosis usually reserved for adolescents, but admitted that Raheem still has some "defiant features." (*Id.* at 2902.) Floyd asked if Raheem was vindictive, one of the characteristics of oppositional defiance disorder. When Nord said he had not observed vindictiveness in Raheem, Floyd asked if the doctor was aware that Raheem had threatened to kick a jailer "in the rear end" and had threatened to kill the Prosecutor and his own girlfriend for their role in this trial. (*Id.* at 2899.) Floyd then suggested that hypothetically, if you put a defiant person in a prison environment, he would be defiant to authority – "that is, prison guards who told him to do things." (*Id.* at 2900-01.)

The defense recalled Dr. Jack Farrar at the sentencing phase to testify further about Raheem's mental health. Farrar talked at some length about his deep frustration and anger when the managed care company stopped paying for Raheem's treatment at Fairview Day Hospital and even insisted that the clinic stop treating Raheem for free. (*Id.* at 2906.) Farrar went to battle for Raheem's continued treatment, and was ultimately distraught over the insurer's decision, because Raheem was still suicidal and had "severe problems" that the clinic could address. (*Id.* at 2906.) Farrar also told the jury that Raheem wanted to die; that he "just doesn't want to live, hasn't wanted to live for a very long time." (*Id.* at 2912.) Farrar testified that if Raheem could have stayed at the center

for further treatment, "we would have gotten this young man well." (*Id.* at 2914.)

Crumbley asked Farrar if he saw things worth salvaging in Raheem. The doctor replied that he certainly saw things worth salvaging, and that although Raheem played the tough guy, he had a softer side, a concern for other people, and an ability to attach to people. (*Id.* at 2916.)

Raheem's father, Askia Raheem, and his mother Elaine were the only members of Petitioner's family to testify in mitigation. Their testimony lasted a collective fifteen minutes, including cross examination.

Askia apologized to the victims and expressed sadness and regret about the whole situation. (*Id.* at 2922.) He told the jury, "I really love my son.... I definitely want the best for him and don't want him to die." (*Id.* at 2923.) He described their family, explaining that he has a twenty-two year old daughter and he and his wife had been separated for about three years. (*Id.* at 2923.) He agreed with Farrar that Raheem wanted to die and said that although he had "given a lot of thought about this," he did not know why. (*Id.*)

When prompted by counsel to "tell the jury something good about" Raheem, Askia recounted a time when he had a little cat and Raheem fought him "harder than anything" about keeping that cat in the garage rather than outside. (*Id.* at 2924.) He said that Raheem could not stand to see him hit a squirrel in the road. (*Id.*) He testified, "I can't remember him talking back to me. That's the truth.... I don't ever remember him having an act of violence against anybody." (*Id.*) Askia also told the story of one time when Raheem was five or six years old and he did not come home from school. (*Id.* at 2926.) Askia went looking for him, and finally, a MARTA bus driver told him they were holding a boy at the transit center who claimed to have caught a bus from Delaware. (*Id.* at 2927.) Askia testified that that was when he first noticed that "something wasn't quite right" with his son. (*Id.* at 2928.)

On cross examination, Floyd brought out that Askia's twenty-two year old daughter had never been in trouble, had attended college, and had a job in retail sales. (*Id.* at 2925-26.) He brought out that Askia was Raheem's natural father and had lived in the home with his mother during "most of [Raheem's] life." Askia testified that Raheem left home when he was about fifteen or sixteen and they "sort of lost track of him" after that. (*Id.* at 2926.) In another exchange, the Prosecutor elicited the following:

***9** Q: Just one more, sir. Your whole life, your grown, your adult life, you've worked, haven't you?

A: Yes, sir.

Q: Provided for your family?

A: Yes, sir.

Q: Provided for Mustafa?

A: Yes, sir.

Q: Has your wife worked outside the home during the marriage?

A: For a few years, yes.

Q: The rest of the time she was a homemaker?

A: Yes, sir.

Q: Stayed home with the children?

A: Yes, sir.

(*Id.* at 2928.)

Raheem's mother Elaine became emotional during her testimony. This prompted Raheem to yell at her in an attempt to get her to step down. (*Id.* at 2929.) When she regained her composure she apologized to the Hollis family and anybody else who was involved. (*Id.*) She testified that this was extremely unlike Raheem, that he had always been well-mannered to her, had never raised a hand against her, and never used profanity. (*Id.* at 2930.) She stated that Raheem had helped her when she was sick (although she gave no detail about her illness) – had cooked for her and driven her places. (*Id.*) When he was a child, she testified, he had always been "very loving, very loving, even more loving than my daughter was." (*Id.*) Therefore Elaine was shocked that he would do something like this. (*Id.*)

Elaine closed by reminding the jury that "we're all still God's children," and two wrongs do not make a right. She told them, "my son's life is in your hands," and that whatever punishment they decided to give him, he would still be judged by God, and "God has the last word." (*Id.* at 2930-31.) Crumbley then asked all of Raheem's family members to stand up so the jury could see them before Elaine stepped down.

D. Post-Conviction Evidence

In the state habeas proceeding, Petitioner presented new evidence that he suffers from organic brain damage, primarily in his left temporal lobe. (RX 105 at 67; RX 107 at 501.) He also presented evidence that he suffers from "absence seizures," where he zones out for periods of about 30 seconds and has no knowledge of what occurs during these periods. [6] (RX 105 at 116-27; RX 107 at 501-02, 527-36.) Petitioner presented numerous affidavits of family members, friends, acquaintances, and teachers who attested that they would have been willing to testify about Petitioner's difficult childhood, but his trial counsel never contacted them or never asked them about his childhood. (RX 108.)

Finally, Petitioner has presented evidence challenging the veracity of Michael Jenkins, Dione Feltus, and Linda Norals' testimony and asserting that the prosecution suppressed material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner introduced an affidavit of Jenkins in which he recants significant portions of his trial testimony. Specifically, Jenkins now attests that Feltus was with them on the night in question, both at the time of Brandon and Ms. Hollis' shootings, and that Jenkins did not see who shot Ms. Hollis. (RX 108 at 726.) He now claims that Feltus' shoes were on his own feet when Ms. Hollis' blood came in contact with them. (*Id.*) Jenkins attests that he gave perjured testimony at Petitioner's trial because Prosecutor Floyd met with him outside of the presence of his attorney just before the trial and told him how to testify about Feltus' shoes, the garbage bags, and Feltus not having been involved. (*Id.*) He claims that Floyd told him his deal depended on testifying in this way. (*Id.*) His plea deal was for life plus fifteen years, to run concurrently. (RX 16 at 2341-42.)

***10** Jenkins states in his affidavit:

> Mr. Floyd told me that Dione's shoes had blood on them. I told Mr. Floyd, during our conversation in his office about Mustafa's shoes, that Dione was wearing his own shoes when the blood got on them and that Dione was with us the night Brandon and Ms. Hollis were killed. Mr. Floyd was putting a lot of pressure on me to talk about how Mustafa wore Dione's shoes, and I broke down and told him that Dione was with us most of the night. Even though I told Mr. Floyd that, he wanted me to stick with what I had said before about Dione not being with us.

(RX 108 at 726-27.)

The record reflects at least two instances prior to trial where Jenkins told Floyd or investigators that Feltus was not involved in the events in question. Other witnesses corroborated that assertion. [7] In the March 7, 2000, interview, Floyd evoked the following responses from Jenkins in the presence of Jenkins' attorney and others:

Q. Did Dion [sic] go over there with you all?

A. No.

Q. Are you sure?

A. I'm positive.

Q. Just like you said, you all let him out at Church's?

A. We dropped him off at Church's.

Q. How come those people say he didn't work there?

A. I don't know.

Q. Don't mess up right here, now.

A. I'm not. I know for a fact we dropped him off at Church's Chicken.

(RX 109 at 1167-68.)

In an interview with Detectives Swanson and Sergeant Gaddis on April 7, 1999, just days after the crime, Jenkins stated that Feltus had not been involved:

Q. [Raheem's] saying that those shoes, Dione wore.

A. Dione wasn't even there.

(RX 147 at 11985.)

Petitioner contends that the state withheld material exculpatory evidence prior to trial that corroborates Jenkins' claim that Petitioner never wore Feltus' black Reeboks and that Floyd knew it. Specifically, Petitioner points to the

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transcript of Jenkins' taped interview with Floyd from March 7, 2000. At the end of that interview, Jenkins states that Petitioner was wearing the K-Swiss shoes when they went to dispose of Ms. Hollis' body. (RX 109 at 1189.) When the state provided the transcript to the defense, the word K-Swiss was transcribed as "unintelligible," and Petitioner now argues this was a material *Brady* omission. [8] (RX 109 at 1093.) The state provided the tape as well as the transcript to Petitioner's trial counsel.

Jenkins also recants his trial testimony that Petitioner told him to bring a garbage bag into Ms. Hollis' house because someone might be home and "if somebody was in there, he was going to kill them." (RX 16 at 2403-04.) Jenkins now attests in his affidavit that they did not bring the garbage bag for that reason; they did not anticipate Ms. Hollis being at home; he told Floyd as much; and Floyd pressured him to testify that way. (RX 108 at 728.)

***11** Floyd testified at the state habeas hearing. When the state's attorney confronted Floyd with the statements in Jenkins' affidavit, Floyd responded, "I never told him what to say about anything. I asked him questions when I questioned him. I didn't tell him what to say on any occasion, under any circumstances, on any subject." (RX 106 at 383.)

Petitioner also presents evidence calling into question Linda Norals' testimony at trial. Norals testified that she had been the manager at Church's Chicken on the night in question, and Feltus had worked until 9:30 or 10 p.m. Floyd used this alibi to argue to the jury that Feltus could not have been implicated in the killings, because he was "cooking chicken." (RX 17 at 2702-04, 2716.) This was important to rebut Petitioner's defense, [9] which asserted that Jenkins or Feltus was actually the trigger man, and to shore up Feltus' credibility.

Petitioner presented the affidavit of Trakeshia Johnnican, who attests that she was the manager on duty that night, Linda Norals did not work, and neither did Dione. (RX 108 at 731.) Johnnican further attests that she had spoken with police officers shortly after that crime occurred:

> The week after the crime happened, two people from the Henry County Police came to the store, a stocky white woman and a black man. They asked who the manager was last Friday night and wanted to know if Dione Feltus had worked. I told them I had been the manager on duty that night and that Dione had not worked. I don't recall the exact words I used but I told them Dione was not at work that night. They had a note pad and wrote down things as I told them. Linda and Sally were both there, and they didn't say anything.

(*Id.* at 732.)

Johnnican attests that this was the only time she spoke with the police. She attests, "If they came back to ask more questions or get a copy of the schedule, it was when I was not there. No one ever contacted me about any of it again." [10] (*Id.*) Although Johnnican attested the officers she spoke with took notes of the conversation, no mention of Trakeshia Johnnican or her statements to the detectives made it into Ferguson's typed report of the investigation. (RX 113 at 2238-45.) Neither were any hand-written notes from this encounter provided to the defense. Ferguson testified in his deposition that he did not recall the name of the person they spoke with at Church's Chicken, and commented, "I don't know why it's not in my narrative." (RX 113 at 2227.) He further explained, "There should have been some handwritten notes because that's how I generated this report. Obviously this wasn't all generated by memory. I mean, I was taking notes throughout the investigation. Where these notes are now I have no idea." (*Id.* at 2228.) Ferguson stated that he would have given his hand-written notes to Swanson, as the lead detective in the case. (*Id.*) He would not have thrown them away in a homicide case, as "the DA's Office ... would have wanted copies of them." (*Id.*)

***12** Detective Swanson, the lead detective in the case, testified at the state habeas proceeding that she had gone with Detective Ferguson to Church's Chicken to get the time sheets. She said the lady they spoke with there "had initially told us that [Feltus] wasn't working and then she said that he had, in fact, been working and that he had been sent home because he had facial hair that she had told him to get rid of." (RX 106 at 377.) Swanson was clear that she spoke to the same person twice and got different answers. (*Id.*)

Petitioner has identified one document that the state definitely failed to produce pretrial: the report of Detective Swanson's

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phone call to Linda Norals from January 26, 2001, just one week prior to the trial. That report states:

> Called Church's Chicken 770-968-3999 spoke with Linda Norals/Frazier. She said that she had not talked to anyone about Dione since Det. Ferguson and I were out there. She said that Dione had come in and worked. I told her that she said that Dione had not worked because she had warned him about the facial hair. She then said that he worked but she sent him home early around 9 or 9:30 because he still had all of that facial hair. She said that she had called him in. I asked her if she had spoke with Dione or his attorney and she said she had not talked to anyone. I asked her who the other lady was we talked to and she said Sally Riggins [11] who now worked at South Fulton Hospital or something. Advised Kip of conversation.

(RX 109 at 1032.)

The state did not include this report in its pretrial production to defense counsel. Habeas counsel found it in the Henry County police records. (Pet'r's Br., Doc. 38, at 193.)

III. DISCUSSION

A. Ineffective Assistance of Counsel

The state habeas court rejected Petitioner's ineffective assistance of counsel claims on the merits. Therefore, Petitioner has the burden of establishing that (1) the state court's denial of this claim for relief was contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or (2) the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d); *see, e.g., Conner v. GDCP, Warden*, 784 F.3d 752, 770 (11th Cir. 2015).

The Supreme Court established the prevailing standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to show that his constitutional right to counsel has been violated, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To make this determination, the court relies on prevailing norms of practice. Such prevailing norms may be reflected in the American Bar Association standards "and the like," but these are "only guides." *Id.* "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89.

The Court noted that in reviewing ineffective assistance of counsel claims, "every effort must be made to eliminate the distorting effects of hindsight." *Id.* at 680. A petitioner must overcome the presumption that the "challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation and citation omitted). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Therefore, a petitioner must identify the acts or omissions that were not the result of sound or reasonable professional judgment. *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

***13** Counsel has a duty to conduct a reasonable investigation or to "make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* Counsel's conversations with the defendant may give counsel reason not to investigate further "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." *Id.*

If a petitioner establishes that counsel's performance was professionally unreasonable, he is entitled to relief only if the error affected the outcome of his case. *Id.* This is the second prong of the *Strickland* test: a petitioner must show that counsel's deficient performance was prejudicial to his defense. To do so, a petitioner must show to a reasonable

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probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* The *Strickland* Court was concerned with the "fundamental fairness of the proceeding." *Id.* at 696. Therefore, a court reviewing counsel's performance must consider whether the result of a proceeding is unreliable due to a "breakdown in the adversarial process that our system counts on to produce just results." *Id.*

As a panel of the Eleventh Circuit explained:

> It is now hornbook law that to succeed on an ineffective assistance of counsel claim, a petitioner must show that: (1) 'counsel's representation fell below an objective standard of reasonableness,' and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' We 'may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied.' Moreover, where, as here, a claim implicates AEDPA and *Strickland*, our review is 'doubly deferential.' *See* *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ('Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.

(citations and quotations omitted*)).* *Boyd v. Comm'r, Ala. Dept. of Corr.*, 697 F.3d 1320, 1332 (11th Cir. 2012), *cert. denied* 133 S. Ct. 2857 (2013).

Petitioner relies on *Williams v. Allen*, in which the Eleventh Circuit determined that the state court had unreasonably applied *Strickland* to the facts underlying the petitioner's claim of ineffective assistance of counsel at sentencing. 542 F.3d 1326, 1343 (11th Cir. 2008), *cert. denied*, 556 U.S. 1253 (2009). Williams argued that he was denied his constitutional right to effective assistance of counsel due to his trial counsel's failure to investigate and present reasonably available mitigating evidence concerning his background. In *Williams*, the attorneys' investigation was extremely circumscribed; it was limited to access to the report filed by the defense psychologist, access to the presentence investigation report ("PSI"), and their interview of the defendant's mother. Moreover, the mitigation evidence that Williams' counsel failed to discover and to present painted a "vastly different picture" of his background than that presented to the jury. *Id.* at 1342. *Williams* itself relies on *Wiggins v. Smith*, 539 U.S. 510 (2003), in which the attorneys had conducted a similarly deficient investigation into mitigating factors (relying exclusively on test reports of a psychologist, a PSI, and Department of Social Services Records which contained red flags). As in the *Williams* case, the evidence presented on federal habeas presented a vastly different picture of the Petitioner's childhood; it presented a horrific account of physical and sexual abuse and extreme deprivation.

***14** In contrast to *Wiggins* and *Williams*, in this case counsel conducted a wide ranging investigation into mitigation. Regarding this investigation, the habeas court found:

> The record before this Court establishes that trial counsel conducted a thorough mitigation investigation. As part of their investigation, trial counsel obtained all of Petitioner's school, medical, mental health, court and juvenile records that were in existence.... In addition to obtaining records, trial counsel testified that they made an attempt to locate all of Petitioner's family to see if they would be cooperative.... In addition to family members, trial counsel also tried to interview all of the mental health professionals and counselors who had previously treated Petitioner.

(RX 177 at 62-63, 65 (citations to record omitted.))

The failure of Petitioner to establish that counsel's performance was professionally unreasonable bars relief under *Strickland.* In this case, however, the state habeas court also addressed the second prong of the *Strickland* test. To assess the probability of a different outcome if undiscovered mitigation evidence had been presented, the court must "consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced at the habeas proceeding – and reweigh it against the evidence in aggravation." *Id.* Courts generally have not found prejudice where the overlooked mitigation evidence

would "barely have altered the sentencing profile presented." *Id.* However, where "the jury labored under a profoundly misleading picture of [the defendant's] moral culpability because the most important mitigating circumstances were completely withheld from it," prejudice may exist. *Ferrell v. Hall*, 640 F.3d 1199, 1236 (11th Cir. 2011).

1. Mental Health Investigation

With reference to the claim that Petitioner's counsel were ineffective for failing to investigate and present in mitigation evidence that Petitioner suffered from organic brain damage, the state habeas court concluded that Petitioner failed to establish either deficient performance or prejudice. (RX 177 at 93.)

Trial attorneys Wade Crumbley and Gregory Futch understood the relevance of organic brain damage in mitigation, as well as the potential significance of the incidents of traumatic head injury which Petitioner suffered as a child, and which were described to them by Petitioner's father. As a result, they focused their investigative efforts, in part, on determining whether there was evidence of organic brain damage. (RX 107 at 400, 411-12.)

Counsel retained four mental health experts to examine Petitioner prior to trial in an attempt to develop mitigation evidence related to mental health and possible organic brain damage: licensed psychologists Dr. Jack Farrar, Dr. Charles Nord, and Dr. Dennis Herendeen, and neurologist/psychiatrist Dr. Jeffrey Klopper. (RX 108 at 671, 677, 714, and 881.) Farrar told counsel that in order to detect evidence of brain damage, a full battery of neuropsychological testing was needed. (*Id.* at 672.) Farrar recommended that defense counsel should retain a psychiatrist with a specialization in neurology to do neuropsychological testing. (*Id.* at 877-81.) The trial court approved the funds for such an expert, and Farrar recommended Dr. Jeffrey Klopper. (*Id.*) Klopper met with Petitioner and conducted tests. (RX 107 at 430.) Dr. Herendeen also met with Petitioner and administered several tests designed to reveal evidence of organic brain damage. (RX 108 at 715.) In addition, the defense contacted Nord, who had conducted tests related to brain function when he treated Petitioner at Charter Peachford Hospital. (*Id.* at 677.)

***15** Doctors Herendeen and Nord did some neuropsychological testing, though Petitioner's post-conviction expert Dr. Ruben Gur states that their testing was not a "full battery" and was more in the nature of screening. (RX 105 at 55, 208, 211.) Herendeen conducted the Kaufman Short Neuropsychological Assessment Procedure ("KSNAP"), which tests five or six areas of brain function and provides an overall score. (RX 107 at 499-500.) Herendeen also conducted an Aphasia Screening Test, which looks for impairment in language – namely, the ability to understand what people are saying and express oneself through language and writing. (*Id.*) Herendeen also administered the Trail Making Test, Parts A and B. (RX 105 at 211.) Herendeen and Nord both conducted the Bender-Gestalt test. (*Id.* at 212.) Klopper conducted testing, although there is no evidence in the record of what tests Klopper administered or precisely what results he obtained. Unlike doctors Nord, Herendeen, and Farrar, Klopper did not present any testimony or affidavit in the post-conviction proceeding.

Trial counsel testified that shortly before trial, the various mental health experts informed them that they had not found evidence that Petitioner suffered from brain damage. (RX 107 at 425-30.) However, Klopper suggested that in order to further investigate the issue, Petitioner should have an MRI and a PET scan. (*Id.* at 430.) Defense counsel sought funds for these tests from the trial court and arranged them. The MRI came back with a clinical reading of normal. (RX 105 at 153.) On the day Petitioner was scheduled to have the PET scan, he refused to get out of the transport at Emory Hospital to have it done. (RX 107 at 412.)

At the point of trial, defense counsels' four mental health experts reported that they had nothing helpful to the defense to say about evidence of organic brain damage. (*Id.* at 425-30.) Crumbley testified in deposition that they did not have Dr. Klopper testify at trial for the following reasons:

> Well, he didn't testify because what he would have said, if we had called him to testify, was that he found no evidence in his examination of Mustafa of any organic brain damage or any effects of a childhood head injury. He was very skeptical that the [MRI and PET scan] testing that he ordered was going to show anything - but he agreed to sign the order to have the testing done anyway.

(RX 113 at 2318.)

In the State Habeas, Doctors Herendeen and Nord filed affidavits stating that their testing results were consistent with organic brain damage and were essentially short screening assessments. Dr. Herendeen added: "When screening tests produce results consistent with organic brain damage, usually a full neuropsychological battery is then administered by a neuropsychologist, not a psychologist." (RX 108 at 677, 714-15.) He did not state that he recommended further testing. Petitioner points to counsel's notes from the December 4, 2000, meeting as evidence that Klopper indicated neuropsychological testing by a neuropsychologist "would help." (RX 109 at 901.) Trial counsel, however, testified that there were no other tests suggested by the mental health experts that they failed to pursue. (RX 113 at 2330-31.)

This Court concludes that the state habeas court reasonably determined that trial counsel were not deficient in their investigation of brain damage, and that based on the results of that investigation, counsel made an appropriate strategic decision not to put forth any evidence of brain damage in the sentencing phase. This was neither an unreasonable application of *Strickland* nor was it based on an unreasonable determination of the facts in light of the evidence presented.

2. Background and Social History

Petitioner also contends that trial "counsel unreasonably failed to investigate and present evidence of Petitioner's mitigating background." (Habeas Pet. at 4, Doc. 1.)

In contrast to the constrained investigation in the *Williams* and *Wiggins* cases, trial counsel in this case conducted a wide-ranging investigation of Petitioner's background. In addition to obtaining virtually all available school and medical records, counsel spoke individually with Petitioner's father, Askia Raheem, his mother, Elaine Raheem, and his sister Jameelah on multiple occasions. (RX 106 at 280-81, RX 107 at 415; RX 113 at 2312.) During those conversations, trial counsel asked about incidents of head injuries that would be relevant to proving organic brain damage (RX 107 at 411-12; RX 106 at 316) as well as about "everywhere he'd been to school, everywhere he'd been to the doctor, everywhere he'd been for counseling." (RX 107 at 415.)

***16** Crumbley testified that he tried to find every member of Petitioner's family he could, "to see if they were willing to cooperate." (*Id.* at 415.) He found that Petitioner's "immediate family was close by and at least some of them wanted to try to help." (*Id.*) Trial counsel held a meeting with members of Petitioner's extended family "a couple of days before the trial" where they explained the status of the case and asked the family to attend the trial. (RX 108 at 754-55.) Elaine, Askia, Jameelah, Elaine's parents, Elaine's brothers Kevin and Joe Lewis, and Joe's wife attended this meeting. (RX 108 at 740, 750, 754-55.) According to these family members, the purpose of this meeting was primarily to provide information about Petitioner's case, answer their questions, and ask them to attend the trial. (*Id.*; RX 106 at 280-81.) Crumbley and Futch did not interview the family members individually or seek information about Raheem's childhood at this meeting. (RX 108 at 740, 750, 754-55.) Other than this group informational meeting with the family, trial counsel only recalled speaking with Petitioner's father, mother, and sister during their investigation. Trial preparation notes suggest that they also spoke with Amanda Bright, Petitioner's grandfather Thomas Lewis, and his cousin Allen Rainey. (RX 151 at 13399, 13403-04; RX 159 at 13855.)

Trial counsel knew from Dr. Farrar and from Petitioner's medical records that he had attempted suicide around age fifteen after his mother's mental breakdown. (RX 113 at 2312-13.) They were aware "to some extent" that Elaine Raheem had been ill. (RX 106 at 317.) Counsel knew that Petitioner had been admitted to Charter Peachford Hospital and Fairview Day Hospital and that Petitioner's father had resisted the treatments doctors recommended for Petitioner. (*Id.* at 314.) The notes from Fairview Day Hospital dated July 30, 1994, state that Petitioner's mother "is reported to have a history of depression." (RX 110 at 1356.)

The extent of trial counsels' investigation of his social background notwithstanding, Petitioner now contends it was inadequate because it raised red flags that trial counsel did not follow up on. In essence, Petitioner contends that if trial counsel had dug even deeper, they would have discovered more witnesses (teachers and relatives) who could have spoken to Petitioner's odd behavior/mental illness in his childhood and youth; and they would have discovered the extent of the dysfunction in his childhood household, i.e., that his father, Askia, was "militaristic, brutal, and abusive; he beat Petitioner rather than provide him with psychiatric help. And he maintained a bizarre and hostile household, demanding to bring a second wife into it because Petitioner's mother, Elaine, was too ill properly to serve him." (Pet'r's Br., at 18, Doc. 38.) In his post-conviction affidavit, Petitioner's father, Askia, confirmed that he wanted to acquire a second wife, stating that it was permitted by his Muslim religion. In her post-conviction affidavit, Petitioner's sister Jameelah

speaks of her father's temper and of his use of corporal punishment, particularly on Petitioner. Jameelah was the one family member whom Petitioner forbade trial counsel to use as a witness. (RX 113 at 2353; RX 107 at 415.) When his mother testified during the sentencing phase of the trial, however, and began crying, Petitioner jumped to his feet and told his attorney, Crumbley, “Get her down. Get her down.” (RX 107 at 414.)

With reference to the claim that trial “counsel unreasonably failed to investigate and present evidence of Petitioner's mitigating background,” this Court concludes that the determination of the state habeas court that “Petitioner failed to establish that trial counsel's investigation into Petitioner's background for mitigation purposes was deficient or that Petitioner was prejudiced” was neither an unreasonable application of *Strickland* nor was it based on an unreasonable determination of the facts in light of the evidence presented.

3. Issues Relating to the Use of a Stun Belt

Petitioner argues that trial counsel were deficient in not requiring a hearing to determine whether any restraint was necessary, and that the trial court “committed reversible constitutional error” by allowing the use of the stun belt without holding a hearing. The state habeas court, however, held that “the use of the stun belt during Petitioner's trial was proper due to Petitioner's violent behavior,” (Order at 70,) alluding to the two murders of which he was convicted, the weapons found in his cell and evidence of his intent to escape, and an alleged threat against one of the jailers. *Id.* Moreover, the court noted, a stun belt is a battery pack worn underneath clothing; Petitioner did not establish “that the stun belt was visible to the jury or that Petitioner was prejudiced or harmed in any way.” (*Id.* at 71.)

***17** When Petitioner's mother was on the stand during the sentencing phase of the trial she said “Well, Mustafa is my baby” and began to cry. (RX 18 at 2929; RX 177 at 72.) The transcript goes on to show Petitioner saying “get off the stand.” (RX 18 at 2929.) Although the trial transcript does not reflect it, at the state habeas hearing Petitioner's counsel testified that he stood up as he said this; that when he did a deputy activated the stun belt which caused it to beep; and that Petitioner turned to the Deputy and said “Go ahead and shock me.” (RX 177 at 72, citing Vol. 3, HT 441.)

Petitioner now contends that his trial counsel were “prejudicially ineffective for allowing this to happen, for not warning Petitioner not to stand while having the ... stun belt on, [and] for not moving for a mistrial when a courtroom deputy audibly started to ‘stun’ Petitioner – and when Petitioner said ‘go ahead’ ”– in the presence of the jury. (Pet'r's Brief at 113-14.) Ruling on these contentions, the state habeas court noted that Petitioner knew he was wearing a stun belt, that he understood it could be used during the trial, and he appeared to understand that the beeping he heard meant it had been activated. Dismissing the contention that counsel were ineffective in not moving for a mistrial, the Court noted that Petitioner “failed to prove any of the jurors heard the alleged activation of the stun belt or the comment allegedly made by Petitioner.” (RX 177 at 73.) Neither are reflected in the trial transcript.

Finally, Petitioner argues that counsel “unreasonably and prejudicially argued to the jurors – as a basis to vote for life – that the presence of ... a stun gun (*sic*) had been necessary so as to protect everyone from Petitioner's violence” and that Petitioner had worn it every day since his arrest. This is a reference to Crumbley's closing argument in the sentencing phase:

> You need to understand that Mustafa is not a threat any longer. The Sheriff has had him locked up for almost two years. He is in chains, or wearing an electric shock belt, as he is today, everywhere he goes. (RX 18 at 2979.)

The state habeas court held that this argument “was not unreasonable in light of counsel's theory of no future dangerousness,” and that, in any event, there was “no reasonable probability that had trial counsel not referenced the stun belt in closing argument the result of Petitioner's sentencing would have been different.” (RX 177 at 73.)

This Court holds that the rulings of the state habeas court with reference to issues raised about the stun belt were neither unreasonable applications of clearly established federal law nor were they based on unreasonable determinations of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

B. Competence to Stand Trial

“The Due Process Clause of the Fourteenth Amendment prohibits states from trying and convicting mentally

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incompetent defendants." *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995) (citing *James v. Singletary*, 957 F.2d 1562, 1569-70 (11th Cir. 1992)). The test established for determining whether a defendant is competent to stand trial requires courts to consider (1) "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Petitioner makes two arguments regarding his competency to stand trial. First, he argues that his procedural due process rights were violated by the trial court's failure to hold a competency hearing in light of evidence sufficient to raise a bona fide doubt regarding his competence. As a means of overcoming his procedural default of this claim, he argues that his counsel were ineffective for failing to request a competency hearing or raise the issue on direct appeal, in light of what they knew. Moreover, Petitioner argues that his substantive due process rights were violated because he was actually incompetent at the time of his trial.

***18** The state habeas court concluded that Petitioner had procedurally defaulted his incompetence claims by failing to raise them on direct appeal and had failed to establish ineffective assistance of counsel to overcome the procedural default. (Order, RX 177 at 7-11.) To the extent the state court did not reach the merits of Petitioner's substantive due process claim, [12] and to the extent procedural default is not a bar, this Court is permitted to address the merits outside of the framework of § 2254(d). *Wright v. Sec'y Dept. of Corr.*, 278 F.3d 1245, 1259 (11th Cir. 2002).

1. Procedural Due Process

In his procedural due process claim, Petitioner argues that the trial court should have held a competency hearing prior to trial because the information known to the court raised a bona fide doubt as to his competence to stand trial. *See Pate v. Robinson*, 393 U.S. 375, 385 (1966) (holding that in the face of evidence that called into question the defendant's competence to stand trial, the court's failure to make an inquiry into his competence deprived the petitioner of his constitutional right to a fair trial). The state habeas court determined that Petitioner had procedurally defaulted on this claim because he failed to raise the issue in his direct appeal. *See* *James*, 957 F.2d at 1572 ("*Pate* claims can and must be raised on direct appeal.") In order for the Court to consider Petitioner's *Pate* claim on the merits, he must show ineffective assistance of counsel to overcome the procedural default. Moreover, because the state habeas court concluded that Petitioner had not established ineffective assistance of counsel with regard to counsel's failure to move for a competency hearing or raise the issue on direct appeal, Petitioner must show that the state court's decision on this issue was "contrary to, or involved an unreasonable application of" *Strickland.* 28 U.S.C. § 2254(d).

As discussed above, trial counsel retained four mental health experts to examine Petitioner prior to trial: licensed psychologists Dr. Jack Farrar, Dr. Charles Nord, and Dr. Dennis Herendeen, and neurologist/psychiatrist Dr. Jeffrey Klopper. (RX 108 at 671, 677, 714, and 881.) In an affidavit filed with the state habeas court, Farrar stated, "I advised defense counsel that I believed Mr. Raheem was schizophrenic and had a psychotic process going on during pre-trial proceedings," and, "[b]ased upon my interactions with and observations of Mr. Raheem during pre-trial and trial proceedings, I also advised defense counsel ... I believed that Mr. Raheem was not competent." (*Id.* at 673.)

Both trial attorneys, however, unwaveringly denied in the state habeas hearing that Farrar or any other medical expert had ever told them Petitioner was incompetent. When directly confronted with Farrar's affidavit at the habeas hearing, Crumbley responded, "Dr. Farrar never advised me that he believed Mr. Raheem was not competent, in the legal sense, not competent to stand trial, I mean." (RX 107 at 446-47.) He further explained, "As a matter of fact, I recall distinctly that he told me that Mustafa was very interesting in that he had the ability to sort of move between his imaginary world and the real world, and he did understand the difference." (*Id.* at 447.) Crumbley more generally testified on this point, "No one ever suggested to me that Mustafa was not competent. My impression was that he was competent." (*Id.* at 431; *see also Id.* at 409.) The state habeas court asked Crumbley whether he had discussed with the defense mental health experts having a competency trial, and Crumbley said they had discussed it, but that none of these experts and no one on the defense team suggested that they should demand one. (*Id.* at 448.) Crumbley further explained:

> ***19** If there had been any suggestion of that we would have done it. I mean, you know, we did things that we thought really didn't have much of a factual foundation just because of what was at stake, and we were trying to do everything we could think of, you know, and that included, you know, having the MRI scan done and arranging to have the PET scan done. [13]

(*Id.*)

Futch similarly testified that he did not recall any mental health expert ever telling them that Petitioner was not competent to stand trial, and that if one had, "[they] probably would have filed a motion to that effect." (RX 106 at 312.) Futch explained that as a lay person, he relied on the doctors to make this determination, saying, "That's why we call upon experts to help us out, because I personally can't differentiate between something that may be a ... brain injury from just being unconcerned." (*Id.* at 253.) Like Crumbley, Futch confirms that the defense team had conversations about Petitioner's competency. (*Id.* at 335.) Futch believed Petitioner was competent to stand trial; otherwise he would have "fought very vigorously to have his trial postponed." (*Id.* at 354.)

This Court notes that Dr. Farrar testified at a pretrial hearing on April 18, 2000 (the trial was in February 2001), after he had administered a full battery of psychological tests to Petitioner — "about eighteen tests in all, maybe more than that." (RX 122 at 5109.) When asked whether the tests indicated Petitioner suffered from depression, he responded, "Yes, the testing indicates that he suffers from a severe depression, long-term, chronic depression." (*Id.* at 5110.) Dr. Farrar knew the Petitioner before he joined the defense team because Petitioner had been a patient at the Fairview Day Hospital when Dr. Farrar was the Director in the 1990s. When asked whether Petitioner's depression was a new problem, he responded, "It's a problem that I have known present with Mr. Raheem since I knew him and before I knew him. He had been hospitalized at Charter Hospital prior to the time I met him and he'd actually tried to commit suicide I believe twice before that time." (*Id.* at 138.) When asked, he expressed the opinion that Petitioner's depression might be linked to his childhood head injuries. "[W]ith closed head injury you certainly can have emotions affected, such as depression." (*Id.* at 139.)

Dr. Farrar testified that in testing Petitioner he observed two other indicators of neurological damage. After describing the Bender-Gestalt visual-motor test as a "gross indicator of neurological problems," he explained that "[A]lthough he doesn't have a lot of indicators on the Bender gestalt, there's some minor indications of at least mild brain injury, the way he forms angles, the way he draws and replicates figures. They're not accurate as they should be for an individual with this intelligence and for an individual this age." (*Id.* at 140.)

With reference to Petitioner's performance on the Rorschach ink blot test, he testified that Petitioner "had a problem called perseveration. And what perseveration is it's seeing the same thing in several cards over and over again, and he did that. And with people that are as intellectually capable as Mr. Raheem, you don't expect that at all." (*Id.*)

***20** As the hearing closed, Dr. Farrar stated, "I would also like to recommend, although I don't know if Mr. Raheem would do that, I would recommend he be placed on certain medications. I think that would be useful given the test results that we have." (*Id.* at 143.) Crumbley then asked, "Is the decision about medication, I mean, obviously, Mr. Raheem is, he would have to agree to that. I mean, he is mentally competent, is he not, to make his own decision about that?" (*Id.*) Dr. Farrar responded, "Yes, sir, he is." (*Id.*) As Petitioner argues, competency to make a decision about medication is not necessarily determinative on the issue of competency to stand trial. In this case, however, it is cumulative of other evidence. The Court notes that nothing in Dr. Farrar's testimony at the pre-trial hearing indicated that Petitioner lacked the competency to stand trial. Dr. Farrar described an individual who was able to and did comply with testing protocols, a person of "intelligence" who was "intellectually capable." Dr. Farrar's testimony supports trial counsel's decision not to seek a hearing on competency; it supports their determination that Petitioner did have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and "a rational as well as a factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402.

Based on the record, the state habeas court ruling that "Petitioner has failed to establish deficiency of counsel or resulting prejudice or a miscarriage of justice with regard to Petitioner's claim of incompetency. Accordingly, this Court concludes that Petitioner's incompetency claims remain procedurally defaulted," (RX 177 at 11), was neither an unreasonable application of *Strickland* nor was it based on an unreasonable determination of the facts in light of the evidence presented. *Cf.* *Humphrey v. Walker*, 757 S.E.2d 68 (Ga. 2014).

2. Substantive Due Process

Petitioner also argues that his substantive due process rights have been violated because he was not actually competent at the time of his trial. In its order, the state habeas court found the evidence of Petitioner's incompetency wanting. In discussing an affidavit filed by Dr. Farrar and testimony by Dr. Gur, the court noted that "the description of Petitioner's behavior at trial in Dr. Farrar's affidavit, which Dr. Gur relied upon ... did not come from first hand knowledge of Petitioner's behavior, but from interpretations of trial counsel's description." (Order at 10.) "Because neither expert confirmed this behavior with trial counsel," the court noted, "trial counsel's description and opinion concerning Petitioner's behavior is more reliable." *Id.* The state habeas court also noted that the trial court had asked questions of Petitioner in accordance with the Unified Appeal Procedure and it found "nothing in these colloquies that indicates Petitioner was incompetent at trial." (Order at 11.)

The state habeas court did not, however, enter an express finding that the Petitioner was competent at the time of trial. Instead it held, as discussed above, that "Petitioner [had] failed to establish deficiency of counsel or resulting prejudice or a miscarriage of justice with regard to Petitioner's claim of incompetency," and therefore, that "Petitioner's incompetency claims remain[ed] procedurally defaulted." *Id.* As previously noted, had the state habeas court concluded on the record before it that Petitioner's claim that he was incompetent to stand trial had merit, it would have followed that Petitioner's counsel were deficient in failing to raise the issue at trial or on direct appeal. Nonetheless, this Court assumes *arguendo* that a finding of competency to stand trial does not underlie the state habeas court order. Respondent concedes that the state law procedural default does not preclude this Court from considering the merits of this claim. (Resp't Br. at 94.) *Adams v. Wainright*, 764 F.3d 1356, 1359 (11th Cir. 1985) (holding that the procedural default rule of *Wainright v. Sykes*, 433 U.S. 72 (1977), "does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal" from contesting the issue in post-conviction proceedings). *See also Lawrence v. Sec'y, Fla. Dept. of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1807 (2013).

***21** As noted, determining competency to stand trial requires determining (1) "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and (2) "whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This rule stems from the ban against trials in absentia, as "the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Id.* "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial" are all relevant to determining whether the court must inquire into the defendant's competency, and "even one of these factors standing alone may, in some circumstances, be sufficient." *Id.* at 180.

The burden is on the Petitioner to establish that he was incompetent to stand trial:

> In advancing his substantive competency claim, Lawrence [Petitioner] "is entitled to no presumption of incompetency and must demonstrate his ... incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992). Relatedly, we have said that in order to be entitled to an evidentiary hearing on a substantive competency claim, which Lawrence seeks here, a petitioner must present "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his competence. *Id.* at 1573; accord *Medina*, 59 F.3d at 1106; *Card v. Singletary*, 981 F.2d 481, 484 (11th Cir. 1992) ("The standard of proof is high. The facts must positively, unequivocally and clearly

generate the legitimate doubt." (alterations and quotation marks omitted)).

Lawrence, 700 F.3d at 481.

At the time of the trial, Dr. Farrar diagnosed Petitioner with borderline personality disorder. (RX 17 at 2568.) According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV"), "[t]he essential feature of Borderline Personality Disorder is a pervasive pattern of instability in interpersonal relationships, self-image, and affects, and marked impulsivity that begins by early adulthood and is present in a variety of contexts." (DSM IV at 706.)

Dr. Farrar testified at trial regarding Petitioner's illness as follows:

> [S]ince I have seen Mr. Raheem at jail over this last year, myself and another psychologist who has also seen him, Dr. Nord has seen him again and again, we both concur that he is suffering from what is called a borderline personality disorder, which is a pretty serious disorder. And one of the ways you can look at that disorder is there are frequent suicide attempts with that disorder. There is an inability to make attachments to people. Another way of looking at borderline personality disorder is to think of it as an attachment disorder. A person cannot attach.
>
> (RX 17 at 2568.)

Dr. Farrar explained that "people who suffer from borderline personality disorders have had some major trauma occur in their life, usually between birth and six years of age," (RX 17 at 2568), and that "in this family, I have been unable to ascertain what the trauma was. Mr. Raheem cannot remember his childhood." *Id.* He went on to describe Petitioner as "very, very depressed," and as "a young man with a great deal of suspiciousness and paranoia," as well as "a characteristic called hypervigilance. It is where an individual just watches everyone because they don't trust anyone." (RX 17 at 2571-72.) When asked about Petitioner's tendency to "tell stories and embellish things," Dr. Farrar testified:

> [H]e embellishes tremendously.... And there is a delusional flavor to it. The problem is that it is not a pure delusion, well, with borderline personality disorder there is a delusional component to it. Where a person is in a fantasy world, sometimes they lose track of that world, and they don't know what is real and what is imagined. And I think Mustafa gets caught into this tangled web of information that he gives out. He starts kind of playing with people, and then I think there is a part of him that almost believes it and it makes it realistic.

***22** (RX 17 at 2573.)

When asked about Petitioner's mental state at the time of trial, Farrar responded:

> I have seen him do a lot of what appears to be delusional kind of thinking. He spends a lot of time not being present, not being emotionally present, being off in some world. And it is real tough sometimes to get him to be anchored and be back in present reality. And he has looked pretty depressed to me, too.

(*Id.* at 2593.)

In an affidavit filed with the state habeas court Farrar stated that he believed Petitioner "was schizophrenic and had a psychotic process going on during pre-trial proceedings," and that he was not competent at the time of his trial. (RX 108 at 673.) Farrar did not, however, describe Petitioner as suffering from schizophrenia or psychosis in his pre-trial or his trial testimony. When asked on cross examination at trial, "Remind me again, and the jury, what mental illness you have diagnosed Mustafa Raheem with?" he replied: "The diagnoses are depressive disorder, an Axis One. We really are concerned about two axes, the personality disorders and the Axis Two. And that is the borderline personality disorder, an Axis Two, and antisocial features is part of that." (RX 17 at 2577.)

At the state habeas hearing, Crumbley testified that "No one ever suggested to me that Mustafa was not competent;" and his impression was that he was competent. (RX 107 at 431.)

In response to a query from the state habeas judge as to whether he had discussed having a competency hearing with the mental health experts, Crumbley affirmed that he had, and testified that no one had suggested that he seek a competency hearing. (RX 107 at 438). When the judge followed up by asking, "Do you know, in talking to all the mental health experts, of anyone that ever offered you the opinion... that he was not competent to stand trial?," Crumbley responded, "Absolutely not. If there had been any suggestion of that we would have done it." (RX 107 at 448.)

Dr. Nord testified that he had diagnosed Petitioner with depression and borderline personality disorder. He explained the latter saying, "By borderline, meaning he's on the verge of becoming more psychotic, but he's still within some range of reason but has moments when he is psychotic." (RX 18 at 2895.) When asked by counsel what he meant by psychotic, Nord replied, "He hallucinates. He removes himself from our world and goes into his own world. He may at times hear voices. He regresses into some childlike states." (*Id.*)

The state's expert, Dr. Martell, testified at the habeas hearing that he did not see Petitioner's escapes into his "other world" as evidence that Petitioner was psychotic (RX 107 at 571-72) and that "At the time I saw him he was having his imaginary world but clearly tested on valid testing as not being psychotic." (*Id.* at 573.) Habeas counsel read to Martell the results from an administration of the Minnesota Multiphasic Personality Inventory ("MMPI") to Petitioner during his time at Charter Peachford:

> It says, 'Results of second MMPI testing were valid. His emotional and behavioral disturbance seems severe. Ego functions—'I think that's what it says, '—are reduced. His defensive structure is reduced. He shows in a labile mood. He may show manic excitement and flight of ideas. He is indecisive, manipulative, rejects authority, and has limited insight and at times he may become psychotic.'

***23** (*Id.* at 575.) Martell agreed that this test result was evidence that Petitioner had been psychotic or might become psychotic. (*Id.*)

Dr. Ruben Gur, a neuropsychologist and a professor at the University of Pennsylvania, testified extensively at the habeas hearing. Dr. Gur based his testimony, in part, on a standard neurophysical battery that he conducted himself. In describing it, he stated, "My own testing permits the separation of accuracy and speed measures." RX 105 at 63. In addition, he reviewed tests conducted by Drs. Evans, Farrar, Herendeen and Nord (*Id.* at 51, 61). Based on these data sources, Gur concluded that Petitioner's left temporal lobe exhibited severe abnormality and his amygdala was between three and four standard deviations smaller than normal. (*Id.* at 64-67, 74, 76.) Gur explained:

> And as you can see here, the left hippocampus is between two and two and a half standard deviations worse than normal, whereas, the amygdala is between three and four standard deviations smaller than normal. So, both hippocampus, especially on the left, and the amygdala are abnormally small in Mr. Raheem, and so that explains a lot of the deficits that he has in memory but also would indicate deficit in the ability to interpret situations, in terms of their emotional value, whether something is threatening or not. And the frontal lobe is also reduced in volume, especially the orbital frontal, which, as I mentioned, is the brakes that stop the amygdala from attacking or fleeing. That's also reduced to the point that it is a very abnormal brain. And that's why I thought that it's not just what we call a psychiatric disorder, although that distinction is now increasingly blurry, it is brain damage.

(*Id.* at 76.)

Dr. Gur also reviewed a videotaped interview conducted with Petitioner by Dr. Martell a few months prior to the habeas hearing and concluded that it evidenced a "seizure disorder." When asked why he had not arrived at this diagnosis himself, he replied, "Well, I didn't spend a lot of time with him. I only spent about three or four hours, and most of this time was taken up by testing. And if he had those absences during my interview I have to admit, embarrassingly, that I didn't notice them." (*Id.* at 122.) He then noted that "these are not easily picked up and there are also days when they don't happen." (*Id.*) Dr. Gur also testified that Petitioner exhibited psychosis. When asked to describe it, he responded:

> The main feature was flat and occasionally inappropriate affect.... The whole bit about the alternative world he enters into, I probed that a little bit and it looked like a delusional system since it seemed that he very strongly is attached to the belief that those two parallel universes exist and that he can go back and forth."

(RX 105 at 133.) In sum, Dr. Gur testified that he thought Petitioner suffered from brain damage, psychosis, and a seizure disorder. (*Id.* at 134-35.)

The state habeas judge asked Dr. Gur, "When you were interviewing him, did he understand what your job was and what you were doing?" (*Id.* at 138.) Dr. Gur responded, "I think so." (*Id.*) The judge then asked, "And was he able to be responsive to you?" (*Id.*) Dr. Gur responded, "He was very guarded, especially at the beginning. I couldn't tell whether he was responding to me." (*Id.*) The judge queried, "[B]ut you wound up with all these valid test results?" (*Id.*) Dr. Gur then said, "He warmed up to me, actually, as I recall. He asked about my accent and when I said, I think I said something like, 'You can't recognize a south Philly accent when you hear one?' he sort of – and then he relaxed a bit. And he spoke with monotone and I didn't feel, like with some patients, that I established good, real good rapport with him, but he was very cooperative and he put forth his best effort in the testing. It looked like he was working hard on them." (*Id.* at 138-39.)

***24** When the state habeas judge asked "are you saying that his mental status may have affected the attorney/client relationship, or are you saying it really would have prevented one?" (*Id.* at 144), Gur responded, "His behavior, the jocular behavior during the trial, his inappropriate affect and his refusal to acknowledge that there is anything wrong with him mentally, I think that can interfere with the ability to defend him." (*Id.*) When the habeas judge asked, "[I]s there anything in particular about your examination of him or your examination of the trial transcript that makes you conclude that the Petitioner was incompetent at the time of trial, other than what you have told me?" (*Id.* at 144-45), Dr. Gur responded, "I think mostly his lack of contact with reality, his confabulations, memory distortions, his mannerisms. When you put them all together it puts obstacles in the relationship between the lawyer and the client." (*Id.* at 145).

Petitioner submitted an affidavit of Dr. James Evans, a psychologist specializing in neuropsychology, supplementing Gur's findings of brain damage. (RX 108 at 662.) Evans attested that in May 2005 he completed a neuropsychological evaluation of Petitioner that revealed "clear indications of brain damage/dysfunction." (*Id.* at 662-63.) Evans summarized, "Taken as a whole, the neuropsychological test results were indicative of rather widespread cortical dysfunction, probably greatest in temporal areas." (*Id.* at 664.) The comprehensive neuropsychological testing Evans performed "clearly indicates brain damage." (RX 105 at 55.)

Pre-trial tests for organic brain damage confirm that there was some evidence of organicity. Dr. Nord submitted an affidavit stating that he administered the Bender-Gestalt test to Petitioner in 1994 at the request of Charter Peachford hospital, where Petitioner was then under treatment. (RX 108 at 677.) Nord attested that when he administered the test, "Mustafa was able to reproduce the abstract designs but the drawings evidenced distortions in rotations, angulation and curvature." (*Id.*) He continued, "I also noted that he rotated the paper a full 90 degrees while reproducing the designs, and placed them all over the paper. On recall, he could recall only six of the nine designs from memory. Those findings are consistent with organic brain impairment." (*Id.* at 678.) Dr. Herendeen, a clinical psychologist, administered several tests to Petitioner at the Henry County jail on December 2, 2000. (*Id.* at 714.) Herendeen administered what is known as the Trail Making Test parts A and B, a test of gross frontal lobe function. He attested, "Mr. Raheem performed very poorly on Trails Part B, taking 2 minutes and 28 seconds to complete the test, which is consistent with organic brain impairment." (*Id.* at 714-15.) He also confirmed Nord's earlier findings that Petitioner's drawings on the Bender-Gestalt test showed indications of organicity. (*Id.* at 715.)

The state's expert, Dr. Martell, testified at the habeas hearing that his own testing confirmed the findings of other doctors that Petitioner has abnormal brain function. (RX 107 at 515.) However, Martell testified, "the impairment that he does have appears to be mild to moderate and specific to [several] focal areas ... : the tapping deficit, particularly with his right hand, implicating the left motor strip, the mathematic learning disability and the possibility of an attention deficit disorder." (*Id.* at 501-02.) Martell concluded that Petitioner's organic brain abnormality did not impact his behavior or

functioning in the ways Gur concluded. (*Id.* at 562, 566.) Martell testified that Petitioner's "shriveled" brain and various deficits in temporal lobe functioning would "be of interest" to a jury considering how to sentence Petitioner, but that he did not see any evidence that Petitioner was "unable to control his behavior," had impaired executive functioning, or lacked the ability to understand the world around him. (*Id.* at 562-63, 568.)

***25** As noted in the discussion of Dr. Gur's testimony, Dr. Martell conducted a seven hour videotaped evaluation of Petitioner on January 15th and 16th, 2007. Martell testified that between six and eight times, Petitioner "zoned out," and that "raised the possibility in my mind that he may have what are called absence seizures, which would not be unusual, together with ADHD. It's the kind of thing that's often seen in school kids ...." (RX 107 at 502). He described them as from ten to thirty seconds in duration. (*Id.* at 505)

Martell further observed that when Petitioner came out of one of these periods, he was extremely self-conscious, was "aware that he had been gone," and "would make up stories to cover it up." (*Id.* at 528.) This behavior suggested to Martell an epileptic phenomenon. (*Id.* at 528.) Martell explained that if Petitioner was having these absences at the time of trial, he could "zon[e] out for 30 seconds at a time," and "it's certainly conceivable that he could zone out at a moment when there's critical testimony and miss that testimony." (*Id.* at 536.) When habeas counsel explained to Martell that Petitioner had experienced two fainting episodes while in jail where guards observed that his eyes rolled back in his head, Martell testified that this behavior is "quite consistent with a seizure disorder." (*Id.* at 569-70.)

The Martell videotape was produced nearly six years after trial. Petitioner's father, however, submitted an affidavit in the habeas proceeding, Exhibit 41, in which he said that Petitioner "suffered from childhood spell[s] ... where he would zone out for about 30 second[s]." (RX 105 at 119).

At the habeas hearing, the judge asked Petitioner's attorney, Crumbley, "Do you remember in interview times when the Petitioner would kind of blank out and just stare into space and he was incommunicado for a period of a few seconds?" (RX 107 at 468.) Crumbley responded:

> Yeah, there were times when he was not responsive. There were times when he, you know, avoided my efforts to engage with him in a conversation. But, no, no, I didn't, I never saw anything that seemed, that suggested any sort of psychiatric abnormality, or anything of that nature.

Id. At that point, the court played the videotape so that Crumbley could view it, and asked if he had observed the "zoning out" behavior." *Id.* at 469. Crumbley responded:

> You're talking about the time on that video where the questioner asks him a question and he just didn't move or respond ... for a period of 15 or 20 seconds, or something?.... No, I don't remember seeing anything like that. But you know, again, it has been many years since I talked to him.

Id. at 470.

Dr. Gur watched the videotape of Dr. Martell's interview with Petitioner and also observed a series of events that he believed to be absence seizures. [14] (RX 105 at 116.) When asked to estimate the length of what he called "staring spells" that he observed on the videotape, Dr. Gur said "I thought they ranged from about half a minute to maybe up to two minutes." (RX 105 at 163.) He also testified that he had not observed this behavior during his own interactions with Petitioner, either because Petitioner did not have any such episodes during their meeting or because he had failed to notice them. (RX 105 at 121-23.)

Habeas counsel played the video tape of Martell's interview with Petitioner during the hearing, and Gregory Futch testified that he had observed the kind of zoning out now described as absence seizures around the time of Petitioner's trial. (RX 106 at 250-52; RX 107 at 468.) Futch explained:

> ***26** In our many meetings and interactions with each other, he would, for lack of a better way to explain it, like, go off somewhere else in his mind. We'd have to bring him back to where we were. Where he went, what he was thinking about, I have no clue but he was hard to focus, hard to pin down on things that obviously would be helpful

to his defense team, to try to investigate. And just in the personal interactions with him, it was apparent that he, I thought there was something wrong with him.

Q: And that was from the beginning to the end?

A: Yes, sir.

Q: Okay. We provided you recently with a DVD?

A: Yes, sir.

Q: Did you review that?

A: I did.

Q: Exhibit 99, I think is the one. And when you reviewed that, did it reflect experiences you had with your client or not?

A: Yes, it did. That was very much like Mustafa.

Q: So, when he would sort of fade out –

A: Yes, sir.

Q: You saw it a lot?

A: Yes, sir?

Q: In your representation?

A: I did

(RX 106 at 250-51.)

When asked by the court during re-cross examination whether he believed the "brief trance[s] or interlude[s] of inattention or whatever it is you want to call it" he observed in Petitioner contemporaneous with the trial were "real," Futch testified that he did (*Id.* at 362.) The colloquy continued:

The Court: So, let me ask you this. His behavior during the trial, so of which you is, you know, not exactly what an attorney would like to have their client do, under the best of circumstances —

The Witness: Yes, sir.

The Court: — what kind of conversations were going on during the trial, as to why that was happening or why he was doing that?

The Witness: Well, for the most part, he was appropriate during the trial.

(*Id.*)

Futch also testified that when they interviewed Petitioner, he was communicative and responsive "most of the time." When he wasn't responsive, Futch testified, it was "very much like what you saw in the video ... with the other expert.... He would drift off, look like his mind would wander to some other subject, some other place, or whatever. And then you'd get him back on task and then he could become communicative with you again on the issue at hand." (*Id.* at 339.)

Crumbley also testified that Petitioner's "attitude about his case varied pretty dramatically from day to day." (RX 107 at 431.) He recalled one day when they were at the jail with him to talk about his case, he was "acting very silly about the whole thing and laughing about it. Jumping up and down and shouting at people." (*Id.* at 434.) Futch's notes from a meeting with Petitioner on February 15, 2000, state, "[Raheem] is down and out & depressed. He wants to beat the case. No deals. He didn't do anything!" and then, "[Raheem] starts talking about how he can beat the charges, etc., & he starts talking nonstop!!" (RX 151 at 13283.) In a letter to Wade Crumbley (undated), Petitioner says he is finally telling Crumbley "the truth" about the events in question – after being swayed too long by the "high glamour of the media, front page, prime time, live on T.V." (*Id.* at 13344.) "My reputation has skyrocketed," he boasts; "It's a dream of nearly every thug, to make the news." (*Id.*)

Based on their interactions with Petitioner, trial counsel discussed with Farrar the question of whether Petitioner was competent to stand trial. (RX 106 at 335.) Petitioner was "so erratic at times in his desires" that Futch "didn't think he was looking out for his own interests at times." (*Id.*) Futch testified that he and Crumbley saw some "serious issues" with Petitioner, although they both felt at the time that he "was competent enough at least that his trial could proceed." (*Id.* at 354.) Futch agreed that at times Petitioner was "psychotic and delusional," at times he "was unable to determine what was in his best interests and act in his best interests," and "at times he did not have a rational understanding of what was going on." (*Id.* at 368-69.) At one point during the habeas hearing, when the state habeas court asked Futch if he believed his client was competent, he paused, looked up, and sighed. (*Id.* at 354; 367.) Futch testified that this issue was a "really serious concern," and "[i]t's still a concern in

this case." (*Id.* at 367-68.) Trial counsel agreed that Petitioner had failed to assist his counsel in preparing a mitigation case when he refused to get out of the transport at Emory to have the PET scan. As Futch testified, this decision "didn't help trial counsel" and "didn't help him either." (*Id.* at 366.) Not only did Petitioner refuse to get out of the vehicle, he "would not speak with [Crumbley] on the phone about it." (RX 109 at 978.) At an *ex parte* hearing to inquire into the failed PET scan, Judge Craig asked, "Mr. Raheem, do you agree that that's what happened, that the reason the test was not performed is you just decided you just didn't want to take the test or have it done on you?" (*Id.*) Petitioner responded:

> ***27** I mean, no, sir. I mean, that wasn't exactly it, not that I just didn't want to take it, you know. It was, like, you know, we went up there, man, it was, like, twelve o'clock. I mean, it was, like, doctors and, like, old, old money out there. I mean, it's two cars and it's, like, deputies and Emory security standing in front of the car, like. And I've got a green jumpsuit on and I've got a chain around my waist and shackles on me and stuff. And everybody's just waiting to see who got out of the car, you know. And it had just went off the news at eleven o'clock last night, you know. And if I got out of the car, I mean, I've got the Henry County jumpsuit on, I mean, you know what I'm saying? It would be easy to put one and one together, you know. I mean, it looked like a circus out there, you know. I didn't want to be a circus monkey. That's the only thing it was. I mean, I'm not going to worry about taking it.

(*Id.* at 978-79.) Crumbley was extremely frustrated by his client's conduct, and Petitioner's response was consistent with what he had always told counsel before about their attempts to develop mitigation evidence: "that he didn't care about that part of it." (RX 107 at 419.)

Trial counsel described Petitioner's complete disinterest in the trial, his – "air of indifference." (*Id.* at 414.) "[Raheem] asked Judge Craig to just let him go back to jail, but Judge Craig wouldn't let him do it." (*Id.*) Crumbley resorted to bringing Petitioner lunch every day just to get him to sit through the trial. (*Id.* 107 at 414-15, 443.)

The record establishes that Petitioner suffered from severe depression and compensated with conduct that interfered with his ability to assist his counsel. The record supports Petitioner's contention that he suffers from brain damage, possibly organic in origin, and it supports his contention that he suffers from absence seizures of brief duration.

Each of the mental health professionals who examined Petitioner conducted tests designed to reveal faking or any attempt to alter the natural test results. No professional found any evidence that Petitioner was malingering. On the contrary, Martell testified that Petitioner was consistently trying to make himself look normal, did not want to be presented as abnormal, seemed "very concerned with how he'd be perceived on the street," and "did not want to be found ill or impaired." (RX 107 at 518-19.) Similarly, Gur found no evidence of malingering. (RX 105 at 142.) Evans concurred. (RX 108 at 662; RX 17 at 2562-63.)

The record establishes that Petitioner's attorneys were alert to the issue of competency, and concerned about it. They worried about it, consciously assessed the issue, and determined grounds did not exist to support a request for a competency hearing. As the Eleventh Circuit has explained:

> Because legal competency is primarily a function of defendant's role in assisting counsel in conducting the defense, the defendant's attorney is in the best position to determine whether the defendant's competency is suspect. Accordingly, failure of defense counsel to raise the competency issue at trial, while not dispositive, is evidence that the defendant's competency was not really in doubt and there was no need for a *Pate* hearing.

Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997).

Based on its review of the record, the Court assumes, arguendo, that Petitioner did suffer brief absence seizures at the trial. But the Court also bears in mind the narrow test of competency to stand trial — whether the petitioner "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. Given the narrowness of the competency standard, and the totality of the evidence presented in this case, this Court concludes that the Petitioner has not demonstrated his incompetence at the time of trial by a preponderance of the evidence, nor has he established by "clear and convincing evidence" that creates a "real, substantial, and legitimate doubt" as to his competence that he is entitled to an evidentiary hearing. *Lawrence*, 700 F.3d at 481. *Cf.* *Humphrey v. Walker*, 294 Ga. 855, 757 S.E.2d 68 (2014).

***28** None of this is to say that our nation's jurisprudential case law might not well evolve at some juncture to recognize serious mental illness as constituting proper grounds for exempting a defendant from the death penalty. *See* *Roper v. Simmons*, 543 U.S. 551, 561, 568 (2005) (affirming "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual" and setting forth the principle that the death penalty should not apply to certain classes of offenders, such as juveniles under 16 [now 18], the insane, and the mentally retarded, no matter how heinous the crime." (Citations omitted). Here, the petitioner was 19 at the time of his criminal offenses — and had a documented record of serious mental illness, hospitalization and some mental limitations, but one which did not arise to the level of rendering him mental incompetent to stand trial. The Court can well appreciate that *Roper's* rationale, extending the prohibition of imposition of death penalty to juveniles under the age of 18 based in part on juveniles' diminished culpability and their fragile status of psychological development, echoes here. That said, the case before the Court solely presents the issue of Petitioner's mental incompetence.

C. Prosecutorial Misconduct

Petitioner asserts that prosecutorial misconduct deprived him of a fair trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (Pet'r's Br. at 161.) Petitioner alleges that two different kinds of violations of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), occurred in his case. The first, often referred to as a *Giglio* claim, "occurs where the undisclosed evidence reveals that the prosecution knowingly made false statements or introduced or allowed trial testimony that it knew or should have known was false." *Smith v. Sec'y, Dept. of Corr.*, 572 F.3d 1327, 1333 (11th Cir. 2009) (citing *United States v. Agurs*, 427 U.S. 97, 103-04 (1976)); *Giglio v. United States*, 405 U.S. 150, 153 (1972) (noting that the same rule applies when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears.")

"To prevail on a *Giglio* claim, a petitioner must establish that (1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material." *Smith*, 572 F.3d at 1334 (11th Cir. 2009) (quoting *Ford v. Hall*, 546 F.3d 1326, 1331-32 (11th Cir. 2008)). The Supreme Court has held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony *could* have affected the judgment of the jury." *Agurs*, 427 U.S. at 104 (citing *Giglio*, 405 U.S. at 154, *Napue v. People of State of Ill.*, 360 U.S. 264, 271 (1959)) (emphasis added). The materiality standard for a *Giglio* violation is whether it was harmless beyond a reasonable doubt. *Guzman v. Sec'y, Dept. of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011).

The second kind of *Brady* violation occurs when the government "suppresses evidence that is favorable to the defense, although the evidence does not involve false testimony or false statements by the prosecution." *Smith*, 572 F.3d at 1334 (citing *United States v. Bagley*, 473 U.S. 667, 682, 685, (1985); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). This kind of *Brady* violation occurs when the prosecution withholds favorable evidence that is material, meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different." *Id.* The materiality of any suppressed evidence is considered collectively, not item by item. *Id.* at 436.

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The state habeas court determined that Petitioner had procedurally defaulted on all of his prosecutorial misconduct claims by failing to raise them on direct appeal. Thus, the Court must consider whether Petitioner has shown cause and prejudice to overcome the procedural default. Cause to overcome the procedural default of a claim for prosecutorial misconduct may consist of the actual suppression of evidence or the ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Greene v. United States*, 880 F.2d 1299, 1305 (11th Cir. 1989) (ineffective assistance of counsel may constitute cause to excuse default); *Alderman v. Zant*, 22 F.3d 1541, 1551 (11th Cir. 1994) ("state misconduct may constitute grounds for cause.") Prejudice is shown where the suppressed evidence or perjured testimony is material. *Kyles*, 514 U.S. 419, *passim.* To determine whether cause and prejudice exist to overcome the procedural default, the Court simultaneously weighs the merits of Petitioner's *Brady* and *Giglio* claims.

1. Guilt-Phase Misconduct

***29** Petitioner asserts that the Prosecutor in his case, Tommy Floyd, knowingly presented perjured testimony by Michael Jenkins, Dione Feltus, and Linda Norals at the guilt-innocence phase of the trial. He further asserts that the state withheld material exculpatory evidence related to this false testimony.

First, Petitioner alleges that Michael Jenkins perjured himself and Prosecutor Tommy Floyd knew or should have known it. In support of this contention, Petitioner submits Jenkins' affidavit in which he attests under oath that he gave perjured testimony at Petitioner's trial because Floyd met with him outside of the presence of his attorney just before the trial and told him how to testify about Feltus' shoes, the garbage bags, and Feltus not having been involved. (RX 108 at 726.) Jenkins now claims that Feltus was with them most of the night and that Jenkins did not see who shot Ms. Hollis, Feltus or Petitioner. (*Id.*)

The state habeas court's conclusion that Petitioner failed to prove Jenkins gave perjured testimony was not an unreasonable determination of the facts. (RX 177 at 12-15.) This Court notes that Jenkins had previously told Floyd and detectives on at least two occasions that Feltus was not involved in the events in question. Others had corroborated that. [15]

Relatedly, Petitioner claims that the state withheld material exculpatory evidence that corroborates Jenkins' claim that Petitioner never wore Feltus' black Reeboks and Floyd knew it. Specifically, Petitioner points to the transcript of Jenkins' taped interview with Floyd from March 7, 2000. At the end of that interview, Jenkins states that Petitioner was wearing the K-Swiss shoes when they went to dispose of Ms. Hollis' body. (RX 109 at 1189.) When the state provided the transcript to the defense, the word K-Swiss was transcribed as "unintelligible," and Petitioner argues this was a material *Brady* omission. (*Id.* at 1093.) The state, however, also provided the defense with the audio tape of the interview. Thus, Petitioner has not established a *Brady* violation in the failure to transcribe the word "K-Swiss" in the Jenkins interview transcript. [16]

Petitioner also asserts that Norals gave perjured testimony supporting Feltus' alibi at the trial and Floyd knew or should have known it. According to Trakeshia Johnnican's affidavit, she was the manager on duty that night; Norals did not work and neither did Feltus. (RX 108 at 731.) Johnnican further attested that she had spoken with police officers shortly after the crime occurred and told them as much. (*Id.* at 732.)

In addition to testifying that she was the manager on duty on April 2, 1999, and Feltus had worked that night, Norals testified at trial that she had talked to police when they came by to pick up the schedule, and she had "said the same thing, he was at work." (RX 17 at 2541.) She further testified, "Nobody never asked me anything. I just said all I knew was Dione was at work." (*Id.*)

Defense counsel recalled Detective Ferguson in rebuttal to explain that when the detectives first went to Church's Chicken, on either April 6 or 7, they talked to a person, a black female, (he believed she was a manager, but was not sure), who told him that Feltus was not at work on Friday. (*Id.* at 2548.) Mr. Futch had asked Ferguson earlier out in the hall if he recognized Norals as the person he had spoken to at Church's Chicken, and he could not say. (*Id.*) On Floyd's redirect, Ferguson again stated that he could not recall if he had spoken to Norals or someone else.

***30** Detective Swanson, the lead detective in the case, testified at the state habeas proceeding that she had gone with Ferguson to Church's Chicken to get the time sheets. She said the lady they spoke with there "had initially told us that [Feltus] wasn't working and then she said that he had, in fact, been working and that he had been sent home because he had

facial hair that she had told him to get rid of." (RX 106 at 377.) Swanson was clear that she spoke to the same person twice and got different answers. (*Id.*)

Petitioner alleges that the state never produced two pieces of exculpatory evidence related to Feltus' alibi. First, although Ferguson testified that it was his practice to take notes, and Johnnican recalled the officers taking notes, the state produced no hand-written notes from the detectives' first visit to Church's Chicken. Those notes, Petitioner contends, would have included what Johnnican testified she told the officers: that Feltus did not work that Friday night. Second, the state failed to produce the report of Swanson's phone call to Norals from January 26, 2001, just one week prior to the trial, in which she wrote that Norals had changed her story from saying Feltus had not worked to saying he worked. (RX 109 at 1032.)

The state habeas court's determination that the suppressed evidence failed to meet the *Brady* standard for materiality was not unreasonable. The court pointed out that defense counsel knew there was an issue about whether someone at Church's Chicken said Feltus had not worked. Moreover, the court noted that defense counsel cross examined Norals about whether she had changed her story and recalled Ferguson in rebuttal after Norals' testimony to explain that he had initially spoken to someone at Church's Chicken who said Feltus had not worked. (RX 177 at 16-17.) The state court reasonably applied federal law in concluding that the evidence suppressed, considered cumulatively, did not create a reasonable likelihood – one sufficient to undermine confidence in the outcome – that the jury would have decided differently at guilt or sentencing. The state habeas court's determination that this claim remained procedurally defaulted does not constitute an unreasonable determination of the facts or an unreasonable application of the law.

Petitioner also asserts that Norals perjured herself when she testified that Feltus worked until 9:30 or 10 p m. on the night in question, that Swanson knew as much, and that Swanson's knowledge is imputed to Floyd. *See* *Kyles*, 514 U.S. at 437-38 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation ... the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.")

Both Jenkins and Norals (as well as Feltus himself)[17] testified at trial that Feltus was at work on the night in question. In reviewing the challenges to the use of Jenkins' testimony, the state habeas court held that Petitioner had "failed to establish that Michael Jenkins' testimony at trial was false." (RX 177 at 13.) This finding carries over to Norals' testimony that Feltus was at work. While the state habeas court notes the conflicts in the evidence and recognizes that the testimony of the state's recall witness, Ferguson, "calls into question the credibility of Ms. Norals' testimony and, ultimately, Mr. Feltus' alibi," the court ruled that Petitioner had "not established cause or prejudice or a miscarriage of justice to overcome the procedural default of this claim." This Court holds that the finding that Petitioner did not establish the falsity of the testimony that Feltus was at work does not constitute "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Because Petitioner was unable to establish that Norals' testimony was false, Petitioner is also unable to establish that the Prosecutor knowingly presented perjured testimony.

2. Sentencing-Phase Misconduct

***31** In seeking the death penalty, the Prosecutor sought to convince the jury that Petitioner was, and would continue to be, a dangerous man. Petitioner contends that the Prosecutor built his sentencing phase argument of future dangerousness on false testimony.

As noted earlier, at the sentencing phase the prosecution called several law enforcement witnesses who testified about Petitioner's behavior in jail. Deputy Susan Rogers testified that during a routine search of Petitioner's cell she found a large shank and a razor blade stuck in the bed frame and a second shank hidden in the smoke detector. (RX 18 at 2823-28.) Deputy Michael Corley testified that he found a chair leg hidden under Petitioner's bunk on another occasion. (*Id.* at 2837.) Deputy Robert Anderson testified that he found a hand-drawn map of the jail with Petitioner's name on it inside a bible on the top bunk of his cell. (*Id.* at 2847.) Anderson testified that in his opinion the map was in Petitioner's handwriting. (*Id.* at 2853-54.) He also testified that he found a sock with a rock stuffed into it during this search of Petitioner's cell. (*Id.* at 2854.) Deputy Gary Walls testified that Petitioner "ran the cell block" and that Petitioner had stated that he had no remorse over what happened because it was "just business." (*Id.* at 2869-71.)

In support of his assertion that in presenting this evidence the prosecution knowingly presented false testimony, Petitioner presented affidavits of several prison inmates claiming that the makeshift weapons belonged to them. Addressing this issue, the state habeas court found that the post-trial affidavits relied upon by Petitioner "point blame in many different directions" and did not amount to proof that the testimony was false. (RX 177 at 19.) Moreover, the state habeas court noted that the inmates' statements had been made known to trial counsel; that trial counsel had been afforded the opportunity to interview the inmates; and that following these interviews trial counsel "determined that their testimony was not credible and could actually hurt more than help Petitioner's case." (*Id.* at 19-20.) On these facts, the state habeas holding that these claims were procedurally defaulted, that Petitioner failed to establish knowing use of false testimony, and that Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default was not unreasonable. (*Id.* at 20.)

With reference to the escape map, Petitioner argues that Floyd knowingly put on perjured testimony by Deputy Robert Anderson that the escape map was in Petitioner's handwriting because the GBI crime lab had sent back a report stating that it could not match the map with Petitioner's writing. (Pet'r's Br., Doc. 38, at 223-24; RX 108 at 802.) The state habeas court, however, held that this claim was procedurally defaulted and reasonably concluded that the Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome the default, noting that the crime lab report did not indicate the map was not in Petitioner's handwriting but instead that no conclusive determination that it was in Petitioner's handwriting had been made. Anderson was familiar with Petitioner's handwriting and stated a personal opinion. Both the map and all GBI reports were made available to trial counsel. On these facts, the state habeas court reasonably concluded that Petitioner failed to establish the factual falsity of any testimony regarding the map. (RX 177 at 18.) The state habeas court's determination that Petitioner failed to establish cause and prejudice to overcome the procedural default of this claim was not unreasonable. (*Id.* at 18-19.)

D. Conflicts of Interest

1. Petitioner's Attorney Had Previously Represented One of the State's Witnesses

***32** As noted earlier, in the sentencing phase, the State called Clyde Hufstetler, an inmate who had been housed with Petitioner in the Henry County jail and who testified that Petitioner had told him he was going to have Prosecutor Floyd killed and have his girlfriend killed for testifying against him. (RX 18 at 2880.) In his cross examination of Hufstetler, Crumbley brought out the fact that Crumbley had previously represented Hufstetler for several years and they "used to fight the county together." (*Id.* at 2882.) Crumbley did not represent Hufstetler in his trial for the murder of his wife, which resulted in the conviction for which he was incarcerated. (*Id.*) Petitioner contends that Crumbley "operated under a fundamental conflict of interest when he did not withdraw upon learning that one of his former clients" would testify against Petitioner, (Pet'r's Br. at 245) and that his conflict violated his Sixth, Eighth, and Fourteenth Amendment rights.

In addressing this claim, the state habeas court noted that Crumbley "clearly challenged Mr. Hufstetler's veracity" by pointing out that although he had testified under oath that he was innocent of murdering his wife, the jury found him guilty; and that he also challenged Hufstetler's memory by bringing out the fact that at the time of the alleged conversation with Petitioner, Hufstetler was on prescription medicine. (RX 177 at 97, 95-96.) Hufstetler testified that he was on medication, but that it did not affect his memory. (*Id.* at 96.) Crumbley also brought out the fact that Hufstetler had been diagnosed with battered person's syndrome and posttraumatic stress disorder. (*Id.*)

Citing, *inter alia,* *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Lamb v. State*, 472 S.E.2d 683 (Ga. 1996); *Hudson v. State*, 299 S.E.2d 531 (Ga. 1983); *Turner v. State*, 541 S.E.2d 641 (Ga. 2001); and *Smith v. White*, 815 F.2d 1401 (11th Cir. 1987), the court found Petitioner had failed to show an actual conflict existed. "Petitioner failed to show that counsel's prior representation of Mr. Hufstetler, in fact, caused him to make choices or resulted in omissions that were harmful to Petitioner's case." (RX 177 at 97.)

This Court holds that the determination by the state habeas court that no actual conflict was established did not "(1) [result] 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) [result] 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).

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2. Defense Counsel Imported a Conflict into the Defense Team by Using Dr. Jack Farrar as Their Main Mental Health Expert

Petitioner contends that defense counsel "imported a conflict" into their team by using Dr. Jack Farrar as their main mental health expert because Farrar had been the therapist for Brandon Hollis who was "the first suspect" in the murder of his mother. While it is true that law enforcement officers did initially consider the possibility that Brandon Hollis had murdered his mother, when his body was found and it was determined that the same weapon had been used in both his and his mother's murder, that line of inquiry was dropped. (RX 15 at 2114-23, 2066-67.)

Petitioner contends that using Farrar created a conflict on the defense team by preventing them "from investigating and showing that Brandon Hollis himself was the more likely killer of Miriam Hollis, his mother, and [from] presenting other evidence about Hollis [sic] background." (Pet'r's Br. at 249-50.)

The state habeas court declined to treat this issue as presenting a conflict of interest, but instead held that "this allegation is merely a claim that trial counsel were deficient and Petitioner prejudiced by trial counsel hiring Dr. Farrar as their mental health expert." (RX 177 at 100.) The Court then held that given that "trial counsel hired Dr. Farrar based on their knowledge that Dr. Farrar had previously treated Petitioner, developed a rapport and relationship with Petitioner and had met Petitioner's family, this Court finds that Petitioner has failed to show that trial counsel were deficient in hiring Dr. Farrar ...." (*Id.* at 101.)

***33** The state habeas court also held that a comparison of the mental health evidence presented at trial with that presented to the state habeas court, and consideration of the strength of the evidence that Petitioner was guilty of both murders, resulted in a determination that Petitioner had failed to establish "any prejudice." (*Id.* at 101.)

This Court holds that the state habeas court's determination that neither an actual conflict nor deficient performance by counsel was established did not "(1) [result] 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) [result] 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).

E. Prosecutorial Misconduct in Closing Arguments

1. Commenting on Petitioner's Failure to Testify

In his closing argument in the guilt/innocence phase of Petitioner's trial, the Prosecutor argued to the jury "Mustafa Raheem didn't take the stand but you heard his video taped statement. And I submit to you that it ain't true." (RX 17 at 2680-81). Addressing this on direct appeal, the Georgia Supreme Court recognized that, "As a rule of both constitutional law and Georgia statutory law, a prosecutor may not make any comment upon a criminal defendant's failure to testify at trial," and held that this statement violated both rules. *Raheem v. State*, 560 S.E.2d 680, 685 (Ga. 2002). The Court went on to find that on the facts of this case it was harmless error:

> Nevertheless, upon considering the firsthand observation of the trial court that the comment in question did not appear designed to or likely to urge any negative inference, the strength of the evidence against the defendant, the charge given to the jury by the trial court, and the context in which the comment was made, this Court concludes that the violation here was harmless beyond a reasonable doubt.

Id.

The determination by the State Supreme Court that this comment, while impermissible, was harmless error did not "(1) [result] 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)[result] 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).

2. Vouching for Jenkins' Credibility

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In reference to vouching for Michael Jenkins' credibility, Petitioner contends both that the Prosecutor's argument violated his right to due process and that his counsel's failure to object constituted ineffective assistance. In particular, he points to the Prosecutor's statement that "he knew that if he lied and got caught up with that, that the deal evaporated. And I think he knew it. I think he told you that. I submit to you that you can believe that." (RX 17 at 2694.)

The state habeas court found that the "District Attorney simply argued that he had offered Michael Jenkins a deal, that Michael Jenkins knew he had to tell the truth to take advantage of that deal, and that he, therefore, told the truth at trial." (RX 177 at 102.) These, the state habeas court held, "were proper inferences from the evidence after the defense had challenged the credibility of Michael Jenkins ...." *(Id.)*

***34** Having reviewed the transcript of the closing argument and considered it in the context of the evidence presented at trial, this Court finds that this determination by the state habeas court did not "(1) result 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) result 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 notes that even assuming *arguendo* that the Prosecutor violated his obligation not to interject his personal beliefs into his presentation, his argument did not rise to the level of a violation of due process that undermined the fundamental fairness of the trial. *See* *United States v. Young*, 470 U.S. 1, 8, 16 (1985).

Moreover, in determining whether counsel's failure to object fell below an objective standard of reasonableness, Petitioner has not established a reasonable probability that "but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

3. Use of the Pronoun "I" and Injecting Evidence into the Record

Petitioner also objects to the Prosecutor's use of the personal pronoun "I", as opposed to "the State", in statements such as "I filed a notice of intent to seek the death penalty." (RX 18 at 2929). In addition, he complains that the Prosecutor injected evidence into the record by stating that "[t]here have been folks that have [escaped], I know that." (*Id.* at 2953.)

The state habeas court held that "in stating that he had sought the death penalty and noticed Petitioner of the aggravating circumstances" the Prosecutor was "merely making a proper assertion that the State had sought the death penalty in Petitioner's case and had given proper notice to Petitioner," and that his "use of the term 'I' instead of 'the State' clearly does not constitute error." (RX 177 at 103-04.) This determination by the State Supreme Court did not "(1) result 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) [result] 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). With reference to the argument that the Prosecutor injected evidence into the record, this Court holds that the brief statement that people do escape from prison, a known fact, does not impermissibly inject evidence into the record.

4. Telling the Jurors that Petitioner Would Kill Them Unless They Sentenced Him to Death

In arguing that Petitioner's future dangerousness was a reason to impose the death penalty, after references to threats that the Petitioner had allegedly made to the life of the Prosecutor and the Petitioner's girlfriend, the Prosecutor said, "This man is just mean, ladies and gentlemen, in just plain, old country English, he's mean. He's cold hearted. He's cold blooded. And let me tell you something, he'll kill you. And I'm not having to guess." (RX 18 at 2594.)

The state habeas court addressed the Prosecutor's argument regarding Petitioner's future dangerousness in general but did not reference this particular comment. [18] The Court held that "[t]he District Attorney's argument concerning future dangerousness was not improper as the prosecutor made a reasonable deduction from the evidence in suggesting that Petitioner would pose a future danger ...." and that "Petitioner [had] failed to establish that trial counsel were deficient or Petitioner prejudiced by trial counsel not objecting to the District Attorney's arguments ...." (RX 177 at 104.)

***35** This Court notes that while defense counsel did not object to this argument by the Prosecutor at the time he made it, Crumbley addressed it in his own closing:

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> Fear is our enemy here. It's the State's ally. That's why Mr. Floyd got up close to you and yelled at you that we know one thing for sure, and that is that he'll kill you. Mustafa is responsible for getting all that fear started, but you can stop it. The State wants you to give in to it.

(RX 18 at 2978-79.)

This portion of the Prosecutor's argument is very troubling. The Prosecutor appears to have skated dangerously close to injecting passion and prejudice into his argument. Still, under the double deferential standard of review required here, this Court finds some support for the state habeas court ruling that the Prosecutor's arguments regarding future dangerousness were "a reasonable deduction from the evidence" (RX 177 at 104) and that counsel were "not deficient or Petitioner prejudiced" by the failure to object. [19] This ruling did not "(1) result 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) result 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).

F. Whether Petitioner's Mental Condition Bars Execution

Petitioner's claim that his mental condition bars execution is not ripe for decision. "Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh." *Tompkins v. Sec'y, Dept. of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009), *cert. denied*, 555 U.S. 1161 (2009); *see also Connor v. Sec'y, Fla. Dept. of Corr.*, 713 F.3d 609, 625 (11th Cir. 2013), *cert. denied sub nom. Connor v. Crews*, 134 S. Ct. 325 (2013) (competency to be executed [is] simply not now ripe for adjudication because the state has not set an execution date) (citing *Panetti v. Quarterman*, 551 U.S. 930, 945-47 (2007)).

G. Petitioner Contends That the Death Penalty in Georgia is Imposed Arbitrarily and Capriciously and Without Meaningful Proportionality Review

Petitioner's challenge to the manner in which the death penalty is imposed in Georgia in general, i.e., that it is imposed arbitrarily and capriciously, and his contention that the death penalty imposed on him is constitutionally disproportionate, were both rejected on the merits by the Georgia Supreme Court in the direct appeal. *Raheem v. State*, 560 S.E.2d at 687. The Petitioner has not established that the Georgia Supreme Court's method of proportionality review is contrary to or an unreasonable application of Supreme Court law. S*ee Fults v. Upton*, No. 3:09-CV-86-TWT, 2012 WL 884766, at *17-19 (N.D. Ga. Mar. 14, 2012) (rejecting the same challenge). Nor has the Petitioner established that the Georgia Supreme Court's conclusion that the statutory aggravating circumstances supporting a death penalty were proven beyond a reasonable doubt was an unreasonable determination of the facts. Finally, Petitioner has not established that the Georgia Supreme Court's conclusion that, considering the nature of the crime and of the Petitioner, the death penalty was not excessive or disproportionate, was an unreasonable determination of the facts. *Raheem v. State*, 560 S.E.2d at 687.

H. Georgia's Current Lethal Injection Procedures Violate the Eighth Amendment

***36** This ground fails to state a claim under § 2254 and must be denied without prejudice. Claims raising challenges to lethal injection procedures should be brought in a 42 U.S.C. § 1983 lawsuit rather than in a habeas proceeding. *Hill v. McDonough*, 547 U.S. 573 (2006); *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1261 11th Cir. 2009). See generally, *Glossip v. Gross*, __ U.S. __, 135 S.Ct. 2726 (2015).

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2254 seeking relief from alleged constitutional violations during his trial and sentencing.

IT IS SO ORDERED this 24th day of September, 2015.

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All Citations

Slip Copy, 2015 WL 13899724

Footnotes

1 The state habeas court sent the state a memo asking counsel to resubmit their proposed order as a final order with two additional case citations inserted in the "appropriate place." (Respondent's Exhibit ("RX") 177A).

2 Throughout, specific descriptions of documents in the record have been omitted. A comprehensive list of the document descriptions can be found in Document 5 (Doc. 5).

3 RX 108 at 653, 751; RX 111 at 1555; RX 110 at 1476-1528; RX 111 at 1530-1664; RX 108 at 848; *Id.* at 686; RX 111 at 1715.

4 The evidence described in the instant decision is summarized in condensed form in the Georgia Supreme Court's decision in *Raheem v. State*, 560 S.E.2d 680, 672 (Ga. 2002).

5 Defense counsel tried to exclude the videotaped statement based on an alleged *Miranda* violation, arguing that early in the tape Petitioner asked the detectives something to the effect of whether his statement could be used in court. (RX 15 at 2034-2045.) Petitioner testified in the *Jackson-Denno* hearing for the limited purpose of attempting to explain what he remembered about his conversation on this point, reserving all of his rights. The trial judge ruled that there was no *Miranda* violation and the videotaped statement was admissible. (*Id.*)

6 Doctors Gur and Martell testified in the evidentiary hearing about these apparent absence seizures, and Petitioner presented a DVD with examples of these episodes.

7 Gibbs told investigators on April 6, 1999, that only Raheem and Jenkins were in the car when they came to see her at her work and showed her Ms. Hollis' body in the trunk. (RX 113 at 2219.) Raheem also gave a statement to the police on April 6, 1999, describing both killings and identifying Jenkins and himself as the only ones present. (RX 120 at 4467-79.)

8 Throughout the whole transcript, every mention of K-Swiss is transcribed as "unintelligible." (RX 109 at 1039-93.)

9 This defense strategy continued at sentencing, with counsel's residual doubt strategy. (RX 18 at 2956-61.)

10 Norals initially failed to appear on the date subpoenaed to testify at the trial. (*See* RX 16 at 2525-26.) Hank Aaron, Jr., a District Manager for Church's Chicken in charge of the Lake Harbin store, submitted an affidavit stating that Norals "was slick," "did not like working Friday nights," and "would change the schedule any time she wanted to cover herself." (RX 108 at 681.) He further attested that Linda "could look you straight in your eye and lie to your face." (*Id.* at 681-82.)

11 According to the Johnnican affidavit, Sally Riggins was a relative of Norals.

12 As this Court noted in its Order of August 26, 2013, denying Petitioner's "Motion to Expand the Record ... and Motion to Conduct Discovery ...", "Competence to stand trial is fundamental to any semblance of justice. Had the state habeas court concluded on the record before it that Petitioner's claim that he was incompetent to stand trial had merit, it would have followed that Petitioner's counsel were deficient in failing to raise the issue at trial or on direct appeal." Nonetheless, this Court assumes *arguendo* that a finding of competency to stand trial does not underlie the state habeas court order.

13 Crumbley's testimony on this point was the same at his deposition: that no mental health expert ever told him Raheem was not competent to stand trial, and if one had, he would have raised it. (RX 113 at 2333.)

15 Footnote text missing.

15 *See* note 6, *supra.*

16 The state court order did not address this alleged Brady violation, so the Court considers it *de novo.*

17 The state habeas court cites T. 2209, 2235.

18 Assuming that in context the jurors would have heard this comment as articulating a specific threat to them, it was so highly improper it could potentially impermissibly taint the proceedings. On a cold record, however, it is not possible to determine with certitude whether the Prosecutor was using “you” to mean the jurors, or using it to suggest general future dangerousness.

19 It is not clear under the circumstances presented here that the outcome in this case would have been different if defense counsel had objected to the prosecutor's remark, as opposed to addressing it strategically in his own closing argument.

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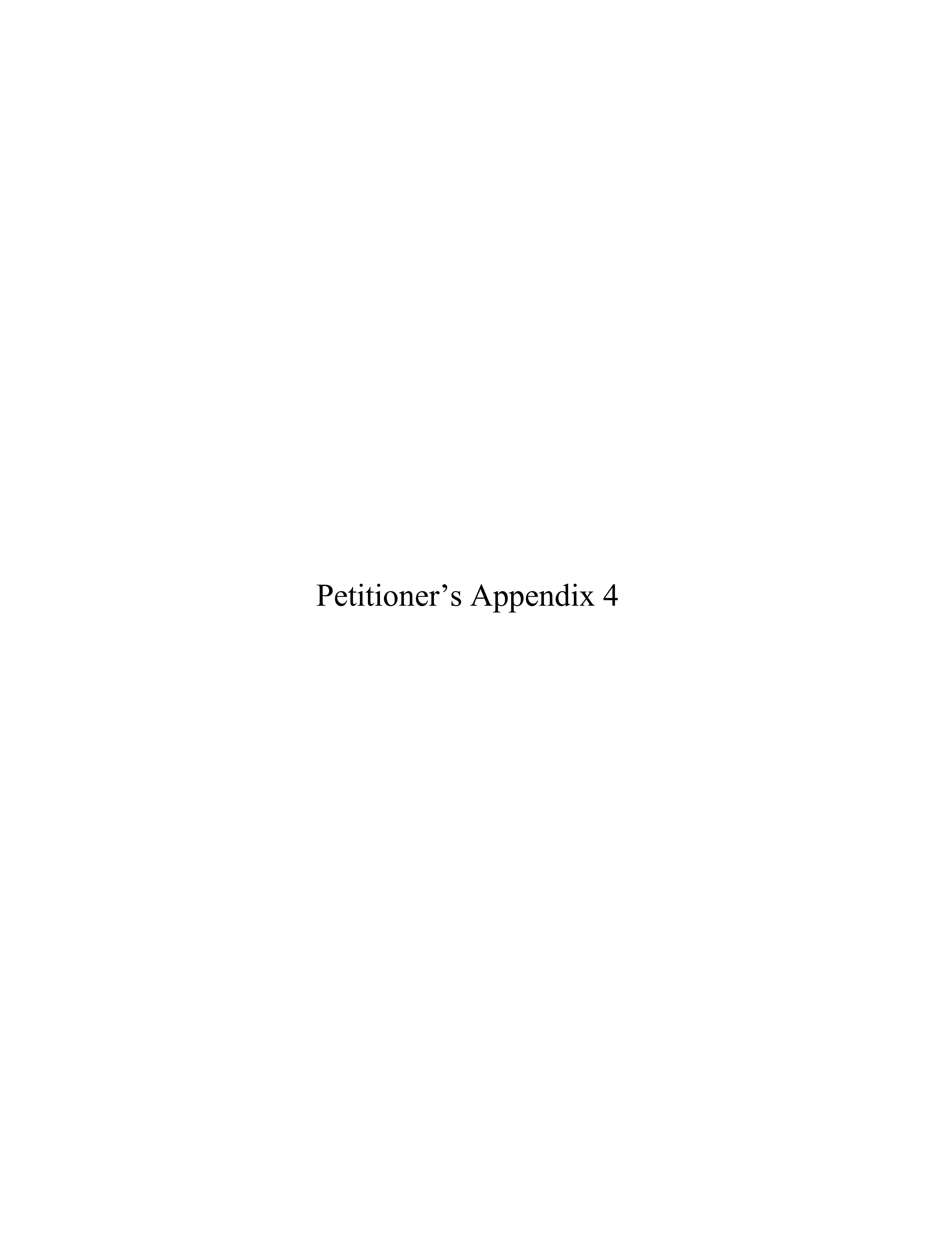

Petitioner's Appendix 4

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

MUSTAFA ASKIA RAHEEM,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	2003-V-319
	*	
v.	*	HABEAS CORPUS
	*	
HILTON HALL, Warden,	*	
Georgia Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

Filed 02/19 2009 at 10:20 a M
Frances R Barnes
Clerk, Butts Superior Court

FINAL ORDER

COMES NOW before the Court Petitioner's Petition for Writ of Habeas Corpus as to his convictions and sentences from the Superior Court of Henry County. Having considered Petitioner's Original and Amended Petitions (hereinafter "Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition, as amended, for writ of habeas corpus as to the convictions and sentences.

I. PROCEDURAL HISTORY

Petitioner, Mustafa Askia Raheem, was convicted by a jury in the Superior Court of Henry County of two counts of malice

Res. Ex. No. 177
Case No. 1:11-CV-1694

murder, two counts of armed robbery and burglary on February 15, 2001. On February 17, 2001, Petitioner was sentenced to death for the malice murder of Miriam Hollis. In addition to the death sentence, the trial court sentenced Petitioner to life imprisonment without parole for the malice murder of Brandon Hollis, life imprisonment for each count of armed robbery, and twenty years for burglary, all to be served consecutively.

The Georgia Supreme Court unanimously affirmed Petitioner's convictions and sentence on March 11, 2002. Raheem v. State, 275 Ga. 87 (2002). Petitioner's petition for writ of certiorari in the United States Supreme Court was denied on November 12, 2002. Raheem v. Georgia, 537 U.S. 1021 (2002). Petitioner filed a petition for rehearing in the United States Supreme Court, which was denied on January 13, 2003. Raheem v. Georgia, 537 U.S. 1150 (2003).

Petitioner filed this instant habeas corpus petition on April 3, 2003, and his amended petition on October 23, 2006. An evidentiary hearing was held on January 28-30, 2008.

II. STATEMENT OF FACTS

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> The evidence adduced at the guilt/innocence phase of Raheem's trial showed the following. On April 2, 1999, Raheem picked up Michael Jenkins and Dione Feltus in Raheem's girlfriend's blue Honda automobile. Raheem dropped Mr. Feltus off at his place of

employment at 4:00 p.m., where, according to the testimony of Mr. Feltus's manager, Mr. Feltus remained until 10:00 p.m. Raheem told Jenkins that he wanted to shoot his .380 caliber handgun. He then shot the handgun out the window of the blue Honda, explaining to Jenkins that he wanted to make sure the weapon would not jam. Raheem purchased black plastic trash bags at a grocery store and called Brandon Hollis from a nearby payphone. Raheem picked up Brandon Hollis and then drove Brandon Hollis and Jenkins to a remote location, where Raheem fired his .380 caliber handgun in the direction of a tree and handed the handgun to Jenkins. After Brandon Hollis said the handgun was too loud, Raheem took the handgun from Jenkins and began walking toward the blue Honda. As Jenkins walked some distance behind Raheem and Brandon Hollis, Raheem shot Brandon Hollis in the head. Jenkins inquired whether Brandon Hollis was dead, and Raheem replied, "No, but he is on his way out." Raheem then took Brandon Hollis's watch and commented to the dying man, "I guess you ain't going to be needing this watch no more." Raheem also took Brandon Hollis's keys and commented to Jenkins, "I'm glad you didn't run."

After killing Brandon Hollis, Raheem drove himself and Jenkins to the home of Miriam Hollis, Brandon Hollis's mother. Raheem opened Ms. Hollis's door with Brandon Hollis's key and instructed Jenkins to bring a trash bag into the home. Ms. Hollis stood to her feet as Raheem and Jenkins entered her home, and Raheem fired a shot at her but missed her. Raheem then ordered Ms. Hollis to her hands and knees and shot her in the head. Raheem placed the trash bag over Ms. Hollis's head, got Ms. Hollis's keys from her kitchen, placed Ms. Hollis's body in the trunk of her white Lexus automobile, and then attempted to mop up Ms. Hollis's blood inside the home. Raheem told Jenkins later that he previously had given Ms. Hollis money for the Lexus automobile but that she had refused to give the automobile to him.

Raheem drove with Jenkins in Ms. Hollis's Lexus to visit Raheem's girlfriend, Veronica Gibbs. Raheem boasted that he had a new automobile, opened the trunk to show Gibbs Ms. Hollis's body, and informed Gibbs that he had shot the woman and a young man. Later, Raheem drove back to Ms. Hollis's home with Jenkins

> and Gibbs, where they burglarized the home, stole a number of items, and retrieved Gibbs's blue Honda. Later, Raheem changed his shoes, which had blood on them, and drove with Jenkins to dispose of Ms. Hollis's body. The body was placed underneath planks and tires, doused with a flammable liquid, and set ablaze.

Raheem v. State, 275 Ga. at 87-88.

III. CLAIMS THAT ARE NOT REVIEWABLE BY THIS COURT

A. CLAIMS THAT ARE PRECLUDED FROM REVIEW UNDER THE DOCTRINE OF *RES JUDICATA*.

This Court finds that the following claims were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court, Raheem v. State, 275 Ga. 87 (2002), and therefore this Court is precluded from reviewing these claims. Elrod v. Ault, 231 Ga. 750 (1974); Gunter v. Hickman, 256 Ga. 315 (1986); Hance v. Kemp, 258 Ga. 649(6) (1988); Roulain v. Martin, 266 Ga. 353 (1996).

> **Claim V and a portion of IX**, wherein Petitioner alleges that his death sentence is arbitrary and capricious and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, (see Raheem v. State, 275 Ga. at 95-96);
>
> **Claim IV, V, and a portion of IX**, wherein Petitioner alleges that his death sentence is disproportionate, (see Raheem v. State, 275 Ga. at 94-95(13); see also Fleming v. Zant, 259 Ga. 687, 688-689));
>
> **Claim VIII**, wherein Petitioner alleges that the prosecutor excused potential jurors on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79 (1986), (see Raheem v. State, 275 Ga. at 90(4)).

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

In his petition, Petitioner raises contentions which he failed to raise on direct appeal. The Court finds that Petitioner failed to establish cause and actual prejudice or a miscarriage of justice sufficient to excuse his procedural default of these claims. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985); O.C.G.A. § 9-14-48(d); Hance v. Kemp, 258 Ga. 649(4) (1988); White v. Kelso, 261 Ga. 32 (1991).

That **portion of Claim I**, wherein Petitioner alleges prosecutorial misconduct in that:

1) the State elicited false and/or misleading testimony from State witnesses at trial;

2) the State introduced materially inaccurate testimony and presented materially inaccurate argument in support of aggravating circumstances at sentencing;

3) the State knowingly or negligently presented false and/or misleading testimony in pretrial and trial proceedings;

4) the State suppressed favorable evidence to the defense at both phases of the trial and argued to the jury that which it knew or should have known to be false and/or misleading. Specifically that: Petitioner was not responsible for the incidents in the jail vis-a-vis escape attempts, did not "run" the jail, did not possess weapons in the jail, and any threats made from him in jail were incredible; Petitioner acted in a psychotic manner while in custody; the State's witnesses had told law enforcement authorities information that was materially different from what they testified to at trial and that that to which they testified at trial was untrue; Petitioner did not

say things that were attributed to him by State's witnesses; Petitioner did not do the things that State's witnesses said he did; that co-defendants had been coached by the prosecutor before they testified; that co-defendant's had been threatened and had been promised things in return for their statements and testimony; transcripts of interviews of state witnesses provided by the State to defense counsel were materially inaccurate; that writings purportedly made by Petitioner were not in fact made by him; that Dione Feltus did not work the night of the offense; and that Michael Jenkins' testimony was false;

5) the State made misleading, improper and unconstitutional closing arguments at both the guilt/innocence and sentencing phase;

Claim III, wherein Petitioner alleges that, because of his mental condition, his execution would violate the Eighth Amendment;

Claim IV, wherein Petitioner alleges that he is severely mentally ill and is, thus, ineligible for the death penalty under the Georgia evolved standards of decency, and that the executions of those who are guilty but mentally ill are prohibited under Georgia statute and the Georgia Constitution, (see, e.g., Lewis v. State, 279 Ga. 756, 764 (2005), cert. denied, 126 S. Ct. 1917 (2006));

Claim VII, wherein Petitioner alleges juror misconduct that included the following:

1) discussing the case after being admonished not to discuss it;

2) improperly considering matters extraneous to the trial;

3) possessing improper racial attitudes which infected the deliberations of the jury;

4) giving false or misleading responses during voir dire;

5) possessing improper biases which infected their deliberations;

6) being improperly exposed to the prejudicial opinions of third parties;

7) improperly communicating with third parties;

8) improperly communicating with jury bailiffs;

9) improperly communicating ex parte with the trial judge;

10) improperly prejudging the guilt/innocence and penalty phases of Petitioner's trial;

11) improperly preparing a statement or speech during deliberations;

12) improperly making a statement during the rendering of verdicts;

13) improperly involving alternates during the deliberation;

14) improperly deliberating on the sentence during the guilt/innocence deliberations; and

15) compromising on the verdict; and

Claim V, incompetent to stand trial and the trial court erred in failing to inquire about incompetency.

Petitioner argues that he was incompetent to be tried and that the trial court erred in failing to conduct, sua sponte, a hearing to determine whether he was competent to stand trial. Petitioner has also alleged ineffective assistance of counsel to attempt to overcome his default of this claim.

As is described in greater detail below, the record shows that trial counsel hired numerous mental health experts to

evaluate Petitioner for a mitigation purpose and a possible mental health defense. Further, those experts met with Petitioner and trial counsel and had previously treated Petitioner years prior to trial. (Vol. 3, HT 422).

In addition to the numerous meetings with Dr. Farrar, Mr. Crumbley testified that he "spent a lot of time with Mustafa … spent a lot of time just talking to him." (Vol. 3, HT 455-456). Petitioner understood the roles of the judge, the lawyers, the prosecutor and the jury. (Vol. 2, HT 348-350). Trial counsel discussed strategy with Petitioner on numerous occasions, and while at times, trial counsel did not agree with Petitioner, Mr. Crumbley testified that they never doubted that Petitioner was competent to stand trial in the legal sense.

Mr. Futch testified at the evidentiary hearing that it was his opinion that Petitioner was competent and had he doubted that opinion or had evidence to the contrary, "I would have, [], fought very vigorously to have his trial postponed. That's not to say, certainly, that Mr. Crumbley and I didn't see some, you know, serious issues with him. But as far as knowing the respective roles of the participants and what a trial was and whether or not he could assist us or not, I think that we both felt that he was competent enough at least that his trial could proceed." (Vol. 2, HT 349-350).

Further, trial counsel testified that they did discuss the question of competency with Dr. Farrar. Regarding the allegation made by Dr. Farrar in his affidavit that he informed trial counsel that Petitioner was incompetent, Mr. Futch responded, "I can't for the life of me think that, you know, Wade Crumbley and myself, who defended countless defendants in cases, would not have taken our only expert at the time telling us he's not competent and not have some kind of hearing on that … I mean, we're just the lawyers, and we had the Court appoint an expert to help us in that regard, and we're going to take his or her opinions as they come." (Vol. 2, HT 365-366).

Similarly, Mr. Crumbley testified that Dr. Farrar never advised him that Petitioner was not competent to stand trial. Mr. Crumbley testified that had there been any suggestion by any of the experts that counsel should demand a competency evaluation "we would have done it." Mr. Crumbley further elaborated, "we did things that we thought really didn't have much of a factual foundation just because of what was at stake, and we were trying to do everything we could think of, you know, and that included, you know, having the MRI scan done and arranging to have the PET scan done. We didn't really think that was going to produce anything but we did it because, you know, we were looking for something that might be helpful." (Vol. 3, HT 446).

The evidence contemporaneous with trial counsel's representation references Petitioner's competency. In fact, the statement by Dr. Farrar, prior to trial, is in direct accordance with trial counsel's habeas testimony, that he believed Petitioner was competent. (Vol. 18, HT 5115).

Further, in the habeas proceedings before this Court Dr. Daniel Martell testified that Petitioner "was competent then [in 2001], and I think he's probably competent now" and the "let the lawyers handle it and false bravado about the proceedings, fully explain his behavior in the courtroom at the time of his capital trial, turning his back to the jury, reading a book, seeming disinterested, putting his head down on the table, consistent with the man that I met who was not psychotic…able to work with his attorneys, willing to work with his attorneys." (Vol. 3, HT 554-555).

Furthermore, the description of Petitioner's behavior at trial in Dr. Farrar's affidavit suggesting that Petitioner was incompetent, which Dr. Gur relied upon during his testimony regarding competency, did not come from first hand knowledge of Petitioner's behavior, but from interpretations of trial counsel's description. (Vol. 3, HT 450-451). This Court finds that neither expert confirmed this behavior with trial counsel, and thus trial counsel's description and opinion concerning Petitioner's behavior is more reliable. (Vol. 1, HT 140-142).

Additionally, the trial court inquired of Petitioner throughout the trial. For example, the trial court asked questions of Petitioner in satisfying the requirements of the Unified Appeal Procedure, Petitioner's request to not be present for the trial, and Petitioner's refusal to take the PET scan. (Vol. 18, HT 5146-5147). The Court finds nothing in these colloquies that indicates Petitioner was incompetent at trial.

This Court finds that Petitioner has failed to establish deficiency of counsel or resulting prejudice or a miscarriage of justice with regard to Petitioner's claim of incompetency. Accordingly, this Court concludes that Petitioner's incompetency claims remain procedurally defaulted.

Claim I, wherein Petitioner alleges prosecutorial misconduct:

This Court finds that Petitioner has procedurally defaulted his prosecutorial misconduct claims, Strickler v. Greene, 527 U.S. 263, 282 (1999), and has failed to establish cause or prejudice or a miscarriage of justice to overcome the default.

The United States Supreme Court has noted that the review of a procedurally defaulted Brady claim and a substantive Brady claim involves an examination of similar components, in that an examination of cause and prejudice is comparable to an examination of whether material has been "suppressed" and whether the suppression was "prejudicial."

In Strickler, the Supreme Court stated:

> Because petitioner acknowledges that his Brady claim is procedurally defaulted, we must first decide whether that default is excused by an adequate showing of cause and prejudice. In this case, cause and prejudice parallel two of the three components of the alleged Brady violation itself. The suppression of the Stoltzfus documents constitutes one of the causes for the failure to assert a Brady claim in the state courts, and unless those documents were "material" for Brady purposes, their suppression did not give rise to sufficient prejudice to overcome the procedural default.

Strickler v. Greene, 527 U.S. 263, 282 (1999).

Michael Jenkins's Testimony

To establish prejudice with regard to his Giglio v. United States 405 U.S. 150, 153 (1972) claim, Petitioner was required to demonstrate that the State knowingly presented false testimony and that there is a "reasonable likelihood that that false testimony could have affected the judgment of the jury." See Smith v. Wainwright, 741 F.2d 1248, 1257 (11th Cir. 1984), cert. denied, 470 U.S. 1087 (1985); Smith v. Zant, 250 Ga. 645(3)(1983); Smith v. Kemp, 251 Ga. 350, 357 (1983).

As to prejudice, the Court further notes that where there is an alleged "recantation" by a State's witness, it is clear that such recantations are viewed with extreme suspicion and that trial testimony is accorded much greater credibility. See Norwood v. State, 273 Ga. 352, 353 (2001)("[d]eclarations made after the trial are entitled to much less regard than sworn

testimony delivered at the trial.") See also, Drake v. State, 248 Ga. 891, 894 (1982).

Norwood also provides additional guidance for reviewing the affidavit of co-defendant Jenkins. In Norwood v. State, 273 Ga. 352, 353 (2001), the Georgia Supreme Court expressed a similar view of the lack of credibility to be accorded a material witness who makes a post-trial recantation of their sworn trial testimony. The Georgia Supreme Court stated:

> That a material witness for the State, who at the trial gave direct evidence tending strongly to show the defendant's guilt, has since the trial made statements under oath that his former testimony was false, is not cause for new trial. Declarations made after the trial are entitled to much less regard than sworn testimony delivered at the trial. The only exception to the rule against setting aside a verdict without proof of a material witness' conviction for perjury, is where there can be no doubt of any kind that the State's witness' testimony in every material part is purest fabrication. A recantation impeaches the witness' prior testimony. However, it is not the kind of evidence that proves the witness' previous testimony was the purest fabrication.

As the Court in Norwood stated, the fact that there is a recantation, does not establish whether the trial testimony or the recantation constitutes the truth.

This Court concludes that Petitioner has failed to prove that Michael Jenkins's testimony at trial was false, or that District Attorney Floyd knowingly presented false testimony. Michael Jenkins was indicted for murder as a co-defendant for

the killings of Miriam and Brandon Hollis. Mr. Jenkins, along with his parents and his attorney, Elaine McGruder, met with the District Attorney about the case, and determined that it was in Mr. Jenkins's best interest to plead guilty. Prior to giving his extensive statement to the District Attorney, Mr. Jenkins, his attorney and his parents were well aware that the District Attorney was making an offer of life plus 15 years in exchange for a plea of guilty to the murder of Ms. Hollis and burglary of the Hollis home. District Attorney Floyd made it very clear to Mr. Jenkins that his deal was contingent on his truthful testimony.

Now many years after the crime, Mr. Jenkins alleges that he committed perjury by submitting false testimony, and that "prosecutor Floyd knew it was false." (Petitioner's post hearing brief, p. 211). Simply because Mr. Jenkins, after being approached many years later by Petitioner's habeas counsel, has decided to change his story does not make it false.

Furthermore, under oath at the evidentiary hearing, District Attorney Floyd adamantly denied all of the allegations set forth by Petitioner, including that the District Attorney told Mr. Jenkins to lie about buying garbage bags at Kroger, to lie about Mr. Feltus's whereabouts on the night of the murder, and to lie about which shoes Petitioner was wearing on the night of the murder, by stating, "I never told him what to say about

anything. I asked him questions when I questioned him. I didn't tell him what to say on any occasion, under any circumstances, on any subject." (Vol. 2, HT 382-387).

The Court finds that as Petitioner has failed to prove that this testimony was false, he has failed to show cause and prejudice or a miscarriage of justice to overcome his default of this claim.

Dione Feltus Alibi

The Court also finds that Petitioner has failed to overcome the procedural default of his claim that Mr. Feltus's alibi was false or that the District Attorney knowingly presented the "false testimony" at Petitioner's trial.

The record establishes that both Detective Swanson and Detective Ferguson testified that they investigated Mr. Feltus's alibi by speaking with management at Church's Chicken on more than one occasion and by obtaining the time records from the day of the murders. (Vol. 2, HT 377-378, Vol. 9, HT 2227). Moreover, Mr. Jenkins and Petitioner confirmed that Mr. Feltus was not a part of the murders. At trial Mr. Jenkins, Mr. Feltus, and Linda Norals, the manager of the Church's Chicken, all testified that Mr. Feltus was at work on the night of the murders. (T. 2209, 2535).

Petitioner now alleges that Mr. Feltus was not at work and that a January 26, 2001 supplemental report from Detective

Swanson wherein she clarifies Ms. Norals's testimony that Mr. Feltus had, in fact, worked on the night of the murders, constitutes a Brady violation.

As is stated above in greater detail, the courts have set forth clear guidelines for what constitutes Brady material. Most importantly for the purposes of this case, is the requirement of "materiality," which necessitates that there be a "probability sufficient to undermine confidence in the outcome" that "had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 678, 682 (1985). See also Kyles v. Whitley, 514 U.S. 419 (1995). The Court finds from a review of the totality of the record, even assuming that trial counsel did not have the January 26, 2001 supplemental report, they could do nothing more than attempt to impeach Ms. Norals's credibility or memory of the evening with the report as they already did at trial.

As to prejudice, even assuming that trial counsel did not have the supplemental report, contrary to Petitioner's assertions of ineffectiveness, trial counsel did challenge Ms. Norals's credibility on cross examination. The cross examination revealed that Ms. Norals had not reviewed any records and was testifying strictly on her memory. (T. 2537-2538). Ms. Norals also conceded that she could not recall who

worked every shift of every Friday. (T. 2538). Trial counsel then brought out testimony that Ms. Norals had sent Mr. Feltus home before on a Friday night to which Ms. Norals explained that if the business was slow she would send employees home. (T. 2539). Trial counsel then confronted Ms. Norals as to why she did not go to the police after hearing about the crime. Id. Ms. Norals testified that she did not "believe in getting in somebody else's business." Id.

Furthermore, it is clear based on trial counsel's handwritten investigative notes dated May 11, 2000, that even prior to any police supplemental reports, trial counsel were aware that "supervisor may say that Deon (sic) wasn't at work." (Vol. 49, HT 13865). To that end, at trial, trial counsel recalled the State's witness, Detective Tim Ferguson after Ms. Norals's testimony to clarify that whomever the detectives initially spoke with at Church's Chicken stated that Mr. Feltus was not at work on the Friday of the murders. (T. 2548). This recall witness clearly calls into question the credibility of Ms. Norals's testimony and, ultimately, Mr. Feltus's alibi.

This Court finds that Petitioner has not established cause or prejudice or a miscarriage of justice to overcome his procedural default of this claim.

Escape Map

The Court also finds that Petitioner's claim regarding the "escape map" found in his cell is also procedurally defaulted as Petitioner failed to prove that the escape map was, in fact, not his map and, thus, failed to establish District Attorney knowingly presented false testimony regarding the map.

The map in question was found in Petitioner's cell, in his personal Bible, along with other papers with Petitioner's name on them. The report to which Petitioner now cites from the GBI as evidence that the map is not in Petitioner's handwriting merely states that the GBI can not make a conclusive determination about the handwriting on the map. It does not purport to say that the handwriting is not actually Petitioner's. At trial, Deputy Anderson, having knowledge of Petitioner's handwriting, identified the map as being in Petitioner's handwriting. Further, Petitioner has not testified that it was not his handwriting. Furthermore, as the map and all of the GBI reports were made known to trial counsel, Petitioner has failed to prove that this is a violation of Brady.

As is stated in greater detail below, trial counsel cross-examined Deputy Anderson regarding the other inmates who shared the cell with Petitioner, creating doubt as to whose drawings were found. Trial counsel were not ineffective for challenging

the handwriting as there was no conclusive evidence that the handwriting was not Petitioner's, and furthermore, Deputy Anderson, who was familiar with Petitioner's writings identified the handwriting as Petitioner's. Furthermore, the jury was able to review the writings and could come to their own conclusion about the handwriting and the credibility of Deputy Anderson's testimony that the map and drawings were Petitioner's.

Thus, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim.

"Weapons"

The Court finds that Petitioner's claim that "weapons" found during a search of his cell did not belong to him is procedurally defaulted. Petitioner cites to post-trial affidavits, which, consistent with the statements at trial, point blame in many different directions. Therefore, without proving that the testimony was false, Petitioner has not met his burden to prove that the District Attorney knowingly presented false testimony.

Furthermore, the statements of the inmates were clearly not Brady material, as they were made known to trial counsel, and counsel were afforded the opportunity to interview the inmates. See Castell v. State, 250 Ga. 776 (1983); Marshall v. State, 266 Ga. 304 (1996); Chambers v. State, 250 Ga. 856 (1983). As

is described in greater detail in this order, trial counsel did in fact speak with each of the inmates and determined that their testimony was not credible and could actually hurt more than help Petitioner's case, thus counsel were not ineffective in their investigation of this matter.

Thus, Petitioner failed to establish cause and prejudice or a miscarriage of justice to overcome his procedural default of this claim.

C. CLAIMS THAT ARE NON-COGNIZABLE

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

> That **portion of Claim I**, wherein Petitioner alleges prosecutorial misconduct in that after trial the prosecutor informed jurors that they would be approached by persons likely misrepresenting who they were, and the jurors were told not to speak with these persons without first contacting the prosecutor; and

> That **portion of Claim IX**, wherein Petitioner alleges that execution by lethal injection is cruel and unusual punishment; alternatively, insofar as this claim is reviewable in this type of habeas proceeding, this Court finds this claim is without merit. See Baze v. Rees, 128 S.Ct. 1520 (2008) and the recent holding in Alderman v. Donald, Civil Action No. 1:07-CV-1474 (N.D. Ga. May 2, 2008).

IV. CLAIMS THAT ARE REVIEWABLE BY THIS COURT

A. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

It is undisputed that the standards for reviewing allegations of ineffective assistance of counsel are contained in the United States Supreme Court's seminal case of Strickland v. Washington, 466 U.S. 668 (1984) and its progeny. To establish his ineffectiveness claims, Petitioner must show the following:

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

Strickland, 466 U.S. at 687. (Emphasis added). See also Wiggins v. Smith, 539 U.S. 510 (2003)(reaffirming the Strickland standard as governing ineffective assistance of counsel claims). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

In Strickland, the Court established a deferential standard of review for judging ineffective assistance claims by directing

that "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland v. Washington, 466 U.S. 668, 688 (1984).

In Burger v. Kemp, 483 U.S. 776, 780 (1987), the Court again discussed the parameters for examining Strickland's performance prong and directed that, "we address not what is prudent or appropriate, but only what is constitutionally compelled." See Head v. Carr, 273 Ga. 613, 625 (2001) (quoting Zant v. Moon, 264 Ga. 93, 97-98(1994), relying on Burger v. Kemp, 483 U.S. 776, 780 (1987)).

Further, not only did the Strickland court establish a strong presumption in favor of effective assistance of counsel, but the Court in Strickland also instructed reviewing courts that the proper focus of a court reviewing a claim of ineffective assistance of counsel is to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 688. See also Franks v. State, 278 Ga. 246, 250 (2004).

With reference to the prejudice prong, the Georgia Supreme Court has relied on the Strickland test which requires that to establish actual prejudice, a petitioner "must demonstrate that 'there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Smith, supra. See also Strickland, supra at 694." Head v. Carr, 273 Ga. 613, 616 (2001).

Contrary to Petitioner's suggestions, the United States Supreme Court has not held that noncompliance with the provisions of the ABA's suggested guidelines for attorney performance in capital cases mandates a finding of deficient performance. Rather, the Court has simply held, consistent with its prior holding in Strickland v. Washington, that such standards are only to be used as guides in determining whether an attorney's performance in a particular case was objectively reasonable, but that the ultimate determination regarding the reasonableness of an attorney's performance "must be directly assessed for reasonableness" considering "*all the circumstances*" of counsel's representation. Wiggins v. Smith, 538 U.S. at 533, citing, Strickland, 466 U.S. at 691. (Emphasis added). See also Chandler v. U.S., 218 F.3d 1305, 1317 (11th Cir. 2000), *cert. denied*, Chandler v. U.S., 531 U.S. 1204 (2001). ("[W]e do

not understand the Supreme Court to make the ABA Standards part of the highest law of the land, even if one accepts that those standards reflect a good policy. We remember that these ABA standards were also mentioned in Strickland; but the Court went on [in Strickland] to shun *per se* rules."). See also Strickland, 466 U.S. at 688-689 ("Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").

Trial Counsel's Experience

Petitioner was represented at trial by two experienced attorneys, Wade Crumbley and Gregory Futch. Mr. Crumbley, who was lead counsel, became a member of the State Bar of Georgia in June of 1978. (Vol. 2, HT 226; Vol. 3, HT 392; Vol. 9, HT 2274). Following law school, he entered private practice which consisted of civil litigation and criminal defense. (Vol. 3, HT 392-394; Vol. 9, HT 2274-2276). In addition to having a private

practice, Mr. Crumbley served as the Henry County attorney on two different occasions. (Vol. 3, HT 393; Vol. 18, HT 4958). Specifically, he served as the county attorney from 1979 to 1980 and from December of 1994 to February of 1999. Id. In 2006, Mr. Crumbley became a judge for the Superior Court of the Flint Judicial Circuit. (Vol. 3, HT 391-392; Vol. 9, HT 2271).

Throughout his career as a defense attorney, Mr. Crumbley handled a number of non-capital murder cases. (Vol. 3, HT 401; Vol. 9, HT 2278). He also had experience in handling both state and federal habeas corpus cases. (Vol. 3, HT 400-401; Vol. 9, HT 2279-2287). As such, he was fully aware that claims of ineffective assistance of counsel were presented in habeas cases, and he "fully expected for this day to come" in Petitioner's case. (Vol. 3, HT 402).

Mr. Crumbley had extensive experience in the representation of capital defendants. Prior to his representation of Petitioner, Mr. Crumbley had worked on five death penalty cases, as far back as 1978. (Vol. 3, HT 395; Vol. 9, HT 2276-2277).

Mr. Futch, who was second chair, became a member of the State Bar of Georgia in 1983. (Vol. 2, HT 223, 226). Following the completion of law school, Mr. Futch worked for the Insurance Commissioner's Office for the State of Georgia for about three or four months. Id. In January of 1984, he was hired as an assistant district attorney for the Stone Mountain Judicial

Circuit. Id. In September of 1987, Mr. Futch left the District Attorney's Office and went into private practice with a firm called Smith & Welch. (Vol. 2, HT 224). Mr. Futch was employed at Smith & Welch for about two years, where his practice consisted mostly of general civil litigation and some criminal defense. (Vol. 2, HT 224, 260). From September of 1989 until September of 1993, Mr. Futch worked as an assistant district attorney for the Flint Judicial Circuit. Id. Mr. Futch then left the District Attorney's Office and again entered private practice. Id.

During his career as both a prosecutor and defense attorney, Mr. Futch handled over one hundred felony trials and "countless misdemeanors." (Vol. 2, HT 225). As a prosecutor, Mr. Futch handled several murder cases that went to trial. (Vol. 2, HT 224, 265). As a defense attorney, he handled numerous murder cases. (Vol. 2, HT 262-265).

At the time of his representation of Petitioner, Mr. Futch's private practice was primarily civil in nature. (Vol. 2, HT 225, 264). As he did not handle any appointed work, criminal defense made up about one-third to one-fourth of his practice. (Vol. 2, HT 225-226, 260, 264). In addition, Mr. Futch also worked part-time as a Municipal Court Judge for the City of McDonough. (Vol. 2, HT 264).

Prior to Petitioner's case, Mr. Futch had experience in two death penalty cases. (Vol. 2, HT 224-225, 264-266).

With regard to the experience of Petitioner's trial counsel, this Court notes that, in the Georgia capital habeas case of Fugate v. Head, 261 F.3d 1206 (11th Cir. 2001), the Eleventh Circuit directed that Strickland's strong presumption in favor of the effectiveness of counsel "is even stronger when the reviewing court is examining the performance of an experienced trial counsel. See Chandler v. United States, 218 F.3d. 1305, 1316 (11th Cir. 2000) (en banc), cert. denied, __ U.S. __, 121 S. Ct. 1217 (2001)." Fugate v. Head, 261 F.3d at 1216. See also Williams v. Head, 185 F.3d 1223, 1228-1229 (11th Cir. 1999)("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.") (citing Provenzano v. Singletary, 148 F.2d 1223, 1228 (11th Cir. 1998) and Crawford v. Head, 311 F.3d 1288, 1297 (11th Cir. 2002)).

Preparation And Investigation For The Pre-Trial And Guilt Phases Of Trial

A key component of a Strickland analysis involves an examination of defense counsel's investigation. With regard to trial counsel's obligation concerning making investigatory efforts, Strickland instructs that an attorney "has a duty to make reasonable investigations or to make a reasonable decision

that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668 (1984). What investigations are reasonable "may be determined or substantially influenced by the defendant's own statements or actions." Id. See also Mulligan v. Kemp, 771 F.2d 1435, 1442 (11th Cir. 1985).

It is also significant to note that under Strickland and its progeny that, "[m]ost important, we must avoid second-guessing counsel's performance. (Cite omitted). As is often said, 'Nothing is so easy as to be wise after the event.'" Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992). Thus, as Strickland requires, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

Initial Preparation of the Case

An order was entered on July 6, 1999 officially appointing Mr. Crumbley to represent Petitioner. (R. 16; Vol. 3, HT 402). In agreeing to represent Petitioner, Mr. Crumbley requested that the trial court appoint Mr. Futch to act as co-counsel. (Vol. 3, HT 402-403; Vol. 9, HT 2292). In explaining the reasons why he selected Mr. Futch to serve as co-counsel, Mr. Crumbley stated that Mr. Futch was a former assistant district attorney

whose private practice included criminal defense. (Vol. 3, HT 403; Vol. 9, HT 2292-2293). He noted that Mr. Futch had "experience trying fairly serious cases." (Vol. 3, HT 403; Vol. 9, HT 2293).

In addition to bringing their own vast experience to their representation of Petitioner, as set forth above, trial counsel consulted with organizations that specialize in the representation of capital defendants. Specifically, trial counsel spoke with representatives from the Georgia Resource Center and the Multi-County Public Defender's Office. (Vol. 9, HT 2290). Trial counsel also had in their possession articles, documents, seminar materials and the "death penalty notebook" from the director of the Southern Center for Human Rights.

Additionally, Mr. Crumbley requested that the trial court allow Tom Carr to serve as an investigator to assist in Petitioner's case. (Vol. 3, HT 403; Vol. 9, HT 2293). Mr. Carr, who was an attorney, had previously served as a law clerk for Superior Court judges in the Flint Judicial Circuit, and he was considered a "very conscientious and meticulous worker." (Vol. 3, HT 403-404; Vol. 9, HT 2293-2294). In addition, Mr. Carr was "very good at gathering information and organizing it." (Vol. 9, HT 2294).

Trial counsel testified that they divided up the pretrial motions, witness interviews and examinations of the trial

witnesses. (Vol. 2, HT 269-271; Vol. 3, HT 404; Vol. 9, HT 2294-2295). While certain tasks were divided up, trial counsel had group meetings to "discuss issues that needed to be discussed," in an attempt to try to "arrive at a decision that we both agreed on." (Vol. 2, HT 269, 271). Furthermore, Mr. Futch testified that he did not recall there being any time where they did not know what each other was doing, and that they "always stayed in touch with each other." (Vol. 2, HT 271).

Relationship with Petitioner

The Court finds that the record establishes that, during their representation of Petitioner, trial counsel met with Petitioner on numerous occasions. (Vol. 2, HT 271-276; Vol. 3, HT 405; Vol. 9, HT 2295-2296). Mr. Crumbley testified:

> Even if I didn't have something specifically relating to the case that I needed to discuss with him, I would go to the jail and just talk to him about how he was doing and what was going on because I was trying to get him to accept me and trust me.

(Vol. 3, HT 458).

As far as their relationship with Petitioner, Mr. Crumbley testified that it was "very difficult" in that "[i]t was not always the same." (Vol. 3, HT 405, 406, 431-432; Vol. 9, HT 2296-2297). Specifically, Mr. Crumbley stated that it was sometimes "cordial" and "friendly," and there were occasions wherein Petitioner was "completely unguarded" with them. (Vol. 3, HT 405). Other times Petitioner was uncooperative and

hostile with trial counsel. (Vol. 3, HT 406). For the most part, however, trial counsel found Petitioner was manipulative. (Vol. 3, HT 406, 411). As such, trial counsel was never sure whether Petitioner was "sincere about anything." (Vol. 3, HT 411).

Trial counsel's relationship with Petitioner was also problematic at times when Petitioner sent them on "wild goose chases." (Vol. 3, HT 406). Specifically, Petitioner would tell them to investigate things that would turn out to be a "waste of time." Id. Mr. Crumbley also stated that Petitioner continued to make statements to the police after he was appointed to represent him wherein Petitioner talked about other heinous crimes that he claimed to have committed, however, there was no evidence that any of those crimes ever occurred. (Vol. 3, HT 408-409).

Trial counsel also testified that Petitioner did a number of things that interfered with their "ability to present the case I wanted to present, but most of them were not things that the jury saw." (Vol. 3, HT 410). Trial counsel explained that they went to "great lengths to have some diagnostic testing done" in an attempt to develop evidence that Petitioner "suffered from some sort of functional abnormality of the brain." (Vol. 3, HT 411). Petitioner cooperated in the brain scan that was performed at Henry Medical Center. (Vol. 3, HT

412). However, he refused to cooperate in the PET scan that was to be performed at Emory. Id.

In addition to his refusal to cooperate with the PET scan, Petitioner severely limited trial counsel with regard to what they could present as evidence, particularly during the sentencing phase. (Vol. 3, HT 413). Specifically, Petitioner would not allow trial counsel to call any of his immediate family members as witnesses during the sentencing phase. Id. After "a lot of begging" and assistance from the trial court and the District Attorney, trial counsel was able to get Petitioner to agree to let them put his parents on the stand. (Vol. 3, HT 413). Petitioner, however, would not allow them to put his sister on the stand. (Vol. 3, HT 413, 437).

Plea Negotiations

The record before this Court establishes that trial counsel engaged in numerous plea discussions with District Attorney Tommy Floyd. (Vol. 2, HT 281; Vol. 9, HT 2309). Mr. Floyd, however, was never willing to extend any plea offer to Petitioner. (Vol. 2, HT 281-282; Vol. 9, HT 2309). Mr. Futch testified that Mr. Floyd believed that the decision as to the sentence was one that a "jury needed to make and not him." (Vol. 2, HT 281).

The Georgia Supreme Court has held that a trial attorney who pursues plea negotiations, yet who is unsuccessful because

the State will not agree to a deal is not deficient. Franks v. State, 278 Ga. 246, 258-259 (2004). As in Franks, Petitioner's trial attorneys were not deficient because they zealously sought a plea agreement for their client. Therefore, the Court finds that Petitioner cannot establish the first prong of Strickland and thus, Petitioner cannot establish ineffectiveness as to this claim.

The Court also finds that Petitioner has failed to show Mr. Floyd would have negotiated a plea with trial counsel and thus has not established prejudice.

Guilt Phase Investigation

This Court finds that the record establishes that trial counsel conducted a reasonable guilt phase investigation.

Guilt Phase Theory

Trial counsel testified that they believed that there was a "low probability" of Petitioner being acquitted by a jury. (Vol. 3, HT 407; Vol. 9, HT 2298). As such, they wanted to focus on the sentencing phase of the case. Id. Petitioner, however, was not concerned or interested in the sentencing phase of the case. Id. Mr. Crumbley stated that Petitioner "had absolutely no concern about the sentence, you know, expressed to me repeatedly and unequivocally that he had no interest in that part of the case, didn't care what the outcome was if he was

convicted, as far as the sentence was concerned." (Vol. 3, HT 410-411; Vol. 9, HT 2298).

This Court finds that trial counsel spent a significant amount of time talking with Petitioner about their desire to accept responsibility and focus solely on the sentencing phase. (Vol. 2, HT 282; Vol. 3, HT 410). Mr. Crumbley testified that it would have been helpful to Petitioner's case if he had admitted to some participation in the offense as it would show an acceptance of responsibility. (Vol. 9, HT 2299-2300). Petitioner, however, refused to agree to a strategy that involved him "conceding guilt and responsibility" during the guilt phase. (Vol. 2, HT 282; Vol. 9, HT 2299). As Petitioner refused to concede guilt, the defense that was presented at trial was not what trial counsel had initially envisioned presenting to the jury. (Vol. 3, HT 408; Vol. 9, HT 2305). Instead, it was the defense that Petitioner allowed them to present which was the result of an "unspoken compromise in this struggle of wills." <u>Id.</u> Trial counsel testified that they agreed to present a defense during the guilt phase in order to maintain Petitioner's cooperation. (Vol. 9, HT 2303).

Thus, in keeping with their belief that Petitioner would benefit from accepting some responsibility, trial counsel argued to the jury during the guilt phase closing arguments that Petitioner had some involvement in the crime. (T. 2650).

Specifically, trial counsel conceded that the State had proven that Petitioner was guilty of burglary, and that Petitioner was "guilty of various other crimes which the State has chosen not to charge, including concealing a death by helping to dispose of Miriam Hollis's body and obstruction of justice." (T. 2651).

In complying with Petitioner's desire to present a defense during the guilt phase, trial counsel developed a theory that focused on showing the jury the weaknesses in the State's evidence that Petitioner was the actual shooter and presenting evidence that, instead, the triggerman was either Michael Jenkins or Dione Feltus. (Vol. 3, HT 408; Vol. 2, HT 289, 294). In support of their chosen theory, trial counsel argued to the jury during the guilt phase closing arguments that the State had not presented any "scientific evidence, absolutely no evidence that is not subject to contradiction or impeachment in this case" about who was the actual shooter. (T. 2653). Trial counsel asserted that the State's witnesses had committed perjury and that the State's case that Petitioner was the shooter was "based entirely on the testimony of three witnesses, every one of whom has serious credibility problems, every one of whom has a very powerful motive to lie." (T. 2653-2655).

Trial counsel testified that Petitioner's statements to the police needed to be "explained if there was any chance the jury was going to believe that he was not the gunman." (Vol. 3, HT

408). Thus, in an attempt to explain Petitioner's numerous police statements, trial counsel argued and presented evidence that supported their theory that Petitioner's tendency to be "expansive and boastful about his prowess and, [], how dangerous he was" was the result of his "psychological makeup and his history of emotional problems." (T. 2652-2653, 2658; Vol. 3, HT 408). Trial counsel testified that Petitioner disliked the idea of presenting evidence to the jury that "he was abnormal mentally or psychologically;" however, he ultimately agreed to allow counsel to "make some reference to his mental health history." (Vol. 3, HT 408; Vol. 9, HT 2304). However, trial counsel had to agree that evidence of his mental health history would only be used to explain why he made statements to the police confessing to crimes that he did not commit. (Vol. 9, HT 2303-2304).

Investigation

During their investigation, trial counsel researched "every single witness on the State's witness list." (Vol. 3, HT 403; Vol. 9, HT 2291, 2336). Mr. Carr submitted numerous requests and obtained criminal histories from the Georgia Crime Information Center that related to persons on the State's witness list, the victims and Petitioner. (Vol. 27, HT 7502-7575). Trial counsel also investigated law enforcement officers and other witnesses that were involved in the investigation of

the case. (Vol. 2, HT 306; Vol. 9, HT 2339; Vols. 27-29, HT 7640-8291). In preparation for trial, Mr. Carr prepared a document for trial counsel that listed the strengths and weaknesses of each of the State's witnesses. (Vol. 47, HT 13230-13238).

Trial counsel also reviewed the District Attorney's file prior to trial, and took notes during their review of the file. (Vol. 2, HT 281; Vol. 9, HT 2334; Vol. 48, HT 13727-13766; Vol. 49, HT 13932). Trial counsel was also provided with copies of the discovery from the District Attorney's file, the GBI files and the Henry County Police Department. (Vol. 2, HT 281-283; Vol. 9, HT 2334; Vol. 33, HT 9292-9299; Vol. 42, HT 11696-11953; Vols. 45-46, HT 12390-13160).

Speaking with Petitioner About the Crime

During their investigation of the crime, trial counsel spoke with Petitioner about the crime and had detailed notes that were prepared by Petitioner regarding the crime. (Vol. 2, HT 341-342; Vol. 9, HT 2305; Vol. 47, HT 13277-13286, 13349-13353). Trial counsel testified that during the investigation of the case, Petitioner's version of the crime changed somewhat, although, Petitioner was always adamant in "denying any involvement until after the murders had taken place." (Vol. 2, HT 341; Vol. 9, HT 2305).

Investigation into Dione Feltus, Michael Jenkins and Veronica Gibbs

Trial counsel testified that they investigated and found no evidence to support Petitioner's theory that a criminal organization was involved in the crime. (Vol. 9, HT 2305-2306). Specifically, Petitioner told trial counsel that Michael Jenkins and Dione Feltus were the persons that actually committed the murders and he was involved only in disposing of Miriam Hollis's body. (Vol. 9, HT 2307-2308).

Trial counsel conducted an investigation into the possible involvement of Dione Feltus and Michael Jenkins. (Vol. 9, HT 2308). Regarding Mr. Feltus, trial counsel attempted to speak with him, however, Mr. Feltus refused to talk to trial counsel. (Vol. 9, HT 2310). As part of their investigation into Mr. Feltus, trial counsel obtained the following: copies of the statements that Mr. Feltus gave to the police on April 6, 1999 and April 7, 1999; GCIC reports; court records; and jail records. (Vol. 34, HT 9406-9701; Vol. 41, HT 11347-11352). Trial counsel testified that they reviewed the statements given by Mr. Feltus, and they reviewed the documents regarding his history of legal troubles. (Vol. 9, HT 2310-2311).

Trial counsel also investigated the alibi that Mr. Feltus had provided to the police in which he stated that he was at work at the time of the murders. (Vol. 9, HT 2311). As part of

their investigation into Mr. Feltus's alibi, trial counsel spoke with a representative of Church's Chicken and obtained the work schedule. (Vol. 2, HT 300; Vol. 9, HT 2311; Vol. 47, HT 13394-13397).

Regarding Mr. Jenkins, trial counsel attempted to talk to Mr. Jenkins, but his attorney, Elaine McGruder, would not allow them to interview Mr. Jenkins. (Vol. 2, HT 297; Vol. 9, HT 2309; Vol. 49, HT 13867). As to any further investigation of Mr. Jenkins, trial counsel obtained the following: copy of the statement given by Mr. Jenkins to the police; records from the Henry County Sheriff's Office; GCIC reports; court records; and a copy of the interview between Mr. Floyd, Mr. Jenkins and Elaine McGruder. (Vol. 2, HT 297-298; Vol. 9, HT 2310; Vol. 43, HT 11956-12144).

Trial counsel also investigated Veronica Gibbs who was Petitioner's girlfriend at the time of the crime. (Vol. 2, HT 305-306; Vol. 3, HT 473; Vol. 42, HT 11645). During the interview, Ms. Gibbs provided trial counsel with information regarding the crime. (Vol. 42, HT 11645). In addition, trial counsel obtained the following information regarding Ms. Gibbs: police statement and reports; arrest warrant; GCIC reports; correspondence between Petitioner and Ms. Gibbs; jail receipts showing money placed on Petitioner's account by Ms. Gibbs; jail visitation logs showing visits by Ms. Gibbs; and a copy of her

videotaped statement. (Vol. 20, HT 5494-5532; Vol. 41, HT 11344-11346; Vol. 42, HT 11648-11695; Vol. 49, HT 13952).

Investigation of the Shoes

During the investigation, trial counsel recognized that one of the issues in Petitioner's case was whether or not Petitioner was wearing a pair of black Reebok tennis shoes that had Miriam Hollis's blood on them. (Vol. 2, HT 298-299). The evidence showed that Petitioner was wearing his grey K-Swiss tennis shoes when they murdered Brandon and Miriam Hollis. Notably, these shoes tested positive for Brandon Hollis's blood. However, the State had additional evidence that, after hours of driving around in Ms. Hollis's Lexus with her body in the trunk, Petitioner and Mr. Jenkins went to Veronica Gibbs's apartment where they all went to sleep for a while. Hours later, Petitioner changed into Mr. Feltus's black Reeboks because "he didn't want to mess up his K-Swiss" as he and Mr. Jenkins disposed of Ms. Hollis's body. (T. 2452). Mr. Jenkins, Mr. Feltus and Petitioner all confirm that it is common for Mr. Feltus and Petitioner to interchange shoes, with the exception of Petitioner's grey K-Swiss, which Mr. Feltus did not like. Mr. Jenkins wears a different shoe size, so he does not wear the other's shoes. Based on this evidence that trial counsel knew was going to be submitted at trial, trial counsel conducted an

investigation in an attempt to place Mr. Feltus in the black Reeboks at the crime scene. (Vol. 9, HT 2311-2312).

As part of their investigation into the shoes, trial counsel engaged in conversations with Petitioner. During one of their conversations, trial counsel showed Petitioner photographs of the various shoes, alleged to be related to the case. (Vol. 47, HT 13286). Petitioner stated that he gave his old shoes to Mr. Feltus and that "everybody knows that." Id. During another conversation with Petitioner about the shoes, trial counsel learned that the K-Swiss shoes belonged to Petitioner; however, Petitioner claimed that he had given the shoes to Mr. Feltus about two weeks before the murders. (Vol. 47, HT 13302).

As part of their investigation, trial counsel also attempted to speak with Mr. Feltus and Mr. Jenkins. (Vol. 9, HT 2310). Mr. Feltus refused. Id. Additionally, Mr. Jenkins's attorney, Elaine McGruder, would not allow them to interview Mr. Jenkins. (Vol. 2, HT 297; Vol. 9, HT 2309; Vol. 49, HT 13867).

As trial counsel obtained documents with regard to the shoes, discussed the shoes with Petitioner and attempted to speak with both Mr. Feltus and Mr. Jenkins about the shoes, this Court finds that trial counsel were not deficient in investigating this issue prior to trial.

Further, Petitioner has failed to establish prejudice. Subsequently, during the guilt phase of Petitioner's trial, the

State presented the testimony of Mr. Feltus. Mr. Feltus testified that Petitioner picked him up the day after the murders and took him to Shoe Carnival to exchange some shoes. (T. 2213-2215). Mr. Feltus purchased white Reeboks that had red and blue stripes down the side. (T. 2241). On cross-examination by trial counsel, Mr. Feltus denied that it was a coincidence that he wanted to buy new shoes the day after the murders. (T. 2250).

Regarding the black Reeboks that were recovered from Veronica Gibbs's apartment, Mr. Feltus testified that they could have been his shoes as he and Petitioner "used to wear each other's shoes." (T. 2242-2244). Mr. Feltus also testified that the black Reeboks that were recovered from Ms. Gibbs's apartment fit him. (T. 2253). Mr. Feltus denied ever wearing Petitioner's K-Swiss shoes as he did not like them. Id.

The State also presented the testimony of Michael Jenkins wherein he was questioned about the shoes. On direct examination, Mr. Jenkins testified that Petitioner got blood on his K-Swiss shoes when Brandon Hollis's head fell on Petitioner's foot after he was shot. (T. 2394, 2396-2397). Regarding the black Reeboks, Mr. Jenkins stated that they belonged to Mr. Feltus; however, he testified that Petitioner wore Mr. Feltus's shoes on the night of the crime. (T. 2430-2431). Similar to Mr. Feltus's testimony, Mr. Jenkins stated

that Petitioner and Mr. Feltus were known to wear each other's shoes. (T. 2432). Regarding the issue of when Petitioner changed shoes, Mr. Jenkins testified that Petitioner changed from the K-Swiss shoes to the black Reeboks before they dumped the body of Miriam Hollis. (T. 2452).

On cross examination by trial counsel, Mr. Jenkins testified that he wore a size ten and a half in Reeboks, and he denied counsel's assertion that he and Petitioner wore each other's shoes. (T. 2471). Regarding Mr. Feltus's shoe size, Mr. Jenkins testified that he wore a size eleven and a half or twelve. Id. Mr. Jenkins further stated that he and Mr. Feltus did not wear each other's shoes. Id.

Consistent with his testimony on direct examination, Mr. Jenkins stated that Petitioner got blood on his shoe after Brandon Hollis's head hit Petitioner's shoe. (T. 2481). Trial counsel then questioned Mr. Jenkins as to when Petitioner changed shoes, and Mr. Jenkins stated that he changed shoes at Ms. Gibbs's apartment after the murders. (T. 2482). Mr. Jenkins was then questioned regarding his police statement wherein he stated that the black Reeboks recovered from Ms. Gibbs's bedroom were Mr. Feltus's shoes, and that the K-Swiss shoes were the shoes that Petitioner was wearing the night of the crime. (T. 2483-2484). Mr. Jenkins reiterated that Petitioner initially wore the K-Swiss shoes, and he put on the

black Reeboks at Ms. Gibbs's apartment after the murders. (T. 2482, 2485).

Trial counsel also presented the testimony of Officer Timothy Ferguson, who interviewed Dione Feltus on April 7, 1999. Officer Ferguson testified that Mr. Feltus stated that he had left a pair of tennis shoes in Miriam Hollis's Lexus on Saturday morning. (T. 2546-2547). Trial counsel attempted to suggest to the jury that Mr. Feltus was actually wearing the Reeboks.

In light of the testimony and evidence submitted at trial, which this Court finds is more reliable than post-conviction affidavits, this Court finds that Petitioner has failed to show that trial counsel were deficient in regards to investigating and challenging the shoe evidence or that Petitioner was prejudiced by trial counsel's representation with regard to this evidence.

Mental Health

The record before this Court also establishes that as part of both their guilt and sentencing phase investigation and preparation, trial counsel utilized four mental health experts to investigate Petitioner's mental health. Specifically, trial counsel retained the services of Dr. Jack Farrar, Dr. Charles Nord, Dr. Jeffrey Klopper and Dr. Dennis Herendeen.

Dr. Farrar was a psychologist at Fairview Day Hospital who had previously treated Petitioner for a significant period of

time following his first suicide attempt in 1994. (Vol. 2, HT 228; Vol.3, HT 416; Vol. 9, HT 2314). Shortly after they were appointed to represent Petitioner, trial counsel submitted a letter to Dr. Farrar and Fairview Day Hospital requesting a copy of all records regarding the treatment of Petitioner. (Vol. 27, HT 7403-7404). Pursuant to their request, trial counsel received records from Dr. Farrar and Fairview Day Hospital. (Vol. 21, HT 5733-6057; Vol. 27, HT 7405-7420).

Trial counsel subsequently sought funds to be used in retaining the services of Dr. Farrar to re-evaluate Petitioner. (Vol. 2, HT 307). Mr. Crumbley testified that while he had not previously used Dr. Farrar, he knew of Dr. Farrar and his credentials. (Vol. 9, HT 2315). He was also aware of the fact that Dr. Farrar "made a pretty good appearance in court," and that the District Attorney's Office could not accuse them of "hiring a hired gun if we hired the psychologist who had been involved with Mustafa from the time he was a child." Id.

On January 12, 2000, trial counsel filed an ex parte motion with the trial court requesting funds for expert assistance. (Vol. 18, HT 4940-4946). In support of their motion, trial counsel asserted that Petitioner had a "documented history of mental illness" having been previously diagnosed with major depression. (Vol. 18, HT 4941, 5093). Trial counsel also argued that Petitioner had at least one suicide attempt, early

childhood head injuries and had been described by family members as having "two distinct personalities." (Vol. 18, HT 4941, 5093-5094). On January 14, 2000, the trial court granted funds in the amount of $2500 to trial counsel for a psychological evaluation. (Vol. 2, HT 288; Vol. 18, HT 4947-4948).

Throughout the investigation of Petitioner's mental health, trial counsel met with Dr. Farrar a number of times, "at least ten or 12 and, you know, maybe more, like, 20 or 30," and had a number of telephone conferences with him. (Vol. 3, HT 423). In addition, trial counsel and Dr. Farrar traveled to the jail to meet with Petitioner several times. (Vol. 3, HT 405, 423; Vol. 9, HT 2296).

Trial counsel also received funding from the trial court to retain the services of Dr. Nord for the purpose of re-evaluating Petitioner. (Vol. 2, HT 308). Dr. Nord was a psychologist at Charter Peachford Hospital who performed a psychological evaluation on Petitioner when he was about fifteen years old following an admission for major depression. (Vol. 27, HT 7435-7441). According to his report, Dr. Nord diagnosed Petitioner with major depression and oppositional defiance disorder. (Vol. 27, HT 7441).

In preparing for Petitioner's trial, counsel had Dr. Nord review some of the testing that had been administered by Dr. Farrar following Petitioner's arrest. (Vol. 9, HT 2319). Dr.

Nord was also afforded the opportunity to conduct an interview with Petitioner at the jail. (Vol. 27, HT 7428-7431).

Dr. Klopper, who was board certified in psychiatry and neurology, was retained by trial counsel after it was suggested by Dr. Farrar that a "neurologist would be in order to do the CAT scan and MRI." (Vol. 2, HT 232; Vol. 9, HT 2315; Vol. 44, HT 12321; Vol. 49, HT 13844). On April 18, 2000, Dr. Farrar testified during an ex parte hearing in support of trial counsel's request for additional funding for further medical testing. (Vol. 18, HT 5108-5115). Dr. Farrar informed the trial court that he believed that there was a possible correlation between Petitioner's depression and his childhood head injuries. (Vol. 18, HT 5110-5111). He believed that further evaluation by a psychiatrist or neurologist might provide information as to the possible cause of Petitioner's depression. (Vol. 18, HT 5111).

Following Dr. Farrar's testimony, the trial court granted trial counsel funds to obtain the services of Dr. Klopper. (Vol. 18, HT 5116). The trial court also granted funds in the amount of $2000 for Dr. Farrar to remain in the case. Id.

As previously stated, Dr. Klopper was retained to examine Petitioner to determine whether or not Petitioner had a functional abnormality of the brain due to childhood head injuries. (Vol. 3, HT 417). In August of 2000, Dr. Klopper

performed an evaluation of Petitioner at the jail. (Vol. 2, HT 239; Vol. 3, HT 425). Following his examination, Dr. Klopper informed trial counsel that he "found nothing that is going to be helpful to you, and the only thing I can suggest is that we do these additional diagnostic tests to see if there is any evidence of a functional abnormality in the brain or some injury in the brain." (Vol. 3, HT 430; see also Vol. 2, HT 240-241; Vol. 49, HT 13851)). Trial counsel testified that Dr. Klopper was "very skeptical that the testing that he ordered was going to show anything but he agreed to sign the order to have the testing done anyway." (Vol. 3, HT 418, 430; Vol. 9, HT 2318). Regarding the additional diagnostic testing, Drs. Farrar and Klopper recommended that Petitioner have an MRI scan which was to be followed by a PET scan. (Vol. 3, HT 426-427).

Pursuant to the recommendation of their mental health experts, trial counsel had an MRI performed on Petitioner on January 19, 2001. (Vol. 2, HT 243; Vol. 19, HT 5187-5193). The results of the MRI showed a "normal brain MRI with no evidence of acute intracranial injury." (Vol. 19, HT 5193). Petitioner was to have a PET scan following the MRI.

On December 14, 2000, an ex parte motions hearing was held wherein trial counsel requested funds for a PET scan to determine if there was "any evidence of brain damage or of impaired functions of certain parts of the brain which might be

attributable to head trauma in his past and which might in some way have a causal link with some of the psychiatric problems that he's experienced." (Vol. 18, HT 5126). The trial court granted funds to trial counsel for the purposes of a PET scan. (Vol. 18, HT 5130).

Trial counsel testified that "it took substantial effort to arrange" to have the PET scan, which was scheduled during the week of voir dire. (Vol. 2, HT 245; Vol. 3, HT 412, 436). On the day of the PET scan, trial counsel received a phone call from the sheriff's deputies wherein they were informed that Petitioner refused to get out of the van for the PET scan. (Vol. 3, HT 418, 421; Vol. 49, HT 13853).

Later when Petitioner would finally speak with Mr. Crumbley, Petitioner informed trial counsel that there were a number of "old money, white people around and that he was not going to get out of the sheriff's vehicle in shackles in front of those old money, white people." (Vol. 3, HT 419, 461-462). Mr. Crumbley expressed his frustration to Petitioner and informed him that that was the only chance to have the PET scan. (Vol. 3, HT 419; Vol. 49, HT 13853). Petitioner's response to trial counsel was that "he didn't care about that part of it." (Vol. 3, HT 419).

The trial court subsequently made an inquiry regarding Petitioner's refusal to participate in the PET scan. (Vol. 18,

HT 5142-5148). The trial judge stated that he had received a phone call between 10:30 and 11:00 a.m. from Major McBrayer of the Henry County Sheriff's Department who stated that Petitioner "was seated in the rear of the vehicle and refused to exit the vehicle, refused to be examined and refused to sign any papers authorizing him to be examined." (Vol. 18, HT 5144). The trial judge also noted that he received a subsequent phone call from Major McBrayer who said he had spoken with Mr. Crumbley and was told to bring Petitioner back to the jail. (Vol. 18, HT 5144-5145). The accuracy of the trial court's recitation of the facts was confirmed by trial counsel. (Vol. 18, HT 5145). Trial counsel further noted that Petitioner refused to speak with them on the phone about his refusal to get out of the vehicle. Id.

The trial court then inquired of Petitioner as to why he refused to participate in the PET scan. (Vol. 18, HT 5146). Petitioner stated:

> I mean, no, sir. I mean, that wasn't exactly it, not that I just didn't want to take it, you know. It was, like, you know, we went up there, man, it was, like, twelve o'clock. I mean, it was, like, doctors and, like, old, old money out there. I man, it's two cars and it's, like, deputies and Emory security standing in front of the car, like. And I've got a green jumpsuit on and I've got a chain around my waist and shackles on me and stuff. And everybody's just waiting to see who got out of the car, you know. And it had just went off the news at eleven o'clock last night, you know. And if I got out of the car, I mean, I've got the Henry County jumpsuit on, I mean, you

> know what I'm saying. It would be easy to put one and one together, you know. I mean, it looked like a circus out there, you know. I didn't want to be a circus monkey. That's the only thing it was. I mean, I'm not going to worry about taking it.

(Vol. 18, HT 5146-5147). Petitioner also clearly stated on the record that it was his decision not to get out of the vehicle and not anything that was done by the deputies who transported him to the test. (Vol. 18, HT 5147).

Prior to the PET scan, trial counsel spoke with Petitioner and explained the importance of the PET scan. (Vol. 2, HT 346-347). Counsel also explained that the PET scan would be at Emory Hospital, and that he would be required to "sit in a chair for about 40 minutes and lay on a table for about 30 minutes." Id. Regarding Petitioner's refusal to participate in the PET scan, trial counsel stated, "[w]e never, at least I don't recall any indication from Mustafa about any hesitancy on his part not to cooperate or any concerns he had about the test, for any particular reason." (Vol. 2, HT 347-348). As such, trial counsel was surprised to learn about Petitioner's refusal to get out of the vehicle. (Vol. 2, HT 348).

Additionally, pursuant to trial counsel's request, Dr. Herendeen performed an evaluation of Petitioner on December 2, 2000. (Vol. 4, HT 714). According to handwritten notes produced on December 4, 2000, trial counsel was informed by Dr. Farrar that Dr. Herendeen did not find anything during his

evaluation of Petitioner that would be helpful to the defense. (Vol. 49, HT 13851). Specifically, trial counsel noted that Dr. Herendeen found Petitioner to be impulsive. Id.

Throughout their representation of Petitioner, trial counsel had discussions with Petitioner during which he would talk about another place that he could go to in his mind. (Vol. 9, HT 2323). Petitioner's fantasy world was a "place where the world would be as, [], he wished it to be, where he was, he had money and he had women and he was powerful and had a lot of freedom." Id. Trial counsel testified that Petitioner "never talked about that place like it was a place that he couldn't go to and then come back from at will." (Vol. 9, HT 2323). Instead, Petitioner's fantasy world appeared to be "more like a child's fantasizing about how he wished things were than a delusional belief or a hallucination that he had no control over." Id.

In speaking with their mental health experts, trial counsel was informed that Petitioner was not delusional, psychotic or schizophrenic as "he goes in and out of this whenever he wants to." (Vol. 9, HT 2323-2324). Dr. Farrar specifically told trial counsel that Petitioner was "very interesting in that he had the ability to sort of move between his imaginary world and the real world, and he did understand the difference," thus

enabling Dr. Farrar to actually rule out true psychosis. (Vol. 3, HT 447).

The Court finds that trial counsel reasonably investigated Petitioner's mental health and Petitioner failed to show prejudice resulting from this investigation. Furthermore, this Court finds that Petitioner has failed to prove that trial counsel were ineffective with regard to Petitioner's own refusal to cooperate with additional psychological or brain testing. See Byrd v. Collins, 209 F.3d 486, at 527 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001) (trial counsel was not constitutionally ineffective where Petitioner himself refused to partake in mental health evaluations). See also Lorraine v. Coyle, 291 F.3d 416 at 435-436 (6th Cir. 2000) (trial counsel cannot be faulted for their client's lack of cooperation).

Reasonable Investigation

This Court also finds that based on the entirety of the record and the totality of the circumstances, Petitioner has failed to establish that trial counsel were deficient in investigating or preparing the guilt phase of his trial or that he was prejudiced by trial counsel's representation in this regard. Accordingly, this claim is denied.

Guilt Phase Presentation

During the guilt phase of Petitioner's trial, counsel presented the testimony of Dr. Farrar in support of their theory

that Petitioner falsely took responsibility for the crime due to his mental health problems. (Vol. 2, HT 295). Dr. Farrar testified that he initially met Petitioner in August of 1994. (T. 2556, 2558-2559). He testified that Petitioner had been referred by Charter Peachford Hospital following a suicide attempt. (T. 2559).

He informed the jury that, during his treatment of Petitioner at Fairview Day Hospital, he administered a battery of tests to Petitioner. (T. 2559-2561). Dr. Farrar administered these same tests a second time on Petitioner following his arrest for the murders of Miriam and Brandon Hollis. (T. 2561). Regarding the test results, Dr. Farrar testified that the testing from the two different time periods were "extremely parallel, almost identical over time" and he did not believe Petitioner was malingering. (T. 2561-2563). He noted that the only difference was that one of the test given after the murders was "more complete" which allowed for additional information and enabled him to "refine" his analysis. (T. 2561-2562).

During his treatment of Petitioner in 1994, Dr. Farrar testified that he developed a close and trusting relationship with Petitioner, and he believed that Petitioner was open and honest with him during the treatment. (T. 2563). Dr. Farrar explained to the jury that Petitioner was in a "very intense

outpatient program" for adolescents that was designed to focus on his psychological issues. (T. 2564).

Dr. Farrar testified that, throughout the years, Petitioner had been "consistently diagnosed major depressive disorder and been placed on antidepressants." (T. 2565-2566). In support of that diagnosis, Dr. Farrar stated that Petitioner had at least four suicide attempts. (T. 2567). During the treatment period at Fairview Day Hospital, there were a number of disorders that were ruled out as they lacked sufficient information to make a "solid diagnosis." Id. Specifically, they ruled out antisocial personality disorder, borderline personality disorder and narcissistic features. Id. Dr. Farrar explained to the jury that adolescents cannot be diagnosed with personality disorders as their "personality is not developed enough to be disordered." (T. 2567-2568). Following Petitioner's arrest for murder, Dr. Farrar was able to diagnose Petitioner with borderline personality disorder. (T. 2568). Dr. Farrar testified that Dr. Nord concurred with the diagnosis of borderline personality disorder. (T. 2568). Dr. Farrar also noted that Petitioner exhibited antisocial features; however, a diagnosis of antisocial personality disorder was not supported by the testing and the time that he spent with Petitioner. (T. 2570-2571).

In explaining borderline personality disorder, Dr. Farrar stated that the following are common characteristics of the

disorder: frequent suicide attempts; intense relationships that go from one extreme to the other; and fear of rejection or abandonment that leads to an inability to form attachments to others. (T. 2568-2570). Additionally, Dr. Farrar testified that persons suffering from borderline personality disorder have had a major trauma in their life that usually occurs between birth and six years of age. (T. 2568). In Petitioner's case, Dr. Farrar was unable to make a determination as to what the trauma was in his life as Petitioner could not recall his childhood. Id.

Dr. Farrar described Petitioner as a "young man that is very, very depressed." (T. 2571). He testified that Petitioner had a family history of depression in that his mother suffered from chronic depression for years. (T. 2572). Dr. Farrar opined that Petitioner's acting out and first suicide attempt was likely brought on by the fact that his mother had a "near breakdown." Id. At that point, Petitioner, who had always considered his mother to be his ally, no longer saw her as an ally which led to "his own suicidal acting out and all of these dynamics playing themselves out." Id.

Regarding Petitioner's depression, Dr. Farrar explained to the jury that one might not recognize Petitioner's depression as one of the characteristics of borderline personality disorder, but it does characteristically include "not demonstrating

publicly how you feel, not demonstrating your scare, your fear." (T. 2571). Dr. Farrar stated that Petitioner gives the initial impression of being a person who is "really accepting" and "very engaging," however, as the relationship develops, he usually becomes scared and pushes people away. Id. Dr. Farrar testified that Petitioner was "unable to be emotionally connected to anyone" despite a "great desire to be close to people." Id. He also stated that persons with borderline personality disorders have a tendency to "embellish things, they make up stories, they are entertaining, they try to pull people in to get close to them so they are accepted." Id. Dr. Farrar explained that when they are accepted, they become "tremendously frightened of the closeness" and they immediately "push away." Id. Dr. Farrar further testified that Petitioner had a "great deal of suspiciousness and paranoia." (T. 2571-2572).

During the time spent with Petitioner, Dr. Farrar observed that Petitioner had a tendency to "embellish tremendously." (T. 2573). Dr. Farrar testified that Petitioner's stories and embellishments usually involved him committing a crime or of him being a powerful and dangerous person. (T. 2574). In looking at what factors caused Petitioner to make up these stories, Dr. Farrar found that Petitioner would tell "outlandish" stories whenever people started "liking him or there is some sense of closeness that comes about." (T. 2573). Dr. Farrar explained

that borderline personality disorder has a "delusional component" where the person has a fantasy world and sometimes they lose track of "what is real and what is imagined." Id. He stated that persons suffering from borderline personality disorder have a difficult time in the real world, so they chose to live in a fantasy world. (T. 2574). Dr. Farrar informed the jury that Petitioner had a fantasy world that he would go to that had "characters and all sorts of kinds of issues and dynamics there involving a whole culture of people." (T. 2576).

Dr. Farrar also observed that Petitioner tried to get people to hurt him. (T. 2574). He explained to the jury that Petitioner's attempts to get others to hurt him was due to the fact that he had been suicidal for a long period of time, was depressed and disliked himself. Id. Dr. Farrar testified that Petitioner had a "real false bravado," and he wanted other people to believe that he was scary. (T. 2575). Petitioner tried "to control situations by being outlandish, by developing these crazy, often times frightening stories and often times admitting to crimes which I don't believe he had conducted or has done to feel bigger than he is." Id. Dr. Farrar opined that it was plausible that Petitioner would tell his girlfriend that he had committed a murder that he had not done as it was "part of his modus operandi." (T. 2576).

In addition to Dr. Farrar, trial counsel continued to challenge the State's evidence that Petitioner was wearing the K-Swiss tennis shoes and then changed into the black Reeboks at the time of the disposal of Ms. Hollis's body. In this regard, trial counsel presented the testimony of Officer Timothy Ferguson. Officer Ferguson, who interviewed Dione Feltus on April 7, 1999, testified that Mr. Feltus stated that he had left a pair of tennis shoes in Miriam Hollis's Lexus on Saturday morning. (T. 2546-2547). Trial counsel attempted to suggest to the jury that Mr. Feltus was actually wearing the K-Swiss shoes.

Trial counsel also presented evidence during the guilt phase attacking Mr. Feltus's alibi that he was at work at the time of the crimes. Specifically, trial counsel elicited testimony from Officer Ferguson that he and Detective Renee Swanson went to Church's Chicken about four or five days after the crime and spoke with a black female who he believed was the manager. (T. 2548). The person that he spoke with stated that Mr. Feltus was not at work on the day of the crime. Id. Trial counsel was attempting to create doubt as to the truthfulness of Mr. Feltus's statement to police, as well as, create an opportunity for him to actually have committed the murders.

Additionally, trial counsel presented evidence in an attempt to show the jury that Michael Jenkins testified untruthfully. Trial counsel introduced the testimony of

Detective Swanson who testified that Mr. Jenkins lied when he stated that he did not want to be like Petitioner. (T. 2551). Detective Swanson confirmed that Mr. Jenkins had in fact stated to her that he wanted to be like Petitioner. Id. In addition, Detective Swanson stated that Mr. Jenkins lied during his testimony when he denied making the statement that he did not go to the police as he did not believe that he would get caught. (T. 2552-2553).

This Court concludes, after a review of the evidence before this Court and the totality of the circumstances at the time of trial, that trial counsel presented a reasonable and cohesive theory during the guilt phase of trial. Thus, this Court finds that Petitioner has not proven that trial counsel were deficient in this presentation, or that he was prejudiced. This claim is thereby denied.

Investigation Of Mitigating Evidence

As has been repeatedly stated in various cases comprising the Strickland progeny, "[t]he fact that [Petitioner] and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that [Petitioner] received representation amounting to ineffective assistance of counsel." Stewart v. State, 263 Ga. 843, 847 (1994) (citing Van Alstine v. State, 263 Ga. 1, 4-5 (1993)). See also Griffin v.

Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985); Rogers v. Zant, 13 F.3d 384 (1994).

This Court finds that the record clearly establishes that trial counsel conducted a thorough investigation for mitigation evidence and developed a reasonable strategy of mitigation.

Sentencing Phase Theory

During the sentencing phase, trial counsel utilized mental health testimony in support of their position that Petitioner did not deserve the death penalty. (Vol. 2, HT 311-312). Trial counsel testified that they presented evidence in order to prove "that there may be some reason or explanation for the act rather than just out of pure mean-spiritedness." (Vol. 2, HT 312, 315). Trial counsel also attempted to garner sympathy from the jurors by presenting testimony that Petitioner could have been helped had it not been for the insurance company removing him from the treatment program. (Vol. 2, HT 320-321). In support of their position, trial counsel stated that if Petitioner "had problems that went untreated, it could very well be a reason not to find for the death penalty." (Vol. 2, HT 321).

Particularly, with regard to mental health, trial counsel testified that Petitioner's "fantasy world" and false bravado were presented at trial in an attempt to explain Petitioner's behavior and the statements that he made to the police. (Vol. 2, HT 308-309). Furthermore, the diagnosis of borderline

personality disorder made by both experts, which was submitted at trial, dovetailed precisely with trial counsel's defense theory that Petitioner was merely an accomplice after the murders and only took responsibility as a result of suffering from the disorder. Drs. Farrar and Nord's diagnoses fully supported that theory by giving an expert opinion and a psychological "label" to explain these events to the jury. Based on the theory that trial counsel presented throughout both phases of the trial, the record is clear that there could not have been a more corroborating psychological disorder to support the strategic defense theory than the psychological experts' diagnosis of borderline personality disorder.

In addition to the evidence about Petitioner's mental health, trial counsel argued the theory of residual doubt. (Vol. 2, HT 319-320). Trial counsel testified that if there was some lingering doubt as to the guilt phase, then it "may be a reason not to, [], find for the death penalty." (Vol. 2, HT 320, 322).

Investigation Into Petitioner's Background

The record before this Court establishes that trial counsel conducted a thorough mitigation investigation. As part of their investigation, trial counsel obtained all of Petitioner's school, medical, mental health, court and juvenile records that

were in existence. (Vol. 2, HT 283-284; Vol. 3, HT 415-416; Vol. 9, HT 2336-2337; Vols. 20-27, HT 5628-7401, 7576-7639).

In addition to obtaining records, trial counsel testified that they made an attempt to locate all of Petitioner's family members to see if they would be cooperative. (Vol. 2, HT 280; Vol. 3, HT 415). Trial counsel described Petitioner's family as cooperative, and they expressed a "willingness to do anything they could to try to help save him." (Vol. 3, HT 415; Vol. 9, HT 2313).

During their conversations with Petitioner's family, trial counsel obtained information regarding Petitioner's childhood and family background. (Vol. 2, HT 280; Vol. 9, HT 2312). Shortly after their appointment, trial counsel spoke with Petitioner's father as they were concerned about Petitioner's lack of concern. (Vol. 47, HT 13287). Petitioner's father reported that "they have always been concerned and tried to help him." Id. He informed trial counsel that when Petitioner was in kindergarten, he left school and caught a bus that took him downtown. (Vol. 47, HT 13287). When he arrived downtown, Petitioner told people that he was from out of state and needed to get home. Id. In addition, Petitioner's father told trial counsel that Petitioner shot himself in the leg about three years ago. Id. Trial counsel also learned that Petitioner took a loaded nine millimeter to school on the bus, carried his gun

around other children and stole money out of a safe. Id. Petitioner's father further reported two incidents of childhood head injuries. (Vol. 47, HT 13287-13288; Vol. 9, HT 2316; Vol. 49, HT 13839). Regarding Petitioner's father, trial counsel stated that he was a "very nice man, very articulate, very well-mannered but I also always felt that he was guarded." (Vol. 9, HT 2314). Mr. Crumbley testified that Petitioner's father was a "very proud person," and he wondered if Petitioner's father would allow anyone to talk about any potential terrible family secret. Id.

In speaking with Petitioner's mother, trial counsel learned that Petitioner's first suicide attempt occurred following her nervous breakdown. (Vol. 49, HT 13854). She also reported that Petitioner's father "faded out of the picture after the marriage broke down." Id. Petitioner's paternal aunt, who expressed a willingness to help, told trial counsel that Petitioner "went from respectful, loving child to a love of guns and violence" around the age of twelve. (Vol. 49, HT 13836). In addition, Petitioner's family reported that he had always been strange and had multiple personalities. (Vol. 49, HT 13866). They described him as "kindhearted but careless and heartless." (Vol. 49, HT 13866). They further reported that Petitioner had attempted suicide about three or four times. Id. During

conversations with Petitioner's family, no one indicated that Petitioner's father was abusive to him. (Vol. 3, HT 444).

Regarding Petitioner's family, Mr. Crumbley testified that he "always had this nagging feeling" that there was something that the family members would not tell him. (Vol. 9, HT 2313). He explained that the information provided by Petitioner's family members did not provide a "plausible explanation for, [], how things had turned out." Id. Mr. Crumbley further stated that Petitioner's "childhood was just too normal by their account of it, or at least I was hoping to find something there that, [], we could use in mitigation and there just wasn't as much there as I thought there ought to be." Id.

Just prior to Petitioner's trial, counsel had a meeting with Petitioner's immediate and extended family to discuss Petitioner's case. (Vol. 2, HT 280-281, 316; Vol. 9, HT 2338). In making the determination as to who would testify during the sentencing phase, trial counsel stated that if they did not call a particular person "it was because they didn't have anything useful to say or anything I thought would be helpful or else Mustafa would not allow me to call them." (Vol. 9, HT 2338).

In addition to family members, trial counsel also tried to interview all of the mental health professionals and counselors who had previously treated Petitioner. (Vol. 3, HT 416; Vol. 9, HT 2312-2313). Mr. Crumbley testified that he had extensive

discussions with "all those people about, [], everywhere he'd been to school, everywhere he'd ever been to the doctor, everywhere he'd ever been for counseling." (Vol. 3, HT 415).

At trial, Petitioner placed restrictions on trial counsel as to who they could present as a witness during the sentencing phase. (Vol. 9, HT 2337). Specifically, Petitioner would not allow them to present the testimony of his sister. Id. Regarding Petitioner's mother's testimony, trial counsel testified that her testimony was shortened as Petitioner became "quite emotional" when his mother became upset and started to cry. (Vol. 3, HT 413-414). After his mother became emotional, Petitioner stood up and yelled at trial counsel to get his mother off of the witness stand. Id. Mr. Crumbley testified that Petitioner's reaction to his mother crying on the stand might have "worked in his favor" as it "suggested to the jury at least that he had concern for some other person." (Vol. 3, HT 413).

This Court concludes that Petitioner failed to establish that trial counsel's investigation into Petitioner's background for mitigation purposes was deficient or that Petitioner was prejudiced. This claim is denied.

Investigation into Jail Contraband

On January 31, 2001, the State provided trial counsel with notice of its intent to present evidence of the fact that

Petitioner was found to be in the possession of contraband and detailed drawings of the Henry County Jail following a search of his jail cell. (R. 162; T. 2796-2797). During the trial, counsel made the trial court aware of the fact that Petitioner had just informed them that the other inmates in his cellblock had given statements to the sheriff's department wherein they claimed ownership of the contraband.[1] (T. 2797; Vol. 2, HT 326-327; Vol. 9, HT 2341). As such, trial counsel requested that the trial court afford them an opportunity to interview the inmates. (T. 2797; Vol. 9, HT 2341).

Pursuant to their request, the trial court afforded counsel with an opportunity to interview the inmates regarding the chair leg, sock with rocks and detailed map. (Vol. 2, HT 327; Vol. 48, HT 13523). Following the interviews with inmates Bowen, Chappel and McDowell, trial counsel made the decision to not call the inmates as witnesses during the sentencing phase to rebut the State's evidence as they lacked credibility and would not be helpful to the case. (Vol. 2, HT 326; Vol. 9, HT 2342; Vol. 48, HT 13523; see also T. 2936 (statement by trial counsel in open court; Vol. 48, HT 13523 (trial counsel's notes)). Further, Mr. Crumbley testified that trial counsel "didn't just

[1] The other inmates who allegedly provided statements claiming ownership of the contraband were Steve Chappell, Demondre McDowell and Larry Bowen. (T. 2797).

let that go, we made a determination that the people didn't have anything helpful to say and decided not to call them on the stand." (Vol. 9, HT 2343).

The Court finds that trial counsel offered reasonable justifications for their decision not to present the testimony of inmates Bowen, Chappel and McDowell, and Petitioner has not established that this strategic decision was objectively unreasonable. Further, it is pure speculation that these witnesses would have testified the same as they do in the submitted affidavits if they had been called to testify at Petitioner's trial. In fact, as to credibility of such affidavits, the Eleventh Circuit Court of Appeals has held, "it is by no means certain that [the affiant witnesses] would have testified at the hearing on the motion for new trial to the same thing they signed their names to three years later in the affidavits prepared by Williams' present counsel. The district court was unconvinced that they would have." Williams v. Head, 185 F. 3d 1223, 1239, n.9 (1999). Additionally, as to the credibility of these affidavits, as set forth above, the map was found in Petitioner's cell, in Petitioner's Bible, in addition to there being testimony it was written in Petitioner's handwriting.

Thus, this Court finds that Petitioner failed to establish deficiency or prejudice as to this claim and it is therefore, denied.

Investigation into Stun Belt

The Georgia Supreme Court has held, "'At trial, the court has discretion to require a defendant to be handcuffed or shackled for security reasons.'" Kitchen v. State, 263 Ga. 629(1)(1993) (quoting Gates v. State, 244 Ga. 587, 593 (2)(1979)). Further, it is "well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court." Young v. State, 269 Ga. 478 (1998) (finding that the trial court did not abuse its discretion in allowing what it found to be a necessary security precaution, namely the use of a belt that enabled law enforcement personnel to administer an electric shock to control courtroom behavior), citing Welch v. State, 251 Ga. 197 (7)(1983), also citing O.C.G.A. § 15-1-3 (1),(4).

The record before this Court establishes that there was a discussion between defense counsel and the trial court regarding the use of the stun belt on Petitioner at trial. At the evidentiary hearing before this Court, trial counsel testified that they did not want Petitioner to wear a stun belt during the trial; however, that was "the least obvious measure, security

measure that Judge Craig was willing to accept." (Vol. 3, HT 439). Trial counsel explained that "everybody was afraid of [Petitioner]," and the security personnel feared that he would try and escape and would hurt someone while trying to escape. Id.

This Court finds that the use of the stun belt during Petitioner's trial was proper due to Petitioner's violent behavior. The record establishes that Petitioner had been charged with the violent murder of Miriam and Brandon Hollis. In addition, the State elicited testimony during the sentencing phase of trial that jailers had searched Petitioner's jail cell and found a shank, razor blade and a detailed map of the jail that was to be used in an escape attempt. Furthermore, the State presented evidence that Petitioner had threatened to kill one of the jailers at the Henry County Sheriff's Office.

Regarding Petitioner's allegation that the stun belt was visible to the jury, the Georgia Supreme Court has defined a stun belt as "an electronic security device worn by a prisoner that can be activated by a remote transmitter which enables law enforcement personnel to administer an incapacitating electric shock if the prisoner becomes disruptive. Unlike shackles, it is worn under the prisoner's clothes and is not visible to the jury." Nance v. State, 280 Ga. 125, 126-127 (2005). (emphasis supplied). Furthermore, trial counsel testified before this

Court that stun belt was a "battery pack thing that he wore, that was under his clothing." (Vol. 3, HT 440). Petitioner has not established deficiency of counsel or prejudice as he has not established that the stun belt was visible to the jury or that Petitioner was prejudiced or harmed in any way. See Stanford v. State, 272 Ga. 267, 271 (2000); Young v. State, 269 Ga. 478, 479 (1998); Brown v. State, 268 Ga. 354, 359-360 (1997) (No error where there is nothing in the record to support an appellant's "contention that the device" had a "detrimental" effect, "psychological" or otherwise, on "his ability to participate in the trial," even where "the court did not make extensive inquiry into the need for the device.").

Petitioner also alleges that trial counsel were ineffective in failing to warn Petitioner to not stand while wearing the stun belt and for not moving for a mistrial when the stun belt was allegedly activated during an outburst by Petitioner during the testimony of his mother.

Regarding the allegation that trial counsel failed to warn Petitioner not to stand while wearing the stun belt, trial counsel testified that they did not explain to Petitioner that the stun belt would be used if he stood up during the trial; however, counsel unequivocally stated that Petitioner knew that he was wearing the stun belt. (Vol. 3, HT 440-441). In explaining the incident, trial counsel stated that he recalled

hearing the beeping following the activation of the stun belt, and that Petitioner turned toward the deputy and stated, "Go ahead and shock me." (Vol. 3, HT 441). While trial counsel did not explain to Petitioner the rules regarding the stun belt, Petitioner had received instructions from someone regarding the stun belt as he knew that the beeping sound meant that the stun belt had been activated.

As to Petitioner's allegation that trial counsel were ineffective for failing to move for a mistrial when the stun belt was allegedly activated in the presence of the jurors, the trial record does not reflect the comment allegedly made by Petitioner to the deputy "Go ahead and shock me." Specifically, the trial transcripts show the following:

> MS. RAHEEM: Well, Mustafa is my baby. (Witness begins to cry).
>
> THE DEFENDANT: -- get off the stand.
>
> THE COURT: Mr. Raheem, just a minute.
>
> MR. CRUMBLEY: (To the witness.) Just come on down.
>
> MS. RAHEEM: No, I'm okay.

(T. 2929).

Petitioner has failed to prove that any of the jurors heard the alleged activation of the stun belt or the comment allegedly made by Petitioner.

Finally, Petitioner alleges that trial counsel were ineffective in informing the jury during their sentencing phase closing arguments that Petitioner was wearing a stun belt. However, the record shows that trial counsel's statement regarding the use of a stun belt was made to rebut the State's argument of future dangerousness.

During the sentencing phase closing argument, trial counsel stated:

> You need to understand that Mustafa is not a threat any longer. The Sheriff has had him locked up for almost two years. He is in chains, or wearing an electric shock belt, as he is today, everywhere he goes. He has talked some, but he hasn't done a single violent thing since he has been in jail. He is headed for the state prison system, into maximum security, into a setting which is far more sophisticated and severe in its security measures than the Henry County Jail. It is not at all likely that he'll ever hurt anyone else in that setting. There's no reason any longer to be afraid of him and there's no reason to kill him. Killing him will just demean us.

(T. 2979). This Court concludes that, although counsel may refer to a stun belt in closing argument, the argument was not unreasonable in light of counsel's theory of no future dangerousness. Further, the Court finds that there is no reasonable probability that had trial counsel not referenced the stun belt in closing argument the result of Petitioner's sentencing would have been different. Accordingly, this claim of ineffective assistance of counsel is denied.

Sentencing Phase Presentation

Evidence Presented at Trial

During the sentencing phase of Petitioner's trial, counsel presented the testimony of Dr. Charles Nord. Dr. Nord testified that he evaluated Petitioner following an admission to Charter Peachford Hospital in 1994. (T. 2889-2890). Dr. Nord explained to the jury that Petitioner was initially taken to Georgia Mental Health Institute following a suicide attempt, and he was subsequently sent to Charter Peachford Hospital pursuant to a request by the insurance company. (T. 2890-2891). It was there that Dr. Nord conducted a clinical interview and administered psychological testing to Petitioner. (T. 2891).

In 1994, Dr. Nord diagnosed Petitioner with major depression and oppositional defiant disorder. (T. 2892). In his report, Dr. Nord stated that Petitioner's situation necessitated a supervised setting due to the potential for additional "suicidal ideation and acting out." Id. He further stated in his report that:

> Mustafa is a young man at risk. He's depressed, continues to have suicidal ideation, gets disorganized easily and is quite impulsive. At times he doesn't care what happens to him. He will continue to be at risk until one gets control of his depression, agitation, and suicidal ideation.

Id. Dr. Nord testified that Petitioner was at Charter Peachford Hospital for about nine days, and he was then sent to Fairview

Day Hospital where he was treated by Dr. Farrar. (T. 2892-2893).

Dr. Nord testified that, subsequently, pursuant to the request of trial counsel, he interviewed Petitioner at the jail and reviewed psychological test data that was generated after Petitioner's arrest. (T. 2893). After reviewing the more recent data, Dr. Nord testified that his opinion had changed. (T. 2894). Specifically, Dr. Nord stated that while Petitioner continued to show symptoms of depression, he also showed borderline personality disorder characteristics, which, again, was consistent with Dr. Farrar's testimony from the guilt phase of trial. Id. Dr. Nord explained that Petitioner would dissociate and was "more distant and distractible." Id.

In explaining borderline personality disorder to the jury, Dr. Nord stated that Petitioner was "on the verge of becoming more psychotic, but he's still within some range of reason but has moments when he is psychotic." (T. 2895). Regarding his opinion that Petitioner has moments where he is psychotic, Dr. Nord testified that Petitioner had hallucinations where he "removes himself from our world and goes into his own world." (T. 2895). He stated that Petitioner sometimes heard voices and would regress into "some childlike states." Id.

Trial counsel then elicited testimony to support Dr. Nord's diagnosis of borderline personality disorder. Dr. Nord

testified that during his recent interview with Petitioner at the jail, Petitioner described the fantasy world to which he escapes to whenever he wants. (T. 2895). Dr. Nord stated that when a person goes off into another world, there is usually a significant amount of concern that they are "losing it." Id. Petitioner, however, was not worried as he felt comfortable in the "fantasy world" and the experts were confident that Petitioner was able to control going back and forth in this "world." (T. 2895-2896).

Trial counsel then recalled Dr. Jack Farrar to discuss the circumstances under which Petitioner was released from Fairview Day Hospital and to discuss his opinion as to whether Petitioner needed further treatment. (T. 2904). At the time of his release from Fairview Day Hospital, Dr. Farrar testified that there was a need for further treatment as Petitioner "wasn't close to being ready to be graduated or to leave the program." Id. Dr. Farrar told the jury that he strongly believed that Petitioner needed to remain in a "very intensive day treatment program." Id.

Regarding the circumstances surrounding Petitioner's discharge from Fairview Day Hospital, Dr. Farrar testified that the hospital received a letter from the insurance company that stated that the "care was not medically necessary." (T. 2906). Dr. Farrar stated that he became very upset upon receiving the

letter from the insurance company as Petitioner had only been in the program for ten days, and he considered Petitioner to be "very suicidal, had severe problems." Id. After receiving the letter, Dr. Farrar stated that he went to "war" with the insurance company. (T. 2908).

Dr. Farrar testified that he filed an initial appeal, which was denied. (T. 2909). His second level appeal was also denied as the insurance company disagreed with the "intensity of the treatment." Id. The insurance company, however, did agree to a "shorter, less intense treatment." Id. At that point, Dr. Farrar informed the psychiatrist at the insurance company of the fact that Petitioner had been diagnosed by several psychologists with major depression and had been diagnosed by a psychiatrist with bipolar disorder. (T. 2909-2910). In response, the insurance company stated that they were incorrect in their diagnoses of Petitioner, and that "he needed to be out of treatment immediately." (T. 2910). Dr. Farrar testified that he then told the insurance company that he was going to treat Petitioner at no charge as it was ethically the right thing to do. Id. The insurance company informed Dr. Farrar that he could not treat Petitioner for free, and that he would be removed from the panel if he did it. Id. Dr. Farrar testified that he continued to treat Petitioner through December, and the

insurance company agreed to pay for a portion of the treatment. Id.

After Petitioner was discharged from the treatment program, Dr. Farrar filed complaints with the Insurance Commissioner's Office. (T. 2911). Dr. Farrar was subsequently elected to be the chair of the managed care committee at the Georgia Psychological Association, and he was involved in getting a bill passed that changed managed care in Georgia. Id. Trial counsel attempted to use this testimony to show that Dr. Farrar thought that Petitioner could have been helped had he been afforded the opportunity to stay in treatment.

In an attempt to convince the jury that the death penalty was actually what Petitioner wanted, trial counsel elicited testimony from Dr. Farrar that Petitioner had been on a "suicide mission from a very young age" and that he lacked the "courage to kill himself." (T. 2912). He testified that Petitioner "hasn't wanted to live for a very long time and has done many behaviors that set people up to do away with his life." Id. Dr. Farrar further stated that Petitioner wanted the death penalty as he was on a "mission to die." Id.

Trial counsel then elicited testimony from Dr. Farrar regarding his feelings on whether or not Petitioner should be sentenced to death. Dr. Farrar testified that Petitioner was responsible for his actions; however, he believed that the

system failed Petitioner as they could have "gotten this young man well" had the insurance company paid for the treatment. (T. 2914-2915). He also believed that Petitioner's life was worth saving. (T. 2915-2916). In support of this belief, Dr. Farrar testified that part of Petitioner's "persona" was to present himself to society as a "tough guy." (T. 2916). However, there was another side to Petitioner that he did not show very often. Id. Dr. Farrar opined that Petitioner had the capacity to attach to people, but "when he attaches to people, for whatever reason, he can't let that be known." Id. Petitioner has a fear of rejection and of losing people, and he "creates a false bravado, to push people away." Id. In concluding, Dr. Farrar stated that "there was lots of potential in him that has been lost." Id.

Trial counsel then presented the testimony of Petitioner's father, Askia Raheem. Mr. Raheem's sentencing phase testimony began with an apology to the victims' family. (T. 2922). He then testified that he loved Petitioner and did not want him to die. (T. 2923). Mr. Raheem agreed with Dr. Farrar's opinion that Petitioner wanted to die, and he expressed a lack of understanding as to why Petitioner had no interest in living. Id.

Trial counsel then elicited testimony as to Petitioner's good qualities. Mr. Raheem testified that Petitioner loved

animals. (T. 2924). Specifically, he told the jury about how Petitioner fought him as a child to keep a cat inside the garage, and how Petitioner hated to see him hit a squirrel in the road. Id. Mr. Raheem stated that, prior to the crime, he had never known Petitioner to act out in a violent manner against another person. Id.

Finally, trial counsel elicited testimony regarding an incident that occurred when Petitioner was about five or six years old. Mr. Raheem testified that Petitioner did not come home from school one day, and he drove around to different places looking for Petitioner. (T. 2926-2927). While talking with some of his neighbors, Mr. Raheem observed a MARTA bus pull up. (T. 2927). He questioned the bus driver as to whether he had seen anyone fitting the description of Petitioner. Id. The bus driver then informed Mr. Raheem that there was a "young man downtown, at the transit authority, that they're holding, but he says he's from Delaware or Pennsylvania, or somewhere like that." Id. Mr. Raheem then traveled to the transit authority and picked up Petitioner. Id. Mr. Raheem then testified that this incident marked the beginning of Petitioner's problems. (T. 2927-2928).

The final witness presented during the sentencing phase was Petitioner's mother, Elaine Raheem. Similar to Petitioner's father, Ms. Raheem began her testimony by apologizing to the

victims' family. (T. 2929). Ms. Raheem then testified that the crime was out of character for Petitioner in that "he's always been mannerful to me. He's never raised a hand at me and never used profanity towards me." (T. 2929-2930). As a child, Ms. Raheem stated that Petitioner was "very, very loving." (T. 2930). She also informed the jury that she was oftentimes sick, and that Petitioner was always there to help her. Id.

At the conclusion of Ms. Raheem's testimony, trial counsel had all of Petitioner's family members that were present in the courtroom stand up so that the jury could see them. (T. 2931).

In support of their sentencing phase theory, trial counsel argued residual doubt during their sentencing phase closing arguments. Specifically, trial counsel questioned the credibility of Dione Feltus, Michael Jenkins and Veronica Gibbs and questioned whether Petitioner was wearing the black Reeboks and/or the grey K-Swiss shoes at the time of the crime. (T. 2958, 2978). In addition, trial counsel reminded the jury that the State did not present any physical evidence that proved that Petitioner was the actual shooter. (T. 2959). Trial counsel urged the jury to reconsider the issue as to who was the actual shooter when deciding the sentence and to grant mercy to Petitioner if there was any doubt as to whether or not Petitioner was the shooter. (T. 2977-2978).

Regarding Petitioner's mental illness, trial counsel argued that the testimony of their mental health experts that Petitioner suffered from a mental illness was unrefuted and that the State even conceded that Petitioner was mentally ill. (T. 2962, 2972). Trial counsel argued that they were not using Petitioner's mental illness as an excuse; however, Petitioner was "not as blameworthy as a normal person who was not mentally ill, who had committed these same crimes." Id. Counsel explained that Petitioner's family tried to get him treatment, but the insurance company believed that it was medically unnecessary. (T. 2973).

Regarding Petitioner's desire to die, trial counsel asserted that it could not "think of a greater punishment for somebody who wants to die than to live." (T. 2963-2964). In support of their argument that Petitioner should receive a life sentence, trial counsel asserted that life in prison would not be enjoyable as he would be "locked in a concrete steel cage" without any freedom. (T. 2967). Trial counsel opined that "being in prison forever would be more cruel and more terrible than death, sort of like being condemned to live and to suffer." (T. 2968).

In an effort to rebut the State's future dangerousness argument, trial counsel argued to the jury that the State had not presented any evidence that Petitioner had assaulted anyone

at the jail since his incarceration. (T. 2965). Petitioner had not "done a single violent thing since he has been in jail." (T. 2979). Trial counsel stressed to the jury that there was no reason to be afraid of Petitioner as he would be sent to a maximum security prison. Id.

In explaining their reasons for begging for mercy, trial counsel stated that they refused to help Petitioner commit suicide. (T. 2969). Additionally, counsel stated that a death sentence would affect more than just Petitioner in that it would affect "his whole family and all of the others who have cared about him." Id. In support of their argument that Petitioner deserved a life sentence, trial counsel argued to the jury that there was the possibility that Petitioner could be helped in prison through the development of new medications and/or new techniques used by psychologists and psychiatrists. (T. 2965). Petitioner could also help others while in prison as he could "read and write better than most people." (T. 2965, 2974). Trial counsel asserted that Petitioner could teach other inmates to read, and he could write letters for other inmates. (T. 2974). Counsel further argued that there were good qualities in Petitioner. (T. 2973). Specifically, counsel asserted that Petitioner was "capable of concern for others." (T. 2974).

Trial counsel also asked the jury to consider Petitioner's "youthful age" at the time of the crime. (T. 2974). At the

time of the crime, Petitioner was nineteen years old. (T. 2974). While trial counsel stated that Petitioner's youth was not an excuse for the murders that he committed, they argued that teenagers are impulsive and "do stupid things." Id. Trial counsel asserted that teenagers "act without thinking about the consequences." (T. 2974-2975). In addition, trial counsel argued that sentencing Petitioner to death would be unfair as there was only a three year age difference between Petitioner and Mr. Jenkins, and Mr. Jenkins had received a life sentence with the possibility of parole. (T. 2975). Counsel further argued that it would be unfair to sentence Petitioner to death given the fact that all of the other participants in the crime were afforded leniency. (T. 2975-2976).

This Court finds that Petitioner has failed to show that trial counsel's presentation of mitigating evidence was deficient or that Petitioner was prejudiced by trial counsel's representation in this regard.

Brain Impairment Introduced in Habeas Proceedings

Petitioner alleges that trial counsel were ineffective in not presenting evidence of Petitioner's alleged brain impairment at his trial. However, the record establishes that after an extensive and thorough investigation into Petitioner's mental health, trial counsel did not have evidence of brain damage to present, but did, however have and present a reasonable

mitigation theory which included evidence of mental illness in the hopes of convincing the jury that Petitioner was "not as blameworthy as a normal person who was not mentally ill, who had committed these same crimes." (T. 2972).

The Eleventh Circuit Court of Appeals has expressly held, that "[g]iven the finite resources of time and money that face a defense attorney, it simply is not realistic to expect counsel to investigate substantially all plausible lines of defense." Williams v. Head, 185 F. 3d 1223, 1236 (11th Cir. 1999). See also Byram v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003) ("the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation."). See also Lewis v. State, 279 Ga. 69, 75-76 (2005); Nichols v. State, 253 Ga. App. 512 517-518 (2) (2002).

The record establishes that, in the instant case, in addition to presenting symptoms of borderline personality disorder, trial counsel and each of the mental health experts were aware from very early in their investigation that there was some indication of symptoms or experiences that could be consistent with brain damage. As a result, at the first

suggestion by Dr. Farrar that neurological testing be conducted, trial counsel approached the trial court and requested funds for an examination by Dr. Klopper, who was both a neurologist and psychiatrist. After conducting an evaluation, Dr. Klopper advised trial counsel that the results of his testing did not reveal any problems.

Around the same time, trial counsel and Dr. Farrar arranged for Dr. Herendeen to perform a neurological assessment of Petitioner. Dr. Herendeen's results indicated that Petitioner performed in the average range on most of his testing. (Vol. 7, HT 1834-1883). Even after there remained little, if any, concrete evidence of brain damage after this testing, Petitioner went back to the trial court to request funds for Petitioner to submit to an MRI and PET scan to rule out any functional abnormality. Dr. Klopper signed off on the tests even though he was skeptical that they would show any abnormalities. Notably, the MRI ultimately revealed no abnormalities and Petitioner refused to participate in the scheduled PET scan.[2]

After the extensive investigation, the evidence was lacking to support the initial indication of brain abnormality. Even now, during the present proceedings, while there is some evidence that Petitioner's brain does not function normally,

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[2] There is no evidence that Petitioner has ever submitted himself to a PET scan, even for the present habeas proceedings.

contrary to Petitioner's assertions, there is not consensus as to what that actually means and what, if any, affect that has on Petitioner's behavior on the night of the crime, nor its influence on the decision of the jury.

Dr. James Evans

At the habeas hearing, Petitioner presented the testimony of Dr. James Evans, a neuropsychologist, who conducted another neuropsychological examination of Petitioner. Dr. Evans opined that the results of the testing "revealed clear indications of brain damage/dysfunction," specifically with "some frontal lobe dysfunction," but, more so, indicating dysfunction in the central, temporal and parietal corticals. (Vol. 4, HT 663-664). Dr. Evans also noted behavioral indications of dysfunction in the way in which Petitioner focused on visual details, rather than the whole visual "stimuli," and needed to rotate his answer sheets 180 degrees when writing his responses. Id. He ultimately concluded that Petitioner suffers from "widespread cortical dysfunction, probably greatest in temporal areas." Id.

Dr. Ruben Gur

Dr. Evans then sent his testing data to Dr. Ruben Gur, a neuropsychologist who conducts research in brain imaging, who was hired by Petitioner for these habeas proceedings. Dr. Gur did not conduct any neuropsychological tests independent of those conducted by Dr. Evans. Instead he used Dr. Evans's

results and plugged them into his computer algorithm, which he and his colleagues have created, normed, and copywrited, for "behavioral imaging." This Court does not find Dr. Gur's opinion or his imaging process persuasive and finds his analysis adds little, if any, new evidence to be considered by this Court.

Dr. Martell

Respondent presented the testimony of Dr. Daniel Martell, a forensic neuropsychologist. (Vol. 3, HT 478). Dr. Martell met with Petitioner at the Georgia Diagnostic and Classification Prison on January 15-16, 2007, for two full days, totaling approximately 7 hours. (Vol. 3, HT 483). Dr. Martell had previously reviewed Dr. Evans's raw data and determined that most of the results were "normal," thus, instead of giving the same tests focusing on these same areas, Dr. Martell focused his examination on the areas which he noticed suggested deficits. (Vol. 3, HT 485-486).

The data from Dr. Martell's testing revealed that Petitioner's scores were "all within normal limits, with the specific exception of pure motor speed in the upper extremities bilaterally, with the right (dominant) hand worse than the left." (Vol. 11, HT 2948). The results of Dr. Martell's testing indicated that Petitioner does not have normal brain functioning, but the impairment that he does have is mild to

moderate and specific to the focal areas of "tapping deficit, particularly with his right hand, implicating the left motor strip, the mathematic learning disability and the possibility of an attention deficit disorder." (Vol. 3, HT 501-502).

Further, although agreeing that Petitioner's brain is not functioning "normally," Dr. Martel disagreed with the extent to which Petitioner's experts label Petitioner as being "significantly brain impaired." Dr. Martell found that the areas in which Petitioner tested as having deficits were focalized to areas associated with learning disabilities and attention-deficit disorder, which do not cause someone to go out and kill another person. (Vol. 3, HT 551-552). To the contrary, Dr. Evans testing show that Petitioner has particular deficits in the brain regions that regulate executive functioning, while Dr. Martell's results show that his executive functions are among his highest objective test scores, meaning that he is not impaired in executive functioning, which contribute to decision-making. (Vol. 3, HT 562). Dr. Martell also did not find a predisposition to confusion and mental decompensation, and opined that Petitioner has the capacity to process information and respond appropriately. (Vol. 3, HT 563-564). Dr. Martell also testified that Petitioner does not suffer from schizophrenia or psychosis. (Vol. 3, HT 565).

Looking back at the mental health evidence at trial, Dr. Martell testified that "the only things that were apparent [at trial] were the depression and, I mean, the fantasy world, which I think all the mental health professionals at that point felt were more in the realm of imagination and less in the realm of psychosis." (Vol. 3, HT 536).

Dr. Martell ultimately concluded that Petitioner "does not suffer from significant brain damage, and he is neither psychotic nor delusional. Were he to have suffered from any of these conditions in the past, it is unlikely that a well trained mental health professional would have overlooked them. Hence, the absence of such diagnoses at the time of the crime, trial, and appeal would suggest that he was not exhibiting symptoms of those mental disorders at those times." (Vol. 11, HT 2954).

This Court finds that it was reasonable for trial counsel to rely upon the reports of its numerous trusted and experienced mental health professionals who were well aware of what trial counsel was looking for to present in mitigation Petitioner's case. The Court concludes that trial counsel were not deficient, nor Petitioner prejudiced by the mental health investigation and presentation for and at Petitioner's trial.

Allegation of Epilepsy and Seizure Disorder

Petitioner also alleges that trial counsel were ineffective in not developing the theory that Petitioner suffers from a

seizure disorder, possibly epilepsy, and that this causes brain impairment. However, as was noted at the evidentiary hearing, the "absence seizures" which Dr. Martell noticed during his evaluation of Petitioner were not noticed, and thus were presumably (based on the obvious nature of the "absences"), were not present prior to Petitioner's trial. Therefore, this Court concludes that Petitioner has not proven that trial counsel were deficient for not noticing something that numerous mental health experts, including Petitioner's present habeas counsel and experts, did not notice.

Furthermore, Dr. Martell merely presented a theory of "absence seizures" possibly linked with epilepsy, however, there is no conclusive evidence that Petitioner suffers from such a disorder. Further, the Court also notes that Dr. Gur, who once was a neuropsychologist in Comprehensive Epilepsy Center, did not diagnose Petitioner with epilepsy or even notice any "absences" during his examination of Petitioner, (Vol. 1, HT 116-119, 122-123), thus leading to the conclusion that either Petitioner does not suffer from epilepsy, or in the alternative, the disease was masked such that not even an expert who had extensive experience with patients with the disorder, would observe his "absence seizures" and correlate them to some disorder. (Vol. 1, HT 115, 122-123, 139, 150-151).

Further, the experts at trial appeared to correlate the "absences" to Petitioner's fantasy world. (Vol. 1, HT 171). One would not expect a mental health professional who interpreted the "staring spells" as part of a delusional thought process, as appears to be the case for Drs. Nord and Farrar, to suggest to trial counsel that Petitioner be seen by an epileptologist. Further, the Court notes that, even after reviewing Dr. Martel's report, habeas counsel did not retain an epileptologist.

This Court finds that trial counsel were reasonable in relying on the evaluations, diagnoses and testimony of Drs. Farrar, Nord, Klopper, and Herendeen prior to trial and were not deficient. Trial counsel followed up on each suggestion from the mental health professionals. (Vol. 2, HT 248).

Further, although Petitioner repeatedly refers to Petitioner's "cognitive deficits" and "organic brain impairment", these "deficits" and "impairments" are simply that Petitioner may act impulsive, use poor judgment and had trouble with decision-making. Even viewing Petitioner's proposed evidence in its most "mitigating" light, this Court finds that there is no reasonable probability that the jury or the courts would have rendered a different determination had it been presented. The crimes were horrific and cold-blooded, showing calculation, planning and execution over a 10-hour period.

Considering the circumstances surrounding the crimes, the failure to offer the proposed weak mitigating evidence did not materially affect the imposition of the death sentence by the jury. Accordingly, Petitioner has failed to establish that trial counsel were deficient or that Petitioner was prejudiced by trial counsel's investigation and presentation of mental health evidence. This claim is denied.

Conflict Of Interest

Petitioner claims that he was denied the effective assistance of counsel due to Mr. Crumbley's representation of a State's witnesses years prior to Mr. Crumbley's representation of Petitioner.

In the seminal case of Cuyler v. Sullivan, 446 U.S. 335 (1980), the United States Supreme Court established the criteria for analyzing a claim of "conflict of interest." First, in order to demonstrate an ineffective assistance of counsel claim arising from alleged conflict of interest, the petitioner must establish an "actual conflict of interest." Cuyler v. Sullivan, 446 U.S. at 348. The alleged conflict "must be palpable and have a substantial basis in fact." Lamb v. State, 267 Ga. 41, 42 (1996). Second, even if a petitioner can successfully demonstrate the existence of an actual conflict of interest, the petitioner must still establish that the actual conflict of interest "adversely affected his lawyer's performance." Lamb v.

State, 267 Ga. at 42 (quoting, Cuyler v. Sullivan, 446 at 348). See also Burger v. Kemp, 483 U.S. 776 (1987).

"In those instances wherein the defendant's right to counsel is denied altogether, a per se presumption of prejudice to the defense applies. 'Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [Cit.]' Strickland v. Washington, supra at 692 (III)." Fogarty v. State, 270 Ga. 609, 610 (1999).

However, "a more 'limited' presumption of prejudice applies with regard to the usual conflict of interest claim. Strickland v. Washington, supra at 692 (III) (B)." Id. "As to those claims, 'prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' [Cit.]' Strickland v. Washington, supra at 692 (III) (B)." Fogarty v. State, 270 Ga. at 610-611.

The record establishes that at the sentencing phase of Petitioner's trial, the State called Clyde Hufstetler, who Mr. Crumbley had represented prior to his representation of Petitioner. During the sentencing phase of Petitioner's trial, Mr. Hufstetler testified that in February of 2000 he was incarcerated in the Henry County Jail in the same cellblock as Petitioner. (T. 2879-2880). Mr. Hufstetler testified that

while incarcerated with Petitioner, Petitioner told Mr. Hufstetler that Petitioner was going to have District Attorney Tommy Floyd killed and District Attorney Floyd "did not know who he was messing with." Id. Mr. Hufstetler testified that Petitioner also stated that he was going to have his girlfriend killed as she was testifying against him. Id.

On cross-examination trial counsel Crumbley brought out the fact that he had represented Mr. Hufstetler in the past. (T. 2882). Further, contrary to Petitioner's argument, Mr. Crumbley clearly challenged Mr. Hufstetler's veracity. Mr. Crumbley asked Mr. Hufstetler about murdering his wife and asked Mr. Hufstetler if he had been "convicted of essentially emptying a gun into her." (T. 2882). Mr. Crumbley also asked Mr. Hufstetler if he had testified at his own trial and claimed that he was innocent, to which Mr. Hufstetler stated, "Yes, I did, sir." (T. 2883). Mr. Crumbley insinuated through further questioning of Mr. Hufstetler that Mr. Hufstetler had lied under oath by previously testifying he was innocent as the jury had found him guilty of murder.

Further challenging the veracity of Mr. Hufstetler's testimony and attempting to establish that Mr. Hufstetler may have been mistaken about the statements Petitioner made to Mr. Hufstetler in 2000, Mr. Crumbley also brought out the fact that, at the time Mr. Hufstetler had the 2000 conversation with

Petitioner, Mr. Hufstetler was on prescription medication. (T. 2883-2884). Mr. Hufstetler testified, however, that he was not on any medication that affected his memory. Id. Mr. Crumbley then questioned Mr. Hufstetler as to whether he suffered from "any sort of problem remembering things." (T. 2884).

In addition to challenging Mr. Hufstetler's memory and use of medication, Mr. Crumbley also asked Mr. Hufstetler if he had been diagnosed with any sort of psychiatric illness. Id. Mr. Hufstetler testified that he had been diagnosed with battered person's syndrome and posttraumatic stress disorder. Id.

No Actual Conflict or Adverse Affect.

This Court finds that an actual conflict is not established by the mere "possibility that a conflict might have developed." Hudson v. State, 250 Ga. 479, 482 (1983). As the Georgia Supreme Court has stated, "[a] theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence." Id. To prove that a conflict, in fact, existed, a petitioner "must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remains hypothetical." Smith v. White, 815 F.2d 1401, 1404 (11th Cir. 1987).

The Georgia Supreme Court has held:

> Where, as here, the alleged conflict of interest is based upon defense counsel's prior representation of a prosecution witness, "we must examine the particular circumstances of the representations to determine whether counsel's undivided loyalties remain with the current client, as they must." Hill v. State, 269 Ga. 23 (2) (494 S.E.2d 661) (1998). Of the factors we considered in Hill "that arguably may interfere with the attorney's effective cross-examination" of the witness/former client, the only one at issue in the case at bar is "the possibility that privileged information obtained from the witness (in the earlier representation) might be relevant to cross-examination." Id.

Turner v. State, 273 Ga. 340, 342 (2001).

Petitioner failed to show that counsel's prior representation of Mr. Hufstetler, in fact, caused him to make choices or resulted in omissions that were harmful to Petitioner's case. Instead, the record establishes that Mr. Crumbley thoroughly questioned Mr. Hufstetler and challenged his credibility and veracity at trial. Petitioner has failed to even assert what further questioning of Mr. Hufstetler could have been conducted to attempt to undermine his testimony.[3]

[3] Petitioner argues that prejudice is shown as Mr. Hufstetler's testimony allowed the District Attorney to make certain arguments in closing. (Petitioner's brief, pp. 197-198). However, Petitioner has not established that these arguments would not have been available to the District Attorney regardless of who represented Petitioner.

Thus this Court concludes that Petitioner failed to establish that there any actual conflict or any adverse affect resulting from Mr. Crumbley's prior representation of Mr. Hufstetler.

Petitioner argues that under Wood v. Georgia, 450 U.S. 261 (1981) and Holloway v. Arkansas, 435 U.S. 475 (1978), he need not show prejudice because trial counsel was adversely affected by his alleged conflict of interest. However, as set forth above, "'prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' [Cit.]'" Fogarty, 270 Ga. at 610-611.

Clearly, the per se presumption does not apply in the instant case as Petitioner has failed to show Petitioner was adversely affected any manner by trial counsel's previous representation of Mr. Hufstetler, much less than he was denied high "right to counsel altogether." Thus, Petitioner was required to establish prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). However, as set forth above, Petitioner has failed to carry this burden.

***Sua Sponte* Hearing**

This Court finds that Petitioner has procedurally defaulted his claim regarding the trial court not sua sponte holding a competency hearing.

Further, the Court finds that Petitioner has failed to establish cause and prejudice or a miscarriage of justice with regard to this claim.

> A trial court certainly bears a duty to inquire into a potential conflict of interest whenever "the trial court is aware of" circumstances creating more than "a vague, unspecified possibility of conflict." However, the Supreme Court has held that a trial court's failure to inquire into the circumstances of a "potential conflict" does not relieve a prisoner of his or her duty to show on appeal that, in fact, a conflict existed that "adversely affected his [or her] counsel's performance."

Whatley v. Terry, 284 Ga. 555 (2008). See also Mickens v. Taylor, 535 U.S. 162, 168-169 (2002)("which is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which "inheres in almost every instance of multiple representation....").

As the Court held in Cuyler v. Sullivan:

> Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in Holloway, supra, at 485-486, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An 'attorney representing two

> defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" 435 U.S., at 485, quoting State v. Davis, 110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

Cuyler v. Sullivan, 446 U.S. 335, 346-347 (1980).

In the instant case, trial counsel was not representing two defendants in any capacity. Trial counsel had merely represented the witness prior to his representation of Petitioner. Accordingly, this Court finds there is nothing in the record to establish that the trial court had a duty to initiate an inquiry into the existence of this alleged conflict. Thus, counsel were not deficient and Petitioner was not prejudiced by counsel not previously raising this claim against the trial court and it remains procedurally defaulted.

Alleged Conflict of Hiring Dr. Jack Farrar

Petitioner also alleges that trial counsel "imported a conflict into the defense team" by having Dr. Farrar as the main mental health expert as Dr. Farrar had previously treated Brandon Hollis. The Court finds that this allegation is merely a claim that trial counsel were deficient and Petitioner prejudiced by trial counsel hiring Dr. Farrar as their mental health expert. Specifically, Petitioner alleges that trial counsel were deficient and Petitioner prejudiced because trial

counsel, by their hiring of Dr. Farrar, was unable to investigate and show that Brandon Hollis, who was also found murdered, was more likely the killer of his mother, Miriam Hollis.

As trial counsel hired Dr. Farrar based on their knowledge that Dr. Farrar had previously treated Petitioner, developed a rapport and relationship with Petitioner and had met Petitioner's family, this Court finds that Petitioner has failed to show that trial counsel were deficient in hiring Dr. Farrar as one of their mental health experts at trial.

Further, Petitioner has failed to establish any prejudice in light of the mental health presented at trial and compared to the evidence presented in the habeas hearing as set forth above and taken in conjunction with the facts establishing Petitioner's guilt in the murders of Brandon Hollis and then Miriam Hollis (T. 2389, 2391, 2394, 2407 (Jenkins's testimony); T. 1904-1906, 1909-1910 (Veronica Gibbs's testimony); T. 2425 (Jenkins' testimony that they took the body to show Gibbs)).

District Attorney's Guilt Phase And Sentencing Phase Closing Arguments

This Court finds that Petitioner failed to establish that trial counsel were deficient or that there was any reasonable probability had trial counsel objected to these arguments Petitioner would not have been convicted and/or not sentenced to death. Strickland, supra.

Michael Jenkins

Petitioner alleges that District Attorney Floyd "improperly vouched" for Michael's Jenkins' credibility in his guilt phase closing argument. However, the record shows that the State argued that, based on the evidence, the witness was credible, which was not an improper argument.

The Court finds that the District Attorney simply argued that he had offered Michael Jenkins a deal, that Michael Jenkins knew he had to tell the truth to take advantage of that deal, and that he, therefore, told the truth at trial. Not only are these statements proper inferences from the evidence after the defense had challenged the credibility of Michael Jenkins based on the deal, Michael Jenkins testified accordingly at trial. (T. 2341-2342, 2464-2466, 2486-2491, 2523-2525).

Expertise

Petitioner also asserts that the District Attorney improperly argued in the sentencing phase closing argument about

his expertise in making deals with witnesses and seeking the death penalty.

In argument and in response to the defense's guilt phase argument that witnesses were given deals and were giving false testimony to obtain a deal, (T. 2653-2657), the District Attorney stated that he had made the determination to offer deals to certain witnesses and that the jury should consider those deals in considering the credibility of the witnesses. (T. 2667-2668). This argument was responsive to the defense's argument. Moreover, the evidence at trial had established that the prosecutor had made the determination to offer deals to certain witnesses in exchange for their testimony. (T. 2464-2466, 2486-2491, 2523-2525). The additional statement that "[s]ometimes you have to offer things that you don't want to offer in order to get the testimony," insofar as it was not proper argument, in no way prejudiced Petitioner.

As to the District Attorney's argument regarding seeking the death penalty, the record establishes the prosecutor, in stating that he had sought the death penalty and noticed Petitioner of the aggravating circumstances, was merely making a proper assertion that the State had sought the death penalty in Petitioner's case and had given proper notice to Petitioner. It is without question that the record established that the prosecutor had sought the death penalty in this case. His use

of the term "I" instead of "the State" clearly does not constitute error.

Future Dangerousness

The Georgia Supreme Court has held that "during the penalty phase, '[a]ny lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes is admissible in aggravation....'" Sears v. State, 270 Ga. 834, 842, 514 S.E.2d 426 (1999)(citing Fair v. State, 245 Ga. 868, 873, 268 S.E.2d 316 (1980)). The case law is well settled that the issue of a defendant's future dangerousness is admissible at the penalty phase of trial and therefore, is well within the proper scope of the State's argument. Johnson v. State, 271 Ga. 375, 384 (1999); Hammond v. State, 264 Ga. 879, 886 (1995); Vance v. State, 262 Ga. 236 (1992); McClain v. State, 267 Ga. 378, 383 (1996); Hill v. State, 263 Ga. 37 (1993); Fleming v. State, 266 Ga. 541 (1995). Finally, the Georgia Supreme Court has held that future dangerousness arguments are proper if based on evidence adduced at trial. Ross v. State, 254 Ga. 22(7) (1985). The District Attorney's argument concerning future dangerousness was not improper as the prosecutor made a reasonable deduction from the evidence in suggesting that Petitioner would pose a future danger based on the evidence presented at the sentencing phase of trial. Hall v. Brannan, 2008 Ga. LEXIS 871 (Nov. 3,

2008). Compare Henry v. State, 278 Ga. 617, at 619-620 (2004)(improper for the State to argue that a defendant will kill in prison simply because he killed while free).

In the instant case, the evidence at trial established that Clyde Hufstetler testified, while awaiting trial, Petitioner had stated that Petitioner was going to have those that were involved in the process of having him convicted and sentenced murdered. Petitioner specifically stated that he would have District Attorney Tommy Floyd killed and was going to have his own girlfriend killed as she was testifying against him. (T. 2879-2880). Further, as noted by the Georgia Supreme Court: "Raheem had previously carried a weapon on school grounds at age 15"; "had stolen an automobile and fled from police at age 17"; "had concealed in his jail cell several rudimentary weapons and a detailed map of the jail"; and threatened to kill a Henry County Police Department Officer because Petitioner thought he was a "little snitch." Raheem, 275 Ga. at 94-95. Petitioner's future dangerousness was a proper inference therefrom.

Generally

This Court concludes that Petitioner has failed to establish that trial counsel were deficient or Petitioner prejudiced by trial counsel not objecting to the District Attorney's arguments and this claim is denied.

V. CONCLUSION

Based upon the findings of fact and conclusions of law, this Court hereby orders that the writ of habeas corpus is DENIED as to the convictions and to the sentences. The Clerk for the Superior Court of Butts County, Georgia, is directed to serve a copy of this Order on the Petitioner, Counsel of Record for the parties, and the Council of Superior Court Judges of Georgia.

IT IS SO ORDERED this 13 day of February, 2009.

Christopher C. Edwards

CHRISTOPHER C. EDWARDS, Judge
Sitting by Designation in the
Superior Court of Butts County

Prepared by:
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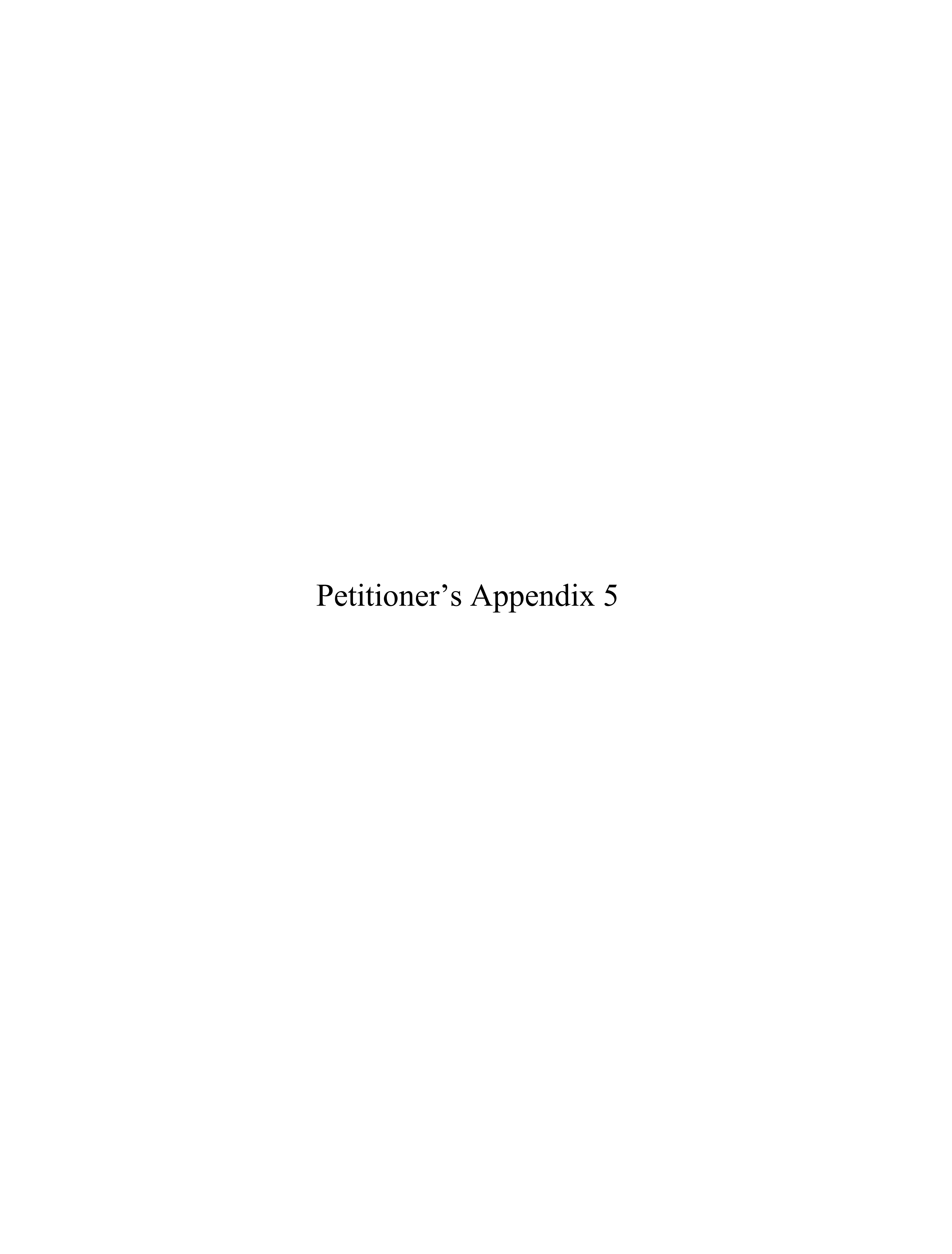

Petitioner’s Appendix 5

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ASKIA MUSTAFA RAHEEM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil Action No. 1:11-CV-1694-AT
	)	
CARL HUMPHREY, Warden,	)	Capital Habeas Corpus
Georgia Diagnostic Prison,	)	
	)	
Respondent.	)	
	)	

MOTION TO EXPAND RECORD/
SUBMISSION OF ADMISSIONS OF PARTY- OPPONENT

COMES NOW Petitioner Askia Mustafa Raheem, and submits the attached documents for inclusion in the record pursuant to Rule 7 of the Rules Governing § 2254 Cases and for consideration by this Court pursuant to FRE 801(d)(2) as the admissions of a party-opponent. These records document that Petitioner suffers brain seizures, a condition Respondent has previously denied. In support, Petitioner states as follows:

1. In state postconviction proceedings and before this Court, Petitioner plead: he suffers from brain damage and a seizure disorder and his mental condition bars his execution; he was incompetent at the time of trial and entitled to a competency hearing; and his counsel were constitutionally ineffective in failing to raise and litigate these issues. *See* Petition for Writ of Habeas Corpus, Claims

I, V and VI. In state court, Petitioner submitted the affidavit testimony of Dr. Melissa Carran, an expert in the treatment of epilepsy, and other evidence of epilepsy. Dr. Carran affirmed the observations of the State's expert, Dr. Martell, that Petitioner suffered from seizures. Dr. Carran reviewed video of Dr. Martell's evaluation of Petitioner and concluded both that Petitioner did suffer from a seizure disorder,[1] and that there were ramifications for his competency at the time of trial because of it.[2]

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[1]According to Dr. Carran, "profound disturbances of brain function" occur with epileptic seizures and Mr. Raheem's epilepsy is chronic in its duration, severity, and "possible multiple seizure types," which "can impair development of affective control and interrelated cognitive, social and moral behaviors, and abstract and verbal reasoning." RX 170 at 7. Dr. Carran noted that the "[d]escriptions of Mr. Raheem's behaviors contained in the affidavits and records repeatedly reflect possible psychosis" consistent with "the irrational and delusional thinking common in schizophrenia-like psychosis of epilepsy." *Id*. According to Dr. Carran, the "documented behaviors and 'choices'" made by Petitioner "are not those of a person with a non-epileptic, normal brain." *Id*.

[2]Dr. Carran noted that "the seizures themselves likely affect Mr. Raheem's ability to both assist his attorneys and understand the proceedings against him." Because he is unconscious during the seizures and cannot recall them, this "necessarily effect[s] his ability to follow narrative, to respond appropriately, and to understand fully what is taking place." According to Dr. Carran, "It is evident from the effects of the seizures suffered during Dr. Martell's testing how detrimental these episodes would be to a person facing a criminal trial, where preparation, concentration, and critical evaluation are key." Noting that Mr. Raheem could not recall many of the examples which he was shown during testing with and told Dr. Martell that he had not been shown certain of the cards because he had no memory of them, "[i]t follows that seizures occurring while meeting with his attorneys about evidence, attempting to follow the testimony of witnesses,

2. The state court order written by Respondent stated that the State's expert Dr. Martell had "merely presented a theory of 'absence seizures' possibly linked with epilepsy, however, there is no conclusive evidence that Petitioner suffers from such a disorder."

3. Respondent has likewise repeated in its brief to this Court that "the state habeas court noted that there is no conclusive evidence that Petitioner suffers from epilepsy. (Res. Ex. 177 p 91)." Doc. 40 at 69.

4. Neither the State's order nor its brief before this Court address Dr. Carran's testimony.

5. Recent statements recorded by Respondent's, the Warden's, agents document that Petitioner suffers from seizures. On January 21, 2013, Petitioner "was being escorted to Medical for having a seizure" according to a Use of Force Supplement Report by Sgt. Michael Stovall, 1/21/13, Exhibit A hereto. Petitioner was "convuls[ing]" and had to be taken to Spalding Regional Hospital for treatment. *Id*.

6. Petitioner "appeared to be having a seizure" and as he was being moved to the medical section of the prison, "began to move/convulse uncontrollably" and

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or evaluating the strength of evidence, and the combined effect over the course of preparation and trial, would clearly compromise Mr. Raheem's ability to assist in his defense."

had to be restrained until he became "responsive and aware of his surroundings." Use of Force Supplement Report by Lt. George Ball, 1/21/13, attached hereto as Exhibit B. Similar reports documenting that Mr. Raheem "was being escorted to medical for having a seizure" were filed by Sgt. Dustin Green, Off. Schedric Wheelings and Sgt. David Etheridge. Exhibit C, hereto.

7. These records documenting Petitioner's seizures comprise statements made by a party in its individual or representative capacity. Petitioner hereby requests that this Court admit and consider this evidence, as it meets the criteria for admission of a party opponent pursuant to FRE 801(d)(2) and is clearly relevant.[3]

8. Additionally, with regard to Petitioner's substantive due process claim that he was incompetent to stand trial, Respondent's brief to this Court argues that its expert Dr. Martell testified Petitioner was competent, attempts to refute substantive information specified in Petitioner's brief, and concludes that:

> A finding of competency, and that Petitioner has failed to

---

[3] The only two requirements for admissability under FRE 801(d)(2)(A) are 1) a statement was made by a party and 2) the statement was offered against that party. *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013). "A statement 'made by [a] party's agent or employee on a matter within the scope of that relationship and while it existed,' . . . is an admission by a party opponent and is not considered to be hearsay. Fed.R.Evid. 801(d)(2)." *Wright v. Farouk Systems, Inc.* 701 F.3d 907 (11th Cir. 2012).

> meet his burden before this Court, is further supported by a wealth of evidence in the record which establishes that Petitioner was competent to stand trial. *See e.g.*, Res. Ex. 118 p. 3625 (**DOC mental health profile form wherein Petitioner is only diagnosed as antisocial**); Res. Ex. 124, pp 5494-5532 (Petitioner's letters to Veronica Gibbs); and Res. Ex. 151, pp 13291-13353) (Petitioner's notes and correspondence with various persons). Thus all of the evidence presented both at trial and the habeas proceedings clearly establish that Petitioner was not incompetent at the time of trial.

Brief at 97-98.

9. Department of Corrections mental health records show Petitioner was diagnosed in 2012 with Dissociative Disorder and Anxiety Disorder, experiencing catatonic states, and with a "target symptom" and diagnosis of psychosis. *See* attachments D, E and F.

10. These documents likewise meet the criteria for admission of a party opponent pursuant to FRE 801(d)(2) and are relevant to Petitioner's claims, and Petitioner moves that this Court admit and consider them.

11. Finally, these same documents are relevant to Respondent's allegation that trial counsel were not ineffective because defense experts at trial correlated Petitioner's "absences" to his fantasy world. Respondent relies on his state habeas expert Dr. Martell, stating to this Court that

> Dr. Martell testified that "**the only things that were**

> **apparent [at trial]** were the depression and, I mean, the fantasy world, which I think all the mental health professionals at that point felt were more in the realm of imagination and less in the realm of psychosis."

Respondent's Brief at 67.

12. Based on this, the state habeas order written by Respondent concluded that if Petitioner suffered from "significant brain damage," or was "psychotic" or "delusional" it was "unlikely that a well trained mental health professional would have overlooked them. Hence, the absence of such diagnoses at the time of the crime, trial, and appeal would suggest that he was not exhibiting symptoms of those mental disorders at those times." HT 2954, Respondent's Brief, Doc 40 at 68. Yet one of Petitioner's experts at trial, Dr. Charles Nord, interviewed Petitioner just days before trial, and noted Petitioner showed a lot of borderline characteristics, *i.e.*, "he would dissociate." "He would zone out and move into another world...He's on the verge of becoming more psychotic...[and] has moments when he is psychotic...He hallucinates....He may at time hear voices." RX 18 at 2894 - 95. Dr. Nord was worried because "I had not seen earlier ...this dissociative disorder, where he can just dissociate from being here into somewhere else." RX 18 at 2896.

13. The documents showing that Respondent has diagnosed Petitioner as

having Dissociative Disorder and Anxiety Disorder, experiencing catatonic states, and with a "target symptom" and diagnosis of psychosis, bolster Dr. Nord's testimony at the time of trial and underscore trial counsel's unreasonable failure to investigate Petitioner's competency.

WHEREFORE, for the foregoing reasons, Petitioner requests that this Court expand the record and/or consider the attached as the admissions of a party-opponent.

This 22nd day of May, 2013.

Respectfully submitted,

/s/ Mark E. Olive
MARK E. OLIVE
Ga. Bar No. 551680
Law Office of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004
(850) 224-3331 (facsimile)

/s/ Gretchen M. Stork
GRETCHEN M. STORK
Ga. Bar No. 68888
Federal Defender Program, Inc.
101 Marietta St., Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
(404) 688-0768 (facsimile)

CERTIFICATE OF SERVICE AND TYPE FACE

This is to certify that the foregoing pleading was produced using a Times New Roman 14 point font in accordance with Local Rule 5.1B and that I have served a copy of the foregoing on counsel for Respondent on this day by causing a copy of same to be deposited in the United States mail, first class, postage prepaid, addressed as follows:

Sabrina D. Graham, Esq
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

This the 22th day of May, 2013.

/s/ Mark E. Olive

EXHIBIT A

Attachment I
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: GD&CP

Inmate/Probationer: Raheem Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21, 2013

On Jan 21, 2013 at 0935 hours, inmate Raheem Mustafa B/M gdc# 917141 was being escorted to Medical for having a seizure. While inmate Raheem was being escorted to medical, he began trying to come off the stretcher.

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I Sgt. Michael Stovall placed my left and right hand on inmate Raheems right arm to restrain him. Only the minimum amount of force was used to control inmate Raheem.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

( ) Yes ( ) No

D. Michael Stovall — Name; Sergeant — Title

[signature] — Signature; Jan 21, 2013 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT B

Attachment 1
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: 1-21-2013

On 1-21-2013 I Lt George Ball responded to D-House at about 0935 hrs D-5 (Acu) Raheem, Mustafa B/m GDC # 917141 appeared to be having a seizure. Medical was contacted and a stretcher arrived at D-House to transport to the medical section. As inmate Raheem was being moved through the hallway, He began to move/convulse uncontrollably trying to come off the stretcher. I then

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

maintained control of the lower left leg with both my hands until the inmate became responsive and aware of his surroundings. The handcuffs were inoperable/not working properly and had to be cut with bolt cutters. He was then secured again in restraints. Medical then cleared inmate Raheem. Mental Health Evaluated and cleared him. He was returned to D-5 with no further incident. Only the minimum amount of force was used to maintain positive control of inmate Raheem during this incident. A video was made and all appropriate authorities were contacted of the incident

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

( ) Yes (✓) No

D. George Ball — Name | Lieutenant — Title

George Ball — Signature | 1-21-2013 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT C

Attachment 1
SOP IIB08-0001
1/15/12

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21st 2013

On January 21st 2013 at 0935hrs Inmate Raheem, Mustafa B/M GDC#917141 was being escorted to medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off of the stretcher. I then...........

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I Sergeant Dustin Green placed my hands on inmate Raheem's left arm area with both my left and right hands, controlling his left arm. All force ceased. The minimum amount of force was used.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s)/probationer(s) should be considered for criminal prosecution?

( ) Yes ( ) No

D. Dustin Green — Name | Sergeant — Title

[signature] — Signature | 01-21-13 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

Attachment 1
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: GD of CP

Inmate/Probationer: Raheem, Mustafa Number: 919141

II. Officer's Report: Wheelings, Schedric

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21, 2013

On Jan. 21, 2013 at 0935 hours, inmate Raheem, Mustafa B/M GDC 919141 was being escorted to Medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off the stretcher.

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I officer Wheelings, Schedric placed my right hand above inmate Raheem, Mustafa knee, and my left hand on his lower leg to restrain him. Only the minimum amount of force was used to control inmate Raheem, Mustafa.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

( ) Yes (✓) No

D. Wheelings, Schedric — Name
Correctional Officer I — Title
[signature] — Signature
20130121 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

Attachment 1
SOP IIB08-0001
1/15/12

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21st 2013

On January 21st 2013 at 0935hrs Inmate Raheem, Mustafa B/M GDC#917141 was being escorted to medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off of the stretcher. I then...........

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

placed my hands on inmate Raheem's upper shoulder area with both my left and right hands, controlling his upper body. All force ceased. The minimum amount of force was used.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s)/probationer(s) should be considered for criminal prosecution?

( ) Yes ( ) No

D. David Ethridge — Name | Sergeant — Title

[signature] — Signature | 01-21-13 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT D

Georgia Department of Corrections

ACU Discharge Summary

Insti GDC#917141
Nar RAHEEM, MUSTAFA ASKIA
ID# RACE;B, SEX;M, DOB:5/21/79
Dat
Ra(

Date/Time of Admission: 1/20/13 11⁰⁰

Date of Discharge: 1-22-13 1130

Referral Source: G. house

Admitting Diagnosis: Need evaluation

Discharge Diagnosis: Dissociation D/O NOS
Anxiety D/O NOS

Discharge Placement: G-House

EXHIBIT E

GEORGIA DEPARTMENT OF CORRECTIONS

CONSULTATION REQUEST

Name ______

GDC#917141
RAHEEM, MUSTAFA ASKIA
RACE;B, SEX;M, DOB:5/21/79

Facility GDCP

Date: 01/20/13 Time: ______

Use form PI-2007C for ASMP patients. This is a : ☐ New Request ☐ Re-submission

Site Code______ Request Date: 01/20/13 Diagnosis Altered Mental Status
Service Consulted ______ ☐ Locally ☐ ASMP ☐ Telemedicine Possible D/D
This request is: ☐ URGENT ☐ ROUTINE Date Appointment Scheduled:___/___/___
Pertinent History: 33 y/o M presents c̄ Altered mental status. Catatonic type state, slow to respond. Altered V/S's Hx of Asthma, mental Health: Anxiety D/O, Borderline personality D/O

Pertinent Physical: V/S B/P 173/111 P109 R 20 T98.2 B/S 65

Pertinent Workup, Lab Results: see attached

List All Medications: Albuterol MDI, Zoloft 50mg received (Ativan 2mg IM at 1:10pm)

SPECIFIC QUESTION FOR CONSULTANT OR PROCEDURE REQUESTED: R/O A.O.D. Altered mental status

Site Medical Director: Dr. Fowlkes Consult requested by: McDonald [illegible] MD / DDS / NP /PA

CONSULTANT'S FINDINGS AND RECOMMENDATIONS

Date:___/___/___ Time:_____ Signed:______ MD/DDS

☐ The consultant recommends no additional consults, tests, or procedures. The patient may return to the original facility.

☐ The consultant recommends ROUTINE consults, tests, or procedures. Patient to wait at the original facility, which is responsible for generating a new PI-2007A and B, faxing PI-2007B to UM at (706) 855-4991, and all scheduling.

☐ The consultant recommends URGENT consults, tests, or procedures. The patient will remain at ASMP ** ASMP consultants will generate form PI-2007C and forward to the ASMP Medical Director for approval.

EXHIBIT F

GEORGIA DEPARTMENT OF CORRECTIONS

MH/MR PROGRESS NOTE

Facility: GDCP

Name: Baheem, Mustafa

ID#: 917141

Date: 1-21-13 3-11p

Race: B Sex: M

I. Data: Purpose: [ ] Individual Counseling Session [ ] Evaluation [✓] ~~Rounds~~ [ ] Crisis [✓] Other: ACU

Chief Compliant: See Below

Target Symptom(s) from Treatment Plan addressed in this contact: Psychosis

Attitude: cooperative Hygiene: fair Orientation: x 4 Suicide Ideation: Denies

Judgement: poor Mood: euthymic Affect: approp Homicidal Ideation: Denies

Thought Processes and Content: Logical

Description of session (include discussion of abnormal findings): I/M calm and cooperative, resting quietly. Arouses during nurse rounds. Denies any complaints

Interventions: Encourage Coping Skills

II. Assessment: Problem/Target Symptoms [ ] Worse [✓] ~~Unchanged~~ [ ] Improved [ ] Eliminated

Diagnosis: Psychosis (Unchanged)/Changed as of: 1-21-13
(circle) (date)

Comments: N/A

III. Plan: (present the plans in terms of the problems): Continue to monitor in ACU

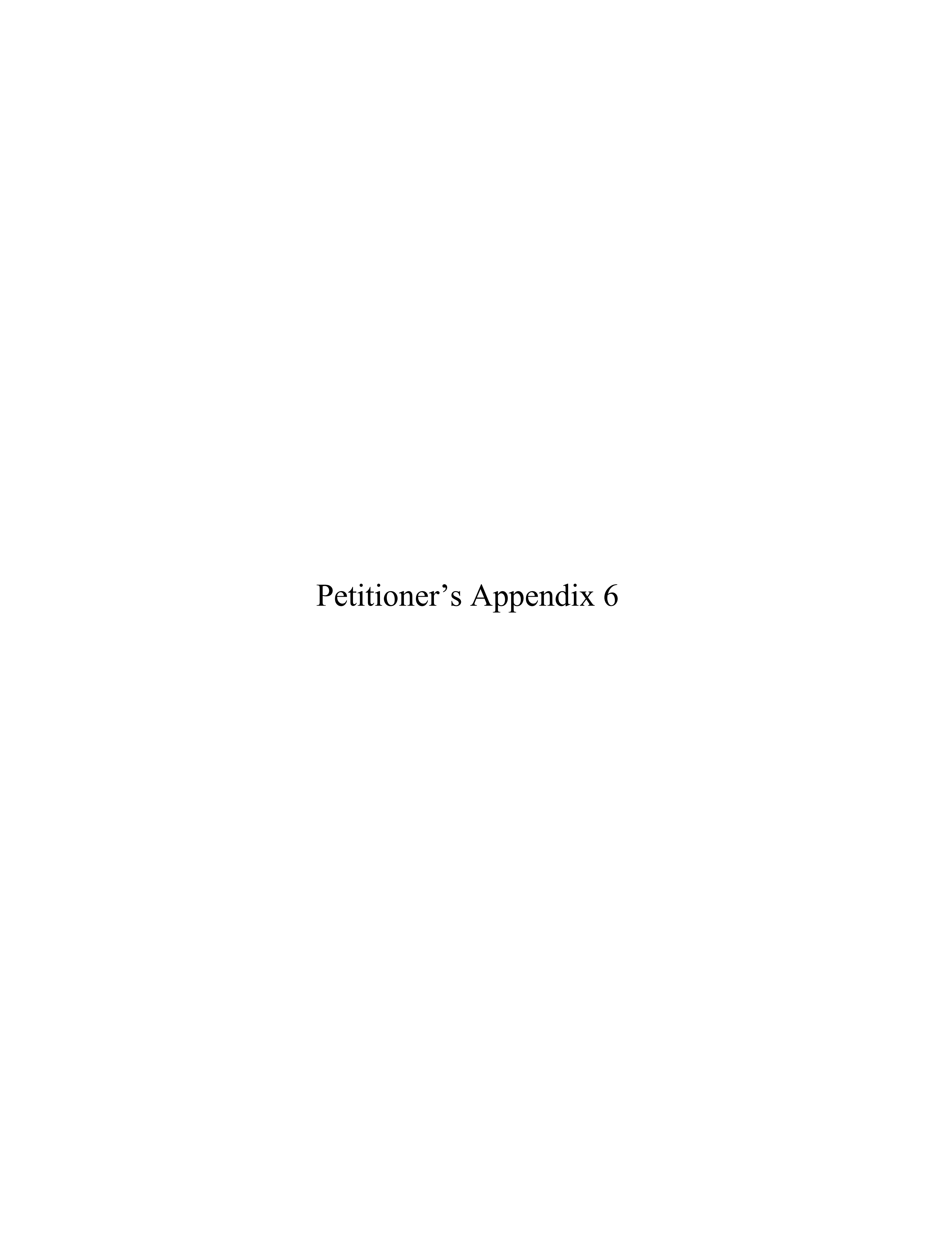
Next Appointment: Rounds

Page 1 of 1 [ ] Attachment

L. Hughes LPN
(Signature/Title)

L. Hughes, LPN
(Printed/Typed Name)

Form M20-02-02 Revised 6/05
Original: Section I, Clinical File



Petitioner’s Appendix 6

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ASKIA MUSTAFA RAHEEM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil Action No. 1:11-CV-1694-AT
	)	
CARL HUMPHREY, Warden, Georgia Diagnostic Prison,	)	Capital Habeas Corpus
	)	
Respondent.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO CONDUCT DISCOVERY AND RENEWED
MOTION FOR EVIDENTIARY HEARING/FACTUAL DEVELOPMENT

Petitioner, Askia Mustafa Raheem, by and through undersigned counsel, submits this Memorandum of Law in support of his Motion for Leave to Conduct Discovery and Renewed Motion for Evidentiary Hearing or Other Factual Development, pursuant to Rules 6 through 8 of the Rules Governing Cases Brought Under 28 U.S.C. § 2254.

The rules governing federal habeas corpus proceedings permit a petitioner to utilize the discovery process of the Federal Rules of Civil Procedure "to the extent that the judge in the exercise of his discretion and for good cause shown grants leave to do so." Rule 6(a). According to the commentary to Rule 6,

> where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

id.; Accord Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793 (1997); *East v. Scott*, 55 F.3d 996 (5th Cir. 1995); *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991) *quoting Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082 (1969). As the plain meaning of the statute indicates, the Petitioner need only show that the facts, if developed, may show that he is illegally confined. "Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence relating to his petition." *Payne v. Bell*, 89 F.Supp.2d 967, 970 (W.D. Tenn. 2000). Plainly, the resolution of that issue must await the completion of the discovery being sought, as occurs in any civil litigation. Likewise, once a habeas petitioner's claims are properly before the district court, he or she must be treated like any civil litigant. *See Keeney v. Tamayo Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 1722 (1992) (O'Connor, J., dissenting).

In state postconviction proceedings and before this Court, Petitioner has pleaded that he suffers from brain damage and a seizure disorder and his mental

condition bars his execution, that he was incompetent at the time of trial and entitled to a competency hearing, and that his counsel were constitutionally ineffective in failing to raise and litigate these issues. *See* Petition for Writ of Habeas Corpus, Claims I, V and VI. Petitioner seeks discovery to obtain evidence related to these claims that was previously unavailable.

Petitioner additionally requests this Court reconsider its Order of September 18, 2012 denying Petitioner's motion for evidentiary hearing or other factual development. Doc. 50. The Court denied that motion, in pertinent part, because

> Petitioner has not pointed to any specific issue on which he was diligent in presenting facts in the state court proceedings, yet the factual record warrants further development by this Court. Nor has Petitioner shown that he failed to develop the factual record for any claim relying on a new rule of constitutional law or a factual predicate that could not have been previously discovered through the exercise of diligence.

Doc. 50 at 4. However, the Court stated that the motion was denied "subject to possible reconsideration upon the Court's substantive ruling on the petition for habeas relief." *Id*. Petitioner submits this is relevant evidence which could not have been previously discovered through the exercise of diligence, and thus the factual record does warrant further development by this Court and is not precluded by § 2254(e)(2).

1. Background

In late January 2013, counsel learned that Petitioner had suffered some sort of psychiatric break and had been taken from the Georgia Diagnostic Prison to Spalding Regional Hospital. His symptoms included seizures. Respondent has previously denied that Petitioner suffers brain seizures.[1]

Counsel had requested medical and mental health and prison administrative records regarding Petitioner on December 3, 2012. When no records were forthcoming, counsel made another request on February 1, 2013.

In March, records relevant to Petitioner's mental health and the incidents on January 20-21, 2013, were received by counsel. *See* incident report tracking sheet and incident report, Exhibit A hereto. These records included reports by several officers regarding the use of force on Petitioner. Each states that on January 21, 2013, Petitioner was being escorted to the medical section after or during a "seizure," Petitioner was "convuls[ing]" or "began to move/convulse

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[1] The state court order in this case written by Respondent stated that the State's expert Dr. Martell had "merely presented a theory of 'absence seizures' possibly linked with epilepsy, however, there is no conclusive evidence that Petitioner suffers from such a disorder." Respondent has likewise repeated in its brief to this Court that "the state habeas court noted that there is no conclusive evidence that Petitioner suffers from epilepsy. (Res. Ex. 177 p 91)." Doc. 40 at 69.

uncontrollably" and had to be restrained. *See* Exhibits B-F hereto. An evidence sheet was also contained in the records, indicating that "2 DVD's For Hands on Use of Force on I/M Raheem, Mustafa" were recorded on January 21, 2013 and reflecting the chain of custody on the 2 DVDs. *See* Exhibit G hereto. Presumably, one or both of these DVDs would document the seizure suffered by Mr. Raheem and any other psychiatric symptoms he exhibited. However, only one DVD was turned over with the records. This DVD is just over two minutes long and shows only a file floor and officers' shoes. The audio on the DVD indicates it was taken outside a cell where Mr. Raheem was apparently unresponsive. There is nothing else on the DVD, which is marked "UOF 1-21-13."

By letter March 25, 2013, counsel requested release of the second DVD and any and all other records documenting the event of Mr. Raheem's psychiatric break and removal to Spalding Regional Hospital, and subsequent seizure as documented in the officer's reports. Exhibit H hereto.

On April 15, 2013, counsel received a response from Respondent's Executive Assistant, referencing two attached statement forms. The first statement is from Officer Jordan, and according to Respondent, states that a second video camera

> was put into operation after inmate Raheem arrived in

> the medical area. Officer Jordan indicates that the camera was pointed at the floor because a medical assessment was being conducted on inmate Raheem. Officer Jordan also indicates that no force was used during the medical assessment. The second statement is from Capt. Ball, who indicates in his statement that he was present during the videotaping and that while two cameras were used, one was not functioning properly. This may explain why there were two cameras used but only one actual disk contained in the report.

Letter to Counsel from John Harper, with statements, Exhibit I hereto. The letter goes on to state that "[P]er the Warden's instructions" staff members had been directed to search for the video disk not included in the original report but that "these searches have been unsuccessful." *Id.*

Mr. Harper's letter does not include a statement from the actual operator of the other camera, who is identified in the documents received in March as Officer Baker. *See* Exhibit J hereto.

2. Discovery/Factual Development Sought

Petitioner seeks to discover evidence relevant to his claims that he suffers from brain damage, seizures, and mental illness and that his mental condition bars his execution, and that he was incompetent at the time of trial and was entitled to a hearing on competency. The documents obtained from Respondent indicate Petitioner suffered from seizures and other psychiatric symptoms on or around the

dates of January 20-21, 2013. These symptoms were witnessed by a number of Respondent's agents, who are identified in documents, and were videotaped. Petitioner seeks discovery in the form of:

1) the missing video disk documented in the evidence chain of custody;

2) sworn depositions of

a) those officers or other personnel identified as witnessing Petitioner's symptoms, including but not limited to Lt. George Ball, Sgt. Michael Stovall, Sgt. Dustin Green, Off. Schedric Wheelings, Sgt. David Ethridge;

b) Camera operators Off. Ankia Baker and Off. Lashawn Jordan;

c) Other personnel who were notified of the incident or responded, including Capt. Jackson, Duty Off. R. Logan, Mental Health Mrs. Amos;

d) other personnel identified on the incident reports as having been notified and/or having reviewed and approved the incident reports and accompanying use of force reports, including Investigating Supervisor Cynthia Jackson, and reviewing captain, deputy warden and warden/designee, whose names on the documents are illegible;

e) Warden Carl Humphrey and executive assistant to the Warden John Harper, who responded to the requests for documents and the second DVD.

f) L.P.N. Calhoun, as author of the Use of Force Assessment medical examination form describing the incident as "Major," the disposition to the Mental Health unit as "Urgent," Mr. Raheem's behavior as "agitated" and "unresponsive pain/verbal tactile stim at times" (sic) and noting "inmate responsive verbally after approx. 30 minutes." *See* Exhibit K, attached hereto.

Petitioner wishes to obtain this evidence/testimony for review by his expert(s), including epileptologist Dr. Melissa Carran and possibly brain behavior expert Dr. Ruben Gur.

3. Discovery/Factual Development is Proper

"Petitioners in habeas corpus proceedings . . . are entitled to careful consideration and plenary processing of their claims *including full opportunity for presentation of the relevant facts." Harris v. Nelson,* 394 U.S. 286, 298 (1969) (emphasis added). To effectuate this policy, Congress has provided that habeas corpus petitioners may take evidence "orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. The Rules Governing Habeas Corpus Cases also provide that

> [d]iscovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing. . . . [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Rule 6(a), Advisory Committee Note (emphasis added); *see also Blackledge v. Allison*, 431 U.S. 63, 81 (1977); *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991). In instances in which a petitioner has alleged misconduct on the part of the

state, discovery may be the only mechanism by which critical facts may be brought to light. Only through discovery, then, can federal habeas corpus continue to play its "particularly important role . . . in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 114 S. Ct. 2568, 2574 (1994). "Denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim." *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); *see also Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995) (ordering discovery where information directly relevant to the ground for relief is "indispensable to a fair, rounded, development of material facts" (quoting *Coleman v. Zant*, 708 F.2d 541, 547 (11th Cir. 1983)).

The missing DVD and/or the sworn testimony of witnesses to Petitioner's psychiatric breakdown and seizure(s), and their review by experts, are necessary to the full development of Petitioner's claims regarding his mental health, competency and ineffective assistance of counsel. In accord with the commentary to Rule 6(a), Petitioner has made specific allegations which provide reason to believe he may, if the facts are fully developed, be able to demonstrate he is entitled to relief, thus "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Accordingly, discovery is proper.

This the 22nd day of May, 2013.

Respectfully submitted,

/s/ Mark E. Olive
MARK E. OLIVE
Ga. Bar No. 551680
Law Office of Mark E. Olive, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004
(850) 224-3331 (facsimile)

/s/ Gretchen M. Stork
GRETCHEN M. STORK
Ga. Bar No. 68888
Federal Defender Program, Inc.
101 Marietta St., Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
(404) 688-0768 (facsimile)

CERTIFICATE OF SERVICE AND TYPE FACE

This is to certify that the foregoing pleading was produced using a Times New Roman 14 point font in accordance with Local Rule 5.1B and that I have served a copy of the foregoing on counsel for Respondent on this day by causing a copy of same to be deposited in the United States mail, first class, postage prepaid, addressed as follows:

Sabrina D. Graham, Esq
Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334

This the 22nd day of May, 2013.

/s/ Mark E. Olive

EXHIBIT A

No video attached.

PLEASE make sure that this Tracking Sheet is attached back to the I.R. after corrections have been made. Also type the I.R. # on the corrected copy. Make sure you are using the revised copy 1-15-2012. Do Not Mark out any thing on Tracking Sheet. Capt. Dendy will highlight what she wants corrected.

INCIDENT REPORT TRACKING SHEET

SPLIT SHIFT CLERK

Received ________ and Issued I.R. Forwarded ________ to Capt. Dendy

All corrected sent to get the camera

If I.R. does not have a # send to me. N.Rooks

Received 1-25-13 CAPT.Dendy Forwarded 1-25-13

Received 1-25-13 MAJOR Forwarded 1-25-13

Received ________ MR. EUTSEY Forwarded ________

If I.R. does not have a # send to me. N.Rooks

Received ________ WARDEN HUMPHREY

Forward to Administrative Assistant Yes ________ No ________

Attachment 3 (SOP IIB08-0001) 1/15/2012

GDCP State Prison
Use of Force/Serious Incident Report Coversheet

I. Inmate Name Raheem Mustafa Date: Jan. 21, 2012

II. Checklist:

1. Use of Force....Yes ✓ No ___ Pending ___
2. Supplemental Use of Force....Yes ✓ No ___ Pending ___
3. Videotape....Yes ✓ No ___ Pending ___
4. Photos....Yes ✓ No ___
5. Witness statements from all involved....Yes ✓ No ___ Pending ___
6. Disciplinary Report filed....Yes ___ No ✓ Pending ___
7. Medical Reports....Yes ✓ No ___ Pending ___
8. Mental Health Report/Statements....Yes ___ No ✓ Pending ___
9. Chain of Evidence....Yes ✓ No ___ Pending ___
10. Use of Weapons Report....Yes ___ No ✓ Pending ___

If pending is checked on any of the above, state the reason why: ___

III. Captain's Review: 1. Date received 1-25-13 2. Date videotape reviewed: ___

3. Rating of Incident: Major: X Serious: ___ Minor: ___ Unusual: ___

4. Comments: Handled Appropriately

5. Signature of Captain: [signature]

IV. Deputy Warden's Review: 1. Date received 1.25.13 2. Date videotape reviewed: N/A

3. Comments: REVIEWED (1. R.)

4. Signature of Deputy Warden: [signature]

V. Warden's Review:

1. Date received: 1-29-13

2. Type and Forward: Yes No
Hold in File: Yes No

3. Comments: ___

4. Signature of Warden/Designee: [signature]

INCIDENT REPORT

Attachment #2
IIB08-0001
01/15/2012

Incident ID#: 522-13-0043
Type Report:
Major Incident: ______ Minor Incident: ______ Use of Force: Yes Use of Weapon: ______
Facility: GD&CP
Date of Occurrence (M/D/Y) 1-21-2013 Time: 0935hrs Location: D-House

II. A. Inmates Involved:

	Name	Number	Type Force	Disp. Filed?	Medical Complaint
1.	Raheem, Mustafa	917141	Hands-On	No	Yes
2.					
3.					

B. Medical Findings (To be completed by appropriate staff within 24 hours):

C. Staff involved:

Name	Race	Sex	Social Security Number
Lt. Ball, George	BLACK	MALE	00327275
Stovall, Michael	White	Male	00969457
Green, Dustin	White	Male	00969457
Wheelings, Schedric	Black	Male	00997352
Ethridge, David	White	Male	00935179

D. Witnesses:

Name	Number/Title	Name	Number/Title
None			

Video Equipment Utilized: Yes X No ____ Name of Camera Operator: Jordan, Lashawn / Baker, Ankia

E.

Name/Agency Notified:	Date	Time	Name/Agency Notified	Date	Time
Capt. Jackson, C. (O.I.C.)	1-21-2013	0940hrs	Duty Ofc. Logan, R.	1-21-13	0950
Medical Sect. L.P.N Calhoun	1-21-2013	0942hrs	Mental Health Mrs. Amos	1-21-13	1000

III. Summary of Incident (by Reporting Officer): On January 21, 2013 at 0935hrs I, Lt Georg Ball was on duty as the first shift assistant O.I.C. I responded to D-House when I arrived inmate Raheem, Mustafa b/m MH/MR gdc#917141 U.D.S. perm. inmate was in A.C.U. cell# 5, inmate Raheem appeared to be having a seizure. Sgt. Stovall and Sgt. Green entered the cell and placed handcuffs and leg irons on inmate Raheem and then he was placed on the stretcher and escorted to medical. While under escort, inmate Raheem began trying to come off the stretcher hands on force had to be used to keep him from falling off the stretcher. and maintained positive control of the inmate until he appeared to stop having seizures and became coherent. While medical was evaluating ,inmate Raheem began to complain that the handcuffs were bothering him and he continued attempting to come off the stretcher and had to restrained once again. It was then handcuff restraints were attempted to be adjusted, however the handcuff# 214 953 on inmate Raheem, left arm would not release. The handcuff had to be removed using bolt cutters making them inoperable. After medical finished there evaluation of inmate Raheem, he was then cleared by the mental health staff and escorted back to D-House A.C.U. cell# 5. The minimum amount of hands on force was used to control inmate Raheem Two cameras were used during this incident and all appropriate staff was notified. Pictures were taken. Mental Health counselor was notified.

IV. A. Weapon Certification Date: ______ Type: ______ Serial # ______
Ammo Type: ______ Weather: ______ Lighting: ______

B. Reason for Weapon Use:

1. Gain control of inmate ______
2. Prevent escape ______
3. Accidental discharge ______
4. Warning shot(s) ______
5. Stop fight ______
6. Kill snake/other animal ______
7. Other ______

V. Property Damages? If yes, explain: ______

VI. Warden's/Superintendent's comments/recommendations:
Handled appropriately Fwd to IA per SOP.

In your opinion, did the forced used by staff exceed that which was required to maintain control of the inmate:
Yes ______ No ______
Any adverse action taken against staff? If yes, explain: ______

Reporting Officer Signature: George Ball/ [signature] Title: Lieutenant Date: 1-21-13
Investigating Supervisor Signature: Cynthia, Jackson [signature] Title: Captain Date: 1-21-13
Warden/Superintendent Signature: [signature] Date: 1-29-13

P-1006

Revised 01/15/12

RETENTION SCHEDULE:

Upon completion, this form will be retained locally for three (3) years and then destroyed.

EXHIBIT B

Attachment 1
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: 1-21-2013

On 1-21-2013 I, Lt George Ball responded to D-House at about 0935 hrs. D-5 (Acu) Raheem, Mustafa B/m GDC # 917141 appeared to be having a seizure. Medical was contacted and a stretcher arrived at D-House to transport to the medical section. As inmate Raheem was being moved through the hallway, He began to move/convulse uncontrollably trying to come off the stretcher. I then

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

maintained control of the lower left leg with both my hands until the inmate became responsive and aware of his surroundings. The handcuffs were inoperable/not working properly and had to be cut with bolt cutters. He was then secured again in restraints. Medical then cleared inmate Raheem. Mental Health Evaluated and cleared him. He was returned to D-5 with no further incident. Only the minimum amount of force was used to maintain positive control of inmate Raheem during this incident. A video was made and all appropriate authorities were contacted of the incident

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

( ) Yes (✓) No

D. George Ball — Name
Lieutenant — Title
[signature] — Signature
1-21-2013 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT C

Attachment 1
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: GD&CP

Inmate/Probationer: Raheem Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21, 2013

On Jan 21, 2013 at 0935 hours, inmate Raheem Mustafa B/M gdc# 917141 was being escorted to Medical for having a Seizure while inmate Raheem was being escorted to medical, he began trying to come off the stretcher.

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I Sgt Michael Stovall placed my left and right hand on inmate Raheems right arm to restrain him. Only the minimum amount of force was used to control inmate Raheem.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

() Yes () No

D. Michael Stovall — Name | Sergeant — Title

[signature] — Signature | Jan 21, 2013 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT D

Attachment 1
SOP IIB08-0001
1/15/12

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21st 2013

On January 21st 2013 at 0935hrs Inmate Raheem, Mustafa B/M GDC#917141 was being escorted to medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off of the stretcher. I then...........

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I Sergeant Dustin Green placed my hands on inmate Raheem's left arm area with both my left and right hands, controlling his left arm. All force ceased. The minimum amount of force was used.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s)/probationer(s) should be considered for criminal prosecution?

( ) Yes ( ) No

D. Dustin Green
Name

Sergeant
Title

[signature]
Signature

01-21-13
Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT E

Attachment 1
SOP IIB08-0001
1/15/2012

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: GD of CP

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report: Wheelings, Schedric

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21, 2013

On Jan 21, 2013 at 0935 hours, inmate Raheem, Mustafa B/M GDC 917141 was being escorted to Medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off the stretcher

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

I officer Wheelings, Schedric placed my right hand above inmate Raheem, Mustafa knee, and my left hand on his lower leg to restrain him. Only the minimum amount of force was used to control inmate Raheem, Mustafa.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s) probationer(s) should be considered for criminal prosecution?

( ) Yes (x) No

D. Wheelings, Schedric — Name

Correctional Officer I — Title

[signature] — Signature

20130121 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT F

Attachment 1
SOP IIB08-0001
1/15/12

GEORGIA DEPARTMENT OF CORRECTIONS

USE OF FORCE SUPPLEMENT REPORT

I. Identification:

Facility: Georgia Diagnostic & Classification Prison

Inmate/Probationer: Raheem, Mustafa Number: 917141

II. Officer's Report:

A. Circumstances Leading to Use of Force or Assault by Inmate/Probationer:

Time of Incident: 0935 Date of Incident: Jan 21st 2013

On January 21st 2013 at 0935hrs Inmate Raheem, Mustafa B/M GDC#917141 was being escorted to medical for having a seizure. While inmate Raheem was being escorted to medical he began trying to come off of the stretcher. I then…………

B. Type and Extent of Forceful Action (Include Equipment Employed, if any):

placed my hands on inmate Raheem's upper shoulder area with both my left and right hands, controlling his upper body. All force ceased. The minimum amount of force was used.

C. Complete (if applicable) by staff member if assaulted by inmate/probationer. Do you feel that inmate(s)/probationer(s) should be considered for criminal prosecution?

( ) Yes ( ) No

D. David Ethridge — Name | Sergeant — Title

[signature] — Signature | 01-21-13 — Date

RETENTION SCHEDULE: Upon completion, this form will be retained in the Inmate/Probationer case history file.

EXHIBIT G

IK01-0005
ATTACHMENT 1
8/15/01

EVIDENCE

Case No. ______________________

Evidence Description
2 DVD's For Hands on Use of Force on I/M Raheem, Mustafa

Place Evidence Found N/A

Date & Time of Recovery Jan 21, 2013 at 0935 hours

Suspect I/M Raheem, Mustafa Offense ______________

Victim N/A

Evidence Recovered by Capt C. Jackson
Signature, Rank

CHAIN OF CUSTODY OF EVIDENCE

Signatures Required

From	*To*	*Date*	*Time*
Lt. Ball	Capt. Jackson	1/21/13	1600
Capt. Jackson	Evidence	1/21/13	1630

Upon completion, this form will be held with the investigation package.

EXHIBIT H

FEDERAL DEFENDER PROGRAM, INC.
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
SUITE 1500, CENTENNIAL TOWER
101 MARIETTA STREET, N.W.
ATLANTA, GEORGIA 30303

STEPHANIE KEARNS
EXECUTIVE DIRECTOR

TELEPHONE
404 688-7530
800 688-7538
FAX
404 688-0768

March 25, 2013

Mr. John T. Harper, Jr.
Administrative Assistant
Georgia Diagnostic and Classification Prison
P.O. Box 3877
Jackson, Georgia 30233

Re: Askia Mustafa Raheem, GDC# 917141
Open Records Request

Dear Mr. Harper:

I have received and reviewed the records supplied last week in response to the Open Records Request sent by Melanie Goodwill of this office on December 3, 2012 and the renewed request for medical/mental health records sent February 1, 2013 specifically referencing the medical/psychiatric emergency of January 20-21, 2013.

As memorialized in the records, Mr. Raheem suffered some sort of psychiatric break on January 20 and was moved to ACU/D-house. He ultimately was taken to Spalding Regional Hospital on January 20, 2013, where a CT scan was performed. On January 21, Mr. Raheem suffered an apparent seizure according to records containing statements from the officers in attendance, which also aver that minimum amounts of force were used in efforts to keep Mr. Raheem on a stretcher as he "began to move/convulse." Contained in the records is one DVD housed in a sleeve marked "UOF 1-21-13." The DVD itself is just over two minutes and shows only a tile floor and officers' shoes. The audio on the DVD indicates it was taken outside a cell where Mr. Raheem was apparently unresponsive. There is nothing further on the DVD, and there is no video record of the removal of Mr. Raheem from that cell. It is unclear if the cell is in G-house or the ACU/D-house. The video itself has the camera date of April 2011.

An evidence description contained in the records indicates that "2 DVD's for Hands On Use of Force on I/M Raheem, Mustafa" exist. (See attached). I am requesting release of the referenced second DVD and any and all other records documenting this event. This includes any video, DVD, still photography, or any other source, memorializing any and all responses to the events of January 20-21, whether inside the cell(s), removing Mr. Raheem from G-house and/or ACU/D-house, transporting him to medical treatment or any other section of the prison, the

removal of the handcuffs, return to the ACU or other section of the prison, and transport to Spalding Regional Hospital.

I appreciate your assistance in this matter. Please contact me if there are any problems with this request.

Sincerely,

Gretchen M. Stork
Counsel for Mr. Raheem

cc: Mark E. Olive

IK01-0005
ATTACHMENT 1
8/15/01

EVIDENCE

Case No. ____________________

Evidence Description
2 DVD's For Hands on Use of Force on I/M Raheem, Mustafa

Place Evidence Found N/A

Date & Time of Recovery Jan 21, 2013 at 0935 hours

Suspect I/M Raheem, Mustafa Offense ____________________

Victim N/A

Evidence Recovered by Capt C. Jackson
Signature, Rank

CHAIN OF CUSTODY OF EVIDENCE

Signatures Required

From	*To*	*Date*	*Time*
Lt. Ball	Capt. Jackson	1/21/13	1600
Capt. Jackson	Evidence	1/21/13	1630

Upon completion, this form will be held with the investigation package.

EXHIBIT I

GEORGIA DEPARTMENT OF CORRECTIONS
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON
P.O. BOX 3877
JACKSON, GA 30233
770/504-2000
FAX 770/504-2006

Nathan Deal
Governor

Brian Owens
Commissioner

April 15, 2013

Gretchen Stork, Attorney
Federal Defender Program, Inc.
Suite 1500, Centennial Tower
101 Marietta Street, NW
Atlanta, GA 30303

Re: Records Request Concerning Inmate RAHEEM, Mustafa GDC#917141

Ms. Stork:

Attached you will find two statement forms concerning the incident involving the above inmate.

The first statement is from Officer Jordan, who, according to the statement, operated the 2nd video camera in the incident involving inmate Raheem. Officer Jordan indicates that the 2nd camera was put into operation after inmate Raheem arrived in the medical area. Officer Jordan indicates that the camera was pointed at the floor because a medical assessment was being conducted on inmate Raheem. Officer Jordan also indicates in the statement that no force was used during the medical assessment.

The second statement is from Capt. Ball, who indicates in his statement that he was present during the videotaping and that while two cameras were used, one was not functioning properly. This may explain why there were two cameras used but only one actual disk contained in the report.

Per the Warden's instructions, I have had the Major and other staff members search for the video disk that was not included in the original incident report. These searches have been unsuccessful.

Sincerely,

John T. Harper Jr.
Executive Assistant

Enclosure(s): 2

Cc: Office File

ATTACHMENT 3
SOP IIB05-0001
5/15/2005

WITNESS STATEMENT

PLACE GD&CP	DATE 4-11-2013	TIME 2012	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME BALL, George	EMPLOYEE ID NUMBER 100327275		STATE ID NO.
INSTITUTION OR ADDRESS GD&CP HWY 36 JACKSON GA 30233			

SWORN STATEMENT

I, George Ball, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

In reference to 1-21-2013, Inmate Mustafa, Raheem B/m GDC# 917141 I was present during the incident, there were two cameras present but one was not working properly. End of statement

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT GB	PAGE 1 OF 1 PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF GB TAKEN AT 202 DATED 4/11/13 CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE __ OF __ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

(Reproduce...)

ATTACHMENT 3
SOP IIB05-0001
5/15/2005

WITNESS STATEMENT

PLACE G.D.C.P.	DATE 4-11-13	TIME 1210	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Jackson Jeffery	EMPLOYEE ID NUMBER 00924174		STATE ID NO.
INSTITUTION OR ADDRESS			

SWORN STATEMENT

I, Jeffery Jackson, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

was the operator of one of the video camera while inmate Rahman, Mustafa G/M # 917191 was in medical. I did not place the camera on inmate Mustafa during medical assessment. However I turned it away. I was called to video this incident with inmate Mustafa after he was taken to medical I began to video tape this incident in medical. Inmate Mustafa was awake but appeared to be recovering from an alledged seizure. At no time ~~the~~ did I video tape an force used against him because no force was used during the time I begin to video tape.

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT JJ	PAGE 1 OF ____ PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ___ TAKEN AT ___ DATED ___ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ___ OF ___ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

(Reproduce)

EXHIBIT J

ATTACHMENT 3
SOP IIB05-0001

WITNESS STATEMENT

PLACE:	DATE 01-21-13	TIME 1:20	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE Baker Amina	EMPLOYEE ID NUMBER 0090596123		STATE ID NO.
INSTITUTION OR ADDRESS G.D. & C.P.			

SWORN STATEMENT

I, Ofc. Baker AM MAKING THIS STATEMENT UNDER OATH:

On 01-21-2013 while working medical I Ofc. Baker assist with video taping Inmate Raheem, Mustafa while he was in medical.

AB AB AB AB

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT AB	PAGE 1 OF 1 PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

EXHIBIT K

GEORGIA DEPARTMENT OF CORRECTIONS
Use of Force Assessment
Facility GDCP

Name Raheem, Mustafa
ID Number 917141
DOB 5/21/79 Race B Gender M

Date Force Used 1/21/13 Time 1020 Place of Exam: ☒ Medical ☐ Housing Unit ☐ Other

Subjective: (inmate's description of force applied or injuries sustained)

Objective: B/P 141/91 HR 136 RR 20 Temp unable to obtain Weight

Inmate's behavior: ☐ Cooperative ☐ Uncooperative ☒ Violent/Combative (describe) agitated behavior and unresponsive pain/verbal tactile stim @ times

Area Examined	No Injury	Describe Injury
Head / Neck	☒	
Maxillo-Facial	☒	
Trunk	☒	
Abdomen	☒	
Genitalia	☒	
Extremities	☒	

Neurological: ☐ Alert ☐ Oriented x3 ☐ Disoriented to ☐ Lethargic
☐ Responds to verbal commands ☐ Speech normal for inmate ☐ Other
☐ Normal Gait ☐ Restrained (describe) physically by officers
Other Physical Findings: inmate responsive verbally after approx 30 minutes

Assessment: ☒ Normal assessment after use of force ☐ Other

Plan: c/u in medical PRN – Referred to mental health

Education: deferred

Disposition: ☐ No follow-up needed ☐ Follow-up appointment scheduled for ___/___/___ (date)

Referral: ☐ Routine ☒ Urgent ☐ STAT to Mental health

GEORGIA DEPARTMENT OF CORRECTIONS

Use of Force Assessment (cont)

Name Raheem Mustafa

ID Number 917141

Indicate on the diagram below any body marks, such as bruises, discolorations, scabs, cut, bumps or other questionable markings, regardless of how slight. You may draw lines between the titles and the corresponding areas of the human body picture.

ABRASION / BURN

ECCHYMOSIS (BRUISE)

LACERATION / CUT / SCRATCH

PUNCTURE

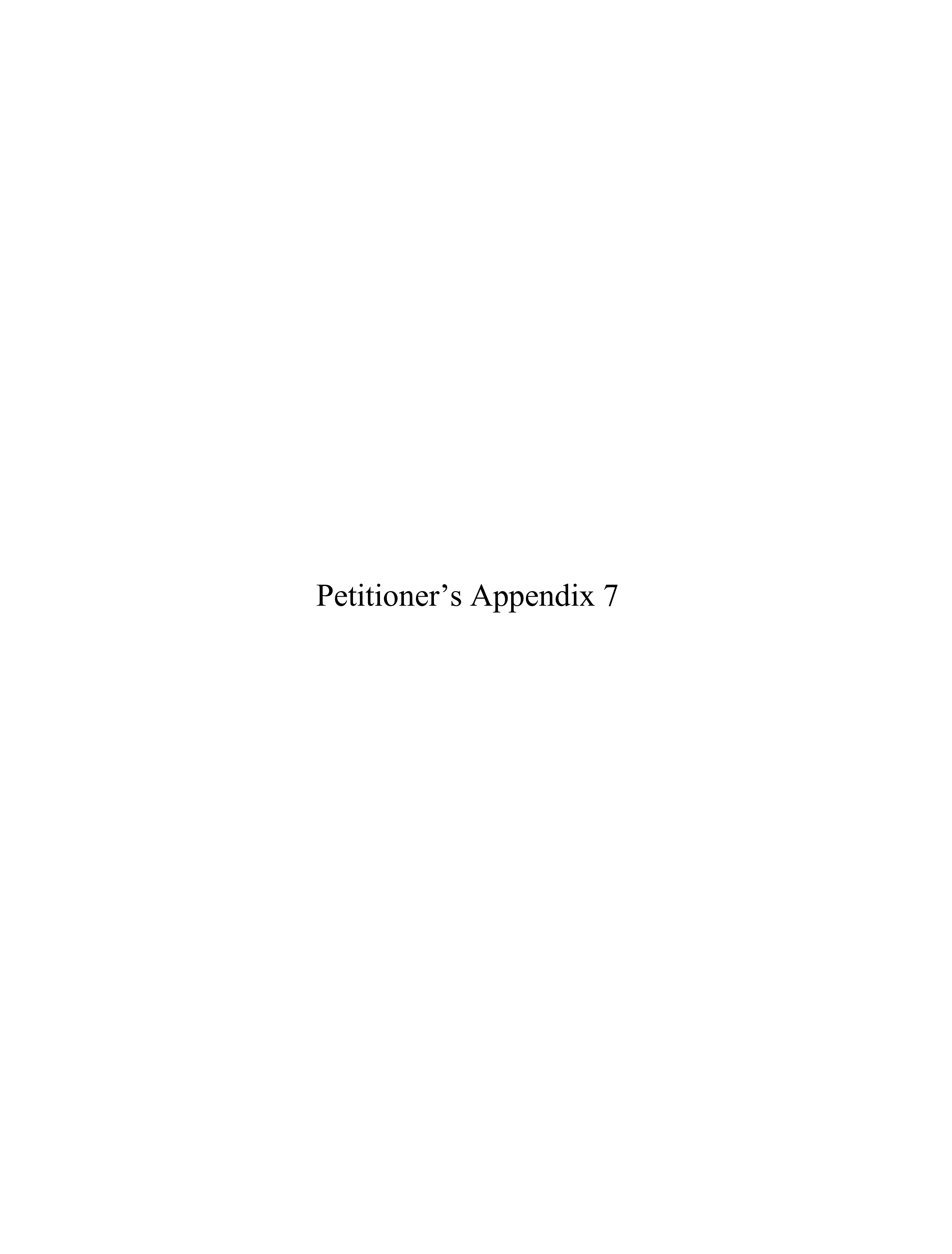
PAIN

SPASM / MUSCLE TENDERNESS

Description of Injuries: none noted

Additional Comments:

Signature [signature] LPN MD / DO / NP / PA / RN / LPN / EMT (circle)



Petitioner’s Appendix 7

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

ASKIA MUSTAFA RAHEEM, Petitioner, v. CARL HUMPHREY, Warden of Georgia Diagnostic Prison, Defendant.	: : : : : : : : : :	CIVIL ACTION NO. 1:11-CV-1694-AT

ORDER

This matter is before the Court on two motions filed by Petitioner on May 22, 2013 – a "Motion To Expand Record/Submission of Admissions of Party-Opponent" [Doc. 53] and a "Motion To Conduct Discovery and Renewed Motion for Evidentiary Hearing/Factual Development" [Doc. 54]. Both motions arise from Petitioner's attempt to establish "that he suffers from brain damage and a seizure disorder and his mental condition bars his execution, that he was incompetent at the time of trial and entitled to a competency hearing, and this his counsel were constitutionally ineffective in failing to raise and litigate these issues."

In particular, Petitioner seeks to add to the record the affidavit of Dr. Melissa Carran which was signed on December 16, 2008 and submitted to the state habeas court on December 31, 2008, nearly a year after the close of the evidentiary hearing which took place from January 28 - January 30, 2008. Dr.

Carran's affidavit is based on her review of the video of Dr. Martell's evaluation of Petitioner; Dr. Martell testified as an expert witness for the state in the habeas proceeding. Dr. Martell testified in 2008 about Petitioner's competency at the time of trial in 2001. While he stated that at that time, 2008, Petitioner suffered from a seizure disorder and was subject to "absence seizures" of up to 30 seconds duration, he also testified that in his opinion Petitioner was competent at the time of the trial, and was probably competent "now", i.e., in 2008.

Petitioner also seeks to add to the record "Department of Corrections mental health records [that] show that Petitioner was diagnosed in 2012 with Dissociative Disorder and Anxiety Disorder, experiencing catatonic states, and with a 'target symptom' and diagnosis of psychosis." Finally, Petitioner seeks to expand the record to include "[r]ecent statements recorded by Respondent's, the Warden's agents [that] document that Petitioner suffers from seizure." These statements relate to an incident that occurred on January 21, 2013. As noted above, Petitioner also seeks to conduct discovery on the issue of his competency at trial.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") limits the circumstances under which a federal court may conduct an evidentiary hearing or allow further factual development in a habeas petition filed under 28 U.S.C. § 2254 as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

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

28 U.S.C. § 2254(e)(2).

In *Williams v. Taylor*, 529 U.S. 420, 437 (2000), the Supreme Court explained the limitations on evidentiary hearings in federal habeas cases created by § 2254:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

See also Isaacs v. Head, 300 F.3d 1232, 1249-50 (11th Cir. 2002). Thus, Section 2254(e)(2) precludes an evidentiary hearing when a petitioner contributes "to the absence of a full and fair adjudication in state court" by failing to diligently

develop his claim unless the petitioner "was unable to develop his claim in state court." *See Williams*, 529 U.S. at 437.

Where a petitioner was diligent in developing the factual bases for his claims in state court, a district court may hold an evidentiary hearing, *Williams v. Allen*, 542 F.3d 1326, 1346-47 (11th Cir. 2008) (citing *Williams v. Taylor*, 529 U.S. at 432), if the state habeas proceeding was conducted in a manner where:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313 (1963), *overruled in part by, Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), *superseded by statute as stated in Williams v. Taylor*, 529 U.S. at 433.

Petitioner contends that his counsel were diligent in developing the factual basis for his claims in the state habeas proceeding and that he is entitled to discovery and expansion of the record because the evidence at issue is relevant to his claims and could not have been developed earlier.

The Court notes that the state habeas court considered and addressed the bulk of the evidence that Petitioner contends supports his contention that he was incompetent to stand trial. The state habeas court noted that trial counsel successfully sought funding for and utilized the services of four mental health experts, successfully sought funding for and obtained an MRI, and that both of

Petitioner's experienced trial counsel testified to the effect that had they had concerns about competency they would have requested a hearing on that issue. Addressing the contention that trial counsel were deficient in litigating the issue of competency, the state habeas court found "that Petitioner has failed to establish deficiency of counsel or resulting prejudice or a miscarriage of justice with regard to Petitioner's claim of incompetency. Accordingly, this court concludes that Petitioner's incompetency claims remain procedurally defaulted."

Petitioner contends that because the state habeas court relied on procedural default, it did not consider his substantive claim of incompetency. Petitioner points out, and Respondent concedes, that a state law procedural default does not preclude this Court from considering the merits of this claim. *Adams v. Wainright*, 764 F.2d 1356, 1359 (11th Cir. 1985) (holding that the procedural default rule of *Wainright v. Sykes*, 433 U.S. 72 (1977), "does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal" from contesting the issue in post-conviction proceedings). *See also Lawrence v. Sec'y, Florida Dept. Of Corrections*, 700 F.3d 464, 481 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1807 (2013).

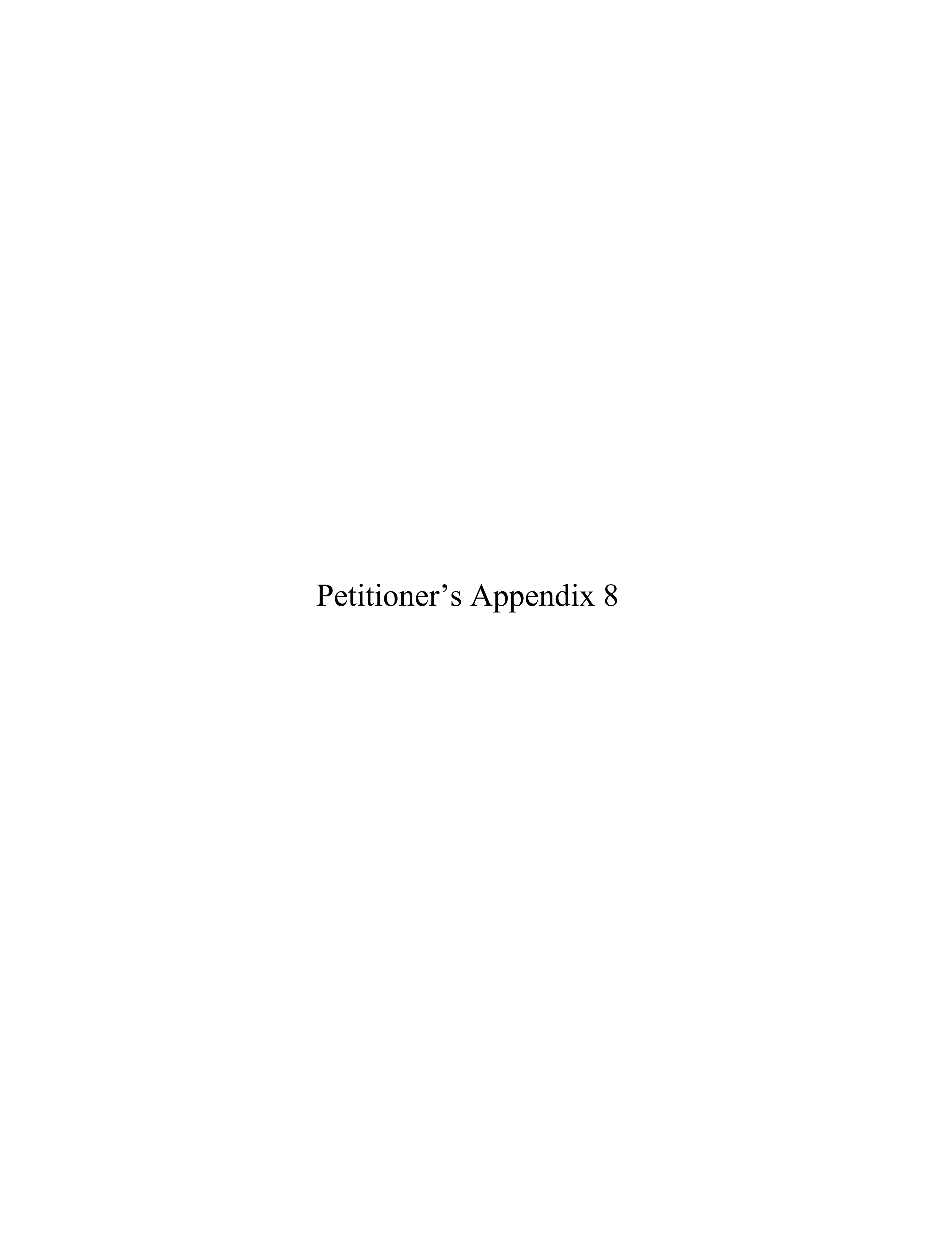
Competence to stand trial is fundamental to any semblance of justice. Had the state habeas court concluded on the record before it that Petitioner's claim that he was incompetent to stand trial contained merit, it would have followed that Petitioner's counsel were deficient in failing to raise the issue at trial or on direct appeal.

In ruling on these motions, however, the Court assumes *arguendo* that a finding of competency to stand trial does not underlie the state habeas court order. In that circumstance, an evidentiary hearing is called for only if the Petitioner's claim has arguable merit. "[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.*; *see also Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 745 (11th Cir. 2010). After review of the record, and noting that the evidence relating to competence to stand trial will be more fully developed in the Court's substantive ruling on the petition for habeas relief, this Court concludes that the relief requested could not enable the Petitioner to prove that he was incompetent to stand trial. Nor does it appear at this point in time that an evidentiary hearing could establish that Petitioner's mental condition bars his execution.

Accordingly, the Court **DENIES** Petitioner's "Motion To Expand Record/Submission of Admissions of Party-Opponent" and "Motion To Conduct Discovery and Renewed Motion for Evidentiary Hearing/Factual Development" subject to possible reconsideration upon the Court's substantive ruling on the petition for habeas relief.

It is so **ORDERED** this 26th day of August, 2013.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE


Petitioner’s Appendix 8

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

ASKIA MUSTAFA RAHEEM,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil Action No. 1:11-CV-1694-AT
	)	
CARL HUMPHREY, Warden,	)	Capital Habeas Corpus
Georgia Diagnostic Prison,	)	
	)	
Respondent.	)	
	)	

MOTION FOR RECONSIDERATION

Petitioner ASKIA MUSTAFA RAHEEM, by and through undersigned counsel, hereby moves this Court to reconsider its Order of August 26, 2013 and grant his Motion to Expand the Record/Submission of Admissions of Party-Opponent (Doc 52) and Motion to Conduct Discovery and Renewed Motion for Evidentiary Hearing or Other Factual Development (Docs. 53 and 54). In support, Petitioner states as follows.

1. In state postconviction proceedings and before this Court, Petitioner pled: he suffers from brain damage and a seizure disorder and his mental condition bars his execution; he was incompetent at the time of trial and entitled to a competency hearing; and his counsel were constitutionally ineffective in failing to raise and litigate these issues. *See* Petition for Writ of Habeas Corpus, Claims I,

V and VI. In state court, Petitioner submitted the affidavit testimony of Dr. Melissa Carran, an expert in the treatment of epilepsy, and other evidence of epilepsy, a seizure disorder. Dr. Carran affirmed the observations of the State's expert, Dr. Martell, that Petitioner suffered from seizures. Dr. Carran reviewed video of Dr. Martell's evaluation of Petitioner and concluded both that Petitioner did suffer from a epilepsy,[1] and that there were ramifications for his competency at the time of trial because of it.[2]

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[1]Dr. Carran's expert opinion was that Petitioner suffered from longstanding, chronic epilepsy, and her affidavit discussed the symptoms evidenced in the Martell video and those described by various witnesses from Petitioner's childhood and before and around the time of Petitioner's trial. *See* Doc. 24-7 at ¶¶ 17, 18, 19, 26, and 27.

[2] According to Dr. Carran, the "documented behaviors and 'choices'" made by Petitioner "are not those of a person with a non-epileptic, normal brain." *Id*. Dr. Carran noted that "the seizures themselves likely affect Mr. Raheem's ability to both assist his attorneys and understand the proceedings against him." Because he is unconscious during the seizures and cannot recall them, this "necessarily effect[s] his ability to follow narrative, to respond appropriately, and to understand fully what is taking place." According to Dr. Carran, "It is evident from the effects of the seizures suffered during Dr. Martell's testing how detrimental these episodes would be to a person facing a criminal trial, where preparation, concentration, and critical evaluation are key." Noting that Mr. Raheem could not recall many of the examples which he was shown during testing with and told Dr. Martell that he had not been shown certain of the cards because he had no memory of them, "[i]t follows that seizures occurring while meeting with his attorneys about evidence, attempting to follow the testimony of witnesses, or evaluating the strength of evidence, and the combined effect over the course of preparation and trial, would clearly compromise Mr. Raheem's ability to assist in his defense."

2. The state court order written by Respondent stated that the State's expert Dr. Martell had "merely presented a theory of 'absence seizures' possibly linked with epilepsy, however, there is no conclusive evidence that Petitioner suffers from such a disorder." Respondent has likewise repeated in its brief to this Court that "the state habeas court noted that there is no conclusive evidence that Petitioner suffers from epilepsy. (Res. Ex. 177 p 91)." Doc. 40 at 69.[3]

3. On May 22, 2013 Petitioner moved to admit to the record in this case evidence obtained from Respondent documenting that in January 2013, Petitioner suffered what are described as seizures, convulsing and unresponsiveness. *See* Doc 52, pp. 3-4, Exhibits A, B, and C; Doc. 53, pp. 4-5, Exhibits A-F, Exhibit K. Other documents obtained from Respondent contradict an exhibit in the state court record relied upon by Respondent to dispute Petitioner's claims relating to competency at the time of trial.[4] *See* Doc 52 at pp. 4-5, Exhibits D, E and F. Petitioner therefore requested that this Court expand the record and admit and consider this evidence, as it meets the criteria for admission of a party opponent pursuant to FRE 801(d)(2) and is clearly relevant to the claims in the petition.

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[3]The Carran affidavit was before the state habeas court but was not discussed in that court's final order, written by Respondent.

[4]Claims I, V and VI of Doc. 1, Petition for Writ of Habeas Corpus. *See supra* at 1.

Doc 52.[5] *See* Habeas Rule 7(a)(court "may direct the parties to expand the record by submitting additional materials relating to the petition.").

4. Petitioner also moved the Court for discovery in the form of deposition testimony by Respondent's agents and the videotape of Petitioner suffering the seizures, (which those agents indicated exists but which was not produced to Petitioner). Finally, Petitioner renewed his request for an evidentiary hearing or other factual development. Doc. 53, 54.[6] The Warden responded to Petitioner's motions by disputing the factual content of the statements by his agents. Doc. 57. Respondent submitted his own document attempting to challenge the substance of Petitioner's claims, i.e. a notation by a prison employee that Mr. Raheem's "excessive thrashing around" did not constitute a seizure, and a CT scan which did not show "evidence of acute intercranial process". Doc. 57 at 7-8.[7]

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[5]Evidence showing Petitioner suffers from seizures now is important because it confirms the diagnosis of Petitioner as suffering from chronic, untreated epilepsy with all the ramifications for competency described by Dr. Carran. That diagnosis has significance for Petitioner's claims and is directly disputed by Respondent.

[6]Petitioner originally requested an evidentiary hearing or other factual development as part of the one and only brief on all issues, ordered by the Court. Doc. 38. The Court denied an evidentiary hearing. Doc. 50.

[7]Petitioner's reply, Doc. 59 at 11-12, pointed out that a CT scan relied on by Respondent to dispute the seizure, actually took place the day before the seizure.

5. The Court issued an Order on August 26, 2013. Doc. 60. It concluded that Petitioner is not entitled to an evidentiary hearing because none of the evidence he seeks to enter into the record or discovery he wishes to conduct would prove he was incompetent to stand trial. Petitioner respectfully requests the Court reconsider its Order and allow the requested expansion of the record and requested discovery.

A. The Order is Mistaken as to the Evidence with which Petitioner Seeks to Expand the Record

1. Petitioner moved this Court to expand the record upon discovering that Respondent's agents had observed Petitioner having seizures. Specifically, Petitioner sought to expand the record with the documents obtained from Respondent containing these observations/admissions. *See* Doc. 52. Petitioner did not, as the Order contends, seek to add to the record the affidavit of epileptologist Dr. Melissa Carran. Dr. Carran's affidavit was submitted in state court and is already part of the state court record.[8] *See* Doc. 24-7.

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[8]As noted previously, Petitioner submitted the affidavit with his post-hearing brief in state court; Respondent moved to strike the affidavit and the state court did not do so. The state court subsequently denied the petition. Petitioner attached Dr. Carran's curriculum vitae to his Reply in this Court (Doc. 59) to Respondent's Opposition to his Motions (Doc. 57) only because Respondent wrote that Dr. Carran "identified herself as an expert in diagnosing epilepsy." (emphasis added). Dr. Carran is an expert, and her expert opinion and diagnosis that Petitioner suffers from epilepsy was developed and submitted in state court.

2. To the extent the Court's belief that the Carran affidavit was not in the record and thus properly before the state court influenced the Court's denial of Petitioner's motions, the Court should reconsider Petitioner's requests in light of that evidence.

B. The Only Evidence On Which Petitioner Seeks to Expand the Record/Conduct Discovery is the Evidence Created by Respondent in 2012 and 2013 – After the State Court Proceedings

1. To qualify as the admission of a party-opponent, the only two requirements under FRE 801(d)(2)(A) are 1) a statement is made by a party and 2) the statement was offered against that party.[9] The Order does not address how the statements of Respondent's agents do not qualify pursuant to that standard.[10]

Petitioner's reply (Doc. 57) discusses in detail why Respondent's claim that Petitioner "did not pursue a 'direct' evaluation of epileptic brain seizures" is a non-issue.

[9]The only two requirements for admissibility of the admission of a party-opponent under FRE 801(d)(2)(A) are 1) a statement was made by a party and 2) the statement was offered against that party. *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013). "A statement 'made by [a] party's agent or employee on a matter within the scope of that relationship and while it existed,' . . . is an admission by a party opponent and is not considered to be hearsay. Fed.R.Evid. 801(d)(2)." *Wright v. Farouk Systems, Inc.* 701 F.3d 907 (11th Cir. 2012). Under Habeas Rule 7(a), a court "may direct the parties to expand the record by submitting additional materials relating to the petition." Thus this Court may supplement the record in this case with the requested documents pursuant to either of these provisions.

[10]In addition to disputing that Petitioner suffers from seizures, Respondent specifically relied on DOC mental health forms diagnosing Petitioner as "only"

The Order instead states that assuming the state habeas court did not rule substantively on Petitioner's competency to stand trial,[11] Petitioner was not entitled to an evidentiary hearing because "the relief requested could not enable Petitioner to prove he was incompetent to stand trial." Doc 60 at 6. "Nor does it appear at this point in time that an evidentiary hearing could establish that Petitioner's mental condition bars his execution." *Id*.

C. To Supplement the Record with the Admissions of a Party Opponent or For Discovery, Petitioner Should Not Have to Show That Evidence Would Conclusively Prove That He was Incompetent at Trial or that He Meets the Standards for Granting an Evidentiary Hearing

1. Petitioner has shown: 1) the presence of seizures now, as documented by the admissions of Respondent[12]; 2) the presence of seizures in 2008 during state

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antisocial. *See* Doc. 40, Respondent's brief at 97-98. The documents Petitioner seeks to include in the record contain different diagnoses, by Respondent's agents, of Dissociative Disorder, Anxiety Disorder, experiencing catatonic states, and with "target symptom" and diagnosis of psychosis. These have far more grave implications for Petitioner's mental status than does "only" antisocial. *See* Doc. 52, attachments D, E and F.

[11]The Court states that it "assum[es] arguendo that a finding of competency to stand trial does not underlie the state habeas court order," and concludes that a hearing would not enable Petitioner to prove he was incompetent and entitle him to relief. Doc 60 at 6. The Order quotes *Schiro v. Landrigan*, 550 U.S. 465, 474 (2007) for this point. Notably, the *Schiro* court had permitted expansion of the record prior to ruling on the Petitioner's evidentiary hearing request.

[12]*See* Doc. 52, Exhibits A-F; Doc. 53, Exhibits A-K.

habeas proceedings, as documented by Dr. Martell, Dr. Gur and Dr. Carran; 3) the presence of seizures in 2001, as presented to the trial court in testimony regarding episodes of "falling out," and other behaviors, and a described by trial counsel (*see* HT 569-70, Doc. 38 at 120-146); and 4) the presence of seizures in Petitioner's childhood, as documented in the unrefuted testimony presented in the state habeas court. As Dr. Carran's affidavit testimony makes clear, this longstanding, chronic epilepsy has direct implications for Petitioner's competency at the time of trial.

2. While standing alone the evidence recently documented by Respondent which Petitioner seeks to have included in the record may not prove incompetency at the time of trial, Petitioner should not be required to prove that it would for it to be included as a party admission,[13] or for discovery.[14] In addition to his 14th

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[13]Petitioner also should not be required to prove incompetency in this proceeding. Retrospective attempts to determine competency, even "under the most favorable circumstances," are hampered by "inherent difficulties." *Drope v Missouri*, 420 U.S. 162, 183, 95 S.Ct. 896 (1975). Accordingly, where several years have passed since the trial took place, retrospective determinations are usually impossible. *See Griffin v. Lockhart*, 935 F.2d 926, 931 (8th Cir. 1992) ("over three years have passed since [petitioner's] trial and it seems impossible to now conduct a meaningful nunc pro tunc hearing. Accordingly, we direct that the writ of habeas corpus be issued"). Given the length of time since Petitioner's trial, no retrospective determination of his incompetency should be attempted.

[14] According to the commentary to Rule 6,

> where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully

Amendment right not to be tried while incompetent, *Drope v Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975), Petitioner also had a due process right to a competency hearing whenever the evidence raised a "sufficient doubt" about the defendant's competency. *Pate v. Robinson,* 383 U.S. 375 (1966)(trial court required to hold a competency hearing *sua sponte* when aware of information that raises a "bona fide doubt as to the petitioner's competency").

3. Petitioner has shown that there was ample evidence leading up to and during the trial which should have prompted the trial court to inquire into Petitioner's competency. *See, e.g.,* Doc. 38 at 120-134. "In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into

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> developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

Petitioner need only show that the facts, if developed, may show that he is illegally confined. "Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence relating to his petition." *Payne v. Bell*, 89 F.Supp.2d 967, 970 (W.D. Tenn. 2000).

petitioner's competence to stand trial, denied him a fair trial." *Drope*, 420 U.S. 162 at 175. A separate, related issue is trial counsel's constitutionally ineffective performance in failing to recognize and seek a competency determination when, as counsel testified, "we had our doubts [about competency], there's no question about that." RX 106 at 371. *See also* Doc. 38 at 134-143.

4. The evidence Petitioner seeks to have included in the record confirms the diagnosis of Petitioner as suffering from chronic, untreated epilepsy with all the ramifications for competency described by Dr. Carran. It confirms, augments and strengthens the evidence already in the record as to incompetency and the symptoms displayed by Petitioner before trial and observed by or known to the trial court and counsel. Even if this Court believes that an evidentiary hearing "could not enable the Petitioner to prove that he was incompetent to stand trial," it does not mean that expansion of the record to include Respondent's admissions, and/or factual development in the form of deposition testimony from observers and the videotape of Petitioner's seizures, is not appropriate to Petitioner's Sixth and 14th Amendment claims.[15]

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[15]Moreover, Petitioner maintains this Court has ample discretion to hold an evidentiary hearing in this case, given the Respondent-written state habeas court order which ignored or reduced to irrelevance all of Petitioner's evidence supporting these claims. *See* Doc 38 at Section 1 and at p. 137, n. 100, n. 101.

D. The Evidence is Relevant to Petitioner's Claim that His Mental Condition Bars His Execution

1. The Order also states that "it does not appear at this time that an evidentiary hearing could establish that Petitioner's mental condition bars his execution." Doc. 60 at 6. Petitioner is asking that the Court allow supplementation of the record with evidence of current seizures and diagnoses by Respondent which are clearly relevant to his Petitioners mental condition. Petitioner's claim is that his lifelong major mental illnesses, brain damage and epileptic seizures mean his death sentence is disproportionate punishment under the Eighth Amendment. This evidence is relevant to that. He need not show that an evidentiary hearing could establish the claim, and this Court should reconsider its Order.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that the Court reconsider its Order and grant Petitioner's Motion to Expand the Record/Submission of Admissions of Party-Opponent (Doc. 52) and Motion to Conduct Discovery and Renewed Motion for Evidentiary Hearing or Other Factual Development (Docs. 53 and 54).

Dated: September 20, 2013

Respectfully submitted:

s:/ Mark E. Olive

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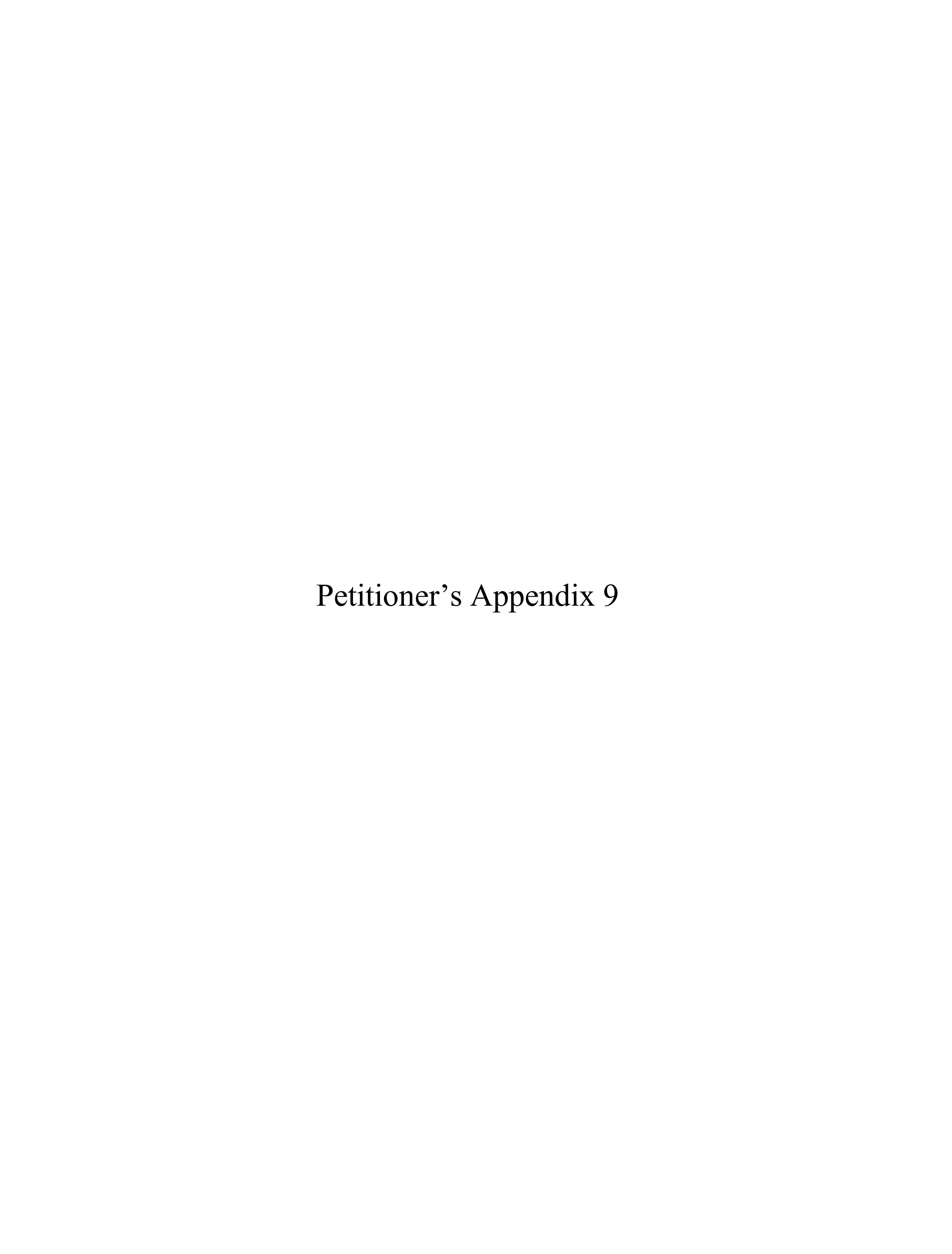
CERTIFICATE OF SERVICE

I hereby certify that this pleading has been filed electronically with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Richard Tangum
Assistant Attorney General
Office of Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Dated: This 20th day of September, 2013.

s:/ *Gretchen Stork*
GRETCHEN STORK
State of Georgia Bar No. 685555



Petitioner’s Appendix 9

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

ASKIA MUSTAFA RAHEEM, Petitioner, v. CARL HUMPHREY, Warden, Georgia Diagnostic Prison, Respondent.	: : : : : : : : : :	 CIVIL ACTION NO. 1:11-CV-1694-AT

ORDER

This matter is before the Court on Petitioner's Motion for Reconsideration [Doc. 61], filed September 20, 2013, which sought reconsideration of the Court's Order of August 26, 2013. In that Order the Court denied Petitioner's Motions filed May 22, 2013 — a "Motion to Expand Record/Submission of Admissions of Party-Opponent" and a "Motion to Conduct Discovery and Renewed Motion for Evidentiary Hearing/Factual Development."

I. THE CARRAN AFFIDAVIT

With reference to the "Motion to Expand Record/Submission of Admissions of Party-Opponent," Petitioner complains that the Court erred in assuming that Petitioner sought to add to the record the affidavit of Dr. Melissa Carran. According to Petitioner, "Dr. Carran's affidavit was submitted in state court and is already part of the state court record." (Mot. Reconsideration at 5, Doc. 61.)

Petitioner is correct that the Court treated his motion as seeking to expand the record to include the Carran affidavit because Petitioner relied in his arguments on the contents of the affidavit, and the affidavit is not in fact part of the record. As Petitioner explains, "Petitioner submitted the affidavit with his post-hearing brief in State court; Respondent moved to strike the affidavit and the court did not do so." (Mot. Reconsideration at 5 n.8.) Simply attaching an affidavit to a post-hearing brief is not the equivalent of introducing the affidavit into the record of the proceeding. Nor does it comply with the requisites of O.C.G.A. § 9-14-48(c), which provides, "If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce such an affidavit shall cause it to be served upon the opposing party at least ten days in advance of the date set for a hearing in the case." It is this Court's opinion that the affidavit is not part of the record in this matter.

II. DEPARTMENT OF CORRECTIONS RECORDS

Petitioner's Motion did seek to add to the record "Department of Corrections mental health records [that] show that Petitioner was diagnosed in 2012 with Dissociative Disorder and Anxiety Disorder, experiencing catatonic states, and with a 'target symptom' and diagnosis of psychosis." (Doc. 52 at 5.) Petitioner also sought to expand the record to include "[r]ecent statements recorded by Respondent's, the Warden's agents [that] document that Petitioner suffers from seizure." (*Id.* at 3.) These statements relate to an incident that occurred on January 21, 2013.

Petitioner seeks to expand the record to include this evidence and to conduct discovery with reference to it because of its alleged relevance to his claims "that he was incompetent at the time of trial [2001] and entitled to a competency hearing; and his counsel were constitutionally ineffective in failing to raise and litigate these issues." (*Id.* at 1.) Having reviewed the record, this Court concludes that the evidence at issue is not sufficiently relevant to Petitioner's claims to provide good cause to expand the record or to allow Petitioner to conduct discovery. *See Crawford v. Head*, 311 F.3d 1288, 1328 (11th Cir. 2002), *cert. denied*, 540 U.S. 1086 (2003).

Finally, Petitioner contends this evidence is relevant to his claim that his mental condition bars execution. This issue is not ripe for decision. "Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh." *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1260 (11th Cir. 2009), *cert. denied*, 555 U.S. 1161 (2009); *see also Connor v. Secretary, Florida Dept. of Corrections*, 713 F.3d 609, 625 (11th Cir. 2013), *cert. denied sub nom. Connor v. Crews*, 134 S. Ct. 325 (2013) ("[C]ompetency to be executed [is] simply not now ripe for adjudication because the state has not set an execution date." (citing *Panetti v. Quarterman*, 551 U.S. 930, 945-47 (2007))). **Motion Denied**.

IT IS SO ORDERED this 29th day of September, 2014.

Amy Totenberg
United States District Judge