No. _______

IN THE

Supreme Court of the United States

WILLIE JAMES PYE,
Petitioner,

v.

SHAWN EMMONS, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,
Respondent.

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

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[**Date Filed: 01/25/2023**]

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 18-12147

WILLIE JAMES PYE,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:13-cv-00119-TCB

Before WILSON and JILL PRYOR, Circuit Judges.*

PER CURIAM:

After a jury found defendant Willie James Pye guilty of malice murder, kidnapping with bodily injury, armed

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* Due to the retirement of Judge Beverly B. Martin, this case is decided by a quorum. *See* 28 U.S.C. § 46(d); 11th Cir. R. 34-2.

robbery, burglary, and rape, he was sentenced to death. In federal habeas proceedings, Pye challenged his convictions and sentence on several grounds, including that his trial counsel provided ineffective assistance at the penalty stage and that he could not be executed because he had an intellectual disability.

After oral argument, this panel concluded that Pye was entitled to relief on his ineffective-assistance-of-counsel claim but did not reach his intellectual-disability claim. *See Pye v. Warden, Ga. Diagnostic Prison*, 853 F. App'x 548, 548 & n.1 (11th Cir. 2021) (unpublished). The panel opinion was later vacated, and this Court sitting en banc held that Pye was not entitled to habeas relief on his ineffective-assistance-of-counsel claim because "the state court reasonably concluded that Pye was not prejudiced by any of his counsel's alleged deficiencies in connecting with his sentencing proceeding." *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1030 (11th Cir. 2022) (en banc). The en banc court remanded the case back to the panel for further proceedings so that we could consider the intellectual-disability claim. *See id.* at 1057.

The Supreme Court has held that the execution of a person with an intellectual disability violates the Eighth Amendment's prohibition on cruel and unusual punishments. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Atkins*, the Supreme Court stated that it was "leav[ing] to the States the task of developing appropriate ways to enforce the constitutional restriction" banning the execution of individuals with intellectual disabilities. *Id.* at 317 (alteration adopted) (internal quotation marks omitted).

Under Georgia law, to prove an intellectual disability, a defendant must establish three things: (1) "that he has

significantly subaverage general intellectual functioning"; (2) "this functioning is associated with impairments in adaptive behavior"; and (3) "the functioning and associated impairments manifested during the developmental period," meaning before the defendant turned 18 years of age. *Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014) (internal quotation marks omitted); *see* O.C.G.A. § 17-7-131(a)(2). Georgia law requires a defendant to prove beyond a reasonable doubt that he has an intellectual disability. *See* O.C.G.A. § 17-7-131(c)(3).

Our focus in this appeal is whether Pye satisfied the second prong of the intellectual-disability standard. Pye argues that he established beyond a reasonable doubt that he has the requisite adaptive deficits. After careful consideration, we conclude that the state court's decision that Pye failed to carry his burden was not unreasonable and thus is entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254(d). We reach this conclusion for the reasons stated in the district court's well-reasoned order.

Pye also argues on appeal that Georgia's requirement that a defendant prove beyond a reasonable doubt that he has an intellectual disability violates the Eighth and Fourteenth Amendments. Pye raised the claim in his state habeas proceedings, and the state habeas court summarily rejected it. Our precedent makes clear that this decision, too, was not unreasonable and therefore is entitled to AEDPA deference. *See Raulerson v. Warden*, 928 F.3d 987, 1001-04 (11th Cir. 2019) (affording deference to state habeas court decision rejecting similar due process claim); *Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011)

(en banc) (affording deference to state habeas court decision rejecting similar Eighth Amendment claim).

We thus affirm the denial of relief on Pye's intellectual disability claim.

AFFIRMED.

APPENDIX B

[**Date Filed: 10/04/2022**]

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 18-12147

WILLIE JAMES PYE,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:13-cv-00119-TCB

Before WILLIAM PRYOR, Chief Judge, WILSON, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, LUCK, LAGOA, and BRASHER, Circuit Judges.*

NEWSOM, Circuit Judge, delivered the opinion of the Court, in which WILLIAM PRYOR, Chief Judge, and

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* Judge Grant is recused.

BRANCH, LUCK, LAGOA, and BRASHER, Circuit Judges, joined.

JORDAN, Circuit Judge, filed an opinion concurring in the judgment, in which ROSENBAUM, Circuit Judge, joined.

JILL PRYOR, Circuit Judge, filed a dissenting opinion, in which WILSON, Circuit Judge, joined.

NEWSOM, Circuit Judge:

More than a quarter century ago, Willie James Pye was convicted by a Georgia jury of having kidnapped, robbed, gang-raped, and viciously murdered Alicia Yarbrough. The jury recommended that Pye be sentenced to death for his crimes, and the trial judge so sentenced him. Having exhausted his state post-conviction remedies, Pye filed a federal habeas corpus petition, arguing, as relevant here, that his trial counsel rendered him constitutionally ineffective assistance in connection with the sentencing phase of his trial. The district court denied relief, but a panel of this Court reversed and vacated Pye's death sentence, holding that the state court's rejection of his ineffective-assistance-of-counsel claim was based on an unreasonable determination of the facts and involved an unreasonable application of clearly established federal law. *See Pye v. Warden, Ga. Diagnostic Prison*, 853 F. App'x 548, 570-71 (11th Cir.), *reh'g en banc granted*, 9 F.4th 1372 (11th Cir. 2021); 28 U.S.C. § 2254(d).

We granted rehearing en banc to decide whether the state court's decision that Pye is not entitled to relief on his ineffective-assistance claim warrants deference under the Antiterrorism and Effective Death Penalty Act (AEDPA). Because the state court reasonably concluded that Pye was not prejudiced by any of his counsel's alleged

deficiencies in connection with his sentencing proceeding, we affirm the district court's denial of Pye's petition and remand to the panel for further proceedings.

I

A

The Georgia Supreme Court's decision on direct appeal recounts the grisly facts of Pye's crimes:

> Pye had been in a sporadic romantic relationship with the victim, Alicia Lynn Yarbrough, but, at the time of her murder, Ms. Yarbrough was living with another man, Charles Puckett. Pye and two companions, Chester Adams and Anthony Freeman, planned to rob Puckett because Pye had heard that Puckett had just collected money from the settlement of a lawsuit. Pye was also angry because Puckett had signed the birth certificate of a child whom Pye claimed as his own.
>
> The three men drove to Griffin[, Georgia] in Adams' car and, in a street transaction, Pye bought a large, distinctive .22 pistol. They then went to a party where a witness observed Pye in possession of the large .22. Just before midnight, the three left the party and drove toward Puckett's house. As they were leaving, a witness heard Pye say, "it's time, let's do it." All of the men put on the ski masks which Pye had brought with him, and Pye and Adams also put on gloves.
>
> They approached Puckett's house on foot and observed that only Ms. Yarbrough and her baby were home. Pye tried to open a window and Ms. Yarbrough saw him and screamed. Pye ran around

to the front door, kicked it in, and held Ms. Yarbrough at gunpoint. After determining that there was no money in the house, they took a ring and a necklace from Ms. Yarbrough and abducted her, leaving the infant in the house. The men drove to a nearby motel where Pye rented a room using an alias. In the motel room, the three men took turns raping Ms. Yarbrough at gunpoint. Pye was angry with Ms. Yarbrough and said, "You let Puckett sign my baby's birth certificate."

After attempting to eliminate their fingerprints from the motel room, the three men and Ms. Yarbrough left in Adams' car. Pye whispered in Adams' ear and Adams turned off onto a dirt road. Pye then ordered Ms. Yarbrough out of the car, made her lie face down, and shot her three times, killing her. As they were driving away, Pye tossed the gloves, masks, and the large .22 from the car. The police later recovered these items and found the victim's body only a few hours after she was killed. A hair found on one of the masks was consistent with the victim's hair, and a ballistics expert determined that there was a 90% probability that a bullet found in the victim's body had been fired by the .22. Semen was found in the victim's body and DNA taken from the semen matched Pye's DNA. When Pye talked to the police later that day, he stated that he had not seen the victim in at least two weeks. However, Freeman confessed and later testified for the State.

Pye v. State, 505 S.E.2d 4, 9-10 (Ga. 1998). Based on the evidence presented, a Georgia jury found Pye guilty of

malice murder, kidnapping with bodily injury, armed robbery, burglary, and rape.

Attorney Johnny Mostiler represented Pye at both the guilt and penalty phases of his trial. At sentencing, Mostiler—with help from his investigator Dewey Yarbrough, who had no relation to the victim—called eight witnesses to testify on Pye's behalf: Pye's sister Pam Bland, sister Sandy Starks, brother Ricky Pye, father Ernest Pye, niece Chanika Pye, nephew Dantarius Usher, sister-in-law Bridgett Pye, and family friend Lillian Buckner. While Mostiler elicited some testimony about Pye's impoverished upbringing—for instance, that his childhood home lacked running water and heat—Pye's witnesses mainly testified to his good moral character and asked the jury to show mercy by declining to impose a death sentence. The State, meanwhile, presented evidence of Pye's reputation for violence in the community, earlier crimes and altercations with Alicia Yarbrough, and the aggravating circumstances of the murder. The State also argued Pye would pose a danger to prison staff were he to remain incarcerated. The jury recommended a death sentence, which the trial court imposed, and the Georgia Supreme Court affirmed. *See id.* at 14.

B

Pye filed a petition for post-conviction relief in the Butts County Superior Court. He raised numerous grounds, including, as relevant here, that Mostiler had provided constitutionally ineffective assistance of counsel during the sentencing phase of his trial by failing to "conduct an adequate pretrial investigation into [Pye's] life, background, physical and psychiatric health to uncover and present to the jury evidence in mitigation." Doc. 13-

31 at 13; *see Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that an attorney's performance is constitutionally ineffective when he (1) renders deficient performance (2) that prejudices the defendant). The state court conducted a three-day evidentiary hearing. In support of his petition, Pye presented affidavit testimony from 27 witnesses, 24 of whom testified about matters relevant to his ineffective-assistance-at-sentencing claim. Many of these affiants asserted (1) that Pye's childhood was marked by significant poverty, abuse, and neglect—mitigating circumstances that, Pye argues, his trial counsel failed to present at sentencing—and (2) that they would have been willing to testify to these facts had they been asked to do so at the time of sentencing but were never contacted by Pye's trial team. Two corrections officers who had known Pye during an earlier period of incarceration provided affidavit testimony that Pye was not a dangerous inmate. Pye also offered testimony from mental-health experts that he suffered from frontal-lobe brain damage that impaired his ability to plan and control his impulses—damage, they said, that was potentially caused by fetal alcohol syndrome.

The State's response to Pye's petition, as relevant here, included testimony from Dewey Yarbrough. Yarbrough testified that he and Mostiler investigated Pye's background in preparation for trial but found Pye's family generally unwilling to cooperate in his defense or to help pursue other leads. The State also called its own mental-health expert, who testified that the facts of Pye's crime, which involved significant premeditation and planning, weren't consistent with frontal-lobe impairment or fetal-alcohol syndrome—though he acknowledged that Pye had

cognitive deficits that would have affected his ability to function in the community.

The Butts County court denied relief on all counts. The court concluded that Mostiler's performance at sentencing wasn't constitutionally deficient and that, even if it was, it didn't prejudice Pye. With respect to evidence of Pye's childhood of poverty and abuse, the court concluded that any failure to investigate and present this evidence wasn't prejudicial. In so holding, the court emphasized (1) credibility concerns regarding the affidavit testimony presented at the state post-conviction proceedings; (2) evidence of Pye's family's unwillingness to cooperate in his defense at the time of trial; (3) the minimal connection between Pye's background and the crimes he committed; (4) Pye's age at the time of his crimes; and (5) the extensive aggravating evidence presented by the State at sentencing. *See* Doc. 20-40 at 64-67. With respect to Pye's mental-health evidence, the court credited the testimony of the State's expert that Pye was not as impaired as his witnesses suggested. *Id.* at 63-64. And with respect to Pye's evidence of his behavior in prison and lack of future dangerousness, the court concluded that disciplinary reports in Pye's prison records indicated "a history of insubordination, aggressiveness and propensity for violence toward those in authority" that negated any reasonable probability that testimony like that offered by the corrections officers during state post-conviction proceedings would have affected the outcome of sentencing. *Id.* at 61-62. The Georgia Supreme Court summarily denied Pye a certificate of probable cause to appeal.

C

Pye filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia. In his amended petition, Pye alleged 16 claims for relief, including a claim that Mostiler provided ineffective assistance during the penalty phase of the trial by failing to conduct an adequate mitigation investigation. The district court rejected Pye's ineffective-assistance claim, reviewing the state court's decision deferentially under AEDPA. As to *Strickland*'s deficient-performance prong, the district court emphasized that Mostiler and Yarbrough had visited Pye's home more than once and obviously knew about his childhood living conditions. The court held that Pye had failed to "rebut the theory that counsel could have reasonably determined that a strategy of humanizing [Pye], highlighting the fact that [he] did not have a violent reputation, and begging for mercy would be preferred to attempting to provide excuses for [his] crimes because he had led a difficult life." On prejudice, the district court concluded that while Pye had demonstrated an impoverished upbringing and that there was some evidence of "fighting by and among [his] family members," he hadn't "presented evidence that he was subjected to regular and brutal beatings, sexual abuse, or conditions so severe that the state had to step in and remove [him] and his siblings from the home or that his parents were charged with neglect," as might overcome the aggravating evidence and thus undermine confidence in his sentence. Pye timely appealed.

A three-judge panel of this Court reversed the district court and vacated Pye's death sentence in an unpublished opinion. *Pye*, 853 F. App'x 548. The panel held that the

district court erred in rejecting Pye's sentencing-phase *Strickland* claim because the state court's conclusions as to both deficient performance and prejudice were based on unreasonable factual determinations and involved unreasonable applications of *Strickland*—and therefore weren't entitled to AEDPA deference. *Id.* at 563, 567. Engaging in de novo review, the panel held that Mostiler's performance at sentencing was deficient because he failed (1) to conduct a sufficient investigation into the potentially mitigating circumstances of Pye's background—specifically, his childhood history of extreme poverty and abuse; (2) to obtain a mental-health evaluation of Pye or otherwise uncover his mental deficiencies; and (3) to attempt to rebut the State's argument about Pye's future dangerousness. *Id.* at 563-65. The panel concluded that these deficiencies were prejudicial notwithstanding the aggravating evidence that the State presented at sentencing, and thus concluded that Pye was entitled to habeas relief. *Id.* at 570-71.

The State filed a petition for rehearing en banc, which presented a single issue: whether the panel's review "of the state court's determination that the petitioner failed to establish prejudice at the sentencing phase" conflicts with Eleventh Circuit and Supreme Court precedent. App. Doc. 59 at 1. After this Court voted to rehear the case en banc, we issued a briefing notice that framed the issue somewhat more generally: whether the state court's decision that Pye's trial counsel "did not render constitutionally ineffective assistance during the penalty phase of trial" was contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. App. Doc. 62 at 1. Pye's opening en banc brief focused almost exclusively on the

prejudice prong of *Strickland*'s two-part test, noting that because "the [state] did not seek rehearing of" the panel's deficient-performance holding, it had abandoned that issue. En Banc Br. of Appellant at 70 n.20. The State's brief in response addressed only prejudice but said, in a footnote, that it had focused on prejudice because "it [was] easier to do so in this case" and that it was "not conceding that trial counsel's performance was deficient." En Banc Br. of Appellee at 39 n.8.

Given the State's failure to seek rehearing on or brief the merits of the deficient-performance issue, we won't consider whether the district court erred in holding that the state court's conclusion as to deficient performance at sentencing was reasonable and entitled to deference. Instead, we will assume that Mostiler's performance was deficient and evaluate only the state court's conclusion that Pye was not prejudiced by these alleged deficiencies.

II

A

We review de novo a district court's denial of habeas relief on an ineffective-assistance-of-counsel claim, which presents a mixed question of law and fact. *See Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 620 (11th Cir. 2013).

When a state court has adjudicated a habeas petitioner's claim on the merits, we review its decision under AEDPA's "highly deferential" standards. *Davis v. Ayala*, 576 U.S. 257, 269 (2015). Under those standards, we may not grant the writ unless the state court's "adjudication of the claim . . . (1) resulted in a decision that was contrary

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To meet the "unreasonable application" standard, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quotation marks omitted). The decision must be "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* (quotation marks omitted). When it comes to factual determinations, "[s]tate court fact-findings are entitled to a presumption of correctness unless the petitioner rebuts that presumption by clear and convincing evidence." *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015); *see* 28 U.S.C. § 2254(e)(1). Overall, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation marks omitted).

When the final state court decision on the merits doesn't come with reasons—as here, where the Georgia Supreme Court summarily denied Pye a certificate of probable cause to appeal the denial of his habeas petition—the federal court must "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

B

Before diving into the merits, we pause to clarify three points about AEDPA's standard of review.[1]

1

First, despite some lingering confusion—including among the parties here—it's not (any longer) the law that a federal court should decline to defer to a state court's factual determinations if it concludes that those findings "lacked . . . fair support in the record." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (quotation omitted). Unlike this case, *Rose* involved a habeas petition filed "before the effective date of [AEDPA]," so it applied "pre-AEDPA law." *Id.* at 1240. The pre-AEDPA version of the federal habeas statute "provided that factual findings of a state court were presumed to be correct unless 'the Federal court on consideration of the record as a whole concludes that such factual determination is not *fairly supported by the record*.'" *Fugate v. Head*, 261 F.3d 1206, 1215 n.11 (11th Cir. 2001) (emphasis added) (quoting 28 U.S.C. § 2254(d)(8) (1994)). In AEDPA, Congress eliminated and replaced the fair-support-in-the-record standard. Under the amended statute, a state court's factual determinations are "presumed to be correct," and the petitioner has the burden of proving otherwise "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

---

[1] It seems clear enough that our dissenting colleagues don't much like AEDPA, whose "abstruse language," they say, leaves much to "imagination and rumination." Dissenting Op. at 12. Not to put too fine a point on it, but the statute is what it is and says what it says. Congress passed it, and President Clinton signed it. *See* U.S. Const. art. I, § 7. It is now our job to apply it according to its terms.

Second, even if a petitioner successfully carries his burden under § 2254(e)(1)—showing by clear and convincing evidence that a particular state-court factual determination was wrong—he does not necessarily meet his burden under § 2254(d)(2): Even if the state court made a clearly erroneous factual determination, that doesn't necessarily mean the state court's "decision" was "based on" an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). Depending on the importance of the factual error to the state court's ultimate "decision," that decision might still be reasonable "even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an 'unreasonable determination of the facts' and isn't 'based on' any such determination." *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1224-25 (11th Cir. 2021) (Newsom, J., concurring) (quoting 28 U.S.C. § 2254(d)(2)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (noting that subsections (e)(1) and (d)(2) are "independent requirements").[2]

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[2] The dissent vehemently objects to our explanation of the "interplay" between §§ 2254(d)(2) and (e)(1)—not, to be clear, to the *merits* of our explanation, but to the fact that we have offered it at all. Calling our decision to address those sections' relationship "irregular[]," "wrong," and "odd at best," the dissent equates our discussion to a "'takeover of the appeal.'" Dissenting Op. at 33 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 1581 (2020)); *see also* Concurring Op. at 1 (citing *Sineneng-Smith*, 140 S. Ct. at 1579-80). We respectfully disagree. This case doesn't remotely present the situation that the Supreme Court confronted in *Sineneng-Smith* or that this Court recently debated in *United States v. Campbell*, 26 F.4th

3

Third, although the Supreme Court's decision in *Wilson* instructs us to "review[ ] the specific reasons given by the state court and defer[ ] to those reasons if they are reasonable," 138 S. Ct. at 1192, we are not required, in assessing the reasonableness of a state court's reasons for its decision, to strictly limit our review to the particular *justifications* that the state court provided. Rather, in order to "give appropriate deference to [the state court's] decision," *id.*, having determined the *reasons* for the state court's decision, we may consider any potential *justification* for those reasons. If, as here, the "specific reason[ ]" for a state court's decision to deny habeas relief was that the petitioner wasn't prejudiced by his counsel's deficient performance, we can, in evaluating whether that "reason [was] reasonable," *id.*, consider additional rationales that support the state court's prejudice determination. We have so held repeatedly, both before and since *Wilson*.

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860 (11th Cir. 2022) (en banc). Those cases considered the questions whether and under what circumstances it is appropriate for an appellate court to consider *sua sponte* a discrete legal issue, claim, or defense that the parties haven't squarely presented. Here, by contrast, in elaborating on the relationship between §§ 2254(d)(2) and (e)(1), we are simply explaining how two adjacent statutory provisions interact—in short, *how the law works*. And of course, once "an issue or claim is properly before the court"—as Pye's entitlement to relief under 28 U.S.C. § 2254 plainly is—"the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); *cf. Babb v. Sec'y, Dep't of Veterans Affs.*, 992 F.3d 1193, 1208 & n.9 (11th Cir. 2021) (doubting that "the correct standard" is an issue subject to ordinary forfeiture rules).

See, e.g., *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1178 (11th Cir. 2019) ("[O]ur review is not limited to the reasons the [state court] gave in its analysis."), *reh'g en banc denied*, 955 F.3d 924 (11th Cir. 2020); *id.* at 1182 ("[W]e are not limited to the reasons the [state court] gave and instead focus on its 'ultimate conclusion.'" (citation omitted)); *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1350 (11th Cir. 2019) ("We have explicitly rejected the proposition that a state court decision involves an unreasonable application of federal law and is not entitled to deference unless that court's opinion on its face 'shows its work' by explicitly mentioning 'all relevant circumstances' that the defendant argues in support of relief." (citation omitted)); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1223 (11th Cir. 2013) ("Under Supreme Court and our Circuit precedent, a state court's written opinion is not required to mention every relevant fact or argument in order for AEDPA deference to apply. . . . [W]e still examine what other 'implicit findings' the state court could have made in its denial of a federal claim."); *cf. Butts v. GDCP Warden*, 850 F.3d 1201, 1232 (11th Cir. 2017) (deferring to a state court's "ultimate conclusion" under AEDPA despite the court's "unreasonable finding" regarding what happened at the sentencing hearing).

Both Pye and our dissenting colleagues assert that *Wilson* prohibits us from considering justifications that support the reasons underlying the state court's decision but that, for whatever reason, the state court didn't explicitly memorialize in its written opinion. For reasons we will explain, we disagree.

Given the vigor with which the dissent presses its *Wilson*-based argument—and the fact that it is, for all practical purposes, the lone basis on which the dissent sidesteps AEDPA deference—it's worth explaining our position in some detail. The dissent strenuously—and stridently—insists that because the Butts County Superior Court issued a written opinion, we are obliged by *Wilson* to limit our review not just to the "reasons" for that court's decision—as relevant here, that Pye wasn't prejudiced by Mostiler's allegedly deficient performance—but also, at an even more granular level, to the particular *justifications* that the court provided to support those reasons. Indeed, the dissent goes so far as to assert that our contrary view is a "[n]onsense" "gambit" that "nullifi[es]" *Wilson*. Dissenting Op. at 16, 18. Respectfully, we don't think so. Here's why.[3]

With a promise to return to *Wilson* in short order, we begin with first principles. Put simply, our approach is

---

[3] A brief preface: The dissent nitpicks our terminology, deploying dictionaries as if we were engaged in statutory or contractual interpretation. *See* Dissenting Op. at 17. But, of course, everyone recognizes the difference between macro-level *reasons* and their constituent rationales—what we've called *justifications*. And to be clear, that distinction is hardly "nonsense." *Id.* at 18. The law is shot through with similar gradations, and the fact that lines can be tough to draw doesn't eliminate our responsibility to draw them. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (distinguishing between "claim[s]" and their constituent "argument[s]"); *Kamen*, 500 U.S. at 99 (distinguishing between "issue[s]" and constituent "theories"). What the dissent never does is convincingly explain why a federal court should be limited on habeas review to the precise explanation offered by the state court—in every jot and tittle, right down to the last syllable.

the one that AEDPA's plain language requires. With respect to "any claim that was adjudicated on the merits in State court"—which Pye's ineffective-assistance claim indisputably was—the statute focuses exclusively on the reasonableness of the state court's "decision." In particular, it states that a petitioner "shall not be granted" relief unless the state court's "adjudication of the claim . . . *resulted* in a *decision*" that was either contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2) (emphasis added). AEDPA's text couldn't be any clearer: A federal habeas court is tasked with reviewing *only* the state court's "result[ing] decision"—*not* the constituent justifications for that decision.

Consistent with the statutory text, the Supreme Court unanimously held in *Harrington v. Richter*, 562 U.S. 86, that a state court's decision rejecting a petitioner's post-conviction claim is entitled to AEDPA deference even "when state-court relief is denied without an accompanying statement of reasons"—*e.g.*, in a "one-sentence summary order." *Id.* at 92, 96.[4] Notably, in so holding, the Court emphasized § 2254(d)'s "terms": "There is no text in the statute requiring a statement of reasons. The statute refers only to a 'decision,' which resulted from an 'adjudication.'" *Id.* at 98. And "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* Even "[w]here a state court's decision is un-

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[4] Justice Ginsburg concurred in the judgment. *See* 562 U.S. at 113-14 (Ginsburg, J., concurring in the judgment).

accompanied by an[y] explanation" at all, the Court explained, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* "AEDPA demands," the Court concluded, that the federal court determine what "arguments or theories" either "supported or . . . *could have supported* . . . the state court's decision." *Id.* at 102 (emphasis added).[5]

Consistent with both AEDPA's plain language and the logic of the Supreme Court's decision in *Richter*, this Court has long (and consistently) held that where, as here, a state court rejects a petitioner's claim in a written opinion accompanied by an explanation, the federal habeas court reviews only the state court's "decision" and is not limited to the particular justifications that the state court supplied. *See, e.g.*, *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 785 (11th Cir. 2003) ("[W]e review the state court's 'decision' and not necessarily its rationale."); *Gill v. Mecusker*, 633 F.3d 1272, 1288-93 (11th Cir. 2011) ("[T]he statutory language focuses on the result, not on the reasoning that led to the result."); *Whatley*, 927 F.3d at 1178 ("[O]ur review is not limited to the reasons the Court gave in its analysis."). Our decisions in that respect are part and parcel of our recognition that "overemphasis on the language of a state court's rationale would lead to

[5] This language from the Supreme Court's unanimous decision in *Richter*—from which the Court didn't recede in *Wilson*—constitutes a full answer to the dissent's charge that we have somehow "miss[ed] half of the text and context" of § 2254(d). Dissenting Op. at 20. It is telling—and more than a little ironic—that the dissent simultaneously criticizes us both for engaging § 2254(d)'s full text—including its "based on" clause—and for ignoring it. *Compare id.* at 20 *with id.* at 32-33.

a grading papers approach that is outmoded in the post-AEDPA era." *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1311 (11th Cir. 2016) (quotation marks omitted); *see also Meders*, 911 F.3d at 1350 (noting that "a line-by-line critique of the state court's reasoning" is "not the proper approach").

And to be clear, ours is hardly an outlier view; rather, it represents the overwhelming consensus position. Surveying courts across the country, the Fifth Circuit recently summarized that "most of the courts of appeals" have held that even where a state court rejects a petitioner's claim in a reasoned decision, the federal "habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*." *Sheppard v. Davis*, 967 F.3d 458, 467 n.5 (5th Cir. 2020) (collecting cases so holding from the First, Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits); *accord, e.g.*, *Holland v. Rivard*, 800 F.3d 224, 236-37 (6th Cir. 2015) ("[I]t is the decision of the state court, not its reasoning, to which AEDPA deference applies.").

And indeed, given *Richter*, that's the only rule that makes any sense at all. On the dissent's view, if a state court offers no explanation whatsoever for its decision to deny a petitioner relief, its decision is, per *Richter*, entitled to full AEDPA deference, and the federal court should indulge any "argument[] or theor[y]" that "could have supported" that decision. 562 U.S. at 102. But, the dissent insists, as soon as the state court gives it the old college try and writes an opinion, the federal court is stuck, so to speak, with the specific justifications articulated therein. As this Court recently explained, such a

rule "would be irrational." *Meders*, 911 F.3d at 1351 (observing that "[i]t would be irrational to afford deference to a decision with no stated explanation"—as *Richter* clearly requires—"but not afford deference to one that states reasons, albeit not as thoroughly as it could have"). The "irrational[ity]" of the dissent's position exists on at least two levels. First, and most obviously—and most perversely—it would incentivize state courts to issue unreasoned, summary decisions as a means of guaranteeing maximum AEDPA deference. Second, as a sister circuit has explained, any state court's written opinion is necessarily "partial"; it will never perfectly and exhaustively capture every justification underlying the court's decision:

> [E]ven if we assume that deference to the state court's decision is warranted only when there is some possibility that the court specifically contemplated "reasonable" grounds for denying relief, the issuance of a written opinion with deficient reasoning does not eliminate such a possibility. Just as there is more than one way to skin a cat, there often is more than one way to resolve an appeal, and not every possible approach makes it into an opinion.

Williams v. Roper, 695 F.3d 825, 837 (8th Cir. 2012).

The lone question, then, is whether the Supreme Court's decision in *Wilson* instituted an entirely new and different AEDPA regime, whereby a federal court reviewing a state court's (necessarily partially) reasoned decision is strictly limited to the particular justifications that the state court memorialized in its written opinion. The

dissent insists that it did; *Wilson*, the dissent says, is "materially indistinct" from, and thus "controls," this case. Dissenting Op. at 13-15. But the dissent overreads (and thus misreads) *Wilson*. As the *Wilson* Court itself acknowledged—and as the dissent here does not dispute—it confronted only a very narrow question: "[T]he issue before [it]," the Court said, was solely "whether to 'look through' [a] silent state higher court opinion to the reasoned opinion of a lower court" in applying AEDPA deference. 138 S. Ct. at 1195. To be sure, the Court answered that specific question "yes." But just as surely, there is no indication that, in so doing, the Court silently upended the existing AEDPA standard as it applies to reasoned state-court decisions, thwarted § 2254(d)'s plain language, and abrogated a nationwide circuit consensus.[6]

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[6] Perhaps in an effort to camouflage the breadth of its position, the dissent repeatedly emphasizes the similarities between the procedural postures of this case and *Wilson*—in both, the dissent reminds us, a reasoned lower-court opinion was summarily affirmed on appeal. *See* Dissenting Op. at 14, 19 n.16, 22-23 n.19. And to be clear, contrary to the dissent's suggestion, *see id.* at 14-16, we have followed *Wilson*'s holding to a T, "look[ing] through" the Georgia Supreme Court's summary order to the Butts County Superior Court's decision. *See supra* at 12-13.

But the dissent insists—wrongly—that *Wilson* does so much more. Disregarding both the *Wilson* Court's own specification of the narrow issue before it, *see* 138 S. Ct. at 1195, and our subsequent reaffirmation that *Wilson* dealt *only* with the question of "which state court decision we are to look at if the lower state court gives reasons and the higher state court does not," *Meders*, 911 F.3d at 1350, the dissent insists that *Wilson* changed how AEDPA applies to *all* reasoned decisions, regardless of procedural posture. That's the only way to make sense of the dissent's criticism of our post-*Wilson* decision in *Whatley*, which the dissent admits "arose in a different procedural posture" but which it nonetheless says "conflicted with *Wilson*."

To support its position, the dissent points to a passage in *Wilson* in which it says the Supreme Court "h[eld] that AEDPA 'requires' a federal habeas court to look to the last reasoned state court decision and then 'train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims.'" Dissenting Op. at 14-15 (quoting *Wilson*, 138 S. Ct. at 1191-92, 1195-96 (quoting, in turn, *Hittson v. Chatman*, 135 S. Ct. 2126, 2126 (2015) (Ginsburg, J., concurring in denial of certiorari))). But the dissent's quotation stops short. Notably, the Supreme Court went on, in language that the dissent omits, to clarify that, having divined the "reasons" for the state courts' decision, the federal court should "give appropriate deference to that *decision*." *Wilson*, 138 S. Ct. at 1192. Notably as well, for the latter proposition the Court cited—as binding and with approval—its earlier decision in *Richter*. *See id.*

The dissent's confident contention to the contrary notwithstanding, there is simply nothing in *Wilson* that clearly confines a federal habeas court to the precise justifications that a state court provides in its written opinion.[7] To the extent there is any doubt about that, our own

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Dissenting Op. at 22-23 n.19. And it's the only way to make sense of the dissent's criticism of our citation to "pre-*Wilson*" cases that didn't involve summary affirmances, *see id.* at 26 & n.21, or its own reliance on post-*Wilson* cases that didn't involve summary affirmances, *see id.* at 26-30.

Bottom line: To the dissent, *Wilson* isn't remotely limited to the "look through" issue that the Supreme Court said it was tackling; rather, *Wilson sub silentio* revolutionized AEDPA's application to all state-court decisions. We simply—but vehemently—disagree.

[7] The dissent also overreads *Wilson*'s one-paragraph discussion of *Premo v. Moore*, 562 U.S. 115 (2011), to mean that, having "look[ed]

post-*Wilson* precedent resolves it. For starters, we recently rejected the very misreading of *Wilson* that today's dissent advocates:

> *Wilson* was about which state court decision we are to look at if the lower state court gives reasons and the higher state court does not. It was not about the specificity or thoroughness with which state courts must spell out their reasoning to be entitled to AEDPA deference or the level of scrutiny that we are to apply to the reasons that they give.

Meders, 911 F.3d at 1350.[8] And even more recently, we held—and then declined to reconsider, over the exact same *Wilson*-based objection that today's dissent recycles—that a federal habeas court's "review is not limited to the reasons the [state court] gave in its analysis." *Whatley*, 927 F.3d at 1178. And for what it's worth, others

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through" a state supreme court's summary order and presumed that it adopted the lower state court's reasoning, "we must focus exclusively on the reasons actually given." Dissenting Op. at 31; *see also id.* at 14. But nothing in that paragraph is inconsistent with our approach here—or says that we *must* do anything. State-court reasoning is usually reasonable—and considering only a state court's reasons before determining its decision to be reasonable proves little. Considering only those reasons before determining the decision to be *unreasonable*— which is what the dissent advocates here—would be a different thing altogether.

[8] The dissent suggests that *Meders* held that when a state court's justifications are unreasonable, we must refuse AEDPA deference. *See* Dissenting Op. at 22-23 n.19. Put simply, we just don't see in that decision what our dissenting colleagues do. Moreover, and in any event, in *Meders* we *deferred* under AEDPA, *see* 911 F.3d at 1355, so any suggestion that our decision there created binding "law" *precluding* deference is a non-starter.

share our skepticism about the dissent's ambitious understanding of *Wilson*'s reach. *See Sheppard*, 967 F.3d at 467 n.5 ("[I]t is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*."); *Thompson v. Skipper*, 981 F.3d 476, 483-84 (6th Cir. 2020) (Nalbandian, J., concurring) ("Federal courts have never been required to confine their habeas analysis to the exact reasoning that the state court wrote, and [nothing in] *Wilson v. Sellers* . . . compels us to change our analysis." (citation omitted)); *id.* at 484 ("[N]othing in *Wilson* suggests that federal courts cannot look to any other reason for supporting the state court['s] decision and applying AEDPA deference.").[9]

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[9] The dissent insists that several of our sister circuits have "refined their approach" in the wake of *Wilson* and that, in fact, the "great weight of authority" is on its side. Dissenting Op. at 26-30. With respect, the dissent has overread those courts' decisions in the same way that it has overread *Wilson* itself. Behind the cited cases' rote quotations of *Wilson*'s language, one finds important nuance that the dissent overlooks. In three of the dissent's cases, the courts expressly did not confine themselves to the particular justifications proffered by the state courts whose decisions they were reviewing, but rather considered others—the very thing the dissent insists *Wilson* forbids. In *Coleman v. Bradshaw*, 974 F.3d 710 (6th Cir. 2020), for instance, the Sixth Circuit did not, as Judge Nalbandian has explained, "constrain its analysis to the exact reasons that the state court discussed." *Thompson v. Skipper*, 981 F.3d 476, 485 (6th Cir. 2020) (Nalbandian, J., concurring). So too, in *Porter v. Coyne-Fague*, the First Circuit, after noting that the state court had failed to cite or discuss a key fact, did not—as the dissent here claims *Wilson* requires—proceed straight to de novo review, but rather first considered whether there was another "possible explanation of the state court's decision." 35 F.4th 68, 79 (1st Cir. 2022). And in *Scrimo v. Lee*, the Second Circuit,

Absent a clearer indication that *Wilson* "meant to strike the widespread method of applying AEDPA without even[ ] mentioning the overhaul that would result," *id.*,

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after determining that "it was error to exclude [certain w]itnesses' testimony for [the state court's] reason," went on to ask "whether the [w]itnesses' testimony could have been excluded on other grounds." 935 F.3d 103, 116 (2d Cir. 2019).

The dissent's Fourth and Seventh Circuit citations are similarly unavailing. In holding that a state court's decision was reasonable, the Fourth Circuit in *Richardson v. Kornegay* adopted pretty much exactly the approach that we've outlined here: It defined the state court's "particular reason" at a relatively high level of generality—namely, that "the trial court did not abuse its discretion"—and then distinguished that *reason* from its underlying "rationale," which it said "support[ed] finding no abuse of discretion." 3 F.4th 687, 697-98 (4th Cir. 2021) (quotation omitted). And in *Winfield v. Dorethy*, the Seventh Circuit declined to decide exactly how § 2254(d) applied, instead refusing relief on § 2254(a) grounds. *See* 956 F.3d 442, 455 (7th Cir. 2020).

So, after careful review of the dissent's two-page string cite, it turns out that just one circuit—the Ninth—has employed its sweeping rule. *See Kipp v. Davis*, 971 F.3d 939, 948-60 (9th Cir. 2020). But the Ninth Circuit had limited federal habeas courts' review to the state courts' specific justifications long before *Wilson* was decided and has done so on a different theory than the dissent proffers here—namely, on the ground that certain factual determinations rendered the "fact-finding process itself . . . defective" rather than that "the resulting finding[s]" were themselves substantively unreasonable. *See id.* at 953-55 (applying its earlier decision in *Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004)). Even before *Wilson*, we had noted the circuit split over whether a "state court's fact-finding procedures" can render its decision unreasonable under AEDPA, and we declined to adopt the Ninth Circuit's approach in *Taylor*. *See Landers v. Warden*, 776 F.3d 1288, 1298 (11th Cir. 2015).

No circuit, so far as we can tell, shares the dissent's view that *Wilson* somehow changed the way AEDPA applies to reasoned state-court decisions.

we decline to read the Supreme Court's decision as aggressively as the dissent does.

C

Back to this case: AEDPA's deferential standard of review governs the state court's application of *Strickland*, which itself places a demanding burden on a convicted defendant to show that he was prejudiced by his counsel's deficient performance. "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." *Shinn*, 141 S. Ct. at 522-23 (quotation marks omitted). "A reasonable probability means a substantial, not just conceivable, likelihood of a different result."[10] *Id.* at 523 (quotation marks omitted). And this probability must be sufficient for the reviewing court to determine that counsel's errors were "so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Strickland*, 466 U.S. at 487.

Applying AEDPA to *Strickland*'s prejudice standard, we must decide whether the state court's conclusion that Mostiler's performance at the sentencing phase of Pye's trial didn't prejudice him—that there was no "substantial likelihood" of a different result—was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 141 S. Ct. at 523-24 (quotation

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[10] Here, because Georgia law requires jury unanimity as a prerequisite to the imposition of capital punishment, prejudice requires a substantial likelihood that at least one juror would have voted against the death penalty. *See* O.C.G.A. § 17-10-31(c).

marks omitted). So without respect to what we might (or might not) have concluded about prejudice were we free to review that issue de novo, we lack the power to grant relief so long as the state court's conclusion wasn't *that* wrong.[11]

III

The state court's conclusion that Pye wasn't prejudiced by any of Mostiler's alleged deficiencies was not "contrary to" and did not "involve[] an unreasonable application of, clearly established Federal law," nor was it "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). While the state court might have made some debatable calls as to the weight that it ascribed to different pieces of evidence—and made at least one dubious factual statement—its ultimate decision to deny relief was not "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 141 S. Ct. at 523 (quotation marks omitted).

To assess whether an allegedly deficient aspect of a lawyer's performance was prejudicial, courts must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (alteration adopted) (quotation marks omitted). Here, Pye alleges multiple grounds on which Mostiler's performance was deficient: His failure to (a) reasonably

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[11] Moreover, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

investigate mitigation evidence concerning Pye's background, (b) discover evidence of Pye's mental-health issues, and (c) attempt to rebut the State's future-dangerousness argument by presenting evidence of Pye's nonviolent behavior in prison. Before us, Pye also argues (d) that he was prejudiced by Mostiler's deficient failure to introduce at sentencing residual-doubt evidence supporting his version of the events surrounding his crimes.[12] Accordingly, the state court's conclusion that there was no sentencing-phase prejudice is reasonable and entitled to deference if its prejudice determinations with respect to each alleged deficiency, and with respect to the deficiencies cumulatively, were reasonable. They were.

A

It was reasonable for the state court to conclude that Mostiler's failure to further investigate Pye's difficult childhood and present this mitigating evidence at sentencing wasn't prejudicial. The court's prejudice determination with respect to this deficiency was based on (1) its decision to discount the affidavit evidence presented at the

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[12] The district court did not discuss the residual-doubt issue as it pertained to the sentencing phase of the trial—presumably because Pye framed his argument that Mostiler should have presented more evidence supporting his version of events primarily in terms of Mostiler's deficient performance during the *guilt* phase. *See* Doc. 1 at 68-72; Corrected Initial Br. of Appellant at 161-72. Still, we will assume for argument's sake that Mostiler's performance was deficient on this ground—that he should have introduced additional residual-doubt evidence at either the guilt or sentencing phase of trial—and explain why it still wasn't unreasonable for the state court to conclude there is "simply no reasonable probability that the result of the penalty phase . . . would have been different if the new evidence had been submitted at trial." Doc. 20-40 at 67.

state post-conviction proceedings due to concerns about their credibility; (2) evidence of Pye's family's unwillingness to cooperate in his defense at the time of trial; (3) the minimal connection between Pye's background and the crimes he committed; (4) Pye's age at the time of those crimes; and (5) the extensive aggravating evidence presented by the State at sentencing. Neither the court's weighing of these factors nor its ultimate prejudice determination was contrary to or based on an unreasonable application of federal law, or based on an unreasonable determination of the facts.

1

First, the discounting of the affidavits. The state court expressed both (a) concerns about the credibility of the affidavits generally and (b) specific concerns based on inconsistencies that it identified in the affidavits of Curtis Pye, Ricky Pye, Lolla Mae Pye, and Arthur Lawson. While the court's determination that these affidavits contained inconsistencies might have been debatable, it wasn't "clear[ly] and convincing[ly]" erroneous. 28 U.S.C. § 2254(e)(1). Nor—after giving effect to the presumptive correctness of the state court's assessment of the affidavits' inconsistencies, *see id.*—was it unreasonable for the state court to view the "affidavit evidence alleging abuse and deprivation," taken as a whole, "with caution." Doc. 20-40 at 66.

The state court read the affidavits of Curtis, Ricky, and Lolla Mae Pye as stating that Mostiler didn't speak with them *at all* before trial—whereas contemporaneous billing records show that Mostiler in fact met with all three. Pye argues that these affidavits are best read to assert only that Mostiler didn't talk to the affiants *about*

Pye's childhood. So, the argument goes, the affidavits weren't inconsistent with the record, the presumption is rebutted, and it was thus unreasonable for the state court to discredit them. We disagree. However debatable, the state court's interpretation of these affidavits was not clearly and convincingly erroneous.

Starting with Pye's brother Curtis, he testified in his affidavit about his family's impoverished circumstances and his parents' alcoholism and fighting, and concluded his affidavit as follows:

> No one talked to me about any of this before Willie James's trial. Johnny Mostiler and his assistant Dewey know me. Mr[.] Mostiler represented me before. He didn't get in touch with me or ask me any questions about the house Willie James was raised in or what he was like as a child. If he had, I would have said all the things I've said in this statement, and I would have testified to all these things if he had asked me to.

Doc. 16-24 at 83. The state court's quotation of this passage used ellipses in a way that made it seem like Curtis definitively stated that Mostiler didn't speak to him *at all* before trial: "No one talked to me . . . before Petitioner's trial. Johnny Mostiler and his assistant Dewey know me . . . He didn't get in touch with me." Doc. 20-40 at 65 (omissions in original). But without regard to whether the state court's interpretation of this affidavit was the most natural, it wasn't clearly and convincingly erroneous. That is particularly so given the fact that Curtis stated, disjunctively, that Mostiler didn't *either* "get in touch with me" *or* "ask me any questions about the house." Moreover, if Curtis meant to convey only that Mostiler didn't

talk to him about Willie's childhood, it's unclear why he would have said that "Johnny Mostiler and his assistant Dewey know me"—a statement that would make most sense if Mostiler had failed to contact Curtis at all. Given this entirely plausible interpretation of Curtis's affidavit—with which, tellingly, the dissent doesn't squarely contend, *see* Dissenting Op. at 39-40—the state court's factual finding that Curtis's affidavit contradicted the record evidence was not clearly and convincingly erroneous.

Turning, then, to Ricky Pye's affidavit. It stated, in pertinent part, that—

> The investigator, a man named Dewey, came by the house and talked to my dad about the charges against Willie. He didn't ask about Willie James and how he came up, or how we all were raised. Dewey never spoke to me about those things. . . . I took the stand to testify later on in the trial. No one talked to me about my testimony before I went. I never spoke to Mr. Mostiler about what to say, and he didn't meet with me or ask me any questions before my turn for testimony. I knew who he was because he represented me before that."

Doc. 16-24 at 99-100. Whether or not the best reading, the state court's interpretation of Ricky's affidavit as suggesting that Mostiler didn't speak to him at all before his testimony wasn't clearly and convincingly erroneous. Ricky said that Dewey talked to "[his] dad"—not him—and his statement that he knew who Mostiler was because Mostiler had represented him before suggests that he didn't meet Mostiler again in the context of preparing for Willie's trial. Moreover, Ricky's statement that "[n]o one

talked to me about my testimony before I went" suggests—or at the very least could reasonably be read to suggest—that he didn't speak to Mostiler *at all* before his testimony. (Again, the dissent offers no response to this plausible interpretation of Ricky's affidavit. *See* Dissenting Op. at 40.) So, given the fact that Mostiler did speak to Ricky for an hour about a month before trial, the state court's finding that Ricky's affidavit testimony contradicted the record evidence was not clearly and convincingly erroneous.

Next, Pye's mother, Lolla Mae. As relevant here, she testified by affidavit as follows: "No one took the time to talk to me about all anything before Willie's trial. Nobody ask me all about how I grew up, how I came to be married to Ernest, and how I raised Willie and my other children." Doc. 16-24 at 97. The state court read this statement as suggesting that no one from Willie's trial team spoke to her at all—contradicting Dewey Yarbrough's testimony and Mostiler's billing records that reflect their meeting with her. While the phrase "all anything" is unusual and *could* reflect a typographical error, the most natural correction of such an error would simply be to remove the word "all." That would leave the statement, "No one took the time to talk to me about anything before Willie's trial." And if "all anything" wasn't a typo but just a nonstandard turn of phrase, then the statement could plausibly be interpreted to suggest that Mostiler and Yarbrough didn't speak to Lolla Mae *at all*. So again, the state court's interpretation of Lolla Mae's statement and its resulting finding of an inconsistency was not clearly and convincingly erroneous.

Finally, the affidavit of social worker Arthur Lawson. The state court questioned Lawson's credibility because, while he initially testified that he had observed Lolla Mae intoxicated when she was pregnant, he later submitted another affidavit to "clarify [this] inaccurate statement" with the explanation that he had "no direct knowledge" that Pye's mother drank during pregnancy. Doc. 20-40 at 65. He had simply presumed that she did so based on general indications that she'd been drinking. *See* Doc. 20-6 at 17. If we were evaluating Lawson's testimony de novo, we might not view this clarification as a particularly negative reflection on his affidavit's credibility. But the state court didn't say that it was discounting Lawson's affidavit completely, and its finding that the correction diminished Lawson's credibility was not clearly and convincingly erroneous, nor was it in any way unreasonable for the court to give some weight in its prejudice determination to the fact that Lawson needed to correct an earlier inaccurate statement.

Despite these reasonable credibility concerns with some of the affidavits, Pye argues that it was unreasonable to discount *all* of the affidavits based on perceived credibility issues with just a few of them. It's true that for many of the affidavits that speak to Pye's childhood neglect and abuse, neither the state court nor the State have offered specific reasons to doubt their truth besides the general concern with "artfully drafted" affidavit testimony collected many years after trial. And in *Porter v. McCollum*, the Supreme Court held, with respect to evidence adduced from deposition testimony taken during habeas proceedings, that it was "unreasonable to discount to irrelevance the evidence of [the petitioner's] abusive childhood, especially when that kind of history may have

particular salience for a jury evaluating [the petitioner's] behavior in his relationship with [the victim]." 558 U.S. at 43.

But here, there's no indication (and the dissent has pointed to none) that the state court discounted the contents of the affidavits "to irrelevance"—the court merely stated that it "reviewed the Petitioner's affidavit evidence *with caution*." Doc. 20-40 at 66 (emphasis added). And "when the mitigating weight given to the postconviction evidence is unclear, 'we must presume that state courts know and follow the law.'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1329-30 (11th Cir. 2013) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). That presumption isn't defeated here because the Supreme Court hasn't defined a standard that courts must follow in weighing the credibility of affidavit evidence produced in habeas proceedings. So, the state court's decision to view the affidavit evidence "with caution" was neither contrary to nor an unreasonable application of clearly established federal law.

Nor was the state court's finding that the affidavits had been artfully drafted clearly and convincingly erroneous. For one thing, the court identified material inconsistencies in the affidavits provided by Curtis, Ricky, and Lolla Mae Pye and Arthur Lawson. For another, there was substantial uniformity across the affidavits in terms of the language used to describe both Mostiler's alleged failure to discuss Pye's background with the affiants and the affiants' willingness to testify at sentencing had they been asked—a uniformity that could plausibly suggest artful drafting of the sort that might create reasonable credibility concerns. *See Waters v. Thomas*, 46 F.3d 1506,

1513-14 (11th Cir. 1995) ("[T]he existence of [habeas] affidavits, artfully drafted though they may be, usually proves little of significance.").[13]

Ultimately, even if—presuming the correctness of the state court's factfinding—we might have given the affidavit testimony more weight in a prejudice analysis, it wasn't unreasonable for the state court to discount the affidavits, to some degree, based on the inconsistencies it found in several of them and general concerns about after-the-fact artful drafting applicable to all of them.[14] And the

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[13] Although the dissent acknowledges that the state court could determine that the affidavits indicated artful drafting, it seems to suggest that there was no "evidence" here to support such a determination. Dissenting Op. at 43. But even aside from the fact that "the affidavits themselves," *id.* at 43 n.33, contained sufficient evidence—for instance, the conspicuously parallel phrasing— the dissent offers no support for its insinuation that extrinsic corroborating evidence is required, nor are we aware of any. *See, e.g.*, *Nejad v. Attorney Gen., Ga.*, 830 F.3d 1280, 1284-92 (11th Cir. 2016) (holding that the absence of documentary proof to corroborate a witness's testimony didn't constitute the sort of clear and convincing evidence necessary to reject a state court's credibility determination). To the contrary, federal habeas courts *do* require robust evidence—which is lacking here—before disturbing a state court's credibility determinations. 28 U.S.C. § 2254(e)(1).

[14] Another factor that supports the state court's conclusions about the affidavits' credibility is the lack of corroborating evidence in the contemporaneous records—particularly regarding whether Pye was subject to regular physical abuse. The State argues, and Pye doesn't really dispute, that there is no mention of him being abused in two decades' worth of records from the Georgia Department of Human Resources and Division of Family & Children Services or in his school records. This fact, on balance, supports the state court's decision to view the affidavit evidence with caution, regardless of whether the court said as much in its written opinion. *See supra* Part II.B.3.

state court's reasonable concerns about the affidavits' credibility properly played a role in the court's overall prejudice analysis: Doubt about the affidavits' credibility equates to reasonable uncertainty about (1) the truth of their depiction of Pye's childhood as abusive and destitute, (2) whether the affiants actually would have testified to such mitigating factors at sentencing years earlier, and therefore (3) whether there was a substantial likelihood that Mostiler's failure to fully investigate Pye's background affected the outcome of sentencing.

2

Second, Pye's family's unwillingness to cooperate at trial. In order for Mostiler's alleged failure to adequately investigate Pye's background to have resulted in prejudice, Pye's family would have had to have been willing (1) to cooperate during Mostiler's pretrial investigation, (2) to take the stand during sentencing, and (3) to testify frankly about the extreme neglect and abuse that Pye allegedly suffered in their home. If, contrary to what the affidavits said years later, Pye's family was less than fully cooperative at the time of sentencing, it would undermine Pye's contention that he was prejudiced. It was not unreasonable for the state court to consider the "evidence suggesting [Pye's] family's unwillingness to cooperate" as weighing against a finding of prejudice. Doc. 20-40 at 67. That evidence included (1) a contemporaneous memo from Mostiler's files noting that Pye's brothers didn't respond to his phone calls, *see* Doc. 19-11 at 93; and (2) Dewey Yarbrough's state post-conviction testimony that Pye's family "w[as] not willing to work with [them]," "didn't put any effort forth on any of the contacts" he made with them, Doc. 19-11 at 24, and wasn't willing to

help him pursue leads, Doc. 14-41 at 85-86. Of course, some of Pye's family did testify at sentencing. But that doesn't mean that it was unreasonable for the state court to consider the family's general uncooperativeness as undermining any argument about prejudice.

3

Third, the lack of "nexus" between Pye's background and his crimes.[15] It wasn't clearly and convincingly erroneous for the state court to find, nor was it unreasonable for it to weigh in its prejudice analysis, the fact "that there is little, if any, connection between [Pye's] impoverished background and the premeditated and horrendous crimes in his case." Doc. 20-40 at 66. Citing *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Williams v. Taylor*, 529 U.S. 362, 367-68 (2000), Pye argues that the state court's decision in that respect was unreasonable because the Supreme Court "has rejected a causal nexus requirement in order for penalty phase evidence to mitigate a capital crime" and has "given full weight to strikingly similar mitigation despite its lack of bearing upon the crime." En Banc Br. of Appellant at 45-47. But *Tennard* held that mental-capacity evidence in particular—not just any background evidence—can be mitigating regardless of nexus. 542 U.S. at 287. And while Pye is correct that the Supreme Court has decided in individual cases, like *Williams*, that the failure to present background evidence was prejudicial despite a lack of nexus to the defendant's crimes, those cases do not establish a per se rule that the degree

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[15] The dissent offers no response to our assessment of the state court's decision in this respect.

of connection between background and crime can *never* play any role in a court's prejudice analysis.

And indeed, such a rigid rule would contradict the commonsense prejudice standard, which assesses the likelihood that counsel's failures changed the outcome of sentencing: Background circumstances that are closely linked to the defendant's crime are naturally more likely to influence jurors than those that aren't. Here, the state court reasonably concluded that Pye's childhood poverty and neglect aren't strongly connected to his crimes of gang-rape and murder[16]—and this factor could properly have played a role in the court's overall prejudice evaluation. Moreover, given that it's unclear from the court's opinion the extent to which the court relied on this "nexus" factor in its prejudice analysis, "we must presume that [the] state court[ ] kn[e]w and follow[ed] the law." *Evans*, 703 F.3d at 1329-30 (quotation marks omitted).

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[16] Pye also argues that his childhood abuse—"the extreme domestic violence" that he experienced—would have had "particular salience for a jury evaluating" his relationship with Alicia. En Banc Br. of Appellant at 47. Even if Pye is right, that wouldn't mean the state court's finding with respect to Pye's childhood *poverty* was clearly and convincingly erroneous (or that the use of that finding in its prejudice determination was unreasonable): The state court mentioned only Pye's "impoverished background," not the history of domestic violence that Pye allegedly suffered—so it's unclear whether and to what extent the connection between Pye's alleged history of *abuse* and his crimes played in the court's prejudice analysis. As already explained, the court may well have reasonably discounted the credibility of the affidavits alleging that Pye was abused or the likelihood that any witnesses would have testified to that abuse at sentencing—and for that reason didn't proceed to consider the link between domestic abuse and Pye's murder of his ex-girlfriend.

Fourth, Pye's age at the time of the crime. It wasn't unreasonable for the state court to give less mitigating weight to evidence about Pye's childhood because he was 28 years old when he committed his crimes. It's true that in *Porter*, the Supreme Court held that it was "unreasonable to discount to irrelevance the evidence of [the petitioner's] abusive childhood" even though he was 54 years old at the time of the trial. 558 U.S. at 37. But Pye overreads *Porter* when he claims that it makes the state court's treatment of Pye's age "patently unreasonable." En Banc Br. of Appellant at 52 (quoting *Pye*, 853 F. App'x at 566). Neither Pye nor the dissent points to anything in *Porter* that explicitly forbids courts from considering age as one factor among many in their prejudice analyses—just as the state court did here. *Cf. Evans*, 703 F.3d at 1329-30 (noting that we must presume that state courts "know and follow the law" when determining what mitigating weight to give to post-conviction evidence). Regardless of whether *we* would read *Porter* de novo as signaling that habeas courts generally shouldn't weigh age heavily in their prejudice analyses, it wasn't contrary to or an unreasonable application of "clearly established Federal law," 28 U.S.C. § 2254(d)(1), for the state court to consider Pye's age as a factor weighing against prejudice.

Moreover, as just explained with respect to "nexus," a per se prohibition on the consideration of a defendant's age in the prejudice analysis would make little sense given that standard's requirement that we determine the likely impact of the unpresented evidence on the jury: Childhood neglect and abuse are certainly more likely to influence the jury if the defendant was barely an adult at the

time of the crime than if he was significantly older. We do not interpret *Porter* as abrogating our precedents treating a defendant's age at the time of his crime as an appropriate factor for a court to consider (among others) when conducting a *Strickland* prejudice analysis. *See, e.g.*, *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999) (noting that "where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight" (quotation marks omitted)); *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir. 1994); *cf. Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990) (per curiam) (noting that "the fact that [the defendant] was thirty-one-years old" when he committed the crime weighed in favor of finding that trial counsel made a reasonable "decision not to investigate family childhood background").[17]

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[17] In discussing Pye's age at the time of his crimes, the state court made two points. *First*, it offered the strange—and likely clearly erroneous—summary that "trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of [Pye's] guilt, that *remorse* was likely to play better than excuses." Doc. 20-40 at 66 (emphasis added). All here agree that Mostiler's strategy at sentencing had nothing to do with "remorse"; it was focused instead on asking the jury for *mercy*. *Second*, and more broadly, the state court emphasized that "'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight' when the defendant is 'not young' at the time of the offense." *Id.* at 67 (citing *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999)).

The state court's "remorse"-based statement—nestled in a subjustification of a larger justification—doesn't undermine the reasonableness of the state court's overall rejection of Pye's ineffective-assistance claim, or even render the court's constituent no-prejudice determination unreasonable. Perspective is critical. The state court offered at least five justifications for its determination that Mostiler's

Fifth, and finally, the aggravating factors.[18] The state court found especially relevant the "extensive evidence presented in aggravation by the State during sentencing." Doc. 20-40 at 67. That conclusion was far from unreasonable. The mitigating evidence not presented as a result of counsel's deficient performance must be weighed "against the evidence in aggravation." *Porter*, 558 U.S. at 41. We've repeatedly held that even extensive mitigating evidence wouldn't have been reasonably likely to change the outcome of sentencing in light of a particularly heinous crime and significant aggravating factors. *See, e.g.*, *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1251 (11th Cir. 2009) (per curiam) (noting that given the strength of the State's case "and the nature of the crimes themselves," the state court didn't "unreasonably apply *Strickland* when it found that the available mitigating evidence, taken as a whole, did not outweigh the aggravating nature of [the defendant's] crimes" (citing *Payne v. Allen*, 539

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failure to introduce evidence of Pye's childhood wasn't prejudicial: because of (i) that evidence's unreliability; (ii) the seeming unwillingness of the family to testify to it; (iii) its lack of nexus to Pye's crime; (iv) Pye's age; and (v) the aggravated nature of the rape-murder at issue. Within the state court's discussion of *one* of those five justifications—pertaining to Pye's age—*one* of its two sub-justifications was mistaken. With respect, the "remorse" issue is a sideshow—the proverbial flea on the hair of the tail of the dog.

There is no indication—none—that the state court's single misstatement regarding remorse "resulted in" a "decision" that was "based on" an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2); *see supra* Part II.B.2.

[18] The dissent offers no response to our assessment of the state court's decision in this respect.

F.3d 1297, 1318 (11th Cir. 2008))); *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010) (explaining that significant aggravating facts are "difficult to overcome" and holding that a state supreme court's prejudice decision wasn't unreasonable).

Here are the aggravating factors that the jury heard about Pye at sentencing: He had previously struck Alicia in the back with a gun, had been arrested for burglary, and had a "very bad" reputation for violence in the community. He enlisted two accomplices to kidnap Alicia—leaving an infant he thought was his alone at her home—and drive her to a motel room where the three men each raped her at gunpoint. *Pye*, 505 S.E.2d at 8-10. Then, they took her out onto a dirt road, where Pye ordered her to lie face-down on the ground, before he shot her in the back twice, after which she begged him not to shoot her in the head. Despite the opportunity to show mercy, Pye shot her in the head anyway. Alicia took between 10 and 30 minutes to die, during which time she would have been conscious almost until the end, "crawl[ing] . . . in the dark" and "alone." Doc. 13-11 at 88-89. It wasn't unreasonable for the state court to weigh these aggravating factors heavily in its evaluation of whether the presentation of additional mitigating evidence about Pye's background would have changed a juror's vote for the death sentence.[19]

* * *

[19] Our concurring colleagues have likewise (and quite sensibly) emphasized the extremely aggravated nature of Pye's crime. *See* Concurring Op. at 2-3.

The state court's task in conducting its *Strickland* prejudice analysis was to assess probabilities—to determine, by weighing the aggravating and mitigating evidence, whether there was a "substantial" likelihood that the outcome of sentencing would have been different had Mostiler conducted a more complete investigation into Pye's background. *Shinn*, 141 S. Ct. at 523. In doing so, the court discounted, to some extent, the affidavit testimony that it received, and factored in the competing evidence that Pye's family was generally uncooperative at the time of the trial, the tenuous connection between the mitigating evidence and Pye's crimes, and Pye's age when he committed those crimes. None of these choices individually resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts. And it wasn't "so obviously wrong [as to be] beyond any possibility for fairminded disagreement," *id.* (quotation marks omitted), for the state court to conclude that on balance, given the significant aggravating evidence, there wasn't a substantial likelihood that the jury would have voted for anything less than death even had Mostiler conducted a constitutionally adequate investigation into Pye's background.

B

We next consider whether the state court's conclusion that Pye wasn't prejudiced by Mostiler's failure to obtain a mental-health evaluation of Pye or present mental-health evidence at sentencing was either based on an unreasonable determination of the facts or contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d). It was not.

To begin, in determining the facts, it was not clearly and convincingly erroneous (or unreasonable more generally) for the state court to view the evidence of Pye's alleged brain damage as conflicting and to question the severity of the condition it reflected. One of Pye's experts at the state habeas proceeding, Dr. Eisenstein, found that Pye had frontal-lobe impairment and brain damage—which suggested to him that Pye had an impaired ability to plan and control his impulses. But the State's expert, Dr. King, testified that the facts of the crime, which involved significant premeditation and planning, were inconsistent with frontal-lobe impairment. The reason, he said, is because individuals with frontal-lobe damage have significant "disinhibition of responses and impulses in all areas" and "wouldn't choose out a particular victim at a particular time and then engage in premeditation, goal directedness, trying to cover [their] tracks." Doc. 14-44 at 69. Dr. King testified that the tests conducted by Dr. Eisenstein weren't sophisticated enough "to identify that particular kind of specific brain damage," *id.* at 68, and he expressed skepticism of the suggestion—made by another of Pye's experts, Dr. Pettis—that Pye might have had a "failure to thrive" or "fetal alcohol syndrome," *id.* at 72-73. Still, Dr. King agreed that even though Pye didn't meet the threshold for mental retardation, he had cognitive "deficits in a number of areas" that would have "affect[ed] his ability . . . to function in the community." *Id.* at 80. While the state court didn't explicitly make a factual finding about Pye's alleged brain damage, it would have been reasonable for it to find that, given the testimony presented, he had cognitive deficits but not frontal-lobe impairment or fetal-alcohol syndrome.

It was reasonable for the state court to conclude based on these facts that there wasn't a substantial probability that the presentation of mental-health evidence would have changed the outcome of Pye's sentencing. While Pye may be correct in arguing that the only reasonable factual conclusion based on the evidence presented at the state habeas proceeding is that he has cognitive deficits, that doesn't mean that it was unreasonable for the state court to find that no prejudice resulted from the failure to present this mental-health evidence at sentencing. Given the fact that Pye had sufficient mental faculties to "plan a robbery," "le[a]d two fellow co-defendants in the kidnapping, rape, and murder of his former girlfriend," "attempt[ ] to avoid detection by authorities through disposal of the murder weapon and accessories," and "fabricate[ ] an alternative sequence of events," Doc. 20-40 at 62, and in light of the aggravating factors already described, the jury could well have been unmoved even if Mostiler had obtained a mental-health evaluation and presented an expert's testimony about Pye's cognitive defects. It wasn't unreasonable for the state court to find that there wasn't a substantial likelihood of a different sentencing outcome.[20]

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[20] Pye also points to statements in records from his first prison stint that he seemed "unstable," reported that he heard voices calling his name, exhibited a "flat affect" and a "rather fragile composure," and displayed "elements of psychotic withdrawal" and "depression . . . severe enough to suggest consideration of chemotherapy." En Banc Br. of Appellant at 49-50 (quoting Doc. 15-19 at 12-16). Pye faults the state court for not considering this evidence in its prejudice analysis. *See id.* at 50 (citing *Pye*, 853 F. App'x at 567). But under AEDPA, we do not assess "whether the state court considered and discussed every angle of the evidence": "There is no text in [§ 2254(d)] requir-

The state court's prejudice determination regarding the mental-health evidence also didn't contradict or unreasonably apply clearly established federal law. There is no per se rule that the failure to present evidence of a defendant's cognitive defects at sentencing is prejudicial for purposes of the *Strickland* ineffective-assistance analysis. While Pye cites *Porter*, that case noted that "it was not reasonable to discount *entirely* the effect" that the defendant's mental-health expert's testimony might have had on the jury. 558 U.S. at 43 (emphasis added). And here, "[n]othing in the opinion" of the state court "suggests that the mitigating effect of [Pye's] mental health problems was 'discount[ed] entirely.'" *Evans*, 703 F.3d at 1330 (quoting *Porter*, 558 U.S. at 43). Porter didn't create a per se rule that the failure to present evidence of brain damage or cognitive defects is always prejudicial; rather, it held only that *in that case, given that particular petitioner's brain damage*, the failure to present mental-health evidence was prejudicial. 558 U.S. at 43-44; *see also*

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ing a statement of reasons." *Lee*, 726 F.3d at 1211 (alteration in original) (quotation marks omitted); *see supra* Part II.B.3. Here, the state court's overall prejudice determination with respect to Pye's mental-health evidence was reasonable notwithstanding the unaddressed mental-health information in his prison records. As the district court correctly noted, the mitigation value of Pye's psychological state when he went to prison for the first time—years before he killed Alicia—was low because "it is not at all surprising that someone who had just arrived at a state prison to begin serving a ten-year sentence would be depressed and confused." Doc. 68 at 66. Moreover, the same intake form also confirmed that Pye had "no history of mental health treatment and did not show overt signs of severe depression, anxiety, or perceptual disturbance." *Id.* (citing Doc. 15-19 at 11, Doc. 19-11 at 94). So, a fairminded habeas jurist could conclude that, even if these records had been presented to the trial jury, they wouldn't have been substantially likely to make a difference.

Richter, 562 U.S. at 101 (explaining that in evaluating whether a state court's application of federal law was unreasonable, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations"); *Knowles*, 556 U.S. at 123 (noting that *Strickland* is a "general standard"). And the petitioner in *Porter*, in contrast to Pye, presented largely unrebutted evidence that he had PTSD from his military service that "could manifest in impulsive, violent behavior," "suffered from an extreme mental or emotional disturbance," and "was substantially impaired in his ability to conform his conduct to the law." 558 U.S. at 36.[21]

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[21] Nor do the other cases that Pye cites, *see* En Banc Br. of Appellant at 59-60, establish a rule that the failure to present evidence of any sort of brain damage or cognitive deficiency is necessarily prejudicial. While *Jefferson v. GDCP Warden* noted that "evidence of brain damage . . . profoundly change[s] the character of the penalty phase of the proceedings by fundamentally transforming [the defendant's] sentencing profile," it noted only that this sort of evidence "*may* establish prejudice." 941 F.3d 452, 483 (11th Cir. 2019) (emphasis added). Moreover, *Jefferson* is distinguishable because it applied a stricter pre-AEDPA standard of review to the state court's decision. *Id.* at 455. Nor is *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam), directly analogous to Pye's case. There was "clear and compelling evidence" in that case that the petitioner had "pronounced frontal lobe pathology" and was "among the most impaired individuals in the population in terms of ability to suppress competing impulses." *Id.* at 949-50 (quotation marks omitted). Finally, unlike Pye, the defendant in *Rompilla v. Beard*, suffered from "organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions," which was likely caused by fetal-alcohol syndrome and substantially impaired his capacity to "appreciate the criminality of his conduct or to conform his conduct to the law." 545 U.S. 374, 392 (2005) (quotation marks omitted).

Moreover, in addition to there being no per se rule of prejudice based on unpresented mental-health evidence, "we have held that 'the indication of brain damage . . . can often hurt the defense as much or more than it can help.'" *Evans*, 703 F.3d at 1329 (quoting *Haliburton v. Sec'y, Dep't of Corr.*, 342 F.3d 1233, 1244 (11th Cir. 2003)); *see Haliburton*, 342 F.3d at 1244 n.30 (noting defense attorney's testimony that presenting evidence of a defendant's abusive background and brain damage can counterproductively "paint a picture of Frankenstein" for the jury); *cf. Windom*, 578 F.3d at 1249 (holding that it "was not objectively unreasonable" for the state post-conviction court to find no prejudice where there was overwhelming evidence of premeditation, despite counsel's "failure to investigate and present a mental health mitigation defense").

Given the conflicting evidence about the extent of Pye's mental-health issues and the lack of clearly established federal law requiring a finding of prejudice based on the failure to present evidence of cognitive deficits, the state court's conclusion on this issue was not "so obviously wrong [as to be] beyond any possibility for fairminded disagreement." *Shinn*, 141 S. Ct. at 523 (quotation marks omitted).

C

We must next determine whether it was unreasonable for the state court to conclude that Pye suffered no prejudice as a result of Mostiler's failure to rebut the State's argument about his future dangerousness in prison. It was not.

Pye's argument rests largely on the state post-conviction testimony of two corrections officers—Ellenberg and

Pittman—who supervised Pye during his prior incarceration as part of a youthful-offender program. *See* En Banc Br. of Appellant at 50-51 (citing Doc. 16-24 at 49, 70-71). But even assuming the truth of these officers' testimony—that they didn't consider Pye a security concern and that he was less dangerous than most inmates they encountered—it was reasonable for the state court to conclude that this sort of evidence wouldn't have been substantially likely to change the outcome of sentencing for three reasons: (1) prison records show evidence of Pye's insubordination and aggressiveness; (2) Pye became increasingly violent after his first incarceration; and (3) further evidence that Pye wasn't a violent person would have been cumulative.[22]

First, the prison records. It was not clearly and convincingly erroneous for the state court to conclude that these records indicated that Pye had a "history of insubordination, aggressiveness and propensity for violence toward those in authority." Doc. 20-40 at 61. Had Mostiler presented testimony from corrections officers about Pye's behavior during his initial period of incarceration, the State likely would have presented later prison records, which contained at least 15 disciplinary reports, including those pertaining to fights with other inmates and instances of insubordination categorized as "High"- and "Greatest"-level offenses. For instance, on October 12,

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[22] The state court didn't expressly discuss Factors (2) and (3), but in assessing whether a state court's reasons for its decision were reasonable—here, whether it was reasonable for the state court to conclude that Pye wasn't prejudiced by Mostiler's failure to present evidence about his behavior in prison—we can consider additional rationales that support the state court's conclusions. *See supra* Part II.B.3.

1989, Pye "became hostile and aggressive" toward corrections officers after being removed from his dorm. Doc. 15-20 at 18. After he was instructed to assume the shakedown position, "Pye came off the wall in an aggressive manner" while shouting, "[m]other fucker get your hands off me"—leading to officers wrestling him to the floor as he struggled with them. *Id.* at 16, 19.

Pye disputes the state court's characterization of his prison behavior, arguing that there's no record indicating that he was ever violent toward prison personnel. *See* En Banc Br. of Appellant at 51. He describes one incident in which he fought with another inmate as being mere horseplay that didn't result in any injuries and asserts that the prison found him not guilty of assault in connection with another incident in which he fought an inmate. *Id.*; *see* Docs. 15-19 at 51; 15-20 at 8. But Pye doesn't dispute that his prison records contain many instances of insubordination.

Overall, Pye hasn't rebutted by clear and convincing evidence that his prison records "indicate a history of insubordination, aggressiveness and propensity for violence toward those in authority." Doc. 20-40 at 61. It may be debatable whether one should infer from Pye's October 12, 1989 incident with prison staff and his altercations with other inmates that Pye had a history of "aggressiveness and propensity for violence toward those in authority." But Pye has not rebutted the presumption of correctness that AEDPA affords to state-court determinations of fact. *See* 28 U.S.C. § 2254(e)(1). And it wasn't unreasonable for the state court to rely on this characterization of Pye's prison records in assessing whether

Mostiler's failure to offer testimony rebutting the State's future dangerousness argument was prejudicial.

Second, the mitigating value of the officers' testimony. Testimony from witnesses like Ellenberg and Pittman about Pye's behavior in prison likely would have had minimal value in swaying the sentencing jury. Ellenberg and Pittman knew Pye only during his incarceration in the youthful-offender program at Lee Arrendale Correctional Facility for several years in the late 1980s. But Pye admits that when he aged out of that program and was transferred to Frank Scott Correctional Institute[23] in 1988, "[h]is behavior became agitated and he incurred disciplinary reports for insubordination." Doc. 43 at 63. So, even if Officers Ellenberg and Pittman had testified at Pye's sentencing, they wouldn't have been able to speak to Pye's behavior at Frank Scott, and the State could have painted a picture of Pye as a man who became increasingly troubled and violent as he got older. And, of course, at the time of sentencing, the jury had just concluded—contrary to the officers' testimony that Pye was generally nonviolent—that Pye had violently raped and murdered Alicia Yarbrough. Thus, there is little chance that the officers' testimony would have swayed any member of the jury: Even if Pye was generally nonviolent when he was incarcerated as part of a youthful-offender program years earlier, that says little about how dangerous he would be during a future period of incarceration after he had become

[23] While Pye's brief in support of his habeas petition referred to this facility as "Robert Scott State Prison," the state court and the contemporaneous disciplinary reports in the record refer to the institution as "Frank Scott Correctional Institute." *Compare* Doc. 43 at 63, *with* Docs. 20-40 at 61; 15-20 at 17.

progressively more troubled and been convicted of rape and murder.

Third, cumulativeness. During sentencing, Pye's sister and father both testified that he was not violent, and several other witnesses testified about his kindness. This testimony would have served as a counterweight to the State's argument about Pye's future dangerousness. Further evidence from corrections officers as to Pye's nonviolent nature would have been at least partially cumulative. *See Cullen v. Pinholster*, 563 U.S. 170, 200 (2011). The fact that the jury heard some testimony that Pye was generally nonviolent further supports the reasonableness of the state court's conclusion that Pye wasn't prejudiced by Mostiler's failure to discover and present testimony like that offered by Ellenberg and Pittman at the state post-conviction proceedings.

Together, these factors make it unlikely that the corrections officers' testimony would have changed the outcome of Pye's sentencing. At the very least, it wasn't unreasonable for the state court to conclude that there wasn't a "substantial likelihood" that the presentation of such testimony would have resulted in a different sentence. *Shinn*, 141 S. Ct. at 524.

D

Finally, Pye contends that he was prejudiced by Mostiler's failure to present evidence of Alicia Yarbrough's cocaine habit—including evidence that she had cocaine in her system the night she died—and testimony from Linda Lyons that Alicia called Pye on the night of her murder. *See* En Banc Br. of Appellant at 62-68. Pye frames this as residual-doubt evidence that he says would have supported his story that Alicia voluntarily met him

at the motel to trade sex for drugs—negating the aggravating circumstances of the rape and kidnapping committed alongside Alicia's murder—and that it could have persuaded the jury not to impose the death sentence. But even if Mostiler should have presented this additional evidence supporting Pye's version of events during the guilt or penalty phase of trial, it was reasonable for the state court to conclude that his failure to do so wasn't prejudicial.

To begin, it wasn't clearly and convincingly erroneous for the state court to find that Lyons's post-conviction affidavit testimony was unreliable. In this affidavit, Lyons—Alicia's friend and neighbor—said that Alicia called a local motel from Lyons's house and that Lyons heard her ask for Pye's room and arrange for someone to pick her up—presumably to get drugs. *See* Doc. 16-24 at 66. The state court pointed out the inconsistency between this statement and what Lyons told a police investigator about 12 hours after seeing Alicia for the last time: Lyons heard Alicia call "someone" at a local motel and "ask for room #27," and Alicia told the "unknown party" on the other end of the line that she "was going to call the police on them for selling drugs out of the motel." Doc. 12-9 at 3. The lack of positive identification of the person Alicia was calling and Alicia's threat to call the police on that person—a relevant fact not reported in Lyons's post-conviction affidavit, *see* Doc. 16-24 at 66—are significant differences between Lyons's initial story and the affidavit she prepared years later for the state habeas proceedings. Given these discrepancies, it wasn't clearly and convincingly erroneous for the state court to find that Lyons's habeas affidavit testimony was unreliable.

Even if Lyons's affidavit testimony is weighed alongside the additional evidence of Alicia's cocaine use that Pye says Mostiler should have presented, there still isn't a substantial likelihood that this evidence would have changed the outcome of sentencing. That's because Pye's version of events, in addition to being only weakly supported by Lyons's unreliable affidavit, is implausible in light of the evidence produced at trial. As the state court noted, within about 24 hours of the crime, Georgia investigators examined the residence where Alicia had been living with Charles Puckett. They found that the front door had been forced open, with the door, door jamb, and locking mechanisms "broken and shattered from a violent force initiated from the exterior" as though the door had been "kicked open." Doc. 12-2 at 108-09. That finding was consistent with the testimony of Pye's co-defendants Anthony Freeman and Chester Adams that Pye kicked in Alicia's door when he forced himself into the home, but inconsistent with the story that Pye now says he could have told to raise residual doubt—that Alicia willingly went to Pye's motel to get drugs. Pye's explanation that Alicia kicked in *her own* door is implausible. And Pye would have had little reason to murder Alicia if she had gone willingly to his motel room to exchange sex for drugs, but every reason to kill her if he'd kidnapped, robbed, and raped her. At the very least, it wasn't *unreasonable*—"so obviously wrong [as to be] beyond any possibility for fairminded disagreement," *Shinn*, 141 S. Ct. at 523 (quotation marks omitted)—for the state court to conclude that in light of this competing evidence, testimony from Lyons and additional proof of Alicia's cocaine use wouldn't have created residual doubt substantially likely to change the outcome of sentencing.

E

Even if the state court's prejudice determination as to each ground of allegedly deficient performance was reasonable, we must still decide whether its conclusion as to the cumulative prejudice constituted an unreasonable application of *Strickland*. *See Strickland*, 466 U.S. at 694-96; *United States v. Blakey*, 14 F.3d 1557, 1561 (11th Cir. 1994) (discussing cumulative effect of counsel's errors). This question asks whether it was reasonable for the state court to conclude that there was no substantial likelihood that at least one juror would have voted against imposing the death penalty had Mostiler not committed all the errors that Pye alleges (and we assume) that he committed—*i.e.*, if Mostiler had conducted a more thorough investigation of Pye's background and presented additional evidence of his neglected and (possibly) abusive childhood, discovered and presented evidence of Pye's cognitive deficiencies, offered testimony about Pye's generally nonviolent behavior when he was previously incarcerated, and introduced additional residual-doubt evidence. But even considering Mostiler's alleged deficiencies cumulatively, it wasn't unreasonable for the state court to conclude that Pye has failed to establish prejudice: The extensive aggravating circumstances of Pye's crimes weighed heavily in favor of the jury imposing a death sentence, and the difficulties already described, which prevent Pye from establishing prejudice with respect to any individual deficiency—including § 2254(e)(1)'s presumption of correctness, credibility concerns with the habeas affidavits, conflicting mental-health evidence, and minimally relevant and conflicting evidence regarding Pye's behavior in prison—could also, to a fairminded jurist, preclude him from establishing cumulative prejudice.

No precedent applying AEDPA to state-court prejudice determinations compels a different result. While Pye argues that the background evidence that Mostiler should have presented parallels the evidence in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005), those cases "offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking" because the Supreme Court "did not apply AEDPA deference to the question of prejudice in those cases." *Pinholster*, 563 U.S. at 202. And even if those precedents were instructive, the balance of aggravating and mitigating factors is significantly different in Pye's case. Pye's crimes against Alicia could reasonably be considered more aggravated than the robbery and murder that the petitioner in *Williams* committed. 529 U.S. at 367-68. In addition, Pye's argument comparing his background to the petitioner's in *Williams* also assumes the truth of the affidavits presented at his state post-conviction proceeding. *But see supra* Part III.A.1. In *Rompilla*, there were significant aggravating factors—the murder was committed by torture during a felony and the defendant had a significant history of violent felony convictions—and the petitioner's background was characterized by abuse and neglect similar to what Pye alleges. 545 U.S. at 378, 391-92. But in that case, unlike here, there was credible contemporaneous evidence in the petitioner's file (which his attorneys hadn't examined) that suggested that he was schizophrenic and had a third-grade level of cognition, and later testing showed "an extreme mental disturbance . . . likely caused by fetal alcohol syndrome." *Id.* at 391-92. Thus, the mitigating evidence in *Rompilla* was significantly stronger than the evidence presented here. Lastly, in *Porter*, the mitigating evidence that defense

counsel failed to present was also significantly stronger than what Pye has presented: Had counsel performed competently, the jury would have heard about the petitioner's "heroic military service in two of the most critical—and horrific—battles of the Korean War" and his "struggles to regain normality upon his return from war," including PTSD that could "manifest in impulsive, violent behavior." 558 U.S. at 36.

Given the reasonableness of the state court's weighing of the evidence and the lack of contrary precedent, AEDPA requires us to defer to that court's cumulative-prejudice conclusion because it wasn't contrary to or an unreasonable application of the Supreme Court's precedents, based on an unreasonable determination of the facts, or "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 141 S. Ct. at 523 (quotation marks omitted); *see* 28 U.S.C. § 2254(d).

IV

In conclusion, a brief word about today's dissent—which like so (so, so, so) many before it, is framed around an extended allusion to Lewis Carroll's Alice-based novels. *See* Parker B. Potter, Jr., *Wondering About Alice: Judicial References to Alice in Wonderland and Through the Looking Glass*, 28 Whittier L. Rev. 175 (2006) (noting that, as of almost 20 years ago, some 1000 judicial opinions had referenced Carroll's works). What the dissent lacks in originality, it more than makes up for in spice. It accuses us of all manner of things—peddling "[n]onsense," Dissenting Op. at 18, "bury[ing]" unreasonable legal conclusions and factual findings, *id.* at 3, 35, "nullif[ying]" Su-

preme Court precedent, *id.* at 16, and "invent[ing]" reasons to "prop up" the state court opinion, *id.* at 24. Respectfully, none of those things are true.

Our dissenting colleagues' objections notwithstanding, the fact is that the standard embodied by 28 U.S.C. § 2254, as amended by AEDPA, is "difficult to meet . . . because it was meant to be." *Richter*, 562 U.S. at 102. While AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," we have authority to grant relief only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id.* Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (quotation marks omitted). The rationale for this principle is well established: "Under AEDPA, state courts play the leading role in assessing challenges to state sentences based on federal law." *Shinn*, 141 S. Ct. at 526. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Richter*, 562 U.S. at 103 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). It "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Id.* (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)).

Put simply, we have the power to overturn a state court's decision on the merits of a petitioner's habeas claim only in rare circumstances. Pye has not shown that this is one of them.

The district court's denial of habeas relief with respect to Pye's ineffective-assistance-of-counsel-at-sentencing claim is **AFFIRMED** and the case is **REMANDED** to the panel for proceedings consistent with this opinion.

JORDAN, Circuit Judge, joined by ROSENBAUM, Circuit Judge, concurring in the judgment:

I join Parts I and II of Judge Jill Pryor's dissent (with the exception of the last paragraph on page 33). But despite reservations with the majority opinion, I concur in the judgment denying Mr. Pye habeas relief, and write to explain why.

In deciding this appeal, the majority resolves an important issue of first impression in our circuit—the relationship between 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1)—in a single paragraph. This issue is of significant complexity, as evidenced by the literature discussing the caselaw and the different interpretive approaches that exist. *See, e.g.*, Randy Hertz & James S. Liebman, 1 Fed. Habeas Corpus Prac. & Proc. § 20.2[c] (7th ed. & 2020 update); Brian R. Means, Postconviction Remedies § 28.3 (June 2021 update); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 Tul. L. Rev. 385, 396-440 (2007). We did not ask the parties to address this issue, and they did not brief it. In the absence of adversarial presentation, I would not decide it

here. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579-81 (2020).

Like the panel, and as set forth in Judge Jill Pryor's dissent, I think the state court made a number of significant and unreasonable factual determinations. *See Pye v. Warden*, 853 F. App'x 548, 562-63, 566-67 (11th Cir. 2021); Jill Pryor Dissent at 35-49. I would conduct plenary review as to the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and deny relief because Mr. Pye has not made the requisite showing. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in a *de novo* standard when it is unclear whether AEDPA deference applies because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review[.]").

To show prejudice under *Strickland*, Mr. Pye must demonstrate "a reasonable probability that, but for his counsel's ineffectiveness, the jury would have made a different judgment," and because Georgia law requires a unanimous jury recommendation of death the focus is on whether one juror would have come to a different conclusion. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020). Although the reasonable probability standard does not require Mr. Pye to show that his counsel's performance more likely than not affected the outcome, the likelihood of a "different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011).

Each capital case, and every capital defendant, is different. Generalizations, at least when it comes to the prejudice determination, are therefore difficult to make. For me, this is one of those cases in which the totality of the

new mitigating evidence—taking into account some of its limitations and its partly contested nature—does not satisfy the reasonable probability standard. When juxtaposed against the brutality and cruelty of the premeditated kidnapping, gang rape, and murder of Ms. Yarbrough—whose child Mr. Pye claimed was his—after her plea for mercy, I do not believe there is a substantial likelihood that one juror would have made a different recommendation as to punishment. In other words, there is not a reasonable probability that one juror would have "concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. *Cf. Krawczuk v. Secretary*, 873 F.3d 1273, 1297-98 (11th Cir. 2017) ("[U]nder *de novo* review, we readily conclude that Krawczuk failed to establish a reasonable probability that, had he presented the above mitigating evidence [abandonment, isolation, lack of supervision, neuropsychological damage, mental disorders, emotional and physical abuse, depression symptoms, and sexual abuse by strangers on one occasion] the outcome of the proceedings would have been different. . . . In reaching this conclusion, we weigh the totality of the mitigating evidence against the aggravating factors, considering the substantial weight due to aggravation in light of the brutal nature of [the] murder. . . . Krawczuk's cruelty and premeditation make it unlikely that he would have received a different sentence.").

The *Strickland* prejudice analysis is, of course, a predictive human endeavor based on a hypothetical construct. *See Evans v. Secretary*, 703 F.3d 1316, 1334 (11th Cir. 2013) (en banc) (Jordan, J., concurring). But it is the framework the Supreme Court has given us, and the one we must apply.

JILL PRYOR, Circuit Judge, joined by WILSON, Circuit Judge, dissenting:

When she stepped through the looking glass, Alice found a world of opposites, nonsense, and "impossible things."[1] Walking toward a thing is best accomplished by walking away from it.[2] Time runs backwards. Alice can read "Jabberwocky" only by viewing it through a mirror, and, even so, finds it "rather hard to understand."[3] As the author of the panel opinion in this case, which applied the familiar legal standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), I feel as though I too have stepped through the looking glass. But what happened during Alice's time through the looking glass was a dream. This, case, unfortunately, is not.

Willie James Pye was convicted of an aggravated crime. He brutally raped and murdered his former girlfriend. Despite overwhelming evidence to the contrary, Mr. Pye maintained his innocence and insisted on a defense strategy focused on proving it. When Mr. Pye's family members understandably were uncooperative in helping him try to prove the unprovable in the guilt phase of his trial, Mr. Pye's lawyer, Johnny Mostiler, and investigator, Dewey Yarbrough, largely gave up on attempting to rally the family members for the penalty phase, to save their client's life. The majority opinion does not defend trial counsel's performance, so I will not go on about his shortcomings in this case. Suffice it to say that after presenting a meager case in opposition of the death penalty,

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[1] Lewis Carroll, *Through the Looking Glass* 47 (2022).

[2] *Id.* at 15.

[3] *Id.* at 10.

Mr. Mostiler gave a canned closing argument that his opposing counsel anticipated and rebutted, to disastrous result.

Rather than defending trial counsel's performance, the majority opinion concludes that Mr. Pye has failed to show prejudice—or, more precisely, that the state habeas court's determination that he hadn't shown prejudice was not, in AEDPA's terms, "contrary to" and did not "involve[ ] an unreasonable application of, clearly established Federal law"; nor was it "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). In federal habeas, that is checkmate. But in reaching its conclusion, the majority opinion makes two moves that do not belong on any chess board this side of the mirror. So I dissent.

The majority opinion's first move is to declare that federal courts may find that a reasoned state court decision withstands AEDPA deference by turning to justifications the state court never even hinted at. This is the opposite of what the Supreme Court has instructed, and the majority's attempt to wiggle out from under Supreme Court precedent is unconvincing. The majority opinion supports its declaration with a half-baked textual analysis. And it relies on cases holding—uncontroversially—that a state court's decision is not unreasonable just because it did not address and reject each one of a petitioner's arguments and pieces of evidence supporting his claims. To turn this unremarkable principle into support for its holding, the majority must refract the light shed by these cases beyond what the laws of nature allow.

Second, the majority opinion holds—on an issue of first impression in this Court that was never briefed or argued by the parties—that a state court's findings of fact

may be clearly erroneous but not sufficiently important to meet the "unreasonable" AEDPA standard. Even if we assume for argument's sake that this holding is correct, when combined with the majority opinion's disregard of Supreme Court precedent requiring us to review exclusively the reasons the state habeas court actually gave, the holding creates a practically impossible path to relief for habeas petitioners. If federal courts can bury unreasonable findings under an avalanche of new reasons the state court never gave, then unreasonable findings will virtually never be important enough to satisfy the majority's test.

In Part I, I describe what happened in this case. Although the majority opinion mostly gets the facts right, I will highlight some nuances that, I think, the majority opinion has missed. In Part II, I describe habeas review under AEDPA and explain the majority opinion's major errors in describing AEDPA deference. In Part III, using the proper AEDPA analysis, I examine the state habeas court's decision and conclude that *de novo* review of the prejudice to Mr. Pye's defense is warranted. In Part IV, I demonstrate why, on a *de novo* review, Mr. Pye has shown prejudice. In Part V, I conclude by summarizing the majority's errors and the impact they will have unless the Supreme Court sets us right again.

I. BACKGROUND

As the majority opinion recounts, the facts of Mr. Pye's crime are indeed aggravated. Mr. Pye had dated the victim, Alicia Lynn Yarbrough, on and off for a time.[4] When the crime was committed, however, Ms. Yarbrough

[4] Ms. Yarbrough was not related to investigator Dewey Yarbrough.

was living with another man, Charles Puckett, and their infant. Mr. Pye and two associates, Chester Adams and Anthony Freeman, drove to the home of Ms. Yarbrough and Mr. Puckett, apparently intending to rob Mr. Puckett. Mr. Pye was angry that Mr. Puckett had signed the birth certificate of Ms. Yarbrough's child, whom Mr. Pye believed was his child. When they arrived, Mr. Puckett was not at home; Mr. Pye forcibly took Ms. Yarbrough from the home, leaving the infant behind. The three men drove to a hotel and rented a room, where each man repeatedly raped Ms. Yarbrough. The men eventually took Ms. Yarbrough from the hotel room, put her into Mr. Adams's car, and drove away from the hotel. At Mr. Pye's direction, Mr. Adams pulled the car onto a dirt road. Mr. Pye ordered Ms. Yarbrough out of the car, made her lie face down, and shot her three times as she begged for her life. She died of the wounds. Mr. Freeman confessed and implicated the other two men.

The trial court appointed Mr. Mostiler, the county public defender, to represent Mr. Pye. Mr. Mostiler was assisted by Mr. Yarbrough. Mr. Pye maintained his innocence, despite the overwhelming evidence of his guilt, and testified in his own defense. The jury found him guilty.

At the trial's penalty phase, the State presented testimony from three witnesses who collectively spoke about Mr. Pye's previous conviction and incarceration for burglary, reputation for violence about a decade before the murder, and a previous violent altercation involving Ms. Yarbrough. Mr. Mostiler presented testimony from eight lay witnesses: Mr. Pye's sister Pam Bland, sister Sandy Starks, brother Ricky Pye, father Ernest Pye, 15-year-old

niece Cheneeka Pye,[5] nephew Dontarious Usher,[6] sister-in-law Bridgett Pye, and family friend Lillian Buckner. These witnesses testified that Mr. Pye was of good moral character and asked the jury for mercy on his behalf. Ernest Pye testified that Mr. Pye had the makings of a normal childhood: he "liked to play basketball, liked to play with kids," was "always smil[ing,]" and was never known to fight. Doc. 13-11 at 48.[7] Some of the witnesses said Mr. Pye and Ms. Yarbrough seemed to have a good relationship.

Mr. Mostiler asked a couple of the witnesses about Mr. Pye's early life. Ms. Starks testified that she and her siblings were raised in a house with no "running water in the bathroom" and only a "wooden heater." *Id.* at 67. But Ms. Bland testified that the family "had a four-bedroom" home. *Id.* at 30. And Ms. Starks told the jury that, above all, the family "had love." *Id.* at 67.

In closing, the prosecutor—who had tried several capital cases against Mr. Mostiler—anticipated what Mr. Mostiler would say to the jury in defense of Mr. Pye's life, down to the letter. He told the jury Mr. Mostiler would quote from William Shakespeare's *The Merchant of Venice*, "the quality of mercy is not strained," and from the

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[5] I use the spelling "Cheneeka" here because it is used in Ms. Pye's postconviction affidavit. At trial, the court reporter spelled her name "Chanika" without confirming on the record the correct spelling. *See* Doc. 13-11 at 51.

[6] Here, too, I use the spelling reflected in Mr. Usher's postconviction affidavit. At trial, the court reporter spelled his name "Dantarius" without confirming on the record the correct spelling. *See* Doc. 13-11 at 59.

[7] "Doc." numbers refer to the district court's docket entries.

Bible's Beatitudes, "blessed are the merciful for they shall obtain mercy." *Id.* at 83. Mr. Mostiler did exactly that, revealing that he had not bothered to tailor his argument to Mr. Pye's case.

The prosecutor also relied on some old tricks. As he had in previous cases he had tried against Mr. Mostiler, he told the jury that, if left in prison for life, Mr. Pye would "for sure kill a guard to get out." *Id.* at 86-87. Even though Mr. Mostiler well knew that the prosecutor had used this argument in previous cases, Mr. Mostiler had nothing prepared to refute the prosecutor's assertion. He simply told the jury that Mr. Pye wouldn't kill a prison guard. A classic "just trust me" with nothing to back it up.

The jury did not just trust Mr. Mostiler. After finding four statutory aggravating factors, the jury unanimously recommended a sentence of death, which the trial court imposed.

After Mr. Pye's convictions and sentence were upheld on direct appeal, he sought postconviction relief in state court. This en banc proceeding is concerned with only one of Mr. Pye's postconviction claims: that his trial counsel rendered ineffective assistance in failing to investigate and present mitigating evidence at the penalty phase of his trial, including evidence of his family background, mental health challenges, and cognitive impairment, as well as evidence to "counter the State's evidence of aggravated culpability." *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005).[8]

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[8] Although the majority opinion addresses Mr. Pye's argument that trial counsel also should have leaned more heavily on residual doubt,

To prove his claim in state court, Mr. Pye was required to demonstrate that trial counsel's performance fell "below an objective standard of reasonableness," taking into account prevailing professional norms, and that "there is 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, 688, 694 (1984). Mr. Pye presented evidence of deficient performance and resulting prejudice, but because the majority opinion assumes Mr. Mostiler performed deficiently, I do not recount the evidence relating solely to that element and instead focus on Mr. Pye's evidence that went to the state habeas court's prejudice-prong reasoning.

At the postconviction evidentiary hearing, Mr. Yarbrough testified about the defense team's work on Mr. Pye's case. He testified that the primary focus of the defense was to prove Mr. Pye's innocence, a strategy Mr. Pye insisted upon. Mr. Yarbrough testified that Mr. Pye told him "to go out and contact his family members," and so he contacted four or five of them, including Mr. Pye's mother, father, and two to three siblings. Doc. 19-11 at 23. Mr. Yarbrough testified that the family "didn't put any effort forth on any of the contacts I made with them." *Id.* at 24. He recalled one family member saying "that [Mr. Pye] got himself into this, [and] he can get himself out of it." *Id.* When asked to explain "[h]ow . . . the lack of family involvement affect[ed the] investigation," Mr. Yarbrough clarified that the family was unhelpful "as far

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see Maj. Op. at 30 n.12, I do not address it here because in my view Mr. Pye is entitled to relief even without it.

as helping prove [Mr. Pye's] *innocence*." *Id.* at 24-25 (emphasis added); *see id.* at 25 ("[T]hey were not willing to . . . put the effort forward to prove what I was trying to prove that I was told to try to prove by Willie."). Mr. Yarbrough recounted: "I can remember thinking, and I want to say this was during, *right before the sentencing phase*, you know, I just don't care about going back over there and trying to get them here." *Id.* at 25 (emphasis added).

At the hearing, habeas counsel offered undisputed evidence that Mr. Pye is of low intellectual functioning, bordering on intellectual disability.[9] They also offered undisputed evidence that Mr. Pye has suffered from depression for nearly all his life. And counsel offered undisputed evidence through affidavits that Mr. Pye experienced a traumatic childhood and adolescence, during which physical and emotional abuse, extreme parental neglect and endangerment, and abject poverty pervaded his daily life, as well as a resulting troubled adulthood. Finally, habeas counsel introduced evidence that Mr. Pye previously had adapted well to carceral life and had been trusted by prison staff.

The state habeas court denied Mr. Pye's habeas petition, concluding, as relevant here, that he failed to show

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[9] As the state habeas court explained, "[i]t is undisputed among the mental health professionals who have evaluated [Mr. Pye] that [his] intellectual functions are in the low to borderline range." Doc. 20-40 at 18. The majority opinion also discusses dueling witness testimony about the presence and severity of brain damage. *See* Maj. Op. at 7, 47-53. I do not discuss that testimony here because I believe Mr. Pye is entitled to relief even without the contested evidence of brain damage.

that any deficient performance by Mr. Mostiler prejudiced him. The court found that evidence of low intellectual functioning would not have swayed the jury. The court noted the affidavit testimony rebutting the State's contention of future dangerousness but emphasized that Mr. Pye's corrections records showed several instances of insubordination and aggression. The court thus found no reasonable probability that Mr. Pye's resulting sentence would have been different had the jury heard positive testimony about his adaptation to prison.

The state habeas court also concluded that trial counsel's failure to investigate and present evidence of Mr. Pye's family background did not cause prejudice. The majority opinion characterizes the state habeas court's conclusion as based on five reasons: (1) the state habeas court's "decision to discount the affidavit evidence presented at the state post-conviction proceedings due to concerns about their credibility"—specifically, supposed "artful drafting"; (2) "evidence of Pye's family's unwillingness to cooperate in his defense at the time of trial"; (3) "the minimal connection between Pye's background and the crimes he committed"; (4) "Pye's age[, 28,] at the time of those crimes"; and (5) "the extensive aggravating evidence presented by the State at sentencing." Maj. Op. at 31, 37. The majority opinion's identification of the fourth reason is correct but incomplete—the state habeas court found because Mr. Pye "was 28 years old at the time of these crimes, trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of Petitioner's guilt, that remorse was likely to play better than excuses." Doc. 20-40 at 66; *see* Maj. Op. at 44 n.17 (acknowledging the court's "remorse" finding). Add the court's reasoning that Mr. Pye's evidence of (6)

low intellectual functioning and (7) lack of future dangerousness would not have swayed the jury, and we can see that the state habeas court supplied seven total reasons for its no-prejudice determination.[10] And so, the state habeas court denied Mr. Pye relief from his death sentence.

After the Supreme Court of Georgia denied Mr. Pye a certificate of probable cause to appeal the state habeas court's order, Mr. Pye filed a federal habeas petition. Focusing primarily on prejudice, the district court rejected the petition but granted Mr. Pye a certificate of appealability on the claim we address today. After briefing, and with the benefit of oral argument, a panel of this Court—of which I was a member—held that the state habeas court's rejection of Mr. Pye's ineffective-assistance-of-counsel claim was contrary to and involved an unreasonable application of clearly established federal law and was based on unreasonable factual determinations in light of the state court record. *See* 28 U.S.C. § 2254(d). On *de novo* review, we concluded that Mr. Pye had shown deficient performance and prejudice and, therefore, was entitled to habeas relief.[11]

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[10] Do I think we need to take a tally of a state court's reasons? No. I do so here only to compare the state habeas court's reasoning with the majority opinion, which adds reasons that the state habeas court did not give. Because the universe AEDPA tasks us with reviewing is more limited than what the majority opinion describes, I use numbers to define precisely what we should be reviewing.

[11] Our opinion, which was not listed for publication, set out no new law. Rather, it simply applied precedent to the facts of the case. *See* 11th Cir. R. 35-3 ("[E]rror asserted in the panel's misapplication of correct precedent to the facts of the case[] are matters for rehearing before the panel but not for en banc consideration."). As I will explain in the next section, the majority opinion has used this case not, as it

II. AEDPA

AEDPA was enacted in 1996 in part to streamline the federal review of state prisoners' habeas petitions, but in practice the statute has done anything but.[12] Its abstruse language also has left much to the imagination and rumination of jurists and litigants alike throughout the more than quarter of a century it has been in place.

The basics, though, are simple enough. AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). These standards are, we all agree, "highly deferential." *Burt v. Titlow*, 571 U.S. 12, 18

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professes, to "clarify" AEDPA's application, Maj. Op. at 13, but to narrow even further the nearly impossible path to relief available to a state prisoner in federal habeas.

[12] *See* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009) (criticizing the costliness and inefficiency of federal habeas review of state criminal cases); Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts*, NAT'L CTR. STATE CTS. 59 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf (analyzing the statistics of all federal habeas cases and explaining that the "[o]verall disposition time *per case* has increased on average since AEDPA" (emphasis in original)).

(2013).[13] The majority and I disagree, however, on how that "highly deferential" review should be conducted.

Several years ago, our Court fractured over how to apply AEDPA's highly deferential standard in a case materially indistinct from this one: a case in which a Georgia state habeas court issued a reasoned decision and the Supreme Court of Georgia declined to issue a certificate of probable cause to appeal. A majority of our en banc Court borrowed a standard from a Supreme Court case that applied AEDPA's deferential review in the absence of any reasoned state court decision, *Harrington v. Richter*. Applying *Richter*'s standard, the majority held that in conducting AEDPA review we were not limited to the reasons the state habeas court supplied; instead, the Court could imagine what theories supported *or* "could have supported" the state court's denial of habeas relief and examine whether "it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" clearly established federal law. *Wilson v. Warden*, 834 F.3d 1227, 1235 (11th Cir. 2016) (en banc) (majority opinion) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). *But see id.* at 1247-49 (Jill Pryor, J., dissenting) (explaining why *Richter*'s standard did not apply and arguing we should follow *Premo v. Moore*, 562 U.S. 115 (2011), an AEDPA case in which the Supreme Court had looked through an unreasoned decision to a reasoned one and examined the "particular reasons why the state court rejected the claim on the merits" (internal quotation marks omitted)).

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[13] We review *de novo* a district court's rejection of habeas relief on an ineffective-assistance-of-counsel claim. *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

The Supreme Court overruled our en banc decision, holding that AEDPA "requires" a federal habeas court to look to the last reasoned state court decision and then "train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims," and then "defer[ ] to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (emphasis added) (internal quotation marks omitted); *see id.* at 1195-96 ("[W]e focus[ ] *exclusively* on the actual reasons given by the lower state court, and we defer[ ] to those reasons under AEDPA." (emphasis added) (citing *Premo*, 562 U.S. at 132)). The Court, noting that "*Richter* did not directly concern the issue before [it]—whether to 'look through' the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision," held that "*Richter* does not control here." *Id.* at 1195. Without a doubt, then, the Court rejected *Richter*'s approach in cases with reasoned decisions.

Wilson controls this case. Here, as there, a reasoned Georgia state court decision was followed by an unreasoned denial from the Supreme Court of Georgia of a certificate of probable cause to appeal. Here, as there, we must "train [our] attention on the particular reasons—both legal and factual"—why the state habeas court rejected Mr. Pye's ineffective-assistance-of-counsel claim and "defer[ ] to those reasons" only, I repeat, only "if they are reasonable." *Id.* at 1191-92. *Wilson* commands us to review a limited universe—the state habeas court's seven reasons, which I described above. So our task in this appeal consists of three steps: (1) look at these seven reasons, (2) defer to them if they are reasonable, and (3) if they are not, conduct a *de novo* review.

Reading the majority opinion, you would at first think the majority and I agree about *Wilson*'s direct application to this case. *See* Maj. Op. at 12-13. Turn the page, though, and the majority opinion veers into another world entirely, one where "things go the other way."[14] Despite *Wilson*'s clear dictate that we examine the particular reasons the state habeas court actually provided "and defer[ ] to *those reasons if* they are reasonable," *Wilson*, 138 S. Ct. at 1192 (emphasis added), and the majority's apparent acceptance of this rule, *see* Maj. Op. at 15, the majority opines that we can "consider *any potential justification*" for the state court's decision. Maj. Op. at 16 (emphasis added). In other words, according to the majority we can examine what "could have supported" the state court's decision. *Richter*, 562 U.S. at 102. This violates step 1, above. And then, the majority says, AEDPA deference applies "*only* [to] the state court's resulting decision—*not* [to] the constituent justifications for that decision." Maj. Op. at 18-19 (emphasis in original) (alteration adopted) (internal quotation marks omitted). This violates steps 2 and 3, above. All of it violates *Wilson*.

This feels like déjà vu. *Compare Wilson*, 834 F.3d at 1247-49 (Jill Pryor, J., dissenting), *with id.* at 1235-36 (majority opinion), *overruled sub nom. by Wilson*, 138 S. Ct. at 1195-96.[15] How does the majority opinion attempt to justify its nullification of *Wilson*? In a two-part gambit.

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[14] Carroll, *supra* note 1, at 4.

[15] Or, even, déjà vu of déjà vu, because *Wilson* was not the most recent occasion when I argued, unsuccessfully, to my colleagues that the Supreme Court had already resolved an issue for us, only to have the Supreme Court overturn and once again remind us what it has said. *Compare Ovalles v. United States*, 905 F.3d 1231, 1283 (11th

First, the majority opinion sidesteps Wilson's dictate that we focus exclusively on the reasons a state court supplied by imagining two categories of support for a state-court decision: reasons and justifications. Reasons, the majority says, are high-level determinations like "the petitioner wasn't prejudiced by his counsel's deficient performance." Maj. Op. at 16. Justifications, the majority says, are something more granular—like *why* the petitioner was not prejudiced. So, the majority surmises, it can marshal new *justifications* in support of a state habeas court's disposition because justifications are different from reasons, and *Wilson* said only that we must examine the state court's reasons.

This distinction between reasons and justifications is nonexistent in the caselaw, and that should come as no surprise. Justifications are not different from reasons, they *are* reasons. Black's Law Dictionary defines "justification" as "[a] lawful or sufficient reason for one's acts or omissions." *Justification*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Merriam-Webster defines the term to mean "the showing in court of a sufficient lawful *reason* why a party charged or accused did or failed

Cir. 2018) (en banc) (Jill Pryor, J., dissenting) (explaining that the Supreme Court had already said that the "language" used in 18 U.S.C. § 924(c)'s residual clause "require[d]" a categorical approach (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004))), *with id.* at 1242, 1244 (majority opinion) (stating that the Supreme Court hadn't "provide[d] a detailed explanation" when it said in *Leocal* that the § 924(c)'s language "requires" a categorical approach, and holding that a conduct-based approach applied instead), *abrogated by United States v. Davis*, 139 S. Ct. 2319, 2328 (2019) (reiterating that "It's not even close; the statutory text [of § 924(c)'s residual clause] commands the categorical approach" (citing *Leocal*, 543 U.S. at 7)).

to do that for which he is called to answer," or "something that constitutes such a reason." *Justification*, *Merriam-Webster Unabridged* (emphasis added). The Oxford-English Dictionary defines "justification" as "The action of or result of showing something to be just, right, or reasonable; vindication. Also: the grounds on which this is done; a justifying circumstance; *a good reason*." *Justification*, *Oxford-English Dictionary* (emphasis added).

So if a federal court is tasked with reviewing only the state court's reasons, so too is it tasked with reviewing only its justifications. They are one and the same.

Second, the majority opinion casts aside, or diminishes to meaninglessness, its admission that "*Wilson* instructs us to 'review[ ] the specific reasons given by the state court and defer[ ] to those reasons if they are reasonable.'" Maj. Op. at 15 (quoting *Wilson*, 138 S. Ct. at 1192). Now, the majority opines, "*only*" the decision, *id.* at 18-19 (emphasis in original)—the "you win or you lose" on the claim—gets AEDPA deference. Maybe the majority is shifting gears altogether, arguing—inconsistently with its reasons versus justifications nonsense—that we do not defer to reasons at all, only to decisions. I think, though, that the majority is saying something more—that even if we review a state court's reasons, and even if those reasons represent an "unreasonable application of federal law" or an "unreasonable determination of the facts," 28 U.S.C. § 2254(d)(1), (2), the state court's decision nonetheless is worthy of deference so long as we can imagine theories that "'*could have supported*'" the decision. Maj. Op. at 19-20 (emphasis in original) (quoting *Richter*, 562 U.S. at 102). Or, put another way, the majority opines that although we can focus " 'exclusively on the actual reasons

given by the lower state court, and . . . defer[] to those reasons under AEDPA" if they are reasonable, if the actual reasons given are *unreasonable*, then we should revert to *Richter*, imagine reasons that would support the ultimate decision, and hold fast to AEDPA deference. *Wilson*, 138 S. Ct. at 1195-96; *see* Maj. Op. at 25 n.7. Either way, I'm confounded.

If the majority opinion is correct, then *Wilson*'s look-through rule does no work. Whether the majority is saying that we defer only to the ultimate decision of the lower state court, or that we defer to the ultimate decision despite any wrong-beyond-fairminded-disagreement reasoning, examining a state court's reasoning would be a meaningless, make-work exercise. That is because we could always skip that step and start making up reasons to support the state court's decision. This Court's en banc majority in *Wilson* would have been correct because federal courts would have no need to train their attention on a state court's reasons when they could just imagine their own, perhaps better, reasons why a claim would fail. In the same vein, the Supreme Court would have had no occasion to take the case, and *Wilson* would not exist.

That seems to be the world the majority is living in, as it clings to *Richter*[16] and expressly relies on the Court's

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[16] Recently, in a concurring opinion in a federal habeas case, Judge Newsom opined that "there may also be some tension between *Richter* and the Court's . . . more recent decision in" *Wilson*, "which—albeit in a different context—seemed to privilege a state court's 'reasons' over its 'decision.'" *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1215 n.1 (11th Cir. 2021) (Newsom, J., concurring). Although at the time he wrote his concurrence in *Hayes* Judge Newsom explained that he would "leave for another day and for those higher on the food chain" how to resolve the tension he perceived between Supreme

reasoning in that case, *see* Maj. Op. at 19-20 (reviving the "could have supported" standard)—a case that simply "does not control" here. *Wilson*, 138 S. Ct. at 1195.[17] And there is more. The majority opinion gives short shrift to the entirety of § 2254(d). The majority emphasizes that AEDPA asks whether a state court's adjudication of a claim "*resulted* in a *decision*." Maj. Op. at 18. From there, the majority extrapolates that only—or regardless of flaws in a decision's reasoning—a court's "resulting decision" should receive deference. The majority's reading misses half of the text and context. Here is the rest of the story. Under subsection (d), we cannot grant a writ of habeas corpus on a claim a state court decided on the merits "*unless* the adjudication of the claim . . . *resulted in a decision that* was contrary to, or *involved* an unreasonable

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Court decisions, *id.*, it appears that now he has decided we as an inferior Court can overlook the Supreme Court's discussion and rejection of *Richter* not in a "different context," but in the very same context we have here. *Id.*

[17] Contrary to the majority opinion's characterization of my position, *see* Maj. Op. at 23-24, I do not suggest *Wilson* held that a state court's decision is not entitled to AEDPA deference and that somehow only the reasons in support of that decision are. That view of *Wilson* cannot be squared with *Richter*. Rather, *Wilson* says that when a state court provides reasons, we give AEDPA deference to its decision by examining whether the reasons supporting the decision were reasonable. When a state court provides no reasons, we have no reasons to review, and *Richter*'s rule controls.

Nor, to be clear, do I suggest that we can never consider reasons supporting a state habeas court's decision that the state court did not provide. If we conduct a *de novo* review of the record, either by assuming that standard applies or after concluding that the state court's decision does not withstand AEDPA deference, then we may marshal our own reasons why a petitioner is not entitled to relief.

application of, clearly established Federal law," or "*resulted in a decision that was based on* an unreasonable determination of the facts." 28 U.S.C. § 2254(d) (emphasis added). In tasking federal courts with determining whether a decision involved, or was based on, certain egregious errors, the statute directs us to examine *how*, or *why*—that is to say, the reasons, if any, for the decision. And those reasons should rule the day "unless" they were "unreasonable," *id.*—that is, unless they are unworthy of the deference the statute confers upon them. If the how and the why were unreasonable, the "unless" of the statute is satisfied, no further deference is authorized or warranted.

This is what *Wilson* says in instructing federal courts to "defer[ ] to [a state court's] reasons *if* they are reasonable." *Wilson*, 138 S. Ct. at 1191-92 (emphasis added). If they are not, the Supreme Court's body of AEDPA cases shows, we are "free to provide habeas relief."[18] *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 ("In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*. Furthermore, the court partially relies on an erroneous factual assumption. The requirements for habeas relief established by 28 U.S.C. § 2254(d) are thus satisfied.").

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[18] *Wiggins v. Smith*, 539 U.S. 510, 542 (2003) (Scalia, J., dissenting) (characterizing the Court's earlier decision in *Williams v. Taylor*, 529 U.S. 362 (2000): "Williams had surmounted § 2254(d)'s bar to habeas relief because we held that the Virginia Supreme Court's analysis with respect to . . . prejudice . . . was both 'contrary to,' and 'an unreasonable application of,' our clearly established precedents," so the Court was "free to provide habeas relief . . . ." (emphasis omitted)).

Building on the shaky foundation of its feeble reasons-versus-justifications distinction, outdated view of *Richter*'s scope, and partial textual analysis, the majority seeks to buttress its deference-at-every-turn holding with our previous decisions. But those decisions stand only for the wholly unremarkable principle that a state court's decision that otherwise is reasonable is not unreasonable simply because it fails to discuss every fact or argument a petitioner advances. Maj. Op. at 16-17 (citing *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172 (11th Cir. 2013)); *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335 (11th Cir. 2019)). It does not follow from this principle, however, that we can rely on and give deference to reasons never mentioned by the state habeas court to conclude that the decision withstands AEDPA deference. The former merely reflects that we do not "engage[] in a line-by-line critique of the state court's reasoning." *Meders*, 911 F.3d at 1350. The latter violates *Wilson*. *See id.* at 1349 ("[*Wilson*'s holding] does not mean we are to flyspeck the state court order or grade it. What it means is we are to focus not merely on the bottom line ruling of the decision *but on the reasons, if any, given for it*." (emphasis added)).[19]

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[19] No matter how many times the majority opinion says so, *Meders* does not support its reading of *Wilson*. The language from *Meders* the majority opinion cites, *see* Maj. Op. at 16, 21-22, 25, all concerned this same simple idea: that we do not flyspeck a state court's opinion. And, of course, how we did things before the Supreme Court decided *Wilson* in 2018, see Maj. Op. at 16-17, 20-21 (citing cases that pre-date *Wilson*), does not answer how we do things in light of *Wilson*.

The majority opinion also relies heavily on this Court's post-*Wilson* decision in *Whatley v. Warden*, 927 F.3d 1150 (11th Cir. 2019). There, in a case that arose in a different procedural posture than this case

The majority opinion quotes our decision in *Lee v. Commissioner* for the proposition that we may "examine what other 'implicit findings' the state court could have made in its denial of a federal claim." *Lee*, 726 F.3d at 1223; *see* Maj. Op. at 16-17. Divorced from the context of the lengthy *Lee* opinion, this language may seem alluring. But in *Lee*, a case we decided before the Supreme Court decided *Wilson*, the petitioner argued that the state post-conviction court's decision involved an unreasonable application of clearly established law "because that opinion did not mention or discuss every relevant fact or argument he offered in support of his . . . claim." *Lee*, 726 F.3d at 1210-11. We held, as we have numerous times before and since, that a state court is not required to show its work. *Id.* at 1211-12. We further explained that there may be some "implicit findings" of a state court "which, though unstated, are *necessary* to that ruling." *Id.* at 1217 (emphasis added) (internal quotation marks omitted). Those necessary implicit findings, we said, "are entitled to deference under § 2254(d)." *Id.* (internal quotation marks

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and *Wilson*, a panel stated that "our review is not limited to the reasons the [state] [c]ourt gave in its analysis," *id.* at 1178, and that we "instead focus on [the state court's] ultimate conclusion," *id.* at 1182 (internal quotation marks omitted). The *Whatley* panel never mentioned *Wilson*. Nor did it mention this Court's earlier post-*Wilson* decision in *Meders*, 911 F.3d at 1349, where we correctly applied *Wilson*. My former colleague Beverly Martin asked this Court to rehear *Whatley* en banc because it conflicted with *Wilson* and *Meders*. *See Whatley v. Warden*, 955 F.3d 924, 924-27 (11th Cir. 2020) (Martin, J., dissenting from denial of reh'g en banc). She was right. In any event, because *Whatley* conflicted with *Meders*, under our prior panel precedent rule, only *Meders* is good law on this point. *See United States v. Levy*, 379 F.3d 1241, 1245 (11th Cir. 2004) ("[W]here there is conflicting prior panel precedent, we follow the first in time.").

omitted). We gave as an example a *Batson* challenge: if we know from the record that defense counsel failed to rebut the prosecutor's race-neutral explanation for a strike and that the trial court ultimately ruled the strike proper, we can infer "that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry." *Id.* at 1220 (internal quotation marks omitted). That necessary finding, though implicit, is entitled to AEDPA deference. *Id.*

The majority opinion extrapolates from *Lee* that it can consider unlimited reasons unstated by state habeas courts. But even setting aside the illogic of this extrapolation—that because we should not flyspeck state court opinions, we can violate *Wilson*'s express dictates—the reasons the majority opinion invents to prop up the state habeas court's decision were in no way "necessary" to the state habeas court's ruling. *See, e.g.*, Maj. Op. at 38 n.14 (citing the supposed lack of evidence corroborating affidavit testimony, a reason the state habeas court did not provide and that is not necessary to its rejection of the affidavits), 53-54 & n.22 (holding that it was reasonable for the state habeas court to conclude that evidence to rebut future dangerousness would not have been substantially likely to change the outcome of Mr. Pye's sentencing "for three reasons," two of which the state habeas court did not mention, and were not necessary to the state court's conclusion). Thus, they are not "implicit findings" of the type *Lee* contemplated. To read *Lee* any more broadly—that is, to read *Lee* to permit what the majority opinion undertakes—is to violate *Wilson*.

The majority opinion laments that *Wilson*'s rule as I see it "would incentivize state courts to issue unreasoned,

summary decisions as a means of guaranteeing maximum AEDPA deference." Maj. Op. at 22. Ironically, the en banc majority in *Wilson* resisted the look-through rule on the opposite ground, that it "does nothing less than impose an opinion-writing standard." *Wilson*, 834 F.3d at 1238-39. Setting that aside, "the matter is empirical," and the majority opinion has no data to back up its concern. *Wilson*, 138 S. Ct. at 1197. But to the extent such an incentive exists, it has existed since the Supreme Court decided *Richter* in 2011. *See Richter*, 562 U.S. at 99 ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed."). Further, state courts stand to be reversed by more than one court, and on direct review it seems a state court's incentive would be to show its work. Even as it pertains to federal review, I trust that state court judges will value thoroughness for the parties' and the public's sake. And setting aside unsupported empirical matters, deferring to the reasons a state court supplied "is more likely to respect what the state court actually did" than deferring to reasons the court never supplied and perhaps never even considered. *Wilson*, 138 S. Ct. at 1197.[20]

Lastly, the majority says my position conflicts with "the overwhelming consensus position" of our sister circuits. Maj. Op. at 21. In support, the majority opinion cites a recent Fifth Circuit case collecting (the majority

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[20] The majority opinion also notes that "any state court's written opinion is necessarily 'partial.'" Maj. Op. at 22. Undoubtedly. But this is just another way to say that a court is not required to discuss every fact or argument. It does not answer the question here, which is how we apply AEDPA deference to "what the state court actually did." *Wilson*, 138 S. Ct. at 1197.

fails to mention) *pre-Wilson* decisions of the First, Second, Sixth, Seventh, Eighth, and Tenth Circuits, as well as one from our Court. *Sheppard v. Davis*, 967 F.3d 458, 467 n.5 (5th Cir. 2020).[21] Of course, we are obliged to follow *Wilson*, as intervening Supreme Court precedent, not decisions that predated it.

Just as importantly, the majority opinion fails to acknowledge that several of these circuits, and others whose decisions *Sheppard* did not cite, have refined their approach in the wake of *Wilson*. *See, e.g.*, *Porter v. Coyne-Fague*, 35 F.4th 68, 74-75 (1st Cir. 2022) (citing *Wilson*'s requirement that federal courts defer to the "specific reasons" given by the state court, examining those reasons, concluding that they did not withstand AEDPA deference, and applying *de novo* review)[22]; *Scrimo v. Lee*, 935

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[21] To be sure, the Fifth Circuit, pre-*Wilson*, applied the rule the majority applies today. In *Sheppard*, the Fifth Circuit assumed without deciding that *Wilson* overruled its prior precedent. 967 F.3d at 467-68. The majority opinion does not mention this nuance, either.

[22] The majority opinion correctly notes that in *Porter* the First Circuit "considered whether there was another 'possible explanation of the state court's decision.'" Maj. Op. at 26-27 n.9 (quoting *Porter*, 35 F.4th at 79). But that was only because, as the court noted at the outset, the "relevant passages of the state court's opinion are terse to the point of obscuring the precise mechanics of its reasoning" and because of their ambiguity could be read in two different ways. *Porter*, 35 F.4th at 77. The court nevertheless concluded that "the state court decision—depending on how it is read—either unreasonably applies *Batson*'s second step or is premised on an unreasonable determination of the facts," so "there is no need to identify which of these roads the state court traveled because both of them lead to the same destination." *Id.* "Either way, the state supreme court's decision is not entitled to deference under AEDPA." *Id.* The *Porter* court evaluated the state court's reasoning under both alternative readings of that

F.3d 103, 111-12 (2d Cir. 2019) ("consider[ing] the rulings and explanations of the trial judge," citing *Wilson*)[23]; *Coleman v. Bradshaw*, 974 F.3d 710, 719 (6th Cir. 2020) (citing *Wilson* and stating that "AEDPA requires this court to review the actual grounds on which the state court relied")[24]; *Winfield v. Dorethy*, 956 F.3d 442, 454

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reasoning before proceeding to *de novo* review. That is not at all akin to the approach the majority opinion advances here.

[23] The majority opinion's rebuttal to my citation of *Scrimo* misses the mark as well. The majority opinion suggests that in its effort to determine whether the state court's order withstood AEDPA deference, the Second Circuit in *Scrimo* looked for other reasons why the state court may have excluded challenged testimony. *See* Maj. Op. at 26-27 n.9. Not so. The *Scrimo* court asked "whether the [w]itnesses' testimony could have been excluded on other grounds" because a negative answer to that question was essential to meet the petitioner's burden on federal habeas to prove that the trial court's exclusion of the testimony had a substantial and injurious effect or influence on the jury's verdict. *Scrimo*, 935 F.3d at 115-16 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). The state trial court ruling that the Second Circuit was reviewing had not addressed whether the error was harmless, so no AEDPA deference applied to the harmlessness determination. *See Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022) (requiring a federal habeas petitioner to satisfy *Brecht* and AEDPA only "[a]fter a state court determines that an error at trial did not prejudice a criminal defendant").

[24] The majority opinion notes that one Sixth Circuit judge in a later opinion characterized the *Coleman* decision as not "constrain[ing] its analysis to the exact reasons the state court discussed." Maj. Op. at 26-27 n.9 (quoting *Thompson v. Skipper*, 981 F.3d 476, 485 (6th Cir. 2020) (Nalbandian, J., concurring)). Judge Nalbandian's reading of *Coleman*, for which he did not secure a majority, does not convince me that Sixth Circuit does not share my view of *Wilson*.

In *Coleman*, the petitioner pursued a *Brady* claim based on the prosecution's alleged failure to disclose exculpatory evidence that another person, Sapp, had confessed to the murder for which Coleman had been convicted. *Coleman*, 974 F.3d at 716. In support, Coleman

(7th Cir. 2020) ("Having found the state court's 'specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference." (citing *Wilson*, 138 S. Ct. at 1188))[25]; *see also*

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pointed to a letter from Sapp in which he admitted to a killing and an affidavit Coleman's postconviction counsel prepared for Sapp in which Sapp admitted to killing the victim. *Id.* at 717. The state court in *Coleman* rejected the petitioner's *Brady* claim because the affidavit lacked credibility and the letter, which did not name the victim, was too indefinite to be material. *Id.* at 718. Reviewing the state court's decision, the *Coleman* panel first concluded that the state habeas court "reasonably determined that the Sapp letter was not material." *Id.* at 719. This was precisely the reason the state court had employed as to the letter.

Second, addressing the affidavit, the *Coleman* panel noted, as a preliminary matter, that "Coleman does not contend that the state should have disclosed the Sapp affidavit." *Id.* The affidavit was not *Brady* material because it was prepared by Coleman's counsel. Rather, the affidavit was "evidence of alleged *Brady* evidence (i.e., evidence of Sapp's [] confession)." *Id.* The panel then addressed the state court's determination "that the Sapp [a]ffidavit lacked any credibility" and "the necessary implication . . . that Coleman failed to establish that Sapp's [] confession ever occurred." *Id.*

The *Coleman* panel's preliminary observation that the affidavit was not itself *Brady* evidence was merely a point of clarification (that the evidence allegedly was evidence of *Brady* material, not *Brady* material itself); it was not a reason why the state court reasonably rejected Coleman's *Brady* claim. And the panel's observation that if the affiant was not credible, then what he professed was not true, is the same kind of necessary "implicit finding[]" our Court has long swept within the purview of AEDPA deference. *See Lee*, 726 F.3d at 1217.

In sum, *Coleman* does not suggest that a federal court may marshal any reasons that "could have supported" a state court's decision in deferring to that decision.

[25] The Seventh Circuit in *Winfield* did not, as the majority opinion says, "decline[] to decide exactly how § 2254(d) applied." Maj. Op. at

Richardson v. Kornegay, 3 F.4th 687, 697-98 (4th Cir. 2021) ("Sitting as a federal habeas court, we must identify 'the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims.' And the particular reason for rejecting this claim was that the trial court did not abuse its discretion in excluding [the expert witness's] testimony." (quoting *Wilson*, 138 S. Ct. at 1191-92))[26]; *Kipp v. Davis*, 971 F.3d 939, 948–60 (9th Cir. 2020) (reviewing whether the stated reasons of a state habeas court were reasonable, concluding they were not, applying *de novo* review, and granting petitioner relief)[27].

26-27 n.9. The court said exactly how § 2254(d) applied, in the language I have quoted above. Rather, the court accepted for the sake of argument that the district court correctly concluded that AEDPA deference did not apply, holding that the district court erred on a different ground. *Winfield*, 956 F.3d at 455.

[26] Contrary to the majority's claim that *Richardson* supports going beyond the reasons a state court articulates, *see* Maj. Op. at 26-27 n.9, in *Richardson* the Fourth Circuit hewed not only to the state court's "particular reason"—no abuse of discretion in excluding the expert's testimony—*but also* to the state court's "rationale supporting finding no abuse of discretion," which the *Richardson* court enumerated and discussed, without seeking reasons outside the scope of the state court's order. *Richardson*, 3 F.4th at 697-98.

[27] The majority's suggestion that although the Ninth Circuit "has employed [my] sweeping rule," it has done so for an entirely different reason, Maj. Op. at 26-28 n.9, overlooks the most basic of points: *Wilson* has subsumed pre-*Wilson* reasoning. The Ninth Circuit has recognized as much. *See Kipp*, 971 F.3d at 953 n.10 ("The Warden argues that there were several additional [reasons why the state court's decision was correct] . . . but we may look only to the reasoning of the California Supreme Court." (citing *Wilson*, not a previous line of Ninth Circuit cases)).

Respectfully, then, the great weight of authority is not at all in the majority opinion's favor.[28] Quite to the contrary.

This side of the mirror, *Wilson* holds true: as a federal court constrained by AEDPA, we must focus exclusively on the reasons actually given by the state habeas court and defer to those reasons, and those reasons alone, under AEDPA. If those reasons are "*that* wrong," Maj. Op. at 29 (emphasis in original), then the decision is unworthy of AEDPA deference.[29]

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[28] The Third Circuit has not cited *Wilson* in a precedential opinion. But in unpublished opinions, it has applied *Wilson* the way I do here. *See, e.g.*, *Gibbs v. Admin'r N.J. State Prison*, 814 F. App'x 686, 689-91 & n.6 (3d Cir. 2020) (unpublished) (citing *Wilson* and deferring only to the two reasons why the state habeas court concluded counsel had not performed deficiently and the one reason why it concluded there was no prejudice: (1) that either counsel was unaware of allegedly biased jurors until after trial and so did not deficiently fail to object during voir dire; (2) or, alternatively, if counsel knew of the biased jurors, those jurors could have been an advantage to the defense and so any failure to object during voir dire was strategic; and (3) the allegations of bias were too vague to amount to sufficient evidence of bias). The same can be said of the Tenth Circuit. *See Straub v. Goodrich*, 842 F. App'x 263, 267-69 (10th Cir. 2021) (unpublished). The Eighth Circuit has not cited *Wilson* in any reported case.

[29] And no, I do not seek to "camouflage the breadth" of my position on deference to the reasons a state court supplied. *See* Maj. Op. at 23-24 n.6. Nor do I "insist[] that *Wilson* changed how AEDPA applies to *all* reasoned decisions, regardless of procedural posture," or that "*Wilson sub silentio* revolutionized AEDPA's application to all state-court decisions." *Id.* *Wilson* expressly (not *sub silentio*) reminded us (rather than revolutionized) how AEDPA applies to reasoned decisions, characterizing the inquiry as "straightforward":

> Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an

Before leaving my discussion of AEDPA, I echo Judge Jordan's concerns about the majority opinion's "clarif[ication]," Maj. Op. at 13, of the interplay between § 2254(d)(2), which permits a federal court to grant a state prisoner a writ of habeas corpus if the relevant state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and § 2254(e)(1), which provides, "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

> unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision.
>
> This is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits *in a reasoned opinion*. In that case, a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and time again.

Wilson, 138 S. Ct. at 1191-92 (emphasis added) (internal quotation marks and citations omitted). Applying that logic to a reasoned decision layered beneath an unreasoned one, *Wilson* confirmed that the approach it had affirmed "time and time again" applied in the "look through" context. *Id.* at 1192. It is the *Richter* "could have supported" approach that is the exception to the rule, because it applies only when there is no reasoned decision to look to. It is hard to imagine how the Supreme Court could have been any clearer. Would we expect it to have thought to specify that we are not free to add "justifications" of our own devising to the "particular" and "specific reasons" to which we defer if reasonable? I think not. The majority opinion's attempt to overcomplicate the inquiry smacks of obfuscation.

The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *See* Jordan Concurring Op. at 1. Despite the Supreme Court's having repeatedly dodged the question of the precise interplay between the two statutes, a split among the circuits in how to interpret them, and no briefing or argument from either party on the question, the majority opinion—citing to a concurrence written by its author—declares that habeas relief is warranted only if a petitioner proves *both* (1) by clear and convincing evidence that at least one individual state court fact-finding was erroneous *and* (2) that the error or errors were important enough that the state court's decision was based on the finding or findings and was unreasonable as a result. *See* Maj. Op. at 14-15 (citing *Hayes v. Sec'y, Fla. Dep't of Corr.*, 10 F.4th 1203, 1224-25 (11th Cir. 2021) (Newsom, J., concurring)).

Given the irregularity of deciding an issue of such importance without any notice to or briefing by the parties, this should strike anyone paying attention as odd at best. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 1581 (2020) ("[C]ourts normally decide only questions presented by the parties. . . . No extraordinary circumstances justified the panel's takeover of the appeal." (alteration adopted) (internal quotation marks omitted)). Worse, the majority opinion uses its newly crafted rule to deny Mr. Pye relief, even though he had no chance to argue against it or that he should prevail under it. This is wrong.

Nevertheless, I believe Mr. Pye should prevail even if the majority opinion's reading of the interplay between § 2254(d)(2) and (e)(1) is correct. So I will assume only for

purposes of this dissent that the majority opinion is correct on this point.[30]

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[30] The panel opinion in this case, following the lead of previous decisions of our Court that did not define precisely the interplay between the two subsections, explained that habeas relief is unwarranted unless it is, in relevant part, "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding[s]" and that state court factual determinations "are entitled to a presumption of correctness unless the petitioner rebuts that presumption by clear and convincing evidence." *Pye v. Warden Ga Diagnostic Prison*, 853 F. App'x 548, 558 (11th Cir. 2021) (internal quotation marks omitted). We elaborated that relief is not warranted unless a petitioner proves that "the state court's findings lacked even fair support in the record." *Id.* at 559 (quoting *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011)); *see also, e.g.*, *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1263-64 (11th Cir. 2020) (citing *Rose* in an AEDPA case); *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1336-37 (11th Cir. 2019) (same); *Terrell v. GDCP Warden*, 744 F.3d 1255, 1268 (11th Cir. 2014) (same).

The majority opinion, pointing out that *Rose* applied pre-AEDPA law, rules that in passing AEDPA Congress "eliminated and replaced the fair-support-in-the-record standard" Maj. Op. at 14. Now, the majority opinion says, the standard is § 2254(e)(1)'s "presumed to be correct" absent "clear and convincing evidence" standard. *Id.* (internal quotation marks omitted). Although correct that *Rose* was pre-AEDPA, the majority opinion fails to explain how *Rose*'s standard, when articulated alongside the "clear and convincing" burden of § 2254(e)(1), is materially different. If a petitioner proves that a factual determination lacks any fair support in the record, how has he not also proved by clear and convincing evidence that the factual determination was incorrect? Put another way, if the ultimate question is whether a petitioner has "show[n] that the state court's decision is so obviously wrong that its error lies beyond any possibility for *fairminded* disagreement," *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2021) (emphasis added) (internal quotation marks omitted), then how is it different to inquire whether *fair* support in the record is lacking? I fail to see the daylight between the two.

Even so, the majority opinion's construction of the two subsections of § 2254, when paired with its backwards reading of *Wilson*, produces disastrous results. That is because, instead of asking whether any of the stated reasons supporting the state habeas court's decision represented a clearly erroneous finding of fact and then asking whether those reasons were sufficiently important to make an order "based on" them "unreasonable," we as federal courts can bury reasons that flunk AEDPA deference under a mountain of unstated and un-relied-upon reasons that would withstand AEDPA deference. And then, even if one or a handful of the state court's reasons were based on clearly erroneous fact-findings, amongst any number of made-up reasons that could have supported the state court's decision, those findings will never be prominent enough to meet the majority opinion's test.[31]

I have journeyed far only to return to where I began: AEDPA requires that we must be highly deferential of state court decisions. In cases such as this one, where the state habeas court provided a reasoned decision, we review exclusively the reasons the state habeas court gave

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[31] Of course, where *Richter*'s "could have supported" standard does apply—that is, when there is no reasoned state court decision to review—federal courts may do precisely the kind of hypothetical inquiry the majority opinion undertakes in this case. There are reasons for this difference: the "principles of federalism and comity that underlie federal collateral review." *Wilson*, 834 F.3d at 1248 (Jill Pryor, J., dissenting). When a state court gives reasons for denying a state prisoner postconviction relief, a federal court should not give the back of its hand to the state court's given reasons. When a state court does not give reasons, a federal court has no reasons to respect, only the judgment.

for denying relief, deferring to those reasons under § 2254(d). If those reasons fail § 2254(d)'s test, then we are "unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1260 (11th Cir. 2016) (internal quotation marks omitted); *see also Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) ("When a state court unreasonably determines the facts relevant to a claim, we do not owe the state court's findings deference under AEDPA, and we apply the pre-AEDPA *de novo* standard of review to the habeas claim." (internal quotation marks omitted)).

In the next section, I explain why the state habeas court's decision was unreasonable under § 2254(d), and then in the following section, I conduct a *de novo* review of the merits of Mr. Pye's penalty phase ineffective-assistance-of-counsel claim.

III. ANALYSIS UNDER AEDPA

Mr. Pye claims that his trial counsel was ineffective in failing to investigate and present evidence about his traumatic childhood and adolescence, mental health problems, and low intellectual functioning. He also claims that his counsel failed to investigate and present evidence to rebut the State's claim of future dangerousness. And, he argues, there is a reasonable probability that, had the jury heard this evidence, at least one juror would have voted against a death sentence. *See* O.C.G.A. § 17-10-31(c).

Mr. Pye was required to show that his trial counsel rendered deficient performance and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 686, 688, 694. Counsel's deficient performance causes prejudice when "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In determining whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)). Because AEDPA applies to Mr. Pye's claim, the specific question we must ask is whether the state habeas court's determination that he failed to demonstrate prejudice "involved" or was "based on," § 2254(d)(1), (2), an "error [that] lies beyond any possibility for fairminded disagreement." *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (internal quotation marks omitted).

Training our attention on the reasons the state habeas court actually supplied in its no-prejudice determination, we must review these seven reasons: (1) there is no reasonable probability that evidence of low intellectual functioning would have swayed one juror; (2) there is no reasonable probability that evidence rebutting the State's case of future dangerousness would have swayed one juror because prison records showed instances of insubordination and aggression; and, as to evidence of Mr. Pye's family background, the evidence would not have swayed one juror because (3) the affidavit testimony was of little value due to artful drafting; (4) Mr. Pye's family was unwilling to cooperate at the time of trial; (5) there was no nexus between Mr. Pye's background and the crime he committed; (6) the extensive aggravating evidence; and

(7) that because Mr. Pye was 28 at the time of the crimes, the aggravating evidence was extensive, and the evidence of his guilt was overwhelming, remorse was likely to play better than excuses. Several of these reasons were an unreasonable application of clearly established law or represented an unreasonable determination of facts in light of the state court record. *See Pye v. Warden Ga. Diagnostic Prison*, 853 F. App'x 548 (11th Cir. 2021). Without reiterating everything in the panel opinion, and because the unreasonableness of three reasons in particular renders the state court's decision unworthy of AEDPA deference, I will limit my discussion in this section to reasons 3, 4, and 7.

A. Value of affidavit testimony on mitigation

I begin with reason number 3. The state habeas court gave two reasons for discounting the mitigating evidence in the affidavit testimony Mr. Pye's state postconviction counsel amassed. First, the court said, postconviction affidavits usually are unpersuasive, in part because they are artfully drafted long after the fact. Second, the court opined that the affidavits in this case reflected artful drafting because a few of them contained perceived inconsistencies. I will take these in reverse order.

The state habeas court's finding that the affidavits in this case reflected artful drafting due to inconsistencies it perceived was unreasonable in light of the record—or, as the majority sometimes says, "clearly and convincingly erroneous." *See, e.g.*, Maj. Op. at 37.[32] The state habeas

[32] I mostly stick with the reasonable/unreasonable terminology, although I believe that Mr. Pye has also rebutted a presumption of the facts' correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Perhaps one day the Supreme Court will clear up the

court focused on four mitigation affidavits. The first affidavit was by Mr. Pye's brother, Curtis Pye. The court recounted that "Curtis Pye testified . . . 'No one talked to me . . . before [Mr. Pye's] trial. Johnny Mostiler and his assistant Dewey [Yarbrough] know me . . . He didn't get in touch with me.'" Doc. 20-40 at 65 (purporting to quote Curtis Pye's affidavit). "However, Mr. Mostiler's billing records in Petitioner's case reflect that Mr. Mostiler interviewed Curtis Pye for one hour approximately one month prior to trial." *Id.* The ellipses are the state court's, not mine.

In concluding that Curtis had apparently lied in his affidavit about his contact with Mr. Mostiler, the state habeas court omitted with ellipses a key portion of Curtis's testimony. Curtis did not testify that no one talked to him before Mr. Pye's trial—the contradiction the state habeas court purported to identify given Mr. Mostiler's billing records. Rather, after describing the Pye family and Mr. Pye's upbringing, he testified that "[n]o one talked to me *about any of this* before Willie James's trial. . . . [Mr. Mostiler] didn't get in touch with me *or ask me any questions about the house Willie James was raised in or what he was like as a child*." Doc. 16-24 at 83 (emphasis added). After testifying about the mitigating circumstances in Mr. Pye's childhood and adolescence, Curtis testified that no one talked to him "about any of this"—"this" being the circumstances to which he had just testified—before trial. He again clarified that no one asked him questions about Mr. Pye's childhood and upbringing. Reading his isolated statements about contact with the defense team in context

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confusion about the interplay between 28 U.S.C. §§ 2254(d) and 2254(e)(1).

with his entire affidavit makes clear that Curtis never denied meeting with Mr. Mostiler altogether. When read "in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), as a whole—that is to say, in context with the entire affidavit and entire factual record, *see Dunn v. Reeves*, 141 S. Ct. 2405, 2412 (2021)—it is to me beyond fairminded disagreement that the state court's finding of an inherent conflict was in error.

The second affidavit the state habeas court addressed was Mr. Pye's brother Ricky Pye's. According to the state habeas court, Ricky "testified . . . 'I never spoke to Mostiler about what to say [at trial], and he didn't meet with me or ask me any questions before my turn for testimony.'" Doc. 20-40 at 66 (alteration in original) (quoting Ricky Pye's affidavit). But, the court continued, "[t]he affidavit makes no mention of Mr. Mostiler's one hour interview with him, also approximately one month prior to trial." *Id.* The state habeas court's statements are literally true, but they lend no evidentiary support to the court's finding that the affidavit was misleading. Ricky testified that no one talked to him "about what to say"—*what he would testify to*—not that no one talked to him at all. Doc. 16-24 at 99; *see also id.* at 100 (Ricky Pye testifying: "We had it real tough growing up and Mr. Mostiler and Dewey never asked about that.").

Third was the affidavit of Mr. Pye's mother, Lolla Mae Pye. The state habeas court found misleading her testimony that "[n]o one took the time to talk to me about all anything before Willie's trial," given that Mr. Yarbrough's testimony and Mr. Mostiler's billing records showed otherwise. Doc. 16-24 at 97; *see* Doc. 20-40 at 66.

Once again, the state habeas court tore a snippet of affidavit testimony from its context. Before the passage the state habeas court quoted, Lolla Mae testified extensively about the mitigating circumstances in Mr. Pye's background. The passage in Lolla Mae's affidavit that immediately follows the one the state habeas court quoted, together with her lengthy mitigation testimony, leaves no room for doubt that Lolla Mae meant she was never asked about mitigating circumstances:

> Nobody ask me all about how I grew up, how I came to be married to Ernest, and how I raised Willie and my other children. I would have been willing to talk about my life with Willie James's lawyer or investigator, or with any doctor or psychologist working on his case. I would have told about *all the things I described here*, and testified to the jury about them if they wanted me to.

Doc. 16-24 at 97 (emphasis added). In context, there is no misleading statement. Lolla Mae stated straightforwardly that she was not asked about the mitigating circumstances to which she had just testified. The state habeas court's finding is unreasonable in light of the evidence before it.

The state habeas court found that the fourth affidavit, that of social worker and truancy officer Arthur Lawson, reflected artful drafting. Mr. Lawson initially testified: "I showed up at the home to find [Lolla Mae] intoxicated on many visits. This was equally true when she was pregnant." Doc. 16-24 at 61. He later submitted a second affidavit in which he clarified how he knew she was intoxicated: "when I visited the home there were indications that she had been drinking by the way she spoke and her

general behavior. This was equally true when she was pregnant." Doc. 20-6 at 17.

Mr. Lawson's clarification of the basis for his opinion that Lolla Mae often was intoxicated, if indicative of anything, suggests the very opposite of artful drafting. In tweaking his testimony, Mr. Lawson ensured that the evidence he provided did not over-reach the limits of his personal knowledge. In my mind it is beyond fairminded disagreement that Mr. Lawson's slight clarification reflected a desire for accurate conveyance of personal knowledge, not artful drafting.

Based on these unreasonable findings of fact about four of the 24 affidavits containing mitigation evidence, the state habeas court decided to discount *all* of the affidavit evidence about Mr. Pye's family background. Doc. 20-40 at 66. Here the majority opinion acknowledges that "for many of the affidavits that speak to [Mr.] Pye's childhood neglect and abuse, neither the state court nor the State have offered specific reasons to doubt their truth besides the general concern with 'artfully drafted' affidavit testimony collected many years after trial." Maj. Op. at 36. And this is the point: without any *evidence* in the record to demonstrate artful drafting, the state habeas court could not reasonably have made a finding that the affidavits were artfully drafted.[33] And the state habeas court could not then have a solid foundation upon which to

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[33] I do not, as the majority accuses, suggest that "extrinsic corroborating evidence" of artful drafting "is required" to make this determination. Maj. Op. at 38 n.13. The state court could have used as evidence the affidavits themselves. But, as the majority opinion acknowledges, the state court did not point to any such evidence.

base its decision to discount the evidence contained in these affidavits.

The majority opinion maintains that there was evidence of artful drafting because "there was substantial uniformity across the affidavits" in describing Mr. Mostiler's failure to discuss Mr. Pye's background with them and their willingness to testify at sentencing had they been asked to do so. Maj. Op. at 37. I agree that substantial uniformity of affidavits may be evidence of artful drafting, though the affidavits must be viewed as a whole and in context. But there are three problems with the majority opinion's conclusion here. First, the state habeas court never cited the similarity between the affidavits as a reason for finding they were artfully drafted. So, under *Wilson*, we do not consider that reason when examining whether the state court's errors were beyond the realm of fairminded disagreement. *Wilson*, 138 S. Ct. at 1191-92, 1195-96.

Second, "substantial uniformity" is a stretch. These were not boilerplate affidavits that all recited the same statements. *Compare, e.g.*, Affidavit of Curtis Pye, Doc. 16-24 at 83 ("No one talked to me about any of this before Willie James's trial. Johnny Mostiler and his assistant Dewey know me. Mr. Mostiler represented me before. He didn't get in touch with me or ask me any questions about the house Willie James was raised in or what he was like as a child. If he had, I would have said all the things I've said in this statement, and I would have testified to all these things if he had asked me to."), *with* Affidavit of Ricky Pye, Doc. 16-24 at 99-101 ("[Mr. Yarbrough] didn't ask about Willie James and how he came up, or how we all were raised. Dewey never spoke to me about those things.

. . . I took the stand to testify later on in [the penalty phase of] the trial. No one talked to me about my testimony before I went. I never spoke to Mr. Mostiler about what to say, and he didn't meet with me or ask me any questions before my turn for testimony. . . . We had it real tough growing up and Mr. Mostiler and Dewey never asked about that. . . . If Mr. Mostiler had asked me about these things on the stand, I would have told the jury the same things I've said here."), *and* Affidavit of Lolla Mae Pye, Doc. 16-24 at 97 ("No one took the time to talk to me about all anything before Willie's trial. Nobody ask me all about how I grew up, how I came to be married to Ernest, and how I raised Willie and my other children. I would have been willing to talk about my life with Willie James's lawyer or investigator, or with any doctor or psychologist working on his case. I would have told about all the things I described here, and testified to the jury about them if they wanted me to.").

Third, and even more to the point, we *require* a petitioner seeking to substantiate an ineffective-assistance claim for failing to investigate and present evidence of mitigation to show that trial counsel did not contact postconviction witnesses and that the witnesses would have been available to testify at the time of sentencing. *See* Maj. Op. at 39. If the witnesses had not included this testimony, Mr. Pye's claim necessarily would have failed. It cannot be that simply because these two facts—lack of contact by counsel about mitigation and availability to testify at sentencing—are present in every postconviction witness's affidavit, the record supports a finding that the affidavits are artfully drafted. Otherwise, this is a "heads I win, tails you lose" scenario that the law surely does not countenance.

The majority opinion makes one last effort to prop up the state habeas court's devoid-of-context reading of the four affidavits: it says that the affidavits "lack . . . corroborating evidence in the contemporaneous records—particularly regarding whether Pye was subject to regular physical abuse." Maj. Op. at 38 n.14. As the majority opinion acknowledges, however, the state habeas court made no mention of any lack of corroborating evidence.[34] Because the state habeas court did not supply this reason

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[34] The state habeas court's failure to mention the lack of corroborating evidence makes sense: there has never been a requirement that testimonial evidence be corroborated by contemporaneous documentary evidence. What is more, numerous details, including Mr. Pye's severe poverty, neglect, low intellectual functioning, and mental health challenges, were in fact corroborated by contemporaneous documentary evidence. *See, e.g.*, Doc. 15-12 at 10-11 (third grade record stating that Mr. Pye's "major causes of absences" were "illness, no shoes, missed the bus"); Doc. 15-14 at 49 (Department of Family and Children Services record from 1972, when Mr. Pye was about seven, noting that Mrs. Pye had requested food and clothing for the family). There also were at least suggestions that Mr. Pye was suffering from something more serious than neglect. For example, in third grade, his teacher observed that he was "fearful and unhappy." Doc. 15-12 at 11. Another teacher noted that Mr. Pye's sister, Pam, had "a very difficult home situation." Doc. 16-13 at 60. Yet another teacher noted that Mr. Pye's brother Andrew was "often troubled and upset about conditions at home." Doc. 16-14 at 7. That there were not more contemporaneous documents is no surprise to me. Mr. Pye grew up poor and Black in rural Georgia in the 1970s. Common sense tells us that the relative scarcity of law enforcement and governmental records was due to the family's circumstances in the time and place in which Mr. Pye was raised.

And, finally, in this case the testimonial evidence cross-corroborated: nearly every story in the affiants' testimony was corroborated by another affiant's testimony.

for its decision, we cannot consider it in our § 2254(d) analysis. *See Wilson*, 138 S. Ct. at 1191-92, 1195-96.

B. Willingness of Mr. Pye's family to cooperate with trial counsel

As reason 4, the state habeas court found that "the family was not cooperative with the defense team during the pre-trial investigation." Doc. 20-40 at 64. From that finding, the court surmised that counsel did what he could with what little he had. Thus, the court concluded, Mr. Pye had not shown prejudice because trial counsel "did learn, to some extent, of the family's impoverished circumstances" and presented those facts through Mr. Pye's sisters. *Id.* It is of course true that trial counsel had some limited awareness of the family's poverty and hinted at it in the penalty phase. But the state habeas court's factual premise that Mr. Pye's family members were uncooperative in the *mitigation* investigation finds no support in the record. Seven of Mr. Pye's family members testified at the penalty phase, so it cannot be that the entire family was uncooperative when it came to sentencing. Further, every family-member affiant testified under penalty of perjury that he or she would have been willing to speak to the defense team about mitigation before trial, and nothing in Mr. Yarbrough's testimony about the family's uncooperativeness in proving Mr. Pye's innocence called that testimony into question.

In concluding otherwise, the majority opinion cites record evidence that, it says, renders the state court's finding reasonable. First, the majority opinion points to an undated memo from Mr. Mostiler's file noting that "Willie's brothers did not respond to my phone calls." *See* Maj. Op. at 39 (citing Doc. 19-11 at 93). We know from the

record, however, that Mr. Pye's brother Ricky Pye cooperated with the defense because he testified at the penalty phase. Plus, the very next sentence in Mr. Mostiler's memo was: "Willie's sister Pam Bland is a good witness." Doc. 19-11 at 93. And we know Ms. Bland cooperated with the defense because she, too, testified at the penalty phase. In context, then, Mr. Mostiler's undated note—which contains no information about the duration or timing of the noted condition and contradicts other evidence in the record when read as the state habeas court read it—offers no support for the state habeas court's sweeping finding that Mr. Pye's family was unwilling to cooperate in mounting a case in mitigation.

Second, the majority opinion says, Mr. Yarbrough testified that the family members were uncooperative. *See* Maj. Op. at 39-40. Again, in context, Mr. Yarbrough's testimony does not support the state court's finding as it relates to a case in mitigation because Mr. Yarbrough specified that the family was uncooperative in "helping prove [Mr. Pye's] innocence," Doc. 19-11 at 24-25,[35] not in the investigation of mitigating circumstances. By Mr. Yarbrough's own testimony, *he* simply didn't "care" about trying to get Mr. Pye's family members to testify during the penalty phase. *Id.* at 25. The record unmistakably demonstrates that any failure to marshal family support in the penalty-phase investigation and presentation was due not to the family's unwillingness to cooperate but rather to Mr. Yarbrough's lack of care.

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[35] Of course the family could not help the defense team prove Mr. Pye's innocence—he committed the crime.

To sum up on reason 4, the affidavit testimony Mr. Pye introduced in postconviction proceedings about the family's willingness to cooperate if only they had been contacted and adequately prepared about a mitigation case based on Mr. Pye's family background directly contradicted the supposed evidence that the family was uncooperative. Thus, Mr. Pye has shown by clear and convincing evidence that the state habeas court's finding—a finding that the court found to be "especially" important, Doc. 20-40 at 67—was unreasonable.[36]

C. Remorse as the best strategy given Mr. Pye's age

As its seventh reason, the state habeas court found that because Mr. Pye "was 28 years old at the time of the[ ] crime[ ], trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of [his] guilt, that remorse was likely to play better than excuses." Doc. 20-40 at 66. But there is no evidence in the record—none—that Mr. Mostiler attempted to or did offer Mr. Pye's remorse to the jury as a reason not to sentence Mr. Pye to death. Quite to the contrary. Remorse would have been utterly inconsistent with the defense strategy because Mr. Pye testified in his own defense at trial and denied that he had been present for the rape and murder. At the penalty phase, most of the defense witnesses stated their belief that Mr. Pye was innocent. Mr. Mostiler never mentioned remorse in his closing argument. Thus, the state habeas court's conclusion that Mr. Mostiler employed a strategy of remorse which

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[36] Arguably, considering the prominence the state habeas court gave this unreasonable finding, the state habeas court's decision was "based on" it, 28 U.S.C. § 2254(d)(2), and so *de novo* review is appropriate without even examining the court's other findings.

likely played better to the jury than excuses was unreasonable in light of the record. Indeed, even the majority admits this finding was "likely clearly erroneous." Maj. Op. at 44 n.17.

Acknowledging the state habeas court's error, the majority opinion downplays the import of the clearly erroneous finding by characterizing it as a "sideshow" to the more important age-related determination—a "statement" (that remorse was likely to play better than excuses) "nestled in a sub-justification" (that given Mr. Pye's age, evidence of his guilt, and the heinousness of the crime, remorse was likely to play better than excuses) "of a larger justification" (that Mr. Mostiler's failure to introduce evidence of Mr. Pye's childhood was not prejudicial). *Id.* The state court's "statement," however, cannot be teased out from its "sub-justification." It's all one sentence, one thought: when a person is not young when he commits a crime, mitigating evidence from his childhood and adolescence is entitled to little weight; thus, remorse was the better strategy. The remorse "statement" is the conclusion of this thought. It is not a sideshow; rather, it is part and parcel of the main event. And the main event—what the majority terms a "sub-justification" for the no-prejudice "larger justification," was unreasonable. In *Porter v. State*, 788 So. 2d 917 (Fla. 2001), the Florida Supreme Court addressed an ineffective-assistance-of-counsel claim by a prisoner on the state's death row. In rejecting the claim, the court explained that because the defendant was not young at the time of his crime, "evidence of a deprived and abusive childhood is *entitled to little, if any mitigating weight* when compared to the aggravating factors." *Id.* at 924 (emphasis added) (quoting *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir.

1994)). Thus, "[a]ny presentation of this factor would therefore have been insignificant." *Id.* After this Court upheld that determination as reasonable, *see Porter v. Att'y Gen.*, 552 F.3d 1260, 1270 (11th Cir. 2008) (citing *Bolender*, 16 F.3d at 1561), the Supreme Court reversed, concluding that the Florida Supreme Court's analysis was unreasonable, *see Porter*, 558 U.S. at 41.

In Mr. Pye's case the state habeas court cited cases, all predating the Supreme Court's decision in *Porter*, for the proposition that "'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight' when the defendant is 'not young' at the time of the offense." Doc. 20-40 at 67 (quoting *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999), and *Housel v. Head*, 238 F.3d 1289, 1295 (11th Cir. 2001), which cited *Tompkins*); *see id.* at 67 (also citing *Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990), *Mills v. Singletary*, 63 F.3d 999, 1025 (11th Cir. 1995), and *Bolender v. Secretary*, 16 F.3d at 1561). These cases all stood for the same proposition: evidence of a deprived and abusive childhood is entitled to "little, if any" (as stated in *Tompkins* and *Dugger*), or "insignificant" (as stated in *Bolender*, cited in *Mills*) weight when a defendant commits a crime a decade or so after reaching adulthood. These are the same cases the majority opinion now cites to conclude that the state habeas court's treatment of Mr. Pye's age was reasonable. *See* Maj. Op. at 43-44.

But these are the very same reasons—indeed, based on the *very same cases*—that the Supreme Court held to be unreasonable in *Porter*. Thus, the state habeas court's

finding was unreasonable under clearly established Supreme Court precedent. *Porter*, 558 U.S. at 41.[37]

* * *

The state habeas court's numerous consequential unreasonable determinations reflect an "extreme malfunction[ ] in the state criminal justice system." *Reeves*, 141 S. Ct. at 2411 (alteration adopted) (internal quotation marks omitted). Even under the majority opinion's reading of the interplay between 28 U.S.C. § 2254(d)(2) and I(1)—and without the majority opinion's nullification of *Wilson*—it is clear to me that the state court's errors were of sufficient importance that we can say without difficulty that its ultimate decision was "based on" them. Thus, I would hold that the state court's decision does not withstand AEDPA deference, and that we should apply *de novo* review.

IV. *DE NOVO* REVIEW

Typically, once AEDPA deference is pierced, I would begin my *de novo* review[38] by explaining why Mr. Mostiler rendered deficient performance during the penalty phase.

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[37] The majority opinion points out that there isn't "anything in *Porter* that explicitly forbids courts from considering age as one factor among many in their prejudice analyses." Maj. Op. at 42. That is true enough, but in this case the state habeas court did not consider age as a factor. Instead, it repeated precisely the mistake that the Supreme Court corrected in *Porter*.

[38] Although we disagree on whether Mr. Pye is entitled to relief, I note Judge Jordan's and Judge Rosenbaum's agreement that the state habeas court's decision is not entitled to AEDPA deference and so our review should be *de novo*. *See* Jordan Concurring Op. at 1.

But because the majority opinion assumes deficient performance, I refer to our panel opinion for our analysis. *See Pye*, 853 F. App'x at 560-65.

That leaves prejudice. Here we ask, "whether the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 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." *Debruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1275 (11th Cir. 2014) (internal quotation marks omitted). Postconviction counsel produced evidence that Mr. Pye suffered severe physical and emotional abuse, neglect, endangerment, and privation as a child. Counsel produced evidence that Mr. Pye began displaying symptoms of depression early in his childhood, depression that followed him into adulthood. Counsel produced evidence that Mr. Pye's intellectual capacity is low, bordering on intellectually disabled. This "consistent, unwavering, compelling, and wholly unrebutted" evidence, *Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011), "paints a vastly different picture" of Mr. Pye leading up to the crime than the evidence Mr. Mostiler presented to the jury, *Debruce*, 758 F.3d at 1276. Even in the face of the aggravated crime Mr. Pye committed, and the aggravating evidence presented in the penalty phase, I would conclude, as did the panel, that there is a reasonable probability that at least one juror would have voted for a sentence less than death had the jury heard what we now know about Mr. Pye. *See Wiggins*, 539 U.S. at 536.

First, the new mitigating evidence. Had Mr. Mostiler adequately investigated and presented a case in mitigation of the death penalty, the jury would have heard that Mr. Pye was raised in abject poverty by parents who managed to feed and clothe their 10 children by the slimmest of margins. The family lived in a kind of poverty rarely witnessed in the United States, occupying a small four-room house with makeshift walls to separate the sleeping areas and no indoor plumbing or central heating.

The jury would have heard that Mr. Pye suffered from extreme neglect. At the time of Willie's birth, his mother Lolla Mae struggled as the sole provider for her six children. Her husband Ernest, whom people called "Buck," was incarcerated and working on a chain gang. Lolla Mae took whatever work she could get, working all the way up until Willie's birth and then resuming working immediately afterward. Whether to go to one of her jobs or out drinking (which she did even while pregnant), Lolla Mae typically left Willie alone with his siblings all day. This left the older children—the oldest only 10 years old—to care for the younger ones. The youngest children, Willie included, would spend the day outside in the dirt, often crying all day because the older children lacked the skills necessary to care for infants and toddlers. Willie had little to eat, consuming watered-down milk as an infant and primarily bread and gravy through childhood. With no money for it, he received virtually no medical care.

The jury would have heard how the Pye home reflected this neglect. According to a police officer, "[t]he conditions were filthy and the rooms in total disarray every time we entered." Doc. 16-24 at 22. Mr. Lawson, the school's social worker, observed that the condition of

the house was "deplorable." *Id.* at 62. "The house was never clean; piles of filth, scraps and garbage were strewn everywhere." *Id.* at 62. On one visit, finding the home "so unsanitary" that it created a risk to "the health of the children"—specifically, "the small children had not been bathed and there was spoiled food sitting around"—Mr. Lawson reported the Pye home to the Department of Family and Children Services (DFACS). *Id.* at 61-62. DFACS did not intervene.

The jury would have heard that Mr. Pye was raised in a home rife with alcohol abuse and domestic violence. Lolla Mae and Buck drank excessively. Buck, in fact, was notorious around town for his drinking and violent behavior, and Willie and his siblings were ostracized from the community because of the family's notoriety.[39]

Buck was extremely physically violent; "calls [to law enforcement] about violence in the Pye home were constant." Doc. 16-24 at 20. Buck would hit Lolla Mae and throw things at her in front of the children. On at least one occasion, he attacked Lolla Mae with a knife; on another occasion, he hit her over the head with a bottle. Lolla Mae also was violent toward Buck, sometimes threatening him with a knife.

The jury would have heard that Mr. Pye experienced frequent and often severe physical and emotional abuse at the hands of his father and mother. "Beatings and tirades

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[39] Buck and Lolla Mae bought alcohol with their individual meager earnings and from the government assistance check the family received because of their son Ernest Pye, Jr.'s disability. "It was general knowledge in the [community] that Junior . . . limped because his father hit him with a tire iron while he was still recovering from a broken hip and the hip never healed properly." Doc. 16-24 at 73.

were [Buck's] only interaction with his children." *Id.* at 60. His verbal assaults were "downright cruel": he called the children "worthless" and used "every foul expletive he could manage." *Id.* at 21-22. "Willie definitely got the worst of his father's nasty comments." *Id.* at 26. Buck "would tell Willie that he was so stupid that he just couldn't be his kid." *Id.* Buck would say "that Willie was born because [Lolla Mae] was messing around while he was in prison, and that he was sick of looking at a kid that belonged to some other guy." Doc. 16-25 at 2. Buck "would tell the rest of [the Pye] kids that there was stuff wrong with Willie [], and that [they] shouldn't pay attention to him, all with Willie standing right in front of him." *Id.* Buck also "beat the devil out of [the] children," and "Willie definitely got the worst of [those] violent outbursts." Doc. 16-24 at 26, 60. Lolla Mae beat the children too, and although the school's social worker Mr. Lawson counseled her about the abuse, she did not stop.

The jury would have learned that as the older Pye boys reached their teenage years, they too began to drink excessively and engage in physical violence, beating their father when he was drunk and abusive. When police responded to calls at the Pye house, what they found "was absolute chaos," *id.* at 20, with brawling between Willie's parents and older siblings. For their part, "[t]he younger kids would head for the hills when the fighting started," often hiding in a clearing in the woods near the home. *Id.* at 22. Willie was one of the children who ran and hid. As he got older, he tried to play the role of peacemaker, "pull[ing] [his] parents apart" when they fought. *Id.* at 36. In response, Buck would "blast Willie right across the head and he'd go flying." Doc. 16-25 at 2.

The jury would have heard that as a child Mr. Pye "took the comments about not belonging to [his] father hard." *Id.* "He was quieter and took things to heart. The most important thing to Willie was to be like everyone else, and [Buck] was constantly telling him that he wasn't." *Id.* When he got upset, Willie "would find any place he could . . . be alone—the bed, the woods, under the porch. Then he'd lie down and curl up and just stare at nothing." *Id.* If a sibling tried to talk to him, he would act like no one was there. *Id.*

The jury would have learned that Mr. Pye struggled in school because of the home life he experienced and because of his borderline intellectual functioning. Willie often was absent from school because he lacked basic necessities at home: shoes and a place warm enough to dress. When Willie attended school, he performed poorly—in some instances in the lowest one percentile—and attended classes for slow learners. He tried hard but could not succeed, and he left school before the end of junior high. Willie was teased by his peers at school, both because he was behind academically and because he lacked adequate clothing—what little he wore often was shared with his many siblings, was seasonally inappropriate, and was dirty.

The jury would have been informed that Mr. Pye's low intellectual functioning was documented into adulthood. After being convicted of burglary and sentenced to prison, notes from the prison psychologist indicated that "[i]ntellectually, [Mr. Pye] is probably in the low average range but his test scores are significantly lower"—for example, he was reading and writing at a fourth-grade level. Doc. 15-19 at 12-13. The psychologist opined that Mr. Pye

"may need special ed help, probably in the learning disabled area." *Id.* at 11. Mr. Pye asked to be given job training for barbering, but he failed the aptitude test for it. The records stated that Mr. Pye "[a]ppears to need educational upgrading and adjustment prior to retesting." *Id.* at 14.

The jury would have heard that, unsurprisingly, Mr. Pye was depressed. Again, as a child Willie would run away from his family and disassociate. Even as he reached adulthood, he continued to experience long depressive episodes. While Mr. Pye was serving time for his burglary conviction, the prison psychologist indicated that he was "very depressed," "severe enough" to warrant medication and "more counse[l]ing than the average." Doc. 15-19 at 11, 13, 16. When Mr. Pye left prison in 1990, his depressive episodes continued, and, it seems, worsened.

Also of his previous incarceration, the jury would have heard that the prison in which Mr. Pye was first housed, Lee Arrendale Correctional Facility, was dangerous. "New inmates could expect to be terrorized upon arrival by the guys that were already there. Most were either physically or sexually assaulted, or both." Doc. 16-24 at 50. Mr. Pye, "a smaller guy" who came across as "very weak," "confused," and "vulnerable," was considered by prison staff "to be at risk for victimization." Doc. 15-19 at 9, 11, 70. Indeed, a former cellmate of Mr. Pye's recalled being told that Mr. Pye was raped when he first arrived at the prison.

The jury would have heard that despite the environment and the trauma it brought, officials at Lee Arrendale considered Mr. Pye to be generally trustworthy and not

an escape or safety risk. The psychologist opined that Mr. Pye was "[n]ot likely to be violent or potentially dangerous" and was "very unlikely to become a predator"; she found "[n]o evidence of escape." Doc. 15-19 at 9, 11. A psychological report indicated that Mr. Pye "should be able to adapt to average security arrangements." *Id.* at 15. The psychologist's prediction was correct: Mr. Pye made a notably positive impression on some of the staff he encountered. Guards who provided postconviction testimony regarded Mr. Pye as "completely respectful . . . in a way that most of the inmates were not." Doc. 16-24 at 49. "He was never menacing, never made any threatening remarks, never did anything but joke around and take care of his assigned work." *Id.* These guards had "no reservations about [Mr. Pye] working throughout the dorm area, even during times when he was not closely supervised." *Id.* at 71. He even helped the guards "keep the rest of the unit safe" by disclosing knowledge of other prisoners' weapons or plans for disruption—likely at enormous personal risk to himself. *Id.* at 49. Had trial counsel adequately investigated Mr. Pye's previous conviction, he would have unearthed this evidence, and the jury would not have heard, unrebutted, the prosecution's argument that Mr. Pye would kill a prison guard to escape.

Finally, had trial counsel adequately investigated and presented a case in mitigation of the death penalty, the jury would not have heard, without the correct context, that Mr. Pye was raised in a "four bedroom house" or that the family "had love" to offset the lack of modern conveniences. The jury would not have heard, devoid of the context of the abuse he meted out, Mr. Pye's father's brief testimony about Willie's supposedly unremarkable childhood.

The wealth of mitigating evidence the jury would have heard had Mr. Mostiler not rendered deficient performance is precisely the kind of mitigating evidence the Supreme Court and this Court have held can demonstrate prejudice. *See Rompilla*, 545 U.S. at 390, 393 (finding prejudice based on mitigating evidence that *Rompilla* had low intellectual functioning, "was reared in [a] slum environment"; his parents "were both severe alcoholics who drank constantly" his "mother drank during her pregnancy" his "father, who had a vicious temper, frequently beat [his] mother"; his "parents fought violently, and on at least one occasion his mother stabbed his father"; he "was abused by his father who beat him when he was young"; "he was subjected to yelling and verbal abuse"; the family "had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags"); *see also Porter*, 558 U.S. at 33-34 ("Porter routinely witnessed his father beat his mother," his "father was violent every weekend, and by his siblings' account, Porter was their father's favorite target, particularly when Porter tried to protect his mother"; Porter "attended classes for slower learners and left school when he was 12 or 13"); *Wiggins*, 539 U.S. at 516-17 ("[P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days."); *Williams*, 529 U.S. at 396 ("Williams was borderline [intellectually disabled] and did not advance beyond sixth grade in school"; "prison officials . . . described Williams as among the inmates least likely to act in a violent, dangerous or provocative way" (internal quotation marks

omitted)); *Ferrell*, 640 F.3d at 1234 (petitioner was "especially" targeted for abuse by his father).[40]

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[40] The majority opines that the cases in which the Supreme Court has granted habeas relief presented mitigating circumstances that were "significantly stronger" than those present in Mr. Pye's case. Maj. Op. at 62. Respectfully, the majority is hair-splitting.

In *Rompilla*, for example, the Supreme Court noted that a constitutionally adequate investigation into Mr. Rompilla's prior conviction would have led counsel to discover:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Rompilla, 545 U.S. at 391-92. Nearly sentence for sentence, this paragraph could have been written about Mr. Pye.

Nevertheless, the majority opinion homes in on three details it says Mr. Rompilla had in his background that Mr. Pye lacked: evidence of schizophrenia, a third-grade level of cognition, and likely fetal alcohol syndrome. Maj. Op. at 62. Mr. Pye also had a documented, serious mental health condition: he suffered from depression. Mr. Pye also had documented, significant cognitive impairments. He performed in the lowest one percentile of his classmates and attended classes for

What is more, this is not a case where the type of mitigating evidence adduced during the state habeas proceedings would have undermined counsel's strategy at sentencing. Mr. Mostiler focused his penalty-phase presentation on mercy; mitigating evidence of the type postconviction counsel uncovered "would have easily and directly supported the approach counsel offered at sentencing." *Id.* at 1235. If the prosecution had asked a more informed jury, "If Willie James Pye does not deserve the death penalty, who are you saving it for?," Doc. 13-11 at 90, there is a reasonable probability that at least one juror would not have seen Mr. Pye as someone so unworthy of grace.

Second, the aggravating evidence. This of course includes evidence the State would have introduced to rebut the defense's new mitigating evidence. *Wiggins*, 539 U.S. at 534. Mr. Pye's was, without a doubt, an aggravated crime with aggravating circumstances, including Mr. Pye's history with Ms. Yarbrough. Mr. Pye and two others kidnapped and raped Ms. Yarbrough at gunpoint, and then Mr. Pye shot her multiple times as she was lying on

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slow learners—and, like Mr. Rompilla, left school near the end of junior high. *See Rompilla*, 545 U.S. at 391. When he reached adulthood, he was reading and writing at a fourth-grade level—similar to Mr. Rompilla. *See id.* Finally, Mr. Pye's evidence showed that his mother drank while pregnant, and one of his experts opined that Mr. Pye suffered from a fetal alcohol spectrum disorder (one of which is fetal alcohol syndrome).

I see very little daylight between the wealth of mitigating evidence counsel failed to uncover in *Rompilla* and the wealth of mitigating evidence counsel failed to uncover here. It cannot fairly be said that the mitigating evidence in *Rompilla* was "significantly stronger" than the evidence here.

a roadside and left her to die. The State presented compelling evidence that Mr. Pye had been violent with Ms. Yarbrough before and that on this night she remained alive for up to 30 minutes after he shot her, was conscious for most that time, and attempted to stand or crawl to safety. Mr. Pye's conduct resulted in the trial court's imposition of four statutory aggravating circumstances.

But the Supreme Court and this Court have found prejudice in highly aggravated cases. *See, e.g.*, *id.* at 514-15, 535 (finding prejudice even though defendant robbed and drowned an elderly woman); *Ferrell*, 640 F.3d at 1204-05, 1234-36 (finding prejudice even though defendant robbed and murdered, execution-style, his elderly grandmother and young cousin); *Cooper*, 646 F.3d at 1331, 1353-56 (finding prejudice even though the state had proven that the triple execution-style murders—apparently committed in the presence of an eight-year-old child—satisfied five aggravating factors). Moreover, the extreme domestic violence Mr. Pye experienced—in part because his father, imprisoned around the time of his conception and birth, questioned his parentage—would have contextualized some of the circumstances of the undeniably horrific crime Mr. Pye committed—a crime that involved extreme domestic violence apparently fueled by questions about Ms. Yarbrough's child's parentage. *See Ferrell*, 640 F.3d at 1235; *see also* O.C.G.A. § 17-10-30(b) (requiring the judge to instruct the jury that it can consider "any mitigating circumstances").

I have little doubt that had Mr. Mostiler introduced evidence that Mr. Pye posed no serious threat while incarcerated and had trusting, congenial relationships with guards, the State would have introduced evidence that

while serving his time for burglary Mr. Pye was sometimes insubordinate.[41] Even so, these instances would have added very little in the way of support for the prosecutor's assertion that Mr. Pye would murder a prison guard to escape prison. Similarly, although there is some evidence in the record that Mr. Pye occasionally moved or spoke in an aggressive manner, the records reveal no real violence toward guards[42] and no propensity for an escape attempt.

Reweighing the evidence in mitigation against the evidence in aggravation, I am convinced that the "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Mr. Pye's] moral culpability." *Wiggins*, 539 U.S. at 538, (internal quotation marks omitted). Although surely it "is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test." *Rompilla*, 545 U.S. at 393. I would conclude, upon a *de novo* review, that Mr. Pye has shown "a reasonable probability that at least one juror would have struck a different balance" between life and death. *Wiggins*, 539 U.S. at 537. Thus, I would conclude that he

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[41] The majority opinion states that many of the instances of insubordination were "categorized as 'High' and 'Greatest'-level offenses." Maj. Op. at 54. Sort of. Those designations are listed under "Warden's Disposition Recommendation," *see, e.g.*, Doc. 15-20 at 1, indicating that they reflect not the severity of the infraction itself, but the Warden's view of how severe the disciplinary response should be in proportion to the infraction committed.

[42] The one instance of aggression toward a guard the majority opinion highlights—when Mr. Pye refused to take a shakedown posture—resulted only in failure to follow instructions/insubordination charges. Mr. Pye was not charged with assault or any violent offense.

has shown prejudice under *Strickland* and is entitled either to a new penalty phase or to be resentenced without the penalty of death.

V. CONCLUSION

Deciding that she has had enough of the characters she encountered through the looking glass, Alice, immersed in a giant chessboard, captures the Red Queen, puts the Red King into checkmate, and awakens from the dream. She emerges in her home, surrounded by her belongings and her precious pet kittens. All is right again.

The majority opinion, by ignoring the Supreme Court's opinion in *Wilson*, traps our Court behind the looking glass. At this point, only the Supreme Court can set things right again.

This side of the looking glass, the reality for Mr. Pye is that he experienced the unthinkable as an infant, child, and adolescent. He is chronically depressed and has borderline intellectual functioning. When weighing his background against the undeniably horrendous crime he committed, the state habeas court egregiously missed the mark. But the majority opinion—even while acknowledging some of the problems in the state court's decision—buries those problems under a mountain of reasons the state habeas court never employed, in violation of *Wilson*. For Mr. Pye and others who come after his case, though deserving of a second chance to convince a jury to spare their lives under AEDPA as framed by *Wilson*, they will never get that chance. The writ of habeas corpus is illusory—impossible—even, to obtain. I dissent.

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12147

D.C. Docket No. 3:13-cv-00119-TCB

WILLIE JAMES PYE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

(April 27, 2021)

Before WILSON, MARTIN, and JILL PRYOR, Circuit Judges.

JILL PRYOR, Circuit Judge:

Willie James Pye, incarcerated on Georgia's death row, appeals the district court's denial of his 28 U.S.C.

§ 2254 habeas petition. He seeks habeas relief on several grounds, including that his trial counsel provided ineffective assistance at the penalty phase of his capital trial. After careful review, and with the benefit of oral argument, we conclude that the district court erred in denying relief on this claim, so we reverse. We otherwise affirm the district court's judgment.[1]

I. BACKGROUND

Mr. Pye was convicted in Georgia of malice murder, kidnapping with bodily injury, armed robbery, burglary, and rape. The jury unanimously recommended a death sentence for the malice murder conviction, and the trial court accepted the recommendation. Below we recount the events that led to Mr. Pye's convictions and sentence, his state postconviction proceedings, and the course of his federal habeas proceedings.

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[1] The district court correctly denied Mr. Pye relief on his claims that trial counsel provided ineffective assistance at the guilt phase of trial, the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose two prior inconsistent statements made by Mr. Pye's codefendant, Mr. Pye was denied his Sixth Amendment right to conflict-free counsel, and cumulative error deprived Mr. Pye of a fair guilt-phase trial. We affirm in those respects and do not discuss these claims further.

We also do not address the Georgia state court's conclusion that Mr. Pye is not intellectually disabled and therefore ineligible for the death penalty. We need not reach this issue because he is entitled to relief from his death sentence on his claim of ineffective assistance of counsel at the penalty phase of his trial, and this issue also "deal[s] with the penalty phase." *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1331 n.1 (11th Cir. 2011). And we do not address Mr. Pye's cumulative error claim as it pertains to the penalty phase because Mr. Pye has shown prejudice stemming from a single claim.

A. Mr. Pye's Trial

The facts underlying Mr. Pye's convictions were described by the Supreme Court of Georgia on direct appeal. *See Pye v. State*, 505 S.E.2d 4, 9-10 (Ga. 1998). Mr. Pye had dated Alicia Lynn Yarbrough, the victim, on and off for some time. At the time of the murder, however, Ms. Yarbrough was living with another man, Charles Puckett, and their infant child. Mr. Pye and two companions, Chester Adams and Anthony Freeman, drove to the home of Ms. Yarbrough and Mr. Puckett, intending to rob Mr. Puckett. Mr. Pye also was upset that Mr. Puckett had signed the birth certificate of Ms. Yarbrough's child. When they arrived, Mr. Puckett was not home. Mr. Pye forcibly took Ms. Yarbrough from the home, leaving the infant behind. The three men rented a hotel room, where they each repeatedly raped Ms. Yarbrough. The men eventually took Ms. Yarbrough from the hotel room, put her into Mr. Adams's car, and left the hotel. At Mr. Pye's direction, Mr. Adams pulled the car onto a dirt road. Mr. Pye ordered Ms. Yarbrough out of the car, made her lie face down, and shot her three times, killing her. Mr. Pye was charged after Mr. Freeman confessed and implicated the other two men.

The trial court appointed Johnny B. Mostiler, the Spalding County public defender, to represent Mr. Pye. Mr. Mostiler, the sole attorney on Mr. Pye's defense team, was assisted by investigator Dewey Yarbrough.[2] While representing Mr. Pye, Mr. Mostiler represented thousands of other people charged with felonies and misdemeanors and maintained an active private civil practice.

[2] Mr. Yarbrough is not related to the victim.

He was representing four other capital defendants during his representation of Mr. Pye. According to his billing records, Mr. Mostiler spent just over 150 hours preparing for Mr. Pye's trial.

At the guilt phase of his trial, the State presented several witnesses, including Mr. Freeman, who discussed Mr. Pye's involvement in the crime. Mr. Pye, who maintained his innocence despite the evidence against him, testified in his own defense. A jury found him guilty.

At the penalty phase, the State presented testimony from three witnesses. Kimberly Blackmon, Ms. Yarbrough's niece, testified about an argument she saw between Ms. Yarbrough and Mr. Pye in which Mr. Pye threatened Ms. Blackmon, her mother, and Ms. Yarbrough with a gun; fired the gun toward Ms. Blackmon; and struck Ms. Yarbrough, who was pregnant at the time, in the back with the gun. Through Ms. Blackmon, the State presented photos of Ms. Yarbrough's three children. Griffin Police Department Corporal Timothy Trevillion testified that he had responded to a call the police received regarding the incident Ms. Blackmon described. Georgia Bureau of Investigation official Sam House, a former field agent, testified that Mr. Pye was arrested and charged with burglary in 1984—about a decade before the murder—and at that time had a reputation within the community for violence.

Trial counsel presented testimony from eight lay witnesses: Mr. Pye's sister Pam Bland, sister Sandy Starks, brother Ricky Pye, father Ernest Pye, 15-year-old niece Cheneeka Pye, nephew Dontarious Usher, sister-in-law Bridgett Pye, and family friend Lillian Buckner. These witnesses testified to Mr. Pye's good moral character and

asked the jury for mercy. Some said Mr. Pye and Ms. Yarbrough seemed to have a good relationship.

Mr. Mostiler asked a couple of the witnesses about Mr. Pye's early life. He asked Ms. Bland "how big a house" the family lived in growing up, and Ms. Bland testified that the family "had a four-bedroom" home. Doc. 13-11 at 30.[3] Ms. Starks testified that she and her siblings "came up in a household where we didn't have the things like a lot of people had." *Id.* at 67. She testified that the family had no "running water in the bathroom" or central heat (they had "a wooden heater" instead), but, she said, "one thing we did have, we had love, if we didn't have nothing else." *Id.* Five of the eight witnesses told the jury they did not believe Mr. Pye was guilty.

In closing, the prosecutor, William McBroom, "went back to the last death penalty case [he and Mr. Mostiler] had and . . . saw what the arguments that he made on that were." *Id.* at 83. From there, he told the jury what he "anticipate[d]" Mr. Mostiler would argue. *Id.* He anticipated Mr. Mostiler would quote from William Shakespeare's *The Merchant of Venice*, "the quality of mercy is not strained," and from the Bible's Beatitudes, "blessed are the merciful for they shall obtain mercy." *Id.* Mr. McBroom told the jury:

> [T]here's one thing that I fear more than anything else in this case, that if you give him life without parole, if he killed a woman on a dirt—lonely, dirt road, that he loved, he'll for sure kill a guard to get out. And if he ever has the chance and a guard stands between him and freedom, you know what

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[3] "Doc." numbers refer to the district court's docket entries.

> he'll do. And what I fear in this case is you read—pick up the paper and you see where he's killed some guard and you try to think this, I wish I could have done something when I had the chance. He is going to be a danger to everybody around him until the day he is executed. Now, I'm sorry, but that is a cold, hard fact.

Id. at 86-87. Mr. McBroom also set a timer for five minutes, sat in silence, and explained that Ms. Yarbrough had suffered for longer than that after being shot.

Mr. Mostiler asked the jury to have mercy on Mr. Pye and suggested that Mr. Pye had never been violent except against Ms. Yarbrough. He acknowledged that he and Mr. McBroom had "faced off against each other in several death penalty cases," and then—just as Mr. McBroom predicted—he quoted from *The Merchant of Venice* and the Beatitudes. *Id.* at 91-94. Of Mr. McBroom's argument that Mr. Pye would kill a prison guard, Mr. Mostiler said, "Willie James Pye is not a danger to you, he's not a danger to me, he's not a danger to a prison guard." *Id.* at 93-94.

The jury found the following statutory aggravating circumstances in support of the death penalty: the murder was committed while Mr. Pye was engaged in the commission of (1) kidnapping with bodily injury, (2) rape, (3) armed robbery, and (4) burglary. The jury recommended a sentence of death, and the trial court imposed that sentence.[4] On direct appeal, the Supreme Court of

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[4] The court also sentenced Mr. Pye to three terms of life imprisonment for kidnapping with bodily injury, armed robbery, and rape, and 20 years' imprisonment for burglary, all to be served consecutively. Nothing we hold today disturbs those sentences.

Georgia affirmed, and Mr. Pye's petition for a writ of certiorari to the Supreme Court of the United States was denied. *See Pye*, 505 S.E.2d at 4, *cert. denied*, 526 U.S. 1118 (1999).

B. State Habeas Proceedings

Mr. Pye timely petitioned for a writ of habeas corpus in Butts County Superior Court. He asserted, among other claims, that Mr. Mostiler was ineffective for failing to investigate and present mitigating evidence at the penalty phase of his trial, including evidence of his family background and cognitive impairment, as well as evidence to "counter the State's evidence of aggravated culpability." *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005).

i. The Evidentiary Hearing

The state habeas court held an evidentiary hearing on Mr. Pye's petition. Mr. Mostiler was deceased by then, but habeas counsel offered for admission into evidence his case file and billing records, which included one hour for meetings with each of two of Mr. Pye's brothers, one and a half hours the day before the penalty phase began to "[d]iscuss mitigation with family," and one hour the day of the penalty phase for a "[f]inal interview with family witnesses." Doc. 19-11 at 78-79.

Mr. Yarbrough testified about the defense team's work on Mr. Pye's case. He testified that the primary focus of the defense was to prove Mr. Pye's innocence. He did not recall Mr. Mostiler's mitigation strategy, whether the team received school records, or whether they pursued leads about any mental health issues. He acknowledged that despite it being Mr. Mostiler's general practice

to do so, the defense obtained no independent psychological evaluation of Mr. Pye. Mr. Yarbrough recalled discussing Mr. Pye's childhood "a little bit," including by asking Mr. Pye questions about where he and his family lived, how many family members there were, "how they were raised, how they were living at the time, mostly how things were at that particular time with the family." Doc. 19-11 at 22. He acknowledged visiting Mr. Pye's home, which had "no water, no electricity"—facts that left Mr. Yarbrough "a little amazed" by "the sad situation in the home." *Id.* at 22-23; Doc. 14-41 at 75. Mr. Yarbrough testified that Mr. Pye told him "to go out and contact his family members," and he contacted four or five of them, including Mr. Pye's mother, father, and two to three siblings. Doc. 19-11 at 23.[5]

Mr. Yarbrough testified that the family "didn't put any effort forth on any of the contacts I made with them." *Id.* at 24. He recalled one family member saying "that [Mr. Pye] got himself into this, and he can get himself out of it." *Id.* When asked to explain how that affected the defense, Mr. Yarbrough clarified that the family was unhelpful "as far as helping prove [Mr. Pye's] innocence." *Id.* at 25. "I can remember thinking, and I want to say this was during, right before the sentencing phase, you know, I just don't care about going back over there and trying to get them here." *Id.* Mr. Yarbrough surmised that he spoke with other people, including neighbors of the Pye family, but he did not recall specifics. He also testified that both he

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[5] The state habeas court found that an entry in both Mr. Mostiler and Mr. Yarbrough's billing records for a meeting with "Mr. and Mrs. Robert Pye" instead referred to a meeting with Mr. and Mrs. Ernest Pye, Mr. Pye's parents.

and Mr. Mostiler spent more time working on the case than their billing records reflected, although he did not specify the focus of those extra work hours.

Habeas counsel also offered undisputed evidence that Mr. Pye is of low intellectual functioning, bordering on intellectual disability.[6] And they presented affidavit testimony from 27 affiants, 24 of whom testified about matters relevant to the penalty phase investigation and presentation. The affiants described in detail Mr. Pye's traumatic childhood and adolescence, during which near-constant physical and emotional abuse, extreme parental neglect, endangerment, and abject poverty pervaded his daily life, as well as his resulting troubled adulthood. The affiants included Mr. Pye's mother, six of his siblings,[7] nieces and nephew, teachers, school social worker/truancy officer, friends, family friends, neighbors, and corrections officers. A police officer from the community in which Mr. Pye was raised also provided an affidavit. Nearly every story in each account is corroborated by another affiant's account, and numerous details are corroborated by school records, Georgia Department of Corrections ("DOC")

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[6] Mr. Pye's primary witness on intellectual disability, Dr. Victoria Swanson, in fact testified that Mr. Pye is intellectually disabled. The State's expert disputed her conclusion. Even so, as the state habeas court explained, "[i]t is undisputed among the mental health professionals who have evaluated Petitioner that Petitioner's intellectual functions are in the low to borderline range." Doc. 20-40:18. Here, we focus on Mr. Pye's undisputed low intellectual functioning as a mitigating circumstance.

[7] Mr. Pye was one of 10 children in the Pye family. One of his siblings was deceased at the time of the state habeas proceedings, and another is intellectually disabled.

records, or other documentary evidence that habeas counsel introduced. Every affiant expressed a willingness to testify to the details in their affidavits.

The evidence submitted at the evidentiary hearing showed the following. Mr. Pye was born to Ernest Pye Sr. and Lolla Mae Pye. He was the seventh of 10 children born to Lolla Mae, and his challenges began before birth. Whether pregnant or not, Lolla Mae drank alcohol. When she was pregnant with Mr. Pye, Lolla Mae struggled as the sole provider for her six children. Ernest, whom people called "Buck," was incarcerated and working on a chain gang. Lolla Mae took whatever work she could get. She worked all the way up until Mr. Pye's birth and then resumed working immediately afterward.

Lolla Mae had to walk to her jobs from the family's two-room house, which had no running water, and the jobs "were not close by. She stayed gone from before the sun came up until late in the evening." Doc. 16-24 at 32. While she was gone, the older children (Randy, at about 10 years old, was the oldest) cared for the younger ones, including Mr. Pye, then just an infant. Lolla Mae's job paid very little, and "the little ones' milk had more water in it than milk." *Id.* at 90. The family primarily ate bread and gravy. They had no money for medical care.

Buck returned from the chain gang when Mr. Pye was about three years old, and the family moved to a nicer home with indoor plumbing. Their stay was short-lived, however, and when Mr. Pye was about five years old the family moved again, this time to a house in Indian Springs. Indian Springs was "where the poorest black families lived," and "[o]ut of the families in Indian Springs, the Pye[s] were one of the worst off." *Id.* at 28-29. The Indian

Springs home lacked heat and indoor plumbing and was in a constant state of disrepair. The family burned fires or used dangerous propane heaters to heat the house; used "a spout near the road" to get water for drinking, cooking, and bathing; and divided the house into rooms "using boards and sheets." *Id.* at 56, 108. The family crammed itself into the house: "whoever was the baby" at the time slept with Lolla Mae and Buck, the two Pye daughters shared a room, Randy slept on a couch in the hallway, and the rest of the Pye boys slept in one bed.

Worse, according to a police officer, "[t]he conditions were filthy and the rooms in total disarray every time we entered." *Id.* at 22. According to the school's social worker, who visited the home multiple times a week for years, "[t]he house was never clean; piles of filth, scraps and garbage were strewn everywhere." *Id.* at 62. He described the condition of the house as "deplorable." *Id.* at 61. On one visit, finding that "the small children had not been bathed and there was spoiled food sitting around," the social worker reported the conditions of the Pye home to the Department of Family and Children Services ("DFACS"). *Id.* at 62. Despite his concern that the home was "so unsanitary" that it created a risk to "the health of the children," DFACS did not intervene. *Id.*

As she had more children, Lolla Mae's health began to fail. She stopped working shortly after the family moved to Indian Springs and often would stay in bed all day due to various ailments, including arthritis, asthma, high blood pressure, and "nerves." *Id.* at 38. She once had a debilitating asthma attack in front of Mr. Pye and his siblings. As she described it, "I couldn't breathe for several minutes and I nearly died. Everyone in the house was

screaming and carrying on. It was very scary for us." *Id.* at 94. On the days Lolla Mae stayed in bed, the children were tasked with her care.

Lolla Mae continued to drink nonetheless, often leaving the children at home to visit a juke joint with friends. Buck—who drank steadily even before Mr. Pye was born—began to drink even more. Buck was notorious for his drinking, as well as his abusive behavior. Buck "would spend every cent [his] famil[y] had in bars and bootlegging houses, and then come home stinking drunk and mean."[8] *Id.* at 25-26. When he drank, he was verbally and physically abusive. "Beatings and tirades were [Buck's] only interaction with his children." *Id.* at 60.

Buck's verbal assaults were "downright cruel." *Id.* at 21. He "had no problem calling his wife and small children every foul expletive he could manage," carrying on "about how worthless the kids" and Lolla Mae were. *Id.* at 22. But "Willie definitely got the worst of his father's nasty comments." *Id.* at 26. Buck "would tell Willie that he was so stupid that he just couldn't be his kid." *Id.* Buck would say "that Willie was born because [Lolla Mae] was messing around while he was in prison, and that he was sick of looking at a kid that belonged to some other guy." Doc. 16-25 at 2. Buck "would tell the rest of [the Pye] kids that there was stuff wrong with Willie James, and that [they]

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[8] Buck spent the meager earnings he made from cutting down trees, Lolla Mae's meager wages, and the government assistance check the family received because of son Ernest Pye, Jr.'s disability. "It was general knowledge in the [community] that Junior . . . limped because his father hit him with a tire iron while he was still recovering from a broken hip and the hip never healed properly." Doc. 16-24 at 73.

shouldn't pay attention to him, all with Willie standing right in front of him." *Id.*

Unfortunately, Buck's abuse did not stop at words. He was extremely physically violent, and "calls [to police] about violence in the Pye home were constant." Doc. 16-24 at 20. He "beat the devil out of [the] children," *id.* at 60, and again, "Willie definitely got the worst of [those] violent outbursts," *id.* at 26. Buck also would hit Lolla Mae and throw things at her, all in front of the children. On at least one occasion he attacked Lolla Mae with a knife; on another occasion he hit her over the head with a bottle. When Buck hit her with a bottle "[t]here was blood from her head everywhere and [the children] all freaked out"; the wound required stitches. *Id.* at 36. Lolla Mae responded to Buck's violence in kind, sometimes with a knife. She, too, beat the children. The school social worker counseled Lolla Mae about the abuse, but nothing changed.

Sometimes when their parents fought, the children would try to break up the fight. As the older boys reached their teenage years, though, they too began to drink heavily and engage in physical violence, beating their father when he was drunk and abusive. When police responded to calls at the Pye house, what they found "was absolute chaos," *id.* at 20, with brawling between Mr. Pye's parents and older siblings. For their part, "[t]he younger kids would head for the hills when the fighting started," often hiding in a clearing in the woods near the home. *Id.* at 22.

Mr. Pye, unlike his older brothers, was not violent. As a young boy, he was among the children who hid from his family's explosive violent episodes. As he got older, he

tried to play the role of peacemaker, "pull[ing] [his] parents apart" when they fought. *Id.* at 36. In response, Buck would "blast Willie right across the head and he'd go flying." Doc. 16-25 at 2. Mr. Pye "took the comments about not belonging to [his] father hard." *Id.* "He was quieter and took things to heart. The most important thing to Willie was to be like everyone else, and [Buck] was constantly telling him that he wasn't." *Id.* When he got upset, Mr. Pye "would find any place he could . . . be alone—the bed, the woods, under the porch. Then he'd lie down and curl up and just stare at nothing." *Id.* If a sibling tried to talk to him, he would act like no one was there. *Id.*

Nearly all of the Pye children, Mr. Pye included, struggled to attend school and to perform academically when they did. The children did not attend school sometimes "because they were embarrassed that they were behind academically or that their clothing was second-hand." Doc. 16-24 at 63. Mr. Pye was teased for both. "Much of the time, however, the problem was very basic: the children didn't leave the bed and get on the bus because it was cold. The home had no heat and no one got up early to make a fire." *Id.* And no one made them go. When Mr. Pye managed to attend school, he was enrolled in "Title I" classes, which were "designed to target socially and educationally at-risk children who were performing significantly below grade level." *Id.* at 45. Mr. Pye "tried hard," but "he just never did grasp most of the operations" the classes covered. *Id.* at 46. Toward the end of junior high, Mr. Pye dropped out—he "finally got so far behind the rest of [his peers] and so frustrated that it made more sense for him to stop going." *Id.* at 29. Mr.

Pye's school records corroborate his low attendance, academic challenges despite effort (including standardized test scores placing him in the lowest one percentile nationally in reading and language), general lack of family support, and completion only of eight years of schooling.

Mr. Pye received little support at school and even less support at home. He also received virtually no support from other community members. Mr. Pye, like his siblings, was ostracized by members of the community because of the family's reputation for poverty, alcoholism, and violence. Even as he reached adulthood, Mr. Pye continued to experience "long, quiet depressed times" when he "wasn't himself"—he "didn't talk, didn't interact with other people," and "would go off somewhere to be alone." *Id.* at 79-80, 103.

Mr. Pye endured hardship and trauma beyond his early years. When he was about 20 years old, he was convicted of burglary and sentenced to five years in prison. The environment in which Mr. Pye was incarcerated was dangerous. "New inmates could be expected to be terrorized upon arrival by the guys that were already there. Most were either physically or sexually assaulted, or both." *Id.* at 50. Mr. Pye, "a smaller guy," was considered by prison staff "to be at risk for victimization." *Id.* at 70.

DOC records from Mr. Pye's 1985 incarceration, which trial counsel did not attempt to obtain, corroborate that corrections officials considered Mr. Pye to be at risk of victimization. DOC's "Consulting Psychologist" evaluated Mr. Pye shortly after he arrived at the prison. She opined that Mr. Pye was "very weak," "confused," and "vulnerable," and suggested that he may need "protective

placement." Doc. 15-19 at 9, 11. The records also document corrections officials' impressions that Mr. Pye was generally trustworthy and not an escape or safety risk. The psychologist opined that Mr. Pye was "[n]ot likely to be violent or potentially dangerous" and was "very unlikely to become a predator"; she found "[n]o evidence of escape." *Id.* A psychological report indicated that Mr. Pye "should be able to adapt to average security arrangements." *Id.* at 15. And adapt he did. During his time in prison, despite his challenges, Mr. Pye made a notably positive impression on prison staff. Guards regarded Mr. Pye as "completely respectful . . . in a way that most of the inmates were not." Doc. 16-24 at 49. "He was never menacing, never made any threatening remarks, never did anything but joke around and take care of his assigned work." *Id.* Guards had "no reservations about [Mr. Pye] working throughout the dorm area, even during times when he was not closely supervised." *Id.* at 71. He helped the guards "keep the rest of the unit safe" by disclosing knowledge of other prisoners' weapons or plans for disruption. *Id.* at 49.

In addition to his adaptability to prison, Mr. Pye's DOC records from his previous incarceration thoroughly document his severe depression. The consulting psychologist indicated that Mr. Pye "was very depressed when he entered [the prison]." Doc. 15-19 at 11. Mr. Pye's psychological report stated that his depression was "severe enough to suggest consideration of [psychopharmacological therapy]," as well as "special counseling." *Id.* at 15-16; *see id.* at 13 (opinion of consulting psychologist the Mr. Pye should receive "more counseling than the average" because of his depression). The psychologist opined

that Mr. Pye may be coping with his depression "by emotional withdrawal" and that he seemed "unstable," reported hearing voices, and was "very homesick." *Id.* at 12. (In fact, when Mr. Pye left prison in 1990 his depressive episodes continued and, by some accounts, worsened.)

Mr. Pye's low intellectual functioning is also well-documented in the records. The counseling psychologist noted that although Mr. Pye expressed an interest in learning, "[i]ntellectually, he is probably in the low average range but his test scores are significantly lower." *Id.* at 13. For example, he was reading and writing at a fourth-grade level. She opined that Mr. Pye "may need special ed help, probably in the learning disabled area." *Id.* at 11.[9] Because trial counsel did not obtain the records, his defense strategy could not account for the information in them.

Nor had trial counsel contacted most of the affiants whose testimony habeas counsel presented. Some were not contacted even though they knew Mr. Mostiler or Mr. Yarbrough or had attended the guilt phase of the trial.

Mitigation witnesses who had some interaction with the defense team before the penalty phase began explained how limited that contact was. In his affidavit, Mr. Pye's younger brother Ricky, who had testified at trial, recounted Mr. Yarbrough's visit to the family's house. Mr. Yarbrough "talked to my dad about the charges against Willie. He didn't ask about Willie James and how

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[9] DOC records showed that Mr. Pye asked to be given job training for barbering but failed the aptitude test for it. The record stated that Mr. Pye "[a]ppears to need educational upgrading and adjustment prior to retesting." Doc. 15-19 at 14.

he came up, or how we all were raised. [Mr. Yarborough] never spoke to me about those things." Doc. 16-24 at 99; *see id.* at 100 ("We had it real tough growing up and Mr. Mostiler and Dewey never asked about that."). Ms. Bland, who also had testified at trial, reported that she was contacted by Mr. Yarbrough a "week or two before the trial started," at which point he asked her to find witnesses who may testify to Mr. Pye's good character. *Id.* at 39. Despite the short notice, she tried to locate people who could help. Because of *her* efforts, Cheneeka Pye, Sandy Starks, Ricky Pye, Dontarious Usher, and Lillian Buckner testified. Ms. Bland, Ricky, and the other witnesses who had testified at trial explained at the evidentiary hearing that although they met with a member of the defense team for a few minutes before their testimony—a meeting corroborated by Mr. Mostiler's billing records—they were asked no specific questions about Mr. Pye or his background and were not told what kind of evidence would be mitigating other than to say "nice" things about him. Doc. 16-24 at 78. The record reflects that during the motion for new trial proceedings Mr. Yarborough admitted to the Office of Multicounty Public Defender[10] that the defense team "made a big mistake by not talking to Willie's oldest sister [Sandy Starks] before putting her on the stand during sentencing." Doc. 17-9 at 89.

ii. The State Habeas Court's Order

The state habeas court denied Mr. Pye's habeas petition, concluding that he failed to show his counsel was de-

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[10] This office is now known as the Office of the Georgia Capital Defender. *See* O.C.G.A. § 17-12-121.

ficient or that the deficiency prejudiced him. As to deficient performance, the court decided that Mr. Pye's "family members were not helpful to the[] investigation" and were "generally unwilling to cooperate in [Mr. Pye's] defense." Doc. 20-40 at 58-59. Even so, the court found, Mr. Mostiler asked Mr. Pye questions about his background, made requests for school records, and interviewed some family members. The court emphasized that Mr. Mostiler's case file contained notes indicating that Mr. Pye had no military or psychiatric history and that there was nothing to suggest Mr. Pye had suffered serious illness or major traumas. The court pointed to two entries in counsel's time records showing he spoke with Mr. Pye's family. The court therefore concluded that defense counsel's investigation was reasonable.

As to prejudice, the court found that evidence of low intellectual functioning would not have swayed the jury. The court noted affidavit testimony that rebutted the State's contention of future dangerousness but emphasized that Mr. Pye's corrections records showed several instances of "mouthing off" to or ignoring officers, including one instance that required officers to forcibly restrain him. The court thus found no reasonable probability that Mr. Pye's resulting sentence would have been different had the jury heard testimony like that of the two prison guards who provided postconviction affidavits.

With respect to Mr. Pye's family background, the state habeas court explained that trial counsel "did learn, to some extent, of the family's impoverished circumstances, and presented those facts to the jury through [Mr. Pye's] sisters." *Id.* at 64 (citation omitted). The court

also "reviewed [Mr. Pye's] affidavit evidence with caution." *Id.* at 66. First, it observed that the existence of affidavits in postconviction proceedings "usually proves little of significance." *Id.* at 65 (quoting *Waters v. Thomas*, 46 F.3d 1506, 1513-14 (11th Cir. 1995)). Second, the court found that three of the mitigation affidavits "were misleading." *Id.* at 65. Regarding the first of these affidavits, "Curtis Pye testified . . . 'No one talked to me . . . before [Mr. Pye's] trial. Johnny Mostiler and his assistant Dewey [Yarborough] know me . . . He didn't get in touch with me.'" *Id.* at 65 (purporting to quote Curtis Pye's affidavit). "However, Mr. Mostiler's billing records in Petitioner's case reflect that Mr. Mostiler interviewed Curtis Pye for one hour approximately one month prior to trial." *Id.* In the second affidavit, "Ricky Pye testified . . . 'I never spoke to Mostiler about what to say [at trial], and he didn't meet with me or ask me any questions before my turn for testimony.'" *Id.* at 66 (quoting Ricky Pye's affidavit). But "[t]he affidavit makes no mention of Mr. Mostiler's one hour interview with him, also approximately one month prior to trial." *Id.* Finally, although Lolla Mae testified in the third affidavit that "[n]o one took the time to talk to me about all [sic] anything before Willie's trial," Mr. Yarbrough's testimony and Mr. Mostiler's billing records showed otherwise. *Id.*[11]

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[11] The state habeas court also noted—accurately—that Mr. Lawson's affidavit was "corrected through additional affidavit testimony." Doc. 20-40 at 65. Mr. Lawson initially testified that he observed Ms. Pye drunk while pregnant, but later corrected his testimony to say he "had no direct knowledge" that she drank while pregnant. Doc. 20-6 at 17-18.

The court found "little, if any, connection between [Mr. Pye's] impoverished background and the premeditated and horrendous crimes in this case." *Id.* It further determined that because Mr. Pye "was 28 years old at the time of these crimes, trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of [Mr. Pye's] guilt, that remorse was likely to play better than excuses." *Id.* Thus, the court found no prejudice stemming from counsel's performance.

Georgia's Supreme Court denied Mr. Pye a certificate of probable cause to appeal the state habeas court's order.

C. Federal Habeas Proceedings

After he exhausted his state appeals, Mr. Pye filed a petition for a writ of habeas corpus in federal district court, raising several claims including his penalty-phase ineffective assistance of counsel claim. The district court, focusing primarily on prejudice, rejected the petition but granted Mr. Pye a certificate of appealability on the claim. This is Mr. Pye's appeal.

The court further observed that Mr. Pye's codefendant Mr. Adams's affidavit "contain[ed] multiple material inconsistencies when compared to his video-taped statement" made to police in the hours after the murder. Doc. 20-40 at 66. The court was correct in this observation as well. Mr. Adams testified to guilt-phase issues, however; thus, his affidavit is not material to the penalty-phase prejudice analysis. And even if it was, there is no indication from the record that the reliability issues with Mr. Adams's affidavit pervaded the other affidavits.

I. STANDARD OF REVIEW

"When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal quotation marks omitted). An ineffective assistance of counsel claim "presents a mixed question of law and fact that we review *de novo*." *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

Because the state habeas court decided Mr. Pye's ineffective assistance of counsel claim on the merits, we must review that court's decision under the highly deferential standards set by Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018). AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was adjudicated on the merits in state court unless the relevant state court's adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S.

63, 71-72 (2003). A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court's decision "involves an unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 407, 413. "[A]n unreasonable application . . . must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation marks omitted).

With respect to § 2254(d)(2), "[s]tate court fact-findings are entitled to a presumption of correctness unless the petitioner rebuts that presumption by clear and convincing evidence." *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011). "Instead, it must conclude that the state court's findings lacked even fair support in the record." *Id.* Even so, "deference does not imply abandonment or abdication of judicial review," nor does it "by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.*

"Deciding whether a state court's decision involved an unreasonable application of federal law or was based on an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why [a] state court[ ] rejected a state prisoner's federal claims, and to give appropriate deference to that decision." *Wilson*, 138 S. Ct. at 1191-92 (citation and internal quotation marks omitted); *see also Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). If "a federal court determines that a state court decision is unreasonable under § 2254(d)," it is "unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1260 (11th Cir. 2016) (internal quotation marks omitted); *see also Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353 (11th Cir. 2011) ("When a state court unreasonably determines the facts relevant to a claim, we do not owe the state court's findings deference under AEDPA, and we apply the pre-AEDPA *de novo* standard of review to the habeas claim." (internal quotation marks omitted)).

III. DISCUSSION

Mr. Pye claims that his trial counsel was ineffective in failing to investigate and present evidence about his traumatic childhood and adolescence, mental health problems, and low intellectual functioning. He also claims that his counsel failed to investigate and present evidence to rebut the State's claim of future dangerousness. And, he argues, there is a reasonable probability that, had the jury heard this evidence, it would have recommended a sentence other than death.

Under *Strickland v. Washington*, a defendant has a Sixth Amendment right to effective assistance of trial

counsel. 466 U.S. 668, 686 (1984). Counsel renders ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "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.

As to deficient performance, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "To overcome that presumption, [Mr. Pye] must show that counsel failed to act reasonably considering all the circumstances." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (alteration adopted and internal quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but, importantly, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The Supreme Court has cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

To establish prejudice, Mr. Pye "need not show that counsel's deficient conduct more likely than not altered the outcome in the case"; he need only show a reasonable probability of a different outcome. *Id.* at 693. "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Id.* at 694. In determining whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (alteration in original) (quoting *Williams*, 529 U.S. at 397-98).

Because AEDPA applies to the state habeas court's decision, Mr. Pye is "entitled to relief only if the state court's rejection of his claim of ineffective assistance of counsel was 'contrary to, or involved an unreasonable application of,' *Strickland*, or rested on 'an unreasonable determination of the facts in light of the evidence in the State court proceeding.'" *Id.* at 39 (quoting 28 U.S.C. § 2254(d)). "Federal courts may not disturb the judgments of state courts unless each ground supporting the state court decision is examined and found to be unreasonable." *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (emphasis omitted) (internal quotation marks omitted). "Thus, if a fairminded jurist could agree with either [the state court's] deficiency or prejudice holding, the reasonableness of the other is beside the point." *Id.* (internal quotation marks omitted).

The district court reviewed the state habeas court's decision through the lens of AEDPA deference. Focusing its analysis "primarily" on prejudice, Doc. 68 at 26, the court concluded that the state court's decision withstood deference. For the reasons below, we disagree. But because Mr. Pye is not entitled to habeas relief unless he also can show that counsel performed deficiently and that the state habeas court's decision otherwise was unreasonable, we start there.

A. Deficient Performance

Mr. Pye contends that his trial counsel failed to undertake a basic mitigation investigation, ignored signs that further investigation would prove fruitful, and failed entirely to attempt to rebut what counsel knew the State would present in aggravation. We first decide whether the state court's rejection of Mr. Pye's argument withstands AEDPA deference. Because it does not, we then conduct a *de novo* review of *Strickland*'s deficient performance prong. *See Kayer*, 141 S. Ct. at 523-24 (admonishing that courts must first subject state court merits determinations to review under AEDPA and then, only if the court's error lies beyond any fairminded disagreement, proceed to conduct a *de novo* review).

i. AEDPA Analysis

Again, in rejecting Mr. Pye's ineffective assistance of counsel claim, the state habeas court concluded that trial counsel was not deficient because he asked Mr. Pye questions about his background, requested school records, and interviewed some family members despite his family's "unwilling[ness] to cooperate" in Mr. Pye's defense. Doc. 20-40 at 58-59. In support of its decision about deficient performance, the state habeas court pointed to Mr. Mostiler's case file, in which he noted that Mr. Pye had no military or psychiatric history and no indication of serious illness or major traumas, and Mr. Mostiler's time records, which showed he met with family members. We conclude, however, that the state habeas court's decision involved an unreasonable application of clearly established law and rested on an unreasonable determination of the facts in light of the state court record.

As a preliminary matter, the state habeas court's factual premise that Mr. Pye's family members were uncooperative in the mitigation investigation—from which the court surmised that Mr. Mostiler did what he could with what little he had—was unreasonable in light of the record. The fact that seven of Mr. Pye's family members testified at the penalty phase conclusively disproves that the entire family was uncooperative. Every family-member affiant testified under penalty of perjury that he or she would had been willing to speak to the defense team before trial, and nothing in Mr. Yarbrough's testimony called those affidavits into question in that respect. Although Mr. Yarbrough testified that the family members were uncooperative, when asked to elaborate he clarified that they were unhelpful in the investigation of Mr. Pye's *innocence defense*, not in the investigation of mitigating circumstances (which counsel barely inquired about). Mr. Yarbrough asked Ms. Bland to corral potential penalty-phase witnesses a mere two weeks before the trial began. By his own testimony, he didn't "care" about trying to get Mr. Pye's family members to testify. Doc. 19-11 at 25. There is no "fair support in the record" for the state habeas court's sweeping statement that Mr. Pye's family refused to cooperate, *Rose*, 634 F.3d at 1241; thus, we do not defer to that finding.

The remaining weight of the state habeas court's determination that Mr. Mostiler's performance was not deficient—that he performed a reasonable investigation—rested primarily on Mr. Mostiler's file notes in which he concluded that Mr. Pye had no military or psychiatric history and no indication of serious illness or major traumas. But counsel's conclusion does not answer whether his investigation to arrive at that conclusion was reasonable; it

simply begs the question. The state habeas court unreasonably applied *Strickland* and its progeny by taking counsel's conclusions as evidence that the investigation supporting those conclusions was reasonable. *See Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) ("In rejecting petitioner's ineffective assistance claim, the [state court] appears to have assumed that because counsel had *some* information with respect to petitioner's background . . . they were in a position to make a tactical choice not to present a mitigation defense. In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." (citation omitted)).

"Even assuming [trial counsel] limited the scope of [his] investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Id.* at 527. "Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* It is undisputed that Mr. Mostiler met with some of Mr. Pye's family members. The fact that the meetings occurred, however, is not enough to show that Mr. Mostiler's investigation was reasonable. It is not enough in light of the wealth of evidence in the record from Mr. Yarbrough and Mr. Pye's family members—including siblings Sandy Starks, Pam Bland, Curtis Pye, and Ricky Pye; niece Cheneeka Pye; and nephew Dontarious Usher—that those meetings focused on Mr. Pye's innocence defense rather than potential penalty phase mitigation. To the contrary, Mr. Pye's family members recounted in their affidavits that when Mr.

Mostiler and Mr. Yarbrough touched on potential mitigation evidence during a meeting, they asked no searching questions and failed to explain to family members the significance of certain facts as mitigating circumstances. Contemporaneous documentary evidence corroborates these accounts. When viewed in context, the mere fact that Mr. Mostiler met with some members of Mr. Pye's family does not support the conclusion that the investigation was reasonable. The state habeas court's decision otherwise involved an unreasonable application of clearly established federal law regarding the reasonableness of the mitigation investigation. *See id.*

The state habeas court reached the conclusion that counsel's meetings with family members amounted to an adequate investigation in part because it discredited the affidavit testimony of Curtis, Ricky, and Lolla Mae Pye regarding these family members' contacts with the defense team. Doc. 20-40 at 66. The court's factual determinations as to each of these affidavits were, however, unreasonable in light of the factual record. In concluding that Curtis had apparently lied in his affidavit about his contact with Mr. Mostiler, the state habeas court omitted (with ellipses) a key portion of testimony. Curtis did not testify that no one talked to him before Mr. Pye's trial—the lie the state habeas court purported to identify—rather, he testified that "[n]o one talked to me *about any of this* [information about the family and Mr. Pye's upbringing] before Willie James's trial. . . . [Mr. Mostiler] didn't get in touch with me *or ask me any questions about the house Willie James was raised in or what he was like as a child*." Doc. 16-24 at 83 (emphasis added). No reasonable factfinder would have drawn the conclusion the state habeas court drew given the totality of Curtis's testimony.

The state habeas court discredited Ricky's testimony for a similar unsubstantiated reason. The court faulted Ricky for failing to mention his one-hour meeting with Mr. Mostiler about a month before trial when he testified that "[n]o one talked to me about my testimony before I went. I never spoke to Mr. Mostiler about what to say, and he didn't meet with me or ask me any questions before my turn for testimony." *Id.* at 99. It is clear from this quote, however, that Ricky meant Mr. Mostiler did not meet with him to discuss his "testimony" before he testified at the penalty phase. Looking at the quote in the context of his entire affidavit removes any doubt that it concerned Mr. Mostiler's failure to discuss Mr. Pye's family background with him. Ricky testified in his affidavit that "[w]e had it real tough growing up and Mr. Mostiler and Dewey never asked about that." Doc. 16-24 at 100. (Here he seems to be acknowledging rather than denying the meeting the state habeas court referenced because Mr. Mostiler and Mr. Yarbrough both were present at that one-hour meeting.) He also recounted a time when Mr. Yarbrough visited the family's home but "didn't ask about Willie James and how he came up, or how we were all raised." *Id.* at 99. There is simply no evidence in the record that Mr. Mostiler's meeting with Ricky a month before trial concerned this kind of potential mitigating evidence or Ricky's penalty-phase testimony. The state habeas court's decision to discredit Ricky's affidavit lacks fair support in the record, and so we do not defer to it. *Rose*, 634 F.3d at 1241.

The same is true for the state habeas court's rejection of Lolla Mae's affidavit. Her affidavit contains an apparent typographical error: she testified that "[n]o one took the time to talk to me about *all anything* before Willie's

trial." Doc. 16-24 at 97 (emphasis added). The court interpreted her statement to mean that she was never contacted by the trial team—a fact refuted by Mr. Mostiler's billing records and Mr. Yarbrough's testimony. But the next three sentences in her affidavit leave no room for doubt that Lolla Mae meant she was never asked about mitigating circumstances:

> Nobody ask me all about how I grew up, how I came to be married to Ernest, and how I raised Willie and my other children. I would have been willing to talk about my life with Willie James's lawyer or investigator, or with any doctor or psychologist working on his case. I would have told about all the things I described here, and testified to the jury about them if they wanted me to.

Id. The state habeas court's reading of the affidavit is entirely divorced from context. We do not defer to it. *Rose*, 634 F.3d at 1241.

The state habeas court's deficient performance analysis was based on an error in the application of *Strickland* and its progeny that is "beyond any possibility for fairminded disagreement." *Kayer*, 141 S. Ct. at 520 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). And the factual underpinnings of the court's decision are completely lacking in support from the record. For these reasons, we conclude that the state habeas court's deficient performance decision is not entitled to deference under AEDPA.

ii. *De Novo* Review

Because the state habeas court's decision involved an unreasonable application of *Strickland* and was unreasonable in light of the factual record, "we are unconstrained by § 2254's deference and must undertake a *de novo* review of the record" to decide whether trial counsel's performance was deficient. *Daniel*, 822 F.3d at 1260. And the state habeas court did not reach the issue of whether trial counsel was deficient for failing to rebut the State's future-dangerousness case (deciding that issue on prejudice alone), so we conduct a *de novo* review of that aspect of Mr. Pye's claim as well.

On a *de novo* review, we have little trouble concluding that trial counsel was deficient.[12] "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Here, counsel knew little given the cursory investigation he undertook—speaking briefly with a few family members, possibly obtaining school records, and once visiting the family's home. Even given the limited quantum of evidence counsel knew, however, reasonable counsel would have investigated further. Because

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[12] We disagree with the district court's suggestion that Mr. Mostiler's death "works to [Mr. Pye's] disadvantage." Doc. 68 at 36. Although the absence of trial counsel's testimony certainly can work to a petitioner's disadvantage, it does not in cases such as this one, where the record is well-developed as to counsel's actions.

Mr. Mostiler, overwhelmed with an enormous caseload, ceased his investigation at an "unreasonable juncture," *id.*, we conclude that his performance at Mr. Pye's trial was deficient.

Trial counsel effectively outsourced the mitigation investigation to one of Mr. Pye's sisters, Ms. Bland. He did so too late and with virtually no instruction. Mr. Yarborough testified that Mr. Pye asked trial counsel to contact his family in search of potential mitigating evidence. Yet neither Mr. Mostiler nor Mr. Yarbrough meaningfully interviewed family members about mitigation. In fact, Mr. Yarbrough—to whom Mr. Mostiler had delegated investigative responsibilities—testified that he effectively gave up on the effort before sentencing. Rather than undertaking the investigative effort himself, Mr. Yarbrough tasked Ms. Bland with finding potential mitigation witnesses only a week or two before trial. He did so without informing her what types of mitigating evidence may be compelling to the jury, and without allowing her adequate time to find people who would testify. When Ms. Bland secured several family members and one family friend to testify, neither Mr. Yarbrough nor Mr. Mostiler inquired into what the witnesses knew so that Mr. Mostiler could elicit testimony that might sway the jury to recommend a penalty of life imprisonment rather than death. This, simply put, was deficient.

Even though trial counsel conducted only the most cursory of investigations, he knew enough to know he should have dug deeper. Mr. Mostiler failed to obtain a mental health evaluation of Mr. Pye despite it being his usual practice to do so. Had he followed his usual practice,

he would have discovered Mr. Pye's borderline intellectual functioning. His low intellectual functioning also was apparent from his school records. The record does not reveal conclusively whether Mr. Mostiler had Mr. Pye's school records before the start of the penalty phase, but whether or not he did, counsel's deficiency is clear. If counsel had gotten the records, he would have known that Mr. Pye was chronically absent from school and performed poorly—in some instances in the lowest one percentile—when he did attend. Further investigation would have revealed that Mr. Pye is of borderline intellectual functioning and was severely neglected during his school-age years. Mr. Mostiler would have discovered the names of teachers who could have been called to testify about Mr. Pye's struggles in school. But Mr. Mostiler followed none of the leads Mr. Pye's school records contained. Conversely, if counsel did not have the records, it was due to his too-late request for them: a mere ten days before voir dire began.

In addition to—or without—the school records, Mr. Mostiler had other evidence in hand that would have led reasonable counsel to investigate further. Counsel had visited Mr. Pye's family home and knew of its conditions of extreme poverty and neglect. *See Ferrell v. Hall*, 640 F.3d 1199, 1217, 1230 (11th Cir. 2011) (finding mitigating evidence that "[i]n an area where many people were poor, [the petitioner's family was] even worse off than others"). Had Mr. Mostiler explained to potential witnesses the mitigating value of the circumstances in which the Pye siblings were raised, he could have more fully investigated and developed that evidence. If he had, according to Ms. Bland's uncontroverted testimony, she would have revealed more to him, including the abuse Mr. Pye suffered.

Mr. Mostiler's shortcomings in the investigation of Mr. Pye's family background were compounded by his complete failure to attempt to rebut the case in aggravation that he knew was coming. Mr. Mostiler knew in advance that Mr. McBroom likely would argue to the jury that Mr. Pye would be dangerous if sentenced to life imprisonment. Mr. McBroom had a habit of making this argument in capital cases, and he and Mr. Mostiler were frequent opponents. Less than six months before Mr. Pye's trial, in a capital trial in which Mr. Mostiler represented the defendant, Mr. McBroom argued to the jury: "How do you explain [a sentence less than death] to the prison guard if he has to kill one to get out of jail? . . . He killed a defenseless woman, he wouldn't think twice about killing a guard to get out." Doc. 17-10 at 50. This is nearly word-for-word what Mr. McBroom argued to Mr. Pye's jury. Plus, Mr. McBroom had given the defense notice that it would introduce Mr. Pye's prior burglary conviction, providing Mr. Mostiler a peek at the State's strategy in aggravation *in this very case*.

Predictably, then, Mr. McBroom anticipated what Mr. Mostiler would say in his closing argument in Mr. Pye's trial, down to the very quotes Mr. Mostiler would employ. But Mr. Mostiler, knowing full well what Mr. McBroom likely would argue, never sought nor obtained DOC records, or witnesses who would testify, to show that Mr. Pye would not pose an escape risk or a threat to a guard—even though such records and witnesses existed. Indeed, Mr. Mostiler knew Mr. McBroom had his hands on at least some of the records because of the notice that the prosecution would introduce the prior burglary conviction. As the Supreme Court has explained, counsel performs deficiently when he fails to make reasonable efforts to review

evidence he knows the State will use in aggravation. *Rompilla*, 545 U.S. at 388-90.

Considering the paltry mitigation investigation Mr. Mostiler conducted, that he failed to pursue the leads he managed to uncover, and that he failed entirely to rebut the State's case in aggravation, we conclude that Mr. Mostiler performed deficiently in Mr. Pye's case.

B. Prejudice

Having decided that counsel was deficient under a *de novo* review of the record, we turn to the prejudice prong of *Strickland*, first examining the state habeas court's conclusion that Mr. Pye failed to show prejudice through the lens of AEDPA deference and then conducting a *de novo* review.

i. AEDPA Analysis

Just as with its analysis of *Strickland*'s deficient performance prong, the state habeas court's prejudice conclusion both involved unreasonable applications of well-established federal law and was based on unreasonable determinations of fact. As discussed above, in concluding that Mr. Pye failed to show prejudice stemming from counsel's performance, the state habeas court unreasonably characterized as "misleading" several of the affidavits habeas counsel obtained, and so we do not defer to that determination or to the factual findings that underpin it.[13]

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[13] As we noted above, the state habeas court accurately noted that Mr. Lawson "corrected [his original testimony] through additional affidavit testimony." Doc. 20-40 at 65. In contrast to the three affidavits it found to be misleading, however, the state court made no factual findings about Mr. Lawson's testimony or credibility to which AEDPA deference would apply. The state court's blanket decision to

More globally, the state habeas court unreasonably discounted all the mitigation affidavits based on the proposition that they "'usually prove[] little of significance.'" Doc. 20-40 at 65 (quoting *Waters*, 46 F.3d at 1513-14). In context, the *Waters* quote states the unremarkable: that grants of federal habeas corpus are rare because we must avoid the distorting effects of hindsight. *Waters*, 46 F.3d at 1514 (citing *Strickland*, 466 U.S. at 689). The state habeas court, though, wielded the quote like a hammer, using it—along with the unreasonable fact-findings relating to three of the 24 affidavits—to discount the whole lot. This was unreasonable under *Strickland* and its progeny, which direct courts to consider evidence adduced during state postconviction proceedings and reweigh it, along with the evidence admitted at trial, against the evidence in aggravation. *See Wiggins*, 539 U.S. at 534.

The state habeas court also found "little, if any, connection between Mr. Pye's impoverished background" and the crime he committed. Doc. 20-40 at 66. Supreme Court law clearly establishes, however, that no such connection is required. *See Williams*, 529 U.S. at 367-68, 395-98 (granting habeas relief despite lack of any nexus between petitioner's "nightmarish childhood" and the robbery and murder he committed); *cf. Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("[W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating

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assign little weight to Mr. Pye's affidavit testimony is not itself a fact-finding. Rather, "weighing the prosecution's case against the proposed witness testimony," as the state habeas court did here, "is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus is a mixed question of law and fact not within the Section 2254(e)(1) presumption." *Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007).

evidence . . . unless the defendant also establishes a nexus to the crime."). The state habeas court further found that because Mr. Pye "was 28 years old at the time of these crimes, trial counsel could have reasonably decided . . . that remorse was likely to play better than excuses." Doc. 20-40 at 66. The court's premise, that Mr. Pye's age meant evidence of his childhood and family background would not be mitigating, is patently unreasonable under the Supreme Court's decision in *Porter*, and its conclusion—that remorse was a reasonable tactic for counsel to pursue—has no support in the factual record of this case.

In *Porter*, the state court "discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the trial." *Porter*, 558 U.S. at 37. The Supreme Court held that "[i]t is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with [his ex-girlfriend, the murder victim]." *Id.* at 43. Here, just as in *Porter*, evidence that Mr. Pye experienced abuse as a child could have been particularly salient to the jury's evaluation of the crime he committed against a former girlfriend.

As to the state habeas court's conclusion that Mr. Mostiler reasonably could have pursued a strategy grounded in remorse, it is abundantly clear from the record that Mr. Mostiler focused on remorse not at all.[14] Mr.

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[14] We recognize that the state habeas court's conclusion sounds more like a determination that trial counsel was not deficient than a conclusion as to prejudice. We include it in our discussion here because the state court tied its remorse discussion to the premise, clearly grounded in a prejudice determination, that Mr. Pye's age decreased

Pye's testimony in his own defense at the guilt phase of the trial, in which he denied before the jury that he had been present for the rape and murder, was utterly inconsistent with remorse. At the penalty phase, most of the defense witnesses stated their belief that Mr. Pye was innocent—again, inconsistent with remorse. Not surprisingly, Mr. Mostiler did not even mention remorse in his closing argument; instead, he urged the jury to exercise mercy. Thus, the state habeas court's determination that remorse was a reasonable defense strategy was unreasonable in light of the record, which demonstrates that counsel could not have pursued a strategy based on remorse.[15]

Finally, the state habeas court found no prejudice stemming from counsel's failure to rebut the State's future-dangerousness argument, reasoning that DOC records showed Mr. Pye was sometimes insubordinate. Doc.

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or eliminated the mitigating impact of his family background. The court's finding relating to counsel's purported remorse strategy was unreasonable regardless of whether it related to deficient performance or prejudice.

[15] The State, for its part, argues that Mr. Mostiler reasonably pursued a mitigation strategy based on residual doubt. But "in other cases where courts have accepted the efficacy of residual doubt defenses [to the death penalty], *actual* residual doubt was urged by defense counsel." *Ferrell*, 640 F.3d at 1232. Here, Mr. Mostiler did not urge the jury to vote for a sentence other than death on a theory of residual doubt. Instead, "counsel's argument can be more accurately described as evincing a 'mercy-despite-guilt-strategy—asking the jury to spare [Mr. Pye's] life, even if he did it." *Id.* Importantly, aside from the lack of evidence that Mr. Mostiler adopted a residual-doubt strategy, the state habeas court opined that counsel acted reasonably in highlighting remorse, not residual doubt. *See Wilson*, 138 S. Ct. at 1191-92 (requiring us "to train [our] attention on *the particular reasons*" the state habeas court gave in adjudicating a claim and defer to those reasons (emphasis added) (internal quotation mark omitted)).

20-40 at 60-61. The state habeas court failed to consider that it was not just evidence about Mr. Pye's carceral conduct in the DOC records, but also the mitigating evidence about Mr. Pye's mental health and intellectual functioning the records contained, that could have swayed the jury. The court's failure to consider the full breadth of mitigating evidence in the DOC records was contrary to *Rompilla*, in which the Supreme Court ruled that "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested that they would have found a range of mitigation leads that no other source had opened up," including a picture of their client's mental health that was "different[ ] from anything defense counsel had seen or heard." *Rompilla*, 545 U.S. at 390.

The state habeas court unreasonably cast aside Mr. Pye's mitigation affidavits, required a temporal and topical connection between the crime and mitigating circumstances, buoyed trial counsel's performance based on a nonexistent remorse strategy, and failed to consider the full breadth of mitigating evidence in Mr. Pye's DOC records. The court's errors lie "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Thus, the state habeas court's prejudice decision involved an unreasonable application of federal law and was based on unreasonable determination of fact. *Id.*; *see Wilson*, 138 S. Ct. at 1191-92.

ii. *De Novo* Review

Here, as with *Strickland*'s deficient performance prong, we are unconstrained by the deference afforded by § 2254 and now conduct a *de novo* review. The question we must answer in conducting a *de novo* review "is whether the entire postconviction record, viewed as a

whole and cumulative of mitigation evidence presented originally, raised 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." *Debruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1275 (11th Cir. 2014) (internal quotation marks omitted). Habeas counsel compiled evidence of severe physical abuse, neglect and endangerment, low intellectual functioning, depression, and extreme poverty—evidence that "paints a vastly different picture of [Mr. Pye's] background" than the evidence presented at the penalty-phase hearing. *Id.* at 1276; *see also Wiggins*, 539 U.S. at 535. "[H]ad the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Wiggins*, 539 U.S. at 536.

The mitigating evidence habeas counsel adduced "is consistent, unwavering, compelling, and wholly unrebutted." *Ferrell*, 640 F.3d at 1234. It is precisely the kind of mitigating evidence the Supreme Court and this Court have held demonstrates prejudice. Mr. Pye was raised in abject poverty by parents who managed to feed and clothe their 10 children by the slimmest of margins. *See Rompilla*, 545 U.S. at 390. The family lived in a house that had no indoor plumbing or central heating, and the children did not have functional clothing. *Id.* at 392. Whether to go to work or out drinking (Lolla Mae drank even while pregnant), Mr. Pye's mother left him alone with his siblings all day, leaving the older children—10, at the oldest—to care for the younger ones. *See Wiggins*, 539 U.S. at 516-17 ("[P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for

days."). A school social worker found the conditions of the Pye home so deplorable that he reported the family to DFACS, which did nothing.

Experts and lay witnesses unanimously agree that Mr. Pye is of low intellectual functioning, bordering on intellectual disability. He "attended classes for slow learners and left school when he was 12 or 13." *Porter*, 558 U.S. at 33-34; *see also Williams*, 529 U.S. at 396 ("Counsel failed to introduce available evidence that Williams was 'borderline [intellectually disabled]' and did not advance beyond sixth grade in school."). He was teased at school for his academic challenges and for his tattered clothing. He often did not make it onto the school bus because his house was too cold to get out of bed.

Mr. Pye's father, a violent and explosive alcoholic, regularly abused his children and his wife. In fact, the record shows that Buck Pye had virtually no other meaningful interactions with his children. "[B]y his siblings' account, [Mr. Pye] was his father's favorite target, particularly when [Mr. Pye] tried to protect his mother." *Porter*, 558 U.S. at 33; *see also Ferrell*, 640 F.3d at 1234 (explaining that the petitioner was "especially" targeted for abuse by his father). Buck Pye told his son he "was so stupid that he just couldn't be [Buck's] kid" and would tell the other children to ignore him. Doc. 16-24 at 26; Doc. 16-25 at 2. Mr. Pye also "routinely witnessed his father beat his mother," *Porter*, 558 U.S. at 33, at least once so severely that she required medical treatment, despite the family's inability to pay for medical care and resulting inclination not to seek it. *See Rompilla*, 545 U.S. at 392 (listing as a mitigating circumstance that the petitioner's "father, who had a vicious temper, frequently beat Rompilla's mother,

leaving her bruised and black-eyed"). "His parents fought violently," and on at least one occasion his mother attacked his father with a knife. His mother also beat the children. In time, his older siblings began to join in the violent domestic abuse.

Mr. Pye's depression was evident from an early age. His siblings recall his hiding from the family violence, curling up and staring into space. He would not speak in those moments. By the time he was incarcerated on a burglary charge, psychologists considered him to be severely depressed and in need of psychopharmacological treatment. The prison was a brutal environment where, even by accounts of the guards, new prisoners could expect to be physically or sexually assaulted, or both. The guards considered Mr. Pye, who was small in stature, to be a target. The prison's psychologist agreed, calling Mr. Pye "very weak" and suggesting that he may need protective custody. *See Wiggins*, 539 U.S. at 517. Despite the violence of the prison environment, prison guards and officials did not consider Mr. Pye to present an escape or violence threat. *See Williams*, 529 U.S. at 396.

The jury heard virtually none of this powerful mitigating evidence. Instead, the jury heard little more than "naked pleas for mercy." *Rompilla*, 545 U.S. at 393. Worse, what the jury did hear about Mr. Pye was at best misleading. Unprepared to testify, Ms. Bland told the jury that Mr. Pye was raised in a "four-bedroom" house, not one in deplorable condition with makeshift sleeping quarters divided by boards and sheets. Ms. Starks, also unprepared to testify, acknowledged that the family lacked running water and central heating, but followed up her description of what the family did not have with what it supposedly

did have—love. Further misleading the jury about the supposedly loving upbringing Mr. Pye experienced, Mr. Pye's primary abuser, his father, testified without mentioning the trauma he caused his son. No other family member who testified at trial mentioned it either. To top it off, the jury heard from the prosecution that, if given the opportunity, Mr. Pye would kill a prison guard to escape without hearing any of the available evidence that he posed no serious risk to anyone in prison.

Of course, in assessing prejudice we must reweigh the evidence in mitigation against the evidence in aggravation, including evidence the State would have introduced to rebut the defense's new mitigating evidence. *Wiggins*, 539 U.S. at 534. There is no doubt that this was an aggravated crime. Mr. Pye and his companions kidnapped and raped Ms. Yarbrough at gunpoint, and then Mr. Pye shot her multiple times when she was lying on a roadside. The State presented compelling evidence that Mr. Pye had been violent with Ms. Yarbrough before and that on this night she remained alive for 10 to 30 minutes after he shot her, was conscious for most that time, and attempted to stand or crawl to safety. Mr. Pye's conduct resulted in the imposition of four statutory aggravating circumstances. But the Supreme Court and this Court have found prejudice in very aggravated cases. *See, e.g.*, *id.* at 514-15, 535 (finding prejudice even though defendant robbed and drowned an elderly woman); *Ferrell*, 640 F.3d at 1204-05, 1234-36 (finding prejudice even though defendant robbed and murdered, execution-style, his elderly grandmother and young cousin). Moreover, the extreme domestic violence Mr. Pye experienced—in part because his father, imprisoned around the time of his conception and birth, questioned his parentage—would have contextualized

some of the circumstances of the undeniably horrific crime Mr. Pye committed. *See Ferrell*, 640 F.3d at 1235; *see also* O.C.G.A. § 17-10-30(b) (requiring the judge to instruct the jury that it can consider "any mitigating circumstances").

Undoubtedly, had Mr. Mostiler introduced evidence that Mr. Pye posed no serious threat while incarcerated and had trusting, congenial relationships with *570 guards, the State would have introduced evidence that while serving his time for burglary Mr. Pye was investigated twice for assaulting a fellow prisoner. Doc. 15-19 at 51. Here on appeal the State points to these alleged infractions.[16] A close reading of the disciplinary reports does little to bolster the State's argument, however.

In the first incident, the investigating officer found that "horse-playing led to fighting" with a fellow prisoner and, after both prisoners "refused to stop when told," Mr. Pye "got smart mouthed" with an officer. *Id.* There were no injuries. Mr. Pye pled guilty to the disciplinary committee. In the second incident, Mr. Pye was observed fighting with another prisoner, and an officer "only held inmate Willie Pye back away from [the other] inmate to keep the inmates separated," while another officer re-

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[16] The state habeas court noted in passing that Mr. Pye had at least twice assaulted a guard while incarcerated on death row. These incidents, which resulted in no injuries and minimal use of force, occurred after sentencing and so would not have been available to Mr. McBroom. Even considering them now, the incidents do not change our rationale or result because their aggravating nature pales in comparison to the mitigating value of information the DOC records contained.

strained the other man. Doc. 15-20 at 8. During the investigation, Mr. Pye took responsibility, and the disciplinary committee found him *not guilty* of assault. We do not find convincing the State's argument that the aggravating nature of these documents would blunt the mitigating value of the evidence and leads they contained.

What is more, this is not a case where the type of mitigating evidence adduced during the state habeas proceedings would have undermined counsel's strategy at sentencing. Mr. Mostiler focused his penalty-phase presentation on mercy; mitigating evidence of the type habeas counsel uncovered "would have easily and directly supported the approach counsel offered at sentencing." *Ferrell*, 640 F.3d at 1235. To the contrary, with scant details from poorly prepared witnesses, counsel's focus had the weakest of evidentiary support, and the State's argument in closing was made even more powerful. *See id.* at 1236 (finding prejudice, despite numerous strong aggravators, when "the testimony from witnesses at the penalty phase . . . actually was very sparse"). When the prosecution asked the jury, "If Willie James Pye does not deserve the death penalty, who are you saving it for?," Doc. 13-11 at 90, the jury knew almost nothing about Mr. Pye. Thus, "[t]he jury labored under a profoundly misleading picture of [Mr. Pye's] moral culpability"—exacerbated by the State's strategy of suggesting future dangerousness—"because the most important mitigating circumstances were completely withheld from it." *Ferrell*, 640 F.3d at 1236.

The evidence trial counsel failed to investigate and present "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before

the jury." *Rompilla*, 545 U.S. at 393. It "is possible that a jury could have heard it all and still have decided on the death penalty," but "that is not the test." *Id.* The "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Mr. Pye's] moral culpability." *Wiggins*, 539 U.S. at 538 (internal quotation marks omitted). Because he has shown "a reasonable probability that at least one juror would have struck a different balance" between life and death, Mr. Pye has shown prejudice under *Strickland*. *Id.* at 537. He is entitled to a new penalty phase.

IV. CONCLUSION

"[I]t will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding. This is one of those rare cases." *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011). The district court's denial of Mr. Pye's petition for a writ of habeas corpus is reversed in part. We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

APPENDIX D

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

WILLIE JAMES PYE,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	3:13-CV-0119-TCB
v.	:	
	:	DEATH PENALTY
BRUCE CHATMAN,	:	HABEAS CORPUS
Respondent.	:	

ORDER

On January 22, 2018, this Court issued its order denying Petitioner's claims and dismissing this action. [68]. Petitioner has now filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e). [70]. Petitioner further seeks an expansion of the Certificate of Appealability and that "this Court . . . retain jurisdiction over his petition and defer action on the instant motions until the Supreme Court has issued an opinion in *Wilson v. Sellers*, Case No. 16-6855." *Id.* at 2.

Motions for reconsideration are not favored. Under Local Rule 7.2(E), "[m]otions for reconsideration shall not be filed as a matter of routine practice" and only when necessary. LR 7.2(E), N.D. Ga. Reconsideration is necessary only in the event of "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003) (citations omitted). Rule 59(e) may not be used "to

relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

In his petition, Petitioner raised claims pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), regarding (1) two statements that Anthony Freeman, the prosecution's star witness, gave prior to trial and (2) the fact that the district attorney had put a hold on the prosecution of another prosecution witness, Paula Lawrence, in an unrelated insurance fraud case. Petitioner contends that the prosecution withheld the Freeman statements and the information regarding Lawrence's criminal case in violation of *Brady* and *Giglio*. Petitioner asserts that this Court erred in determining that Petitioner was not entitled to relief with respect to these claims. However, in his motion, Petitioner simply rehashes the arguments that appeared in his final brief. This Court considered those arguments in its order denying relief, and it remains steadfast in its belief that Petitioner failed to establish his *Brady/Giglio* claims as discussed in that order.

Petitioner further contends that this Court erred in concluding that Petitioner failed to establish his claim under *Napue v. Illinois*, 360 U.S. 264 (1959), that the prosecution knowingly presented the false testimony of Freeman during Petitioner's trial. Petitioner's *Napue* claim, however, has no merit. Establishing a claim under *Napue* requires, *inter alia*, proving that the prosecution knowingly presented false testimony. As discussed at length in this Court's order denying relief, simply pointing to discrepancies between Freeman's various statements and

his trial testimony falls far short of proving that element of the claim.

Turning to Petitioner's request that this Court maintain jurisdiction over his action "pending the outcome of *Wilson v. Sellers*[, 834 F.3d 1227 (11th Cir. 2016),] to allow amendment of the final order if required," [70] at 33, this Court first points out that the filing of a notice of appeal generally divests the district court of jurisdiction over the case. *United States v. Diveroli*, 729 F.3d 1339, 1341 (11th Cir. 2013).

Additionally, the issue in *Wilson* concerned the manner in which a district court applies the deferential standard under 28 U.S.C. § 2254(d) when a state appellate court denies a habeas corpus petitioner's appeal in summary fashion. According to the Eleventh Circuit, in that circumstance, district courts must determine what theories supported or "could have supported" the state court's summary denial. *Wilson*, 834 F.3d at 1235. The only time that this Court referenced *Wilson* in the order denying relief was in reference to an alternative basis for denying Petitioner's claim that his trial counsel was ineffective for failing to adequately investigate and present evidence regarding Petitioner's background and family life during the penalty phase of Petitioner's trial. As this Court's holding would not have been different if it had not applied the *Wilson* review standard, *see Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in the denial of certiorari) (noting that where the district court "'looks through' to the last reasoned state-court opinion," a later application of *Wilson* does not affect the outcome), this Court deems it unnecessary to maintain jurisdiction over the case.

However, to the degree that Petitioner or Respondent deem it appropriate to for this Court to reevaluate matters once the Supreme Court issues its opinion in *Wilson*, the parties certainly have the option of filing a motion seeking such a reevaluation as long as this action is not pending before the Eleventh Circuit or the Supreme Court.

Finally, with respect to Petitioner's request that this Court expand the Certificate of Appealability (COA) issued at the end of the final order, this Court disagrees with Petitioner that his *Giglio* claim regarding Paula Lawrence's insurance fraud prosecution has arguable merit. This Court concedes, however, that Petitioner's *Brady* claim regarding the Anthony Freeman statements should be included in the COA.

Accordingly, Petitioner's motion, [70], is **GRANTED IN PART**, and the Certificate of Appealability is hereby **EXPANDED** to include Petitioner's *Brady* claim regarding the Anthony Freeman statements. As to the remaining relief sought by Petitioner, the motion is **DENIED**.

IT IS SO ORDERED this 18th day of April, 2018.

[***/s/ Timothy C. Batten, Sr.***]
TIMOTHY C. BATTEN, SR.
UNITED STATES DISTRICT
JUDGE

APPENDIX E

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

WILLIE JAMES PYE,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	3:13-CV-0119-TCB
v.	:	
	:	DEATH PENALTY
BRUCE CHATMAN,	:	HABEAS CORPUS
Respondent.	:	

ORDER

This matter is now before the Court for consideration of the merits of the claims in the petition. After careful consideration, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief.

I. Background and Factual Summary

Following a jury trial, on June 4, 1996, Petitioner was convicted of malice murder, kidnapping with bodily injury, armed robbery, burglary, and rape. After his convictions, the trial court held a sentencing trial, and, on June 7, 1996, the jury found as statutory aggravating circumstances that the offense of murder was committed while Petitioner was engaged in the commission of kidnapping with bodily injury, rape, armed robbery, and burglary. The jury recommended a death sentence for the malice murder conviction, which the trial court imposed. The trial court further sentenced Petitioner to consecutive life sentences for kidnapping with bodily injury,

armed robbery and rape, as well as an additional twenty years for the burglary conviction.

The trial court denied Petitioner's motion for a new trial on August 22, 1997, and the Georgia Supreme Court affirmed Petitioner's convictions and sentences on September 21, 1998. *Pye v. State*, 505 S.E.2d 4 (Ga. 1998). The United States Supreme Court denied Petitioner's petition for a writ of certiorari on May 17, 1999. *Pye v. Georgia*, 526 U.S. 1118 (1999).

Petitioner then filed a petition for a writ of habeas corpus in Butts County Superior Court, which court denied relief on January 30, 2012. [20-40]. The Georgia Supreme Court denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief on April 15, 2013. [20-49]. Petitioner next filed the instant action.

The Georgia Supreme Court provided the following factual summary of Petitioner's crimes:

> The evidence presented at trial authorized the jury to find the following: [Petitioner] had been in a sporadic romantic relationship with the victim, Alicia Lynn Yarbrough, but, at the time of her murder, Ms. Yarbrough was living with another man, Charles Puckett. [Petitioner] and two companions, Chester Adams and Anthony Freeman, planned to rob Puckett because [Petitioner] had heard that Puckett had just collected money from the settlement of a lawsuit. [Petitioner] was also angry because Puckett had signed the birth certificate of a child whom [Petitioner] claimed as his own.
>
> The three men drove to Griffin in Adams' car and, in a street transaction, [Petitioner] bought a large,

distinctive .22 pistol. They then went to a party where a witness observed [Petitioner] in possession of the large .22. Just before midnight, the three left the party and drove toward Puckett's house. As they were leaving, a witness heard [Petitioner] say, "it's time, let's do it." All of the men put on the ski masks which [Petitioner] had brought with him, and [Petitioner] and Adams also put on gloves.

They approached Puckett's house on foot and observed that only Ms. Yarbrough and her baby were home. [Petitioner] tried to open a window and Ms. Yarbrough saw him and screamed. [Petitioner] ran around to the front door, kicked it in, and held Ms. Yarbrough at gunpoint. After determining that there was no money in the house, they took a ring and a necklace from Ms. Yarbrough and abducted her, leaving the infant in the house. The men drove to a nearby motel where [Petitioner] rented a room using an alias. In the motel room, the three men took turns raping Ms. Yarbrough at gunpoint. [Petitioner] was angry with Ms. Yarbrough and said, "You let Puckett sign my baby's birth certificate."

After attempting to eliminate their fingerprints from the motel room, the three men and Ms. Yarbrough left in Adams' car. [Petitioner] whispered in Adams' ear and Adams turned off onto a dirt road. [Petitioner] then ordered Ms. Yarbrough out of the car, made her lie face down, and shot her three times, killing her. As they were driving away, [Petitioner] tossed the gloves, masks, and

> the large .22 from the car. The police later recovered these items and found the victim's body only a few hours after she was killed. A hair found on one of the masks was consistent with the victim's hair, and a ballistics expert determined that there was a 90% probability that a bullet found in the victim's body had been fired by the .22. Semen was found in the victim's body and DNA taken from the semen matched [Petitioner]'s DNA. When [Petitioner] talked to the police later that day, he stated that he had not seen the victim in at least two weeks. However, Freeman confessed and later testified for the State.

Pye, 505 S.E.2d at 9-10.

II. Standard of Review

A. Title 28 U.S.C. § 2254

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

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard is "difficult to meet," *Harrington v. Richter*, 562 U.S. 86, 102 (2011), and "highly deferential," demanding "that state-court decisions be given the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citing *Visciotti*, 537 U.S. at 25). In *Pinholster*, the Supreme Court further held

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

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

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court

considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Id.* at 405, 406. If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *Id.* at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect so long as that misapplication was objectively reasonable. *Id.* ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 102 (2011) (internal quotation marks omitted); *see Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015). In order to obtain habeas corpus relief in federal court, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

As is mentioned above, after the Butts County Superior Court denied Petitioner's habeas corpus petition, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief without a discussion of the merits of Petitioner's claims. Fairly recently, in *Wilson v. Warden*,

834 F.3d 1227 (11th Cir. 2016), the Eleventh Circuit addressed how a state appellate court's summary treatment of a claim should be analyzed under § 2254(d):

> [T]he Supreme Court of the United States ruled that, "[w]here a state court's decision is unaccompanied by an explanation," a petitioner's burden under section 2254(d) is to "show[ ] there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. "[A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the] Court." *Id.* at 102. Under that test, [Petitioner] must establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause.

Wilson v. Warden, 834 F.3d 1227, 1235 (11th Cir. 2016).

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

B. Procedurally Defaulted Claims

As this Court determined in the order of July 1, 2014, the following claims are procedurally defaulted: Peti-

tioner's Claims I, II, portion of III, X, portion of XI, portion of XII, and XIII.[1] This Court will discuss the procedural default of individual claims in its discussion of those claims below. The legal standard for determining whether a claim is procedurally defaulted, and, if so, whether that claim should nonetheless be reviewed on its merits, is as follows:

> The procedural default doctrine dictates that a state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim. The doctrine is grounded in concerns of comity and federalism and was developed as a means of ensuring that federal habeas petitioners first seek relief in accordance with established state procedures.
>
> Nonetheless, comity does not demand that we give preclusive effect to a state court decision disposing of a claim on state grounds unless: (1) the state court has plainly stated that it is basing its decision on the state rule; (2) the state rule is adequate, i.e., not applied in an arbitrary manner; and (3) the state rule is independent, i.e., the federal constitutional question is not intertwined with the state law ruling. We presume that there is no independent and adequate state ground for a state court decision when the decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence

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[1] As is discussed below, Petitioner has abandoned or withdrawn some of these claims.

> of any possible state law ground is not clear from the face of the opinion.

Frazier v. Bouchard, 661 F.3d 519, 524-25 (11th Cir. 2011) (citations, quotations, and footnote omitted).

If a claim is procedurally defaulted, Petitioner can obtain review of that claim by establishing both cause excusing the default and actual prejudice resulting from the procedural bar or, in extraordinary cases, demonstrate that a review of the claim is necessary to correct a fundamental miscarriage of justice. *Hill v. Jones*, 81 F.3d 1015, 1022-23 (11th Cir. 1996).

> To show cause, the petitioner must demonstrate "some objective factor external to the defense" that impeded his effort to raise the claim properly in state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A showing that the legal basis for a claim was not "reasonably available to counsel" could constitute cause. *Reed v. Ross*, 468 U.S. 1, 16 (1984). We have also determined that an ineffective-assistance-of-counsel claim, if both exhausted and not procedurally defaulted, may constitute cause. *See Hill v. Jones*, 81 F.3d 1015, 1031 (11th Cir. 1996). As stated by the Supreme Court, "ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

Ward v. Hall, 592 F.3d 1144, 1157 (11th Cir. 2010).

If a petitioner fails to demonstrate cause, there is no need to consider the issue of prejudice. *McCleskey v.*

Zant, 499 U.S. 467, 502 (1991). Where cause is established, however, the petitioner must also demonstrate actual prejudice. To do so, the petitioner must demonstrate "that there is a reasonable probability that the result of the [proceeding] would have been different [absent the alleged errors]." *Strickler v. Green*, 527 U.S. 263, 289 (1999).

If a petitioner cannot show both cause and prejudice, a federal court may review a procedurally defaulted habeas claim on the merits only to remedy a fundamental miscarriage of justice. *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001). Regarding what is necessary in order for a petitioner to succeed on a claim of fundamental miscarriage of justice, the Eleventh Circuit has stated as follows:

> To excuse a default of a guilt-phase claim under [the fundamental miscarriage of justice] standard, a petitioner must prove a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent .... To gain review of a sentencing-phase claim based on manifest injustice, a petitioner must show that but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law.

Hill, 81 F.3d at 1023 (citations omitted). "'This exception is exceedingly narrow in scope,' however, and requires proof of actual innocence, not just legal innocence." *Ward*, 592 F.3d at 1157 (quoting *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001)).

III. Discussion of Petitioner's Claims for Relief

A. CLAIMS I AND II: Prosecution Violated the Rule in *Brady v. Maryland*, *Giglio v. United States*, and *Napue v. Illinois*

In his Claim I, Petitioner argues that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). "In order to demonstrate a *Brady* violation, [Petitioner] must prove 1) that the evidence was favorable to him because it was exculpatory or impeaching; 2) that the evidence was suppressed by the State, either willfully or inadvertently; and 3) that the evidence was material and, therefore, that the failure to disclose it was prejudicial." *Bradley v. Nagle*, 212 F.3d 559, 566 (11th Cir. 2000). Significant to this Court's discussion, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The purportedly withheld evidence consists of two statements by the state's key witness, Anthony Freeman, and evidence that another prosecution witness, Paula Lawrence, was under indictment for an unrelated matter and that her case had been put on hold.

1. Anthony Freeman Statements

As noted, Anthony Freeman was a significant witness for the prosecution at Petitioner's trial. He testified that

he was with Petitioner and Chester Adams during the kidnapping, robbery, rape, and murder of the victim.[2] A brief summary of the material aspects of Freeman's testimony is as follows: Adams dated Freeman's cousin. On the evening of the murder, Freeman and Adams were together. Petitioner called Adams, and Freeman and Adams went to pick Petitioner up. After purchasing beer and gasoline, the group drove to Griffin, Georgia, with the plan to rob the victim and her boyfriend, Charles Puckett. On the way to Griffin, they stopped to purchase a pistol. Then they went to a party. After leaving the party, they went to the victim's home. After the victim's boyfriend, Charles Puckett, had left the home, the group put on masks and watched the victim's home from an abandoned home on an adjacent property. Petitioner then went to the victim's home and tried climbing through a window. The victim yelled at Petitioner, and Petitioner went around the house and kicked a door open and entered the house. Petitioner later emerged from the victim's house with the victim, holding her at gunpoint and removing some stereo equipment from the home. The group took the victim and drove to a motel where the three men raped the victim. The group left the motel and drove around trying to locate the victim's boyfriend because Petitioner wanted to kill him. They returned to the motel to again rape the victim. Then they took the victim to a secluded location. Petitioner and the victim got out of the car. Petitioner told the victim to lie down on the ground, and he shot her.

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[2] Mr. Freeman's testimony appears at Docket Entry 13-5, transcript pages 930-1019.

Just after the murder occurred, an investigator working for the Butts County Sheriff questioned Freeman, and Freeman admitted what had happened. A transcript of that interview was provided to trial counsel who used the parts of that statement that differed from Freeman's trial testimony in an attempt to impeach Freeman's testimony.

It appears that Freeman made two other statements prior to the trial, and Petitioner claims that the prosecution withheld those statements from Petitioner's trial counsel in violation of *Brady*. As will be discussed below in relation to Petitioner's claims of ineffective assistance of counsel, Petitioner's sole trial counsel, Johnny B. Mostiler, died on April 1, 2000, well before the state habeas corpus hearing that began on May 11, 2009, and Petitioner's only basis for claiming that the two Freeman statements were suppressed is (1) that there was no copy of the statement in trial counsel's files and (2) that trial counsel did not attempt to impeach Freeman's trial testimony by pointing out that what Freeman said in the two statements differed from that testimony.

At the time of the crimes at issue in this matter, Freeman was fifteen years old. After Freeman's arrest in connection with these crimes, the state filed a motion to move his case from juvenile court to superior court to try him as an adult. As part of that process, Freeman's attorney sought a mental health evaluation, which the juvenile court granted. The psychiatrist, Dr. Donald Gibson, who performed the evaluation in December of 1993, prepared a report and submitted it to the juvenile court. Part of that report contained Dr. Gibson's summary of Freeman's description of the crimes committed by Freeman, Adams, and Petitioner on the night of the murder:

[Freeman] reports that on the evening in question he got into a car with his cousin's boyfriend, Chester Adams, and a 25-year-old companion, [Petitioner,] to go for a ride. He was allowed to drive the car because he reportedly has a learners [sic] permit. He reports that [Petitioner] asked his cousin [sic] to drive him to another town. While in the town, he and his cousin [sic] went to visit a friend that [Petitioner] did not like. They reportedly let [Petitioner] out of the car and went to visit a friend. [Freeman] reports that [Petitioner] watched them from a distance with what he found out later was a ski mask and gun trained on them and told them that he had given thought to killing them but he had changed his mind. They found [Petitioner] later during the evening and he reportedly accosted them with a gun. He later put the gun away and asked them to drive him to his girlfriend's house. They picked up [Petitioner]'s girlfriend and took her to a hotel. [Freeman] reports that [Petitioner] had some cocaine in his possession which he supplied to his girlfriend. The girlfriend reportedly ingested the cocaine and had sex with [Petitioner] at the hotel. [Petitioner] then promised her more cocaine if she had sex with the [Freeman] and his cousin [sic]. [Freeman] reports that he and his cousin refused at which time [Petitioner] reportedly pulled a gun on them and forced them to have sex. [Freeman] reports that he was fearful for his life and that is why he engaged in the behavior. They reportedly got back in the car, drove for a while and then [Petitioner] commanded

> them to stop. He then gave his girlfriend some cocaine, she got out of the car, he got out of the car with her and shot her in the head four times. [Freeman] reports that he and his cousin [sic] became frightened and [Petitioner] threatened to shoot them. They then agreed not to tell about the alleged incident and [Petitioner] promised not to kill them. They allowed [Petitioner] to leave the car and they returned home. [Freeman] reports that he was fearful for his life throughout the period of time prior to being arrested by the police because [Petitioner] had threatened to kill both of them if anything happened. When arrested by the police, [Freeman] reports that he volunteered the above information to the police and he was arrested and charged.

[17-15] at 7291-92.

Freeman's next statement, [19-9] at 8974-96, was made in September of 1995 (two years after the murder) to the same sheriff's investigator, Charles Goddard, that had taken Freeman's earlier statement from just after the crimes. That statement differed somewhat from Freeman's trial testimony. Those differences were that (1) Freeman did not mention stopping to purchase a pistol in his September 1995 statement; (2) Freeman said that Petitioner had beaten the victim in the motel room while the men raped her, but he did not say that at Petitioner's trial; (3) in the September 1995 statement, Freeman said that they saw the victim's boyfriend, Charles Puckett, after they left the motel the first time, but he did not mention that at trial; (4) Freeman further said in his 1995 statement that when they saw Puckett, the victim ducked down

so that Puckett would not see her; (5) Freeman also said in the 1995 statement that, just after leaving the hotel for the second time, Petitioner offered to let the victim out and she refused; and (6) in the 1995 statement, Freeman said that after Petitioner had shot the victim once in the leg and once in the head, he gave the gun to Adams and told Adams to shoot the victim. Freeman said that he heard gunshots but that he was not sure whether Adams had shot the victim. Freeman also indicated during his 1995 statement that he was not a willing participant in all of the crimes.

Because Petitioner failed to raise a *Brady* claim at his trial, in his motion for a new trial, or in his appeal, the state habeas corpus court concluded that the claims related to Freeman's two statements were procedurally defaulted before that court and that Petitioner had failed to establish cause or prejudice to overcome the default. [20-40] at 8-9. Accordingly, the claims are procedurally barred before this Court.

With respect to the hearsay description of Freeman's statement recorded by Dr. Gibson in 1993, the state habeas corpus court concluded that Petitioner had failed to demonstrate prejudice because there was no reasonable probability that the outcome of the trial would have been different if trial counsel had access to the statement. *Id.* at 11. This Court agrees. While Dr. Gibson's description does contain several differences from Freeman's trial testimony, those differences are not material to Petitioner's guilt and are easily explained.

As an initial matter, when interviewed by Dr. Gibson, Petitioner was maintaining his innocence, and the fact that his version of events at that time would be more self-

serving is not surprising or indicative that his later testimony was necessarily false. *See, e.g.*, *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1319 (11th Cir. 2013) (involving a situation in which petitioner's codefendant in his initial statements to police denied involvement in murder and later testified against petitioner). Moreover, Freeman was only fifteen at the time of the crimes, and Investigator Goddard, who took several statements from Freeman, testified repeatedly that Freeman was very hard to interview because he was not forthcoming, he misunderstood questions, and he tended to conflate events. *E.g.* [13-7] at 1152.

This Court further notes that Dr. Gibson's hearsay summary of Freeman's description of events is not reliable. The purpose of Dr. Gibson's examination of Freeman was to determine whether he was competent to be tried as an adult, and the factual summary was not necessary to that effort. Indeed, the fact that Dr. Gibson first identified Adams as someone who dated Freeman's cousin and then later repeatedly referred to Adams as Freeman's cousin indicates that Dr. Gibson did not take great care in writing that portion of his report.

As to Freeman's later statement to Investigator Goddard from December 2015, the state habeas corpus likewise concluded that the statement was neither exculpatory nor material [20-40] at 10, and that trial counsel had "ample notice of additional statements made by" Freeman, *id.* at 8.

Petitioner argues that the state court erred in ruling that cause and prejudice did not exist to excuse the default. Petitioner asserts as cause the fact that he could not raise the claim regarding the September 1995 statement

because he did not know about it. It is clear, however, that trial counsel learned about the statement, at the latest, during Petitioner's trial as demonstrated by the trial transcript.[3]

During the trial, Investigator Goddard testified about what Freeman had told him and repeatedly indicated that he had interviewed Freeman more than the one time. *E.g.*, [13-7] at 1162 (discussing subsequent interviews with Freeman); *id.* at 1164 (noting that Freeman had made a certain comment in Freeman's "initial statement to" Goddard). Goddard also testified that, during the first interview, Freeman did not tell him that Chester Adams had a gun with him, but that during a subsequent interview, Freeman told him about Adams's gun. *Id.* at 1172.

After discussing the initial interview, the prosecutor asked, "Now, you have talked with him subsequent to that first time?" and Goddard responded, "Oh, yes, sir. I have." *Id.* at 1172. When Petitioner's trial counsel cross-examined Goddard, he asked Goddard when he had interviewed Freeman "the first time," and Goddard responded that it had been on the night of January 16, 1993. *Id.* at 1178. Also, during trial counsel's cross-examination, Goddard clarified trial counsel was asking about the first interview and then said: "Okay. I just wanted to make sure

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[3] As to Petitioner's claim that, if trial counsel knew about the 1995 statement, then he was ineffective for not using the statement to impeach Freeman, this Court agrees with Respondent that the claim is procedurally barred. Moreover, as this Court concludes that the statement was not material under *Brady*, which is the same standard for determining prejudice under the *Strickland* ineffective assistance of counsel analysis (discussed below), Petitioner cannot establish that he is entitled to relief with regard to his ineffective assistance of counsel claim.

because there have been subsequent interviews where some additional information was provided." *Id.* at 1193.

Accordingly, trial counsel clearly was aware that Goddard had interviewed Freeman more than once, and there is nothing in the record to indicate that trial counsel objected or otherwise sought access to Goddard's subsequent interviews with Freeman under *Brady* because he had not had access to them. This Court thus concludes that Freeman's 1995 statement was not suppressed by the state. *Cf. Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014) (noting that "[w]hen the defendant has equal access to the evidence[,] disclosure is not required," and "there is no suppression by the government") (quotation marks omitted).

This Court further agrees with the state habeas corpus court that the 1995 statement was not material under *Brady*. While that statement has some differences that trial counsel could have used during Freeman's testimony, those differences do not relate to the most relevant portions of the testimony. Minor details may have changed, but Freeman never wavered on who was involved, that there was a burglary, a robbery, a kidnapping, repeated rapes and a murder of the victim, and that Petitioner fired the shots that killed the victim.

The portions of Freeman's September 1995 statement that Petitioner focuses on are not particularly exculpatory when read in context. For example, with regard to Freeman's comment in the 1995 statement that the victim had attempted to hide when the group saw the victim's boyfriend, Petitioner claims that this demonstrates that the victim was with the group willingly because she did not want her boyfriend to see her with Petitioner. However,

when read in context, Freeman's statement makes it clear that the victim hid from her boyfriend was so that Petitioner would not kill him. According to that statement, while driving around, Petitioner had announced that the plan was to drive the victim around so that the boyfriend would see her and follow them so that Petitioner would have the opportunity to kill the boyfriend.

To provide context to Petitioner's arguments, Petitioner was the sole defense witness during the penalty phase of the trial. In his testimony, he claimed that Adams and Freeman brought the victim to his motel room where she had consensual sex with all three men in exchange for cocaine. After having sex, Petitioner claims that Adams and Freeman left with the victim and later murdered her outside of Petitioner's presence. [13-9] at 44. Petitioner denied that he left the motel with Freeman, Adams, and the victim. As a result, the fact that the victim may have tried to hide from her boyfriend while Petitioner was driving her around does not corroborate his testimony.

This same argument applies to Petitioner's assertions regarding the fact that, in his 1995 statement, Freeman said that Petitioner tried to get the victim to get out of the car in Griffin before leaving for Jackson but she refused. According to Petitioner's version of events, he was never in the car with the victim, so he could not have attempted to let her go. Having examined both Freeman's testimony and his 1995 statement, this Court concludes that there is no reasonable probability that the outcome of Petitioner's trial would have been different if trial counsel had used Freeman's 1995 statement to impeach Freeman's testimony. *Bagley*, 473 U.S. at 682. If the statement had been

produced, it might have been somewhat useful to trial counsel, but "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995).

2. Paula Lawrence's Criminal Prosecution

As mentioned above, before leaving for the victim's home, Freeman, Adams, and Petitioner attended a party in Griffin. Paula Lawrence was at that party, and she testified at Petitioner's trial that she saw Petitioner at the party with a gun and that, before leaving, Petitioner said to Adams and/or Freeman, "it's time, let's do it." [13-6] at 1098. After the murder but before Petitioner's trial, Lawrence was arrested and charged with insurance fraud. During Petitioner's trial, the prosecutor asked Lawrence about the charges against her and she denied that she had been promised a benefit as a result of her testimony against Petitioner. Lawrence's charges had not, however, been resolved at the time of Petitioner's trial.

According to Petitioner, someone in the prosecutor's office had put a notation on Lawrence's file indicating that the District Attorney wanted a hold put on Lawrence's criminal case just prior to Petitioner's trial, the implication being that with her criminal case hanging over her, Lawrence would be more inclined to provide helpful testimony against Petitioner. Petitioner also contends that prosecutors delayed proceeding against Lawrence so that she would not have been convicted of a crime of dishonesty when she testified. Petitioner claims that the prosecution's failure to inform Petitioner's trial counsel of the hold on Lawrence's criminal case violated *Brady*.

The state habeas corpus court concluded that this claim was procedurally defaulted and that Petitioner failed to meet the cause and prejudice standard to overcome the default. [20-40] at 16. The state habeas corpus court correctly held that, in the absence of a specific agreement, there was nothing for the prosecution to disclose. Under *Giglio v. United States*, 405 U.S. 150 (1972), "there must be a full disclosure of any agreements entered into between the prosecutor and the witness which may motivate the witness to testify and which may affect the outcome of the trial." *Alderman v. Zant*, 22 F.3d 1541, 1555 (11th Cir. 1994). There is no requirement, however, that prosecutors disclose "all factors which may motivate a witness to cooperate." *Id.* Indeed, a belief by a witness that she will "be in a better position to negotiate a reduced penalty" for a criminal matter if she testifies favorably for the state "is not an agreement within the purview of *Giglio*." *Id.*

Lawrence testified at Petitioner's trial that she had been charged with insurance fraud and that she had not been promised anything in return for her testimony. [13-6] at 1103. Accordingly, the jury was aware of the charges against her, and Petitioner has not presented evidence that there was any type of promise to Lawrence that she would receive favorable treatment in exchange for her testimony. Petitioner's trial counsel was obviously aware of the pending charges, and guessing that Lawrence hoped that her testimony would benefit her with respect to her pending criminal matter it is not a particularly complicated inference for trial counsel or the jury to make. Accordingly, even if prosecutors failed to inform Petitioner's trial counsel that they had put a hold on Lawrence's criminal case, that failure does not rise to the level

of a *Brady* violation, and Petitioner cannot therefore establish prejudice to overcome the procedural default of his claim.

3. Cumulative Impact

As the Supreme Court instructs in *Kyles*, 514 U.S. at 436, this Court must also consider the cumulative impact of all the suppressed evidence. Because this Court has found that Freeman's 1995 statement was not suppressed, this Court's cumulative analysis must consider only the 1993 summary prepared by Dr. Gibson and the notation in Lawrence's criminal file that put her case on hold until after Petitioner's trail was completed. As discussed above, neither of those pieces of evidence was material. Upon further consideration, this Court concludes that even when considered together, it is not reasonably probable that the outcome of Petitioner's trial would have been different if trial counsel had been aware of the Gibson summary or the notation in Lawrence's criminal file.

4. Petitioner's *Napue* Claim (Claim II)

Related to his *Brady* claims, Petitioner also raises a *Napue* claim. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court held that the presentation of false testimony by the prosecution is a violation of the criminal defendant's Fourteenth Amendment rights. Petitioner claims that prosecutors presented false testimony by Freeman, thus violating *Napue*. Petitioner contends that the differences between the two statements discussed in relation to Petitioner's *Brady* claim and his trial testimony necessarily demonstrate that Freeman's trial testimony was false. Freeman also prepared an affidavit for Petitioner's habeas corpus counsel in which he generally

repeats what he said in the 1995 statement, but adds that Petitioner handed the gun to Freeman and that Freeman shot the gun but purposefully missed hitting the victim. [16-24] at 4679-81.

The state habeas corpus court again concluded that this claim was procedurally defaulted and that Petitioner had failed to establish cause and prejudice to excuse the default. [20-40] at 13. The state court found that the "minor discrepancies between the two statements to authorities and the trial testimony do not render Freeman's testimony inaccurate" *id.*, because in every one of Freeman's statements, the significant events were the same; Petitioner kidnaped the victim, he and the other men raped her, and Petitioner shot and killed her. The state court further found that Petitioner failed to establish that the prosecutors presented false testimony. This Court is bound by those findings because Petitioner has failed to present clear and convincing evidence to the contrary. Accordingly, the state court's conclusion that Petitioner's *Napue* claim was procedurally defaulted bars this Court from considering it. As Petitioner has failed to overcome the presumption of correctness that the state court's findings enjoy, he cannot establish prejudice to overcome the procedural bar.

B. CLAIM III: Prosecutorial Misconduct—Improper Closing Argument

In his Claim III, Petitioner argues that the prosecutor violated his rights by offering improper closing argument. According to Petitioner, in closing argument at the close of the guilt phase of the trial, the prosecutor vouched for Freeman's purportedly false testimony and further

falsely argued that Freeman suffered from a mental impairment. In closing argument during the penalty phase of the trial, Petitioner contends that the prosecutor improperly asserted that Petitioner would kill again if the jurors imposed a sentence less than death.

The purpose of closing argument is to explain to the jury what it has to decide and what evidence is relevant to its decision. *United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). The jury's decision must be based upon the evidence presented at trial and the instructions provided by the court. *See Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). Argument urging the jury to decide the matter based upon factors other than the evidence and the jury instructions—inflammatory argument or argument that appeals to bias or prejudice—is thus improper. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments."); *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991) (noting that the prosecutor's comparison of the defendant to Judas Iscariot and other comments improperly appealed to the jury's passions and prejudices and sought to inflame and misinform the jury).

In addition, attempts by a prosecutor to bolster a witness by vouching for his credibility are improper.

> Such attempts are indeed improper if the jury could reasonably believe that the prosecutor indicated a personal belief in the witness' credibility. A jury could reasonably believe the prosecutor's

> indications if the prosecutor either places the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity, or the prosecutor implicitly vouches for the witness' veracity by indicating that information not presented to the jury supports the testimony. In short, the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury.

United States v. Eyster, 948 F.2d 1196, 1206-07 (11th Cir. 1991) (quotations and citations omitted).

"To find prosecutorial misconduct, a two-pronged test must be met: (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *Id.* at 1206 (quotations and citations omitted).

> [R]emarks prejudicially affect the substantial rights of the defendant when they so infect the trial with unfairness as to make the resulting conviction a denial of due process. . . . [I]mproper argument rises to the level of a denial of due process when there is a reasonable probability that, but for the prosecutor's offending remarks, the outcome of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 1207 (quotations and citations omitted).

1. Guilt-Phase Closing Argument

The state habeas corpus court concluded that Petitioner's claims regarding improper prosecutorial argument during the guilt phase of the trial were procedurally defaulted because Petitioner failed to raise those claims at trial or in his appeal. [20-40] at 5. The state court further concluded that Petitioner could not demonstrate prejudice to overcome the default because that court had determined that Petitioner had failed to establish that Freeman's testimony was false or that the prosecutor's arguments regarding Freeman's limited mental capacity were unfounded. *Id.* at 6.

This Court has carefully reviewed the prosecutor's closing argument from the guilt phase of the trial and finds no error. As determined above, Petitioner has failed to demonstrate that Freeman's testimony was false, and as a result, it was perfectly acceptable for the prosecutor to highlight the content of that testimony in his closing argument. The prosecutor did stress to the jury that they should believe Freeman, but nowhere did he vouch for Freeman's testimony based on the government's reputation, allude to evidence not formally before the jury, or make personal assurances of Freeman's veracity. Instead, the prosecutor argued that the jury should believe Freeman based on the fact that he had implicated himself in the crimes committed that night. As noted by the Eleventh Circuit, "[t]he prohibition against vouching does not forbid prosecutors from arguing credibility, which may be central to the case; rather, it forbids arguing credibility based on the reputation of the government office or on evidence not before the jury." *Eyster*, 948 F.2d at 1207 (citation and quotation omitted).

As to Petitioner's argument regarding the fact that the prosecutor told the jury about Freeman's mental limitations, this Court agrees with the state habeas corpus court

> that the very evidence pointed to by Petitioner as negating the District Attorney's assertions of Mr. Freeman as mentally limited, provides evidence for [the prosecutor]'s assertion. . . . [I]n his determination of mental status for competency to stand trial, Dr. Gibson reported Mr. Freeman as having below average intelligence, evidencing poor judgment and insight, slowed speech and a borderline IQ in the low normal range. Thus, Petitioner's assertions to the contrary are unfounded.

[20-40] at 15-16 (citations to the internal record omitted).

2. Penalty-Phase Closing Argument

Petitioner further contends that a number of the prosecutor's closing arguments made during the penalty phase violated his rights. In affirming Petitioner's sentence, the Georgia Supreme Court addressed these claims and concluded that the prosecutor's arguments were not so improper as to require reversal.

> [Petitioner] . . . contends that the prosecutor made improper closing arguments. Counsel for the State commented on future dangerousness by arguing that [Petitioner] would kill a prison guard in order to escape. The issue of a defendant's future dangerousness is relevant in the sentencing phase. *McClain v. State*, 477 S.E.2d 814 (Ga. 1996). The State is allowed considerable latitude in imagery and illustration in making its argument. *Philmore*

> *v. State*, 428 S.E.2d 329 (Ga. 1993). That [Petitioner] could harm a prison guard is a reasonable inference, considering that he had been convicted of several violent crimes, including murder.
>
> The prosecutor also argued that [Petitioner] was sorry that he did not kill Freeman so that Freeman could not "put the finger on him," and that, if [Petitioner]'s lawyer had been present on the night of the murder and had tried to talk [Petitioner] out of killing the victim, "the only difference that it would have made is that there would have been two bodies instead of one," defense counsel's and the victim's. The thrust of this argument was that [Petitioner] showed no mercy during the murder, but was intent on killing the victim, and that he showed no remorse, but was sorry only that he had left an eyewitness alive. It is not improper to argue a defendant's lack of remorse or his failure to show the victim mercy. *See Carr v. State*, 480 S.E.2d 583 (Ga. 1997); *Crowe v. State*, 458 S.E.2d 799 (Ga. 1995). Although the State used violent imagery, it did not exceed its considerable latitude in illustrating its argument. *See Philmore v. State*, *supra*. Moreover, [Petitioner] made no objection to any part of the State's argument, and there is no reasonable probability that the argument, even if improper, changed the result of the sentencing phase. *Todd v. State*, *supra* 410 S.E.2d 725.

Pye, 505 S.E.2d at 13-14.

This Court first points out that "the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad

exercise of supervisory power," applied by the Georgia Supreme Court. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). Even where a prosecutor's closing arguments are offensive, inappropriate, or even universally condemned, a habeas corpus petitioner is not entitled to relief unless he can establish that "the statements were so prejudicial as to render the sentencing proceeding fundamentally unfair." *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988) (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Improper argument results in a denial of due process only if "so egregious as to create a reasonable probability that the outcome was changed because of them." *Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir. 1997). In other words, "[a] sentence proceeding is rendered unfair by an improper argument if, absent the argument, there is a reasonable probability that the result would not have been a death sentence, a reasonable probability being one which undermines our confidence in the outcome." *Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir. 2001).

The Georgia Supreme Court clearly applied the correct constitutional standard in concluding that there was no reasonable probability that the outcome of Petitioner's sentence would have been different had the comments not been made. Petitioner disagrees with the state court, but he has failed in his heavy burden of demonstrating that the court's conclusion was objectively unreasonable. As such, this Court must defer to the state court under § 2254(d). Moreover, this Court further concludes that the prosecutor's closing argument during the penalty phase did not violate the constitutional standard as set

forth in *Darden v. Wainwright* because there is no reasonable probability that the argument changed the outcome of the proceeding.

C. CLAIM IV: Ineffective Assistance of Trial Counsel[4]

1. Legal Standard

In his Claim IV, Petitioner contends that his trial counsel was constitutionally ineffective in failing to present certain evidence during each of the guilt and penalty phases of the trial. The standard for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The analysis is two-pronged, and the Court may "dispose of the ineffectiveness claim on either of its two grounds." *Atkins v. Singletary*, 965 F.2d 952, 959 (11th Cir. 1992); *see Strickland*, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Given the

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[4] In the heading to Petitioner's ineffective assistance discussion in his final brief, Petitioner contends that he was denied effective assistance in relation to his appeal as well as his trial. Petitioner has not, however, raised any claims of ineffective assistance of appellate counsel.

strong presumption in favor of competence, the petitioner's burden of persuasion—through the presumption is not insurmountable—is a heavy one." *Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001) (citation omitted). As the Eleventh Circuit has stated, "[t]he test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). Rather, the inquiry is whether counsel's actions were "so patently unreasonable that no competent attorney would have chosen them." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987). Moreover, under *Strickland* reviewing courts must "allow lawyers broad discretion to represent their clients by pursuing their own strategy," *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992), and must give "great deference" to reasonable strategic decisions, *Dingle v. Secretary for Department of Corrections*, 480 F.3d 1092, 1099 (11th Cir. 2007).

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. *Strickland*, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *id.*, requiring "a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quotation and citation omitted).

As will be discussed in more detail below, the state habeas corpus court rejected Petitioner's claims of ineffective assistance. As such, this Court's review of those

claims are "doubly deferential" wherein this Court takes a "highly deferential look at counsel's performance [under] *Strickland* . . . through the deferential lens of § 2254(d)." *Pinholster*, 563 U.S. at 190 (quotation and citation omitted).

2. Death of Trial Counsel

As mentioned above, trial counsel died prior to the state habeas corpus hearing, and as a result, trial counsel did not provide testimony regarding the extent of his investigation and the strategic reasons for the choices that he made. Petitioner bears the burden of proof and "where the record is incomplete or unclear about [trial counsel]'s actions, [this Court must] presume that he did what he should have done, and that he exercised reasonable professional judgment." *Williams v. Allen*, 598 F.3d 778, 788 (11th Cir. 2010). Counsel cannot be deemed ineffective for presenting his case in a particular way in a case as long as the approach taken "might be considered sound trial strategy." *Darden v. Wainwright*, 477 U.S. 168, 186 (1986). Accordingly, and unfortunately for Petitioner, trial counsel's death works to Petitioner's disadvantage. While this may appear to be a harsh result, this Court has focused its analysis of Petitioner's ineffective assistance claims primarily on the question of whether Petitioner can demonstrate prejudice and has determined that he cannot. As a result, the fairness of holding trial counsel's death against Petitioner is a moot point.

3. Ineffective Assistance Claims Related to the Guilt Phase of the Trial

a. Evidence that Trial Counsel Purportedly Missed

Petitioner contends that his trial counsel was ineffective in failing to present certain evidence during the guilt phase of his trial that would have corroborated his testimony. In an early statement to police, Petitioner's codefendant Freeman said that he and Adams purchased the ski masks and gloves worn on the night of the crimes the previous week,[5] and the crime lab discovered a hair from one of the ski masks that likely belonged to the victim, which, according to Petitioner, "raises the specter that the victim voluntarily spent the evening of her death with Petitioner." [43] at 25.

In addition, Petitioner submitted the affidavit of Leon Berry in his state habeas corpus proceedings in which Berry states that Petitioner, Adams, the victim, and a young male (presumably Freeman) approached Berry in a car seeking to purchase a gun some days before Petitioner murdered the victim. Petitioner also submitted the affidavit of Linda Lyons, a neighbor of the victim, in which she stated that the victim had called someone at a hotel, presumably Petitioner, and asked to be picked up, and that the victim frequently called Petitioner so that she

[5] In a footnote in his final brief [43] at 24-25 n.3, Petitioner seems to contend that Freeman's statement regarding purchasing the ski masks somehow was evidence that Petitioner and Adams "had stolen from Charles Puckett on another occasion." There is no other indication in the record that such a theft took place, and this Court cannot understand how Freeman's statement would constitute evidence of that theft.

could obtain drugs. Petitioner further notes that trial counsel should have introduced evidence regarding the victim's cocaine addiction. According to Petitioner, all of this evidence would have supported his own testimony by demonstrating that the victim willingly participated in the robbery of her boyfriend Charles Puckett and that she willingly had sex with Petitioner, Adams, and Freeman.

In denying relief on this portion of Petitioner's ineffective assistance claim, the state habeas corpus court first correctly identified the *Strickland* standard for analyzing such claims. [20-40] at 41-42. The trial court next found that trial counsel was an accomplished lawyer with substantial experience in trying death penalty cases. *Id.* at 42 (noting that trial counsel had twenty-four years of experience trying criminal cases and had been appointed as lead counsel in at least six capital cases including that of Petitioner). The state court further found that trial counsel's investigator was highly experienced in performing felony investigations, including death penalty cases. *Id.* at 43.

With respect to Petitioner's claims that trial counsel failed to present evidence that tended to demonstrate that the victim willingly left her home and willingly engaged in sex with Petitioner, Adams, and Freeman in exchange for drugs, the state court first concluded that trial counsel's investigation and presentation of evidence during the guilt phase of the trial was reasonable *id.* at 47, and this Court is not convinced by Petitioner's arguments that the state court's determination is not entitled to deference under § 2254(d).

More significant to this Court's analysis, the state court also concluded that Petitioner had not demonstrated that he was prejudiced by the fact that the jury did not hear this evidence:

> Petitioner claims that had trial counsel introduced the statements of Co-defendant Anthony Freeman as well as the testimony of potential witnesses Linda Lyons and Leon Berry, there is reasonable probability jurors would have concluded the victim was not robbed, kidnapped and raped multiple times, but rather was part of a plan to steal from her current boyfriend, Charles Puckett.
>
> This Court finds that the affidavit statements of Ms. Lyons and Mr. Berry are significantly different than their statements made to investigators at the time of crime and thus lack reliability. Further, the multiple statements of Co-defendant Anthony Freeman made under oath and other evidence present a consistent picture of the crime establishing that the victim Alicia Yarbrough was: removed at gunpoint from her residence after Petitioner kicked in her front door; and forcibly taken to a Griffin Motel where she was raped repeatedly by all three codefendants, while pleading for her life prior to being shot and killed by Petitioner.
>
> Affidavit Testimony of Linda Lyons: In her affidavit testimony presented to this Court, Linda Lyons testified in part that the victim called a local hotel and specifically asked for Petitioner's room. She also testified in her affidavit that she was under the impression that, when the victim left her, the victim had "arranged for someone to get her."

In contrast, in her statement to authorities shortly after Ms. Yarbrough's body was found and within approximately twelve . . . hours of seeing the victim, Ms. Lyons told the investigator:

> The last time Ms. Lyons saw Alicia Yarbrough was on November 15, 1993 between the hours of 11:45 P.M. and 11:50 P.M. when Ms. Yarbrough came to her house to get hair grease. When Ms. Yarbrough arrived she had her small infant child with her.
>
> While Ms. Yarbrough was at her residence, Ms. Yarbrough called someone at a local motel. Ms. Lyons knew Ms. Yarbrough had called a motel because she could overhear the victim ask for room #27. During this conversation with the unknown party at the motel, Ms. Lyons could hear the victim telling the person that [Ms. Yarbrough] was going to call the police on them for selling drugs out of the motel.

Additionally, the record further undermines Ms. Lyons' new testimony as, on the day of the murder, Ms. Yarborough's infant child was uncharacteristically left at the Yarborough home unattended. Witness Marvin Tysinger told investigators shortly after the crime, that the victim would never leave the baby alone, and that whenever Ms. Yarbrough was not around, Mr. Tysinger would always be the one called to watch the baby.

The record also shows that State investigators examining the residence within approximately 24 hours of the crime determined that forced entry

was gained by way of the front entrance door, and the wooden front door, door jamb, and locking mechanisms were broken and shattered from a violent force initiated from the exterior. This is entirely consistent with the trial testimony and video taped statements of Co-defendant Anthony Freeman as well as the video taped statement of Co-defendant Chester Adams that Petitioner kicked in Ms. Yarborough's door when forcing himself into the home.

Based on the foregoing, this Court finds Ms. Lyons' new affidavit testimony unreliable and that it would not have, in reasonable probability, changed the outcome of the guilt phase of trial.

Affidavit Testimony of Leon Berry: Petitioner further alleges that trial counsel should have presented Leon Berry to testify that the victim may have been involved in a scheme with Petitioner and Petitioner's co-defendants to rob the victim's boyfriend Charles Puckett.

In an affidavit presented to this Court, Mr. Berry testified that "a few days prior to the murder" he saw Ms. Yarborough in a car with Petitioner, Chester Adams and a "younger kid." In this affidavit, provided eight years after the crimes, Mr. Berry testified that "the four of them wanted to know where they could purchase a gun."

In contrast, within 48 hours of the crime, Mr. Berry told investigators:

> Mr. Berry . . . advised Sgt. Sanders that on the weekend of November the 13th and

> 14th, he had believed, he was not sure of the date, Saturday or Sunday, the 13th or the 14th, that [Petitioner] had come by in a small vehicle with a Fulton County tag on it, he was unable to recall the tag number, and had a black male with him, Chester Adams, and a black male juvenile he was not familiar with. He stated Petitioner had come by and talked with Leon Berry in regards to purchasing a handgun from [Mr.] Berry. Leon had advised [Petitioner] that he did not have a gun to sell him, and [Petitioner] and the other two subjects left the area in this small vehicle.

The statement makes no mention of Alicia Yarbrough being with Petitioner and the two co-defendants at the time.

Further, calling Mr. Berry as a potential witness as Petitioner now suggests would have posed a potential significant detriment to Petitioner's case as Mr. Berry also told investigators that during the summer preceding Ms. Yarbrough's murder, he had observed Petitioner chase the victim down several streets, near where he lived, with Petitioner screaming at Ms. Yarbrough, that he was going to kill her. Further, Mr. Berry stated he had seen Ms. Yarbrough approximately four times that summer, and during each of these four occasions, he recalled Petitioner and the victim involved in a domestic argument, sometimes resulting in physical violence or Petitioner threatening to kill or harm Ms. Yarbrough. Additionally, the State

would also have been able to introduce Mr. Berry's multiple felony convictions including one for burglary and another for Violation of the Controlled Substances Act.

Based on the foregoing, this Court finds Ms. Berry's new affidavit testimony unreliable and that it would not have, in reasonable probability, changed the outcome of the guilt phase of Petitioner's trial.

Evidence of Victim's Cocaine Habit: Petitioner also asserts that trial counsel should have introduced, through two witnesses, the fact that the victim had cocaine in her system at the time of her death. Petitioner wrongly claims "Mr. Mostiler made no subsequent attempt to introduce evidence of the victim's cocaine use and jurors did not hear evidence that she had cocaine in her system at the time of death." Petitioner claims that such evidence would have readily allowed jurors to infer that Alicia Yarbrough was part of a plan to steal from her boyfriend Charles Puckett and that she left home to obtain cocaine in Mr. Pye's motel room.

The record establishes that Mr. Mostiler brought out evidence of the victim's cocaine habit and the inference that she had cocaine in her system at the time of death through the direct testimony of Petitioner himself.

This Court finds that additional evidence of the victim's cocaine use would not have, in reasonable probability, changed the outcome of the guilt phase

> of Petitioner's trial in light of the overwhelming evidence of Petitioner's guilt.

[20-40] at 48-51 (citations to internal record omitted; alterations in original).

In attempting to demonstrate that the state court's prejudice analysis is not entitled to deference under § 2254(d), Petitioner quibbles with the state court's conclusions. He argues that the only evidence of the victim's cocaine use that trial counsel presented to the jury was Petitioner's own testimony, which was not convincing to the jury. Petitioner further disagrees with the state court's assertion that the Linda Lyons and Leon Berry statements to the police were significantly different from the affidavits presented in the state habeas corpus proceedings and contends that, even though their testimony might have had some discrepancies, Lyons and Berry would have been strong witnesses because their testimony indicates that the victim went with Petitioner willingly.

The problem with the Lyons and Berry affidavits, however, is that they merely establish the proposition that Petitioner and his victim were, at some point, on friendly terms, and the jury already knew that by virtue of the fact that they had dated, and even lived together, in the past. The fact that Berry saw Petitioner and his victim together in a seemingly friendly environment days before the murder is wholly unremarkable and does nothing to establish that Petitioner did not rob, kidnap, rape, and kill her. This Court further disagrees with Petitioner that the victim's purported presence in the car with Petitioner when Petitioner was attempting to purchase a gun is convincing evidence that the victim was in cahoots with Petitioner's

plan to steal from Charles Puckett given the fact that there is no other evidence in the record to support that supposition.

As to the Lyons affidavit, the victim could well have wanted to see Petitioner that night, but that fact does nothing to refute the clear evidence that Petitioner, wearing a mask and carrying a gun, appeared at her home, kicked her door in, began stealing property, and ultimately abducted her at gunpoint. Her desire to be in his presence obviously changed at that point.

This Court is further entirely unconvinced by Petitioner's argument that the Lyons and Berry affidavits and evidence of the victim's drug use support Petitioner's testimony. As noted above, Petitioner claimed to the jury that on the night of the crimes, he did not go to the victim's home and that he was never in the car with her. The fact that Petitioner and his victim might have been on friendly terms earlier that week and the fact that the victim might have wanted to see him or to buy drugs from him on the night of her murder does not remove Petitioner from the various crime scenes, does not support Petitioner's version of events, and does not refute Freeman's version of events. Indeed, the affidavits are entirely consistent with the state's theory of the case, and their content does not at all undermine this Court's confidence in the outcome of Petitioner's trial. Likewise, and for obvious reasons, the fact that one of the victim's hairs might have been found on one of the ski masks worn by the assailants who repeatedly raped her and the fact that Freeman at one time mentioned that he and Adams had purchased the ski masks at a Dollar Store some days before the subject crimes does nothing to exculpate Petitioner.

This Court thus concludes that Petitioner has failed to demonstrate that he was prejudiced with respect to his claims that trial counsel provided ineffective assistance in failing to present certain evidence during the guilt phase of his trial, and this Court must therefore defer to the state court's conclusions under § 2254(d).

b. Trial Counsel's Failure to Present the Testimony of a Forensic Expert

Petitioner also contends that trial counsel was ineffective for failing to present the testimony of a forensic expert. At the state habeas corpus hearing, Petitioner presented the testimony of Dr. Leroy Riddick. According to Petitioner, Dr. Riddick's testimony calls into question "key aspects of the State's evidence." [43] at 30. For example, one of the bullets that hit the victim passed through her shoulder, and Dr. Riddick noted that this bullet was never found. Dr. Riddick opined that if, as Freeman testified, the victim had been lying down when she was shot, then the bullet should have been easily found, even if the victim had moved. Dr. Riddick further noted that dirt on the victim's socks indicates that she was standing at some point.

One witness at Petitioner's trial testified that the victim had crawled and clawed around after Petitioner shot her, but Dr. Riddick testified that there was no dirt on the elbows and knees of her clothes or abrasions on her knees or elbows. Dr. Riddick further disputed trial testimony that the victim began to remove her clothes after Petitioner shot her because it is a natural reaction to feel hot in such circumstances. Dr. Riddick also pointed out a discrepancy between a police report and a forensic report, noting that the police reported blood and bullet holes in

the victim's sweatshirt, but that the lab report did not mention bullet holes in the sweatshirt and stated that blood tests on the sweatshirt were negative.

Finally, Dr. Riddick refuted testimony given at Petitioner's trial that the victim had remained conscious and suffered for as long as thirty minutes after she was shot. Dr. Riddick indicated that, given the nature of her injuries, the victim would have quickly lost consciousness. Petitioner contends that evidence of the victim's prolonged suffering was highly prejudicial because, during closing arguments, the prosecutor set an egg timer and asked the jury to imagine the victim's panic and suffering. This Court notes, however, that the prosecutor set the timer for only five minutes, which was consistent with the amount of time that Dr. Riddick said that it would have taken the victim to die.

The state habeas corpus court concluded that Petitioner had failed to establish prejudice with respect to trial counsel's failure to present the testimony of a forensic expert. According to the state court, the fact that the bullet that passed through the victim's shoulder was not found does not establish that the victim was not lying on the ground when shot because the bullet could have ricocheted. [20-40] at 52. The court further pointed out that there was no evidence in the record indicating that the victim was not wearing shoes when she exited the car and that she could have gotten dirt on her socks at that point. *Id.*

As to Dr. Riddick's testimony regarding the length of time that it took the victim to lose consciousness after Petitioner shot her, the state court stated:

> The Court notes that Dr. Leroy Riddick, retained by Petitioner in this proceeding, did not take issue in his affidavit with Dr. Dunton's conclusion that the victim was alive or conscious for a period of time after being shot. Nor did Dr. Riddick contest that the time period could have been at least the five minutes represented by timer utilized by the State or even 10 the [sic] minutes which Dr. Dunton proposed as his estimate for a minimum. Rather, Petitioner's expert merely disagreed with Dr. Dunton that Ms. Yarbrough was conscious for a full 30 minutes.

Id. at 53.

This Court agrees with the state court that Petitioner's proposed forensic evidence is not sufficiently compelling to undermine confidence in the outcome of the guilt phase of Petitioner's trial, including the portions of Dr. Riddick's testimony not mentioned by the state habeas corpus court regarding (1) the question of whether the victim attempted to crawl after getting shot, (2) the question of whether the victim removed her clothing because she felt hot, and (3) the discrepancy regarding whether blood and bullet holes were found in the victim's sweatshirt. Almost all of this evidence concerns what happened after Petitioner shot the victim and has no bearing whatsoever on Petitioner's guilt.

Dr. Riddick's lone contention regarding what might have occurred at the time that Petitioner shot the victim concerned his comments about the missing bullet that passed through the victim's shoulder, and that testimony also does nothing to lessen Petitioner's guilt or culpability.

The fact that the police could not find a bullet in an overgrown area along a dirt road proves virtually nothing about the victim's body position at the time that Petitioner shot her. This Court thus concludes that Petitioner cannot demonstrate that he was prejudiced by trial counsel's failure to present the testimony of a forensic expert.

3. Ineffective Assistance Claims Related to the Sentencing Phase of the Trial

a. Petitioner's Claims

Petitioner contends that trial counsel was ineffective in investigating and presenting his case in mitigation during the sentencing phase of the trial. According to Petitioner, trial counsel did almost no investigation, and as a result, counsel failed to discover "a pattern of poverty, neglect, rejection, alcoholism, violence and chaos in Petitioner's childhood and adolescence." [43] at 36-37. In the state habeas corpus proceeding, Petitioner presented testimony and evidence that he claims trial counsel should have known about and presented during the penalty phase of Petitioner's trial. Petitioner further argues that if this evidence had been presented, there is a reasonable probability that it would have changed the outcome of the sentencing phase of Petitioner's trial.

Petitioner first claims that trial counsel should have presented evidence regarding his struggles as a child. In a long narrative description in his final brief, *id.* at 37-61, Petitioner depicts his childhood as one of deprivation. For most of his youth, Petitioner grew up in a "filthy" house with no indoor plumbing or heat. The house was small, but as many as ten children lived there along with Petitioner's parents. Petitioner was born while his mother's

husband, Ernest, was in prison, and it was obvious that Ernest was not Petitioner's father. While the family operated under the fiction that Ernest was Petitioner's father, Ernest often demeaned and otherwise mistreated Petitioner. Ernest also drank to excess, spending so much money in that endeavor that it left the family poor and the children malnourished. Petitioner and his siblings were not properly disciplined, and family life was volatile and violent.

Trial counsel did not obtain any type of mental health evaluation of Petitioner. In support of his argument that trial counsel was ineffective in failing to obtain and present mental health evidence in mitigation, Petitioner presented the testimony of four expert mental health witnesses. One tested Petitioner and measured his IQ at 70 and determined that Petitioner performed at a fifth- or sixth-grade level. Another diagnosed Petitioner with a developmental disorder caused by Petitioner's childhood poverty, abuse, and exposure to domestic violence. That expert also suspected that Petitioner may suffer from Fetal Alcohol Syndrome because his mother admitted to drinking alcohol while pregnant with Petitioner.

A third mental health professional tested Petitioner and concluded that he was intellectually disabled and suffers specific deficits in cognitive functioning as a result of frontal lobe brain damage giving Petitioner difficulty with problem solving and decision making. The fourth mental health witness concluded that Petitioner has significant impairments in his adaptive functioning. When taken together, Petitioner asserts that the testimony of the mental health experts establishes that he is intellectually disabled and not subject to the death penalty.

Petitioner also presented evidence that he claims could have been used to refute the argument that prosecutors made during the penalty phase regarding Petitioner's propensity for violence and his future dangerousness. Certain prison staff testified that when Petitioner was in prison for a burglary that he committed in the early 1980s, he was not violent. Guards from one of the prisons where Petitioner was incarcerated testified in the state habeas corpus proceeding that Petitioner was a model prisoner who was certainly less violent than most other prisoners. Fellow inmates from that time echoed that claim.

b. The State Habeas Corpus Court's Denial of Petitioner's Claims

The state habeas corpus court rejected all of these claims. The state court first recounted at length the mitigation case that trial counsel presented. [20-40] at 54-57. This Court will not repeat that discussion here other than to note that eight witnesses testified in Petitioner's behalf. All of them were Petitioner's family members with the exception of one family friend. The witnesses generally described Petitioner's personality, the nice things that he had done for others, and his relationship with the victim. These witnesses also testified that Petitioner is not a violent person, and some of them spoke about Petitioner's upbringing.

In his closing argument, trial counsel first spoke about the concept of mercy and the manner in which both the recipient and the giver of mercy are blessed. Trial counsel then argued that, given the nature of Petitioner's crimes, he does not deserve the death penalty when compared to other murderers such as those that commit mass murder.

He then argued that Petitioner is generally not a violent person, and that his acts of violence were all related to his sometimes volatile relationship with the victim. As a result, trial counsel argued, Petitioner is not a danger to other people.

As a brief aside, this Court notes that, as trial counsel had died and did not appear at the state habeas corpus hearing, we do not have the benefit of his testimony regarding his strategy for the sentencing phase. However, given the witnesses he presented and nature of his arguments, this Court deems it reasonable to posit that trial counsel sought to humanize Petitioner and highlight his reputation for not being violent in an effort to counter the state's arguments regarding Petitioner's future dangerousness.

Returning to the state habeas corpus order, that court next discussed trial counsel's investigation into mitigation evidence and, in a probing and fact-specific analysis, found that the investigation was thorough and reasonable. The court found, based on the testimony of trial counsel's investigator and documents found in trial counsel's file, that Petitioner's family was not helpful to the investigation. [20-40] at 58-59. The court further found that trial counsel investigated Petitioner's family, childhood, his living conditions, and his education history and determined that "Petitioner had no military history, no psychiatric history, nor any evidence of serious illness or major traumas." *Id.* at 59.

With respect to the claims of Petitioner's deprivation as a child, the state court held as follows:

> The record reflects that although the family was not cooperative with the defense team during the

pre-trial investigation, trial counsel and trial counsel's investigator did learn, to some extent, of the family's impoverished circumstances and presented those facts to the jury through Petitioner's sisters.

During the sentencing phase of trial, Petitioner's sister Sandy Usher Starks testified:

> We came up in a household where we didn't have the things like a lot of people had. Maybe, you know, where a lot of people might have had running water in the bathroom, we didn't have that. Might of—people might have had heat, we didn't have that. We had like a wooden heater or a fireplace.

Additionally, Petitioner's sister Pam Bland added additional detail surrounding the crowded living conditions experienced by Petitioner:

> Well, me and my sister, we slept together. And my brothers—I have eight brothers and one sister. Four of my brothers slept in the same room. My mama had like two beds in each room, and my other four brothers slept in the other room. And my mom and dad were—I have babies—okay, as the babies were born, when we first moved to Indian Springs—been living in Indian Springs about 27 or 28 years—each time they were born, they always slept in the room with my mom and dad—the babies. And—well, it was just like split in half on the boys, four

> boys in one room and four boys in the other room.

Petitioner's newly presented evidence allegedly documenting Petitioner's upbringing is largely based upon affidavit testimony. As held by the Eleventh Circuit Court of Appeals, "It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." *Waters v. Thomas*, 46 F. 3d, 1506, 1513-1514 (1995). Such affidavits usually prove at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specified parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. *Id.* at 1514.

Artful drafting as pointed out by the Eleventh Circuit in *Waters* is directly reflected in this case. The Court specifically notes that affidavits were presented by Petitioner, which were misleading and later corrected through additional affidavit testimony. Social Worker Arthur Lawson initially testified by an affidavit submitted by Petitioner that "[Petitioner's Mother] was not as flagrant as her husband with her drinking, but I showed up at the home to find her intoxicated on many visits. This was equally true when she was pregnant; there were times when she was carrying one of the younger children that I showed up to find that she

was high." Mr. Lawson later issued a subsequent affidavit correcting the statement, "During the time I worked with the Pye family I was aware that Mrs. Pye drank alcohol, however, I had no direct knowledge she did so while pregnant. I have agreed to give this affidavit to clarify the inaccurate statement in my prior affidavit."

Additionally, Curtis Pye testified through an affidavit submitted by Petitioner, "No one talked to me . . . before Petitioner's trial. Johnny Mostiler and his assistant Dewey know me . . . He didn't get in touch with me." However, Mr. Mostiler's billing records in Petitioner's case reflect that Mr. Mostiler interviewed Curtis Pye for one hour approximately one month prior to trial.

Ricky Pye also testified through an affidavit submitted by Petitioner, "I never spoke to Mostiler about what to say [at trial], and he didn't meet with me or ask me any questions before my turn for testimony." The affidavit makes no mention of Mr. Mostiler's one hour interview with him, also approximately one month prior to trial.

Petitioner's mother Lolla Mae Pye testified through an affidavit submitted by Petitioner, "No one took the time to talk to me about all (sic) anything before [Petitioner's] trial," despite Investigator Dewey Yarbrough's testimony and Mr. Mostiler's billing records to the contrary.

Further, in addition to the previously addressed inconsistent affidavit testimony of both Linda Lyons and Leon Berry, the Court also notes Co-defendant Chester Adams also issued an affidavit in

this case containing multiple material inconsistencies when compared his video-taped statement made to authorities approximately 24 hours after the murder of Alicia Yarbrough.

Accordingly, this Court has reviewed Petitioner's affidavit evidence with caution, including the affidavit evidence alleging abuse and deprivation of Petitioner, where affidavit testimony is extensively relied upon.

The Court also finds that there is little, if any, connection between Petitioner's impoverished background and the premeditated and horrendous crimes in this case.

Further, Petitioner was 28 years old at the time of these crimes, trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of Petitioner's guilt, that remorse was likely to play better than excuses. *See Housel v. Head*, 238 F.3d 1289, 1295 (11th Cir. 2001). In *Tompkins v. Moore*, 193 F.3d 1327, 1337 (11th Cir. 1999), Tompkins was 26 years old at the time he committed his capital crimes. In finding that Tompkins had failed to establish prejudice as to trial counsel not presenting Tompkins' background, the Eleventh Circuit Court of Appeals held that "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight" when the defendant is "not young" at the time of the offense. *See also Francis v. Dugger*, 908 F.2d 696, 703 (11th Cir. 1990) (petitioner was thirty-one years old at the time of the capital offense); *accord Mills v. Singletary*, 63 F.3d 999,

> 1025 (11th Cir. 1995) ("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime."). *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir. 1994) (same holding where petitioner was twenty-seven years old at the time of the capital offense).
>
> Based upon this review, the Court finds that Petitioner has failed to show that he was prejudiced under *Strickland* by trial counsel not presenting the additional details surrounding his upbringing, especially when considered in light of evidence suggesting Petitioner's family's unwillingness to cooperate with trial counsel in Petitioner's defense, and extensive evidence presented in aggravation by the State during sentencing.

[20-40] at 64-67 (citations to internal record omitted; alterations in original).

The state court further concluded that Petitioner could not demonstrate prejudice with respect to his claim that trial counsel failed to hire mental health expert witnesses to testify regarding Petitioner's intellectual disability. *Id.* at 60. As is discussed below, the state habeas corpus court determined elsewhere in its order that Petitioner had failed to demonstrate that he is intellectually disabled, and he therefore cannot have been prejudiced by the fact that trial counsel did not raise the issue. The state court further noted that if Petitioner had presented to the jury the same mental health evidence he presented in the state habeas corpus hearing, there was no reasonable probability of a different outcome. [20-40] at 60. The state

court further concluded that Petitioner's evidence of brain damage and cognitive deficits would not have changed the outcome of the penalty phase because Petitioner had obviously engaged in elaborate scheming in planning and carrying out his crimes and in later attempting to avoid detection by authorities. *Id.* at 62. The state court also contended that the diagnoses were unreliable and credited the testimony of Respondent's mental health expert that Petitioner's expert's diagnoses were not credible. *Id.* at 62-63.

In concluding that Petitioner had failed to demonstrate prejudice with respect to trial counsel's failure to secure the testimony of the prison guards who spoke of Petitioner's exemplary behavior in prison, the state habeas corpus court pointed out that the "disciplinary reports contained in Petitioner's correctional records from his period of incarceration . . . reflect a different picture." *Id.* at 60. The state court then detailed eleven of Petitioner's disciplinary charges from his prior period of incarceration. *Id.* at 60-61. According to those records, Petitioner twice assaulted other inmates and once, after being told to stand down, Petitioner approached a guard in an aggressive manner, requiring officers to use force to restrain him. The state court concluded that Petitioner's disciplinary record while in prison indicates "a history of insubordination, aggressiveness and propensity for violence toward those in authority." *Id.* at 61. Given this background, the state court determined that the prison guard testimony would have been easily refuted.

c. The State Court's Order Is Entitled to Deference

In arguing that the state habeas corpus court's no-prejudice conclusion is not entitled to deference, Petitioner first disputes the state court's finding that Petitioner's evidence of his impoverished and difficult childhood was largely cumulative of other evidence presented by trial counsel, and he disputes the finding that Petitioner's family did not cooperate with trial counsel. Petitioner further assails the state court's discussion regarding the unreliability of the witness affidavits that Petitioner presented, countering that affidavits are permitted and routinely used in Georgia habeas corpus proceedings and asserting that the discrepancies that the state court found in the affidavits were not so significant as to render the affidavits wholly unreliable.

Petitioner also argues that the state court erred in concluding that he was not prejudiced by trial counsel's failure to present mental health evidence. Petitioner contends that the problems the state court found with his mental health evidence were not supported by the record and, in any event, that evidence was certainly sufficient to change the outcome of his sentencing hearing.

In response to the state court's conclusion that Petitioner's deprived upbringing was not connected to the crime and was not persuasive because Petitioner was twenty-eight years old at the time of his crimes and many years removed from his impoverished youth, Petitioner points out that there is no need to prove a causal connection between his background and his crimes in order for the evidence to be persuasive to the jury, and that the Supreme Court has held that the childhood experiences of older death penalty defendants is relevant.

Finally, Petitioner contends that the state court's conclusion of no prejudice in light of trial counsel's failure to present the testimony of the prison guards was wrong because Petitioner's prison disciplinary history in prison was not substantial and would not have substantially weakened the prison guard's testimony.

More generally, Petitioner contends that, if trial counsel had presented all of his now-proffered evidence, it would have undercut all of the prosecution's arguments in favor of the death penalty and, indeed, would have rendered the death sentence impossible because the jury would not have been authorized to find the presence of statutory aggravating factors.

Having carefully considered Petitioner's arguments in light of the state court's findings and conclusions, this Court now concludes that Petitioner has not overcome his burden under § 2254(d).

i. Evidence of Petitioner's Impoverished Childhood

Turning first to the evidence from his childhood, this Court concedes that Petitioner's early years were marked by significant poverty. However, in this Court's judgment, that evidence is simply not compelling enough to undermine confidence in the outcome of Petitioner's sentencing hearing. Petitioner compares his case to *Porter v. McCollum*, 558 U.S. 30, 33 (2009), in which the Supreme Court held that George Porter's trial counsel had been ineffective in failing to discover and present evidence from Porter's background, but the evidence missed by trial counsel in that case is significantly more compelling.

> Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child. Porter's father was violent every weekend, and by his siblings' account, Porter was his father's favorite target, particularly when Porter tried to protect his mother. On one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead.

Id. at 33. Porter's trial counsel also neglected to present evidence of Porter's extensive and heroic experiences in two savage Korean War battles and the physical and psychological injury that those experiences engendered. *Id.* at 34-35.

Likewise, in other cases where the Supreme Court concluded that trial counsel was ineffective for failing to present certain mitigation evidence, the evidence overlooked or ignored by trial counsel was simply horrific. In *Wiggins v. Smith*, 539 U.S. 510 (2003),

> [Wiggins'] mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physi-

> cally, and, as petitioner explained to [a licensed social worker], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Wiggins, 539 U.S. at 516-17.

In *Williams v. Taylor*, Terry Williams' childhood was equally distressing. Williams's parents were severe alcoholics who were often so drunk that they were incapable of caring for the children. When social workers arrived at the Williams's home on one occasion, conditions were not habitable, including human feces in several places on the floor. The social workers had to remove the children because, among other reasons, the children were drunk from consuming moonshine. Williams's parents were each charged with five counts of criminal neglect. Acquaintances of the family testified that Williams's father would strip Williams naked, tie him to a bed post and whip him about the back and face with a belt, and that Williams's parents engaged in repeated fist fights that terrorized the children. *See generally*, Brief of Petitioner, *Williams v. Taylor*, 529 U.S. 362 (2000) (No. 98-8384), 1999 WL 459574.

While Petitioner was certainly poor, his parents may not have been as engaged in his upbringing as they should have, and there was some evidence of fighting by and

among Petitioner's family members, Petitioner has not presented evidence that he was subjected to regular and brutal beatings, sexual abuse, or conditions so severe that the state had to step in and remove Petitioner and his siblings from the home or that his parents were charged with neglect.

Moreover, it is undisputed that trial counsel and his investigator visited Petitioner's home on more than one occasion, *see, e.g.*, [14-41] at 85, and trial counsel obviously knew about Petitioner's childhood living conditions, *see* [19-11] at 93-94 (memo from trial counsel's file regarding the conditions at Petitioner's childhood home). During the penalty phase of the trial, he presented some evidence of Petitioner's family's lack of wealth and the conditions under which Petitioner was raised, and he chose not to present more. Petitioner bears the burden of overcoming "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy," *Strickland*, 466 U.S. at 689, and Petitioner has done nothing to rebut the theory that counsel could have reasonably determined that a strategy of humanizing Petitioner, highlighting the fact that Petitioner did not have a violent reputation, and begging for mercy would be preferred to attempting to provide excuses for Petitioner's crimes because he had led a difficult life. *See Housel v. Head*, 238 F.3d 1289, 1295 (11th Cir. 2001) (holding it was reasonable for trial counsel to make strategic decision to forego evidence of defendant's childhood and adolescence in favor of effort to humanize defendant, show that he had a family, and ask for mercy).

> In assessing the reasonableness of counsel's performance, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Reed v. Sec'y, Fla. Dep't of Corr., 593 F.3d 1217, 1240 (11th Cir. 2010) (quotations, alteration and citations omitted). In this case, trial counsel knew enough about Petitioner's living conditions to make a decision as to whether to pursue further investigation into his upbringing. As the Eleventh Circuit has directed in *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016), this Court must consider this theory that could have supported the Georgia Supreme Court's denial of a certificate of probable cause to appeal the denial of habeas corpus relief. Having so considered it, this Court deems it to be a reasonable interpretation of *Strickland* and a reasonable application of that interpretation to the facts in the record.

In directly addressing Petitioner's arguments that the state court's conclusions regarding trial counsel's failure to present more evidence of Petitioner's childhood are not entitled to deference, this Court first credits Respondent's argument that the state court was correct in finding

that more evidence of Petitioner's background would have been cumulative of the evidence presented by trial counsel. As noted by Respondent, in *Cullen v. Pinholster*, 563 U.S. 170, 197 (2011), the Supreme Court confronted a case in which the mitigation evidence consisted primarily of the testimony of Scott Pinholster's mother who testified that Pinholster's stepfather was "abusive, or nearly so." *Id.* After Pinholster presented new and graphic details about that abuse in post-conviction proceedings, including that the petitioner's "stepfather beat him several times a week" with his fists, belts, and "at least once with a two-by-four," *id.* at 201, the Court held that the "'new' evidence" of abuse "largely duplicated the mitigation evidence at trial" because it "support[ed] his mother's testimony that his stepfather was abusive." *Id.* In confronting similar circumstances in another case, the Eleventh Circuit applied *Pinholster* to hold that "because the evidence [the petitioner] presented in the state collateral court about his troubled, abusive childhood was largely cumulative of the evidence he presented at trial, it was not unreasonable for the Georgia Supreme Court to describe it as largely cumulative. At least, fairminded jurists could disagree about whether it was." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1266 (11th Cir. 2012).

In response to Petitioner's argument that the state court may have overstated the unreliability of the affidavit evidence that he submitted, this Court counters that whether the affidavit testimony was reliable or accurate is a side issue to the state court's reliance on the discussion in *Waters v. Thomas*, 46 F.3d, 1506, 1513-14 (1995). In *Waters*, as the state court noted, the Eleventh Circuit held that affidavits or testimony presented in death penalty post-conviction proceedings purporting to provide

additional mitigation evidence are of "little significance" because they prove only that "with the luxury of time and the opportunity to focus resources on specified parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." *Id.* at 1514. "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." *Foster v. Dugger*, 823 F.2d 402, 406 (11th Cir. 1987) (quotation and citation omitted). The reliability of Petitioner's witness affidavits are thus not relevant to the state court's conclusion.

ii. Mental Health Evidence

In response to Petitioner's arguments regarding Petitioner's mental health evidence, this Court begins with the proposition, voiced by the Eleventh Circuit, that "the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997). Rather, in order to prevail on this claim, Petitioner must first demonstrate that trial counsel's decision not to pursue a mental health evaluation was not reasonable.

Petitioner points to two documents in the record that he claims should have alerted trial counsel to the fact that Petitioner suffered from mental dysfunction: (1) a prison intake form which described Petitioner as depressed, confused, and claiming that he heard voices; and (2) school records that indicated that Petitioner performed particularly badly in standardized testing. However, other than

the modest indications in the prison intake form, there is no record that Petitioner suffered from any form of psychological problems, and it is not at all surprising that someone who had just arrived at a state prison to begin serving a ten-year sentence would be depressed and confused. That same intake form also confirmed the results of trial counsel's investigation that Petitioner had "no history of mental health treatment and did not show overt signs of severe depression, anxiety, or perceptual disturbance." [15-19] at 11; [19-11] at 94.

As to the school records, they do indicate that Petitioner performed poorly on standardized testing. However, there is also evidence in the record that indicates that Petitioner's intelligence was not so low that it would have been useful as mitigation evidence. For example, the prison intake form mentioned above stated that Petitioner tested in the normal to low normal range of intelligence *id.*, and the school records cited by Petitioner demonstrate that Petitioner was not diagnosed with intellectual disability nor placed in special education classes. [14-44] at 18-19, 50; [19-14] at 74. Additionally, the prison intake form notes the discrepancy between Petitioner's intelligence and his test scores [15-19] at 11, indicating that Petitioner tests poorly because of a learning disability as opposed to low intelligence.

Further, trial counsel's investigator testified that it was standard procedure for trial counsel to obtain psychiatric evaluations for his death penalty clients [14-14] at 84, that he did not recall anyone telling him that Petitioner had any type of mental disorder *id.* at 83, and that Petitioner understood his communications regarding the case development *id.* at 84. *See Gissendaner v. Seaboldt*, 735

F.3d 1311, 1332 (11th Cir. 2013) (holding that where there is no indication of "red flags" or "obvious indicators" of substantial mental health problems, trial counsel under no obligation to obtain a mental evaluation); *Holladay v. Haley*, 209 F.3d 1243, 1250 (11th Cir. 2000) (holding counsel not required to seek mental health evaluation when the defendant does not display strong evidence of mental problems). Given the paltry and contradictory evidence in the record indicating that Petitioner had any significant mental disorder and the further evidence that trial counsel knew and understood the importance of using mental health evidence if it fit with trial strategy, Petitioner cannot overcome the presumption that trial counsel made a reasonable and strategic judgment to focus his resources and argument elsewhere. "Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced." *Chandler*, 218 F.3d at 1316 n.20 (citation omitted).

On the question of whether Petitioner demonstrated prejudice in connection with his claim that trial counsel was ineffective for failing to present mental health evidence, in the discussion below regarding Petitioner's Claim VII that he is exempt from execution because he is intellectually disabled, this Court determines that Petitioner is not entitled to relief because he has not demonstrated that he is so disabled. It necessarily follows that the most that he could have demonstrated during the penalty phase of his trial is that he has low intelligence and possibly organic brain damage of various possible etiologies. In *Arbelaez v. Crews*, 662 F. App'x 713, 721 (11th Cir. 2016), the Eleventh Circuit confronted a materially identical case. Trial counsel had not presented any mental

health evidence at the trial. At Arbelaez's state habeas corpus hearing, "mental health experts testified that Arbelaez had epilepsy with organic brain damage, was depressed, had attempted suicide, and had low intellectual functioning." *Id.* (citation omitted). In concluding that Arbelaez had failed to demonstrate prejudice, the Eleventh Circuit noted:

> All of these circumstances indisputably are mitigating. Nevertheless, when we consider this new mitigating evidence together with the mitigation evidence actually presented at trial—that Arbelaez was hard working and lacked any significant criminal history—and weigh it against the evidence in aggravation, we cannot conclude that Arbelaez has met *Strickland*'s standard for prejudice.

Id.

Likewise, in this case, when considering the mitigation evidence that trial counsel presented weighed against the strong evidence in aggravation presented by the prosecution, this Court concludes that there is no reasonable probability that the additional mental health evidence that Petitioner presented in his state habeas corpus proceeding would have resulted in a different outcome in the penalty phase of Petitioner's trial.

iii. Evidence of a Lack of Future Dangerousness

Turning now to the testimony of the prison guards that Petitioner claims that trial counsel should have presented, this Court agrees with the state habeas corpus court's opinion that Petitioner's prison disciplinary his-

tory would have blunted the effectiveness of that testimony. This Court concedes Petitioner's point that many of the disciplinary reports lodged against Petitioner were for comparatively minor offenses. However, he was cited for assault on another inmate as well as approaching a guard in an aggressive manner. While Petitioner's disciplinary history may not reflect that Petitioner was a hardened criminal, neither does it show him to be the model prisoner that the guard affidavits depict. Moreover, this Court notes that the affidavit testimony that Petitioner submitted concerned his incarceration in the youthful defender program at Lee Arrendale State Prison. Petitioner admits that when he aged out of that program and was sent to Scott State Prison, he became agitated and his disciplinary issues became worse. [43] at 63. This would have obviously fit nicely with the prosecutor's penalty phase closing argument that Petitioner's behavior had gotten "progressively worse." [13-11] at 87.

This Court further notes that the affidavit testimony of the prison guards is cumulative of evidence that trial counsel did present. Petitioner's sister and his father both testified during the penalty phase that Petitioner was not violent, and several witnesses testified regarding how kind Petitioner is. As this testimony was clearly intended to refute the prosecution's arguments about Petitioner's future dangerousness, the prison guard testimony is clearly cumulative of the evidence counsel presented. *See Pinholster*, 563 U.S. at 197.

In summary, this Court concludes that Petitioner has failed to demonstrate that his trial counsel rendered constitutionally ineffective assistance.

D. CLAIM V: Trial Counsel Conflict of Interest

In his Claim V, Petitioner contends that trial counsel had three discrete conflicts of interest, none of which are true conflicts of interest. According to Petitioner, during a Unified Appeal Procedure hearing, the trial court asked Petitioner if he was satisfied with his counsel. Petitioner responded that he was not because trial counsel had visited with him only twice over the course of a year, trial counsel had not interviewed certain witnesses that Petitioner wanted him to interview, and one of those witnesses had died. In a later hearing, trial counsel put on the record a rebuttal to Petitioner's assertions, stating that he and his investigator had visited Petitioner in the jail a number of times and describing the lengths that he went to in a futile attempt to locate the witness that Petitioner wanted him to interview. Petitioner claims that trial counsel's rebuttal had the effect of calling Petitioner a liar in open court. Petitioner also points out that he later filed a grievance with the state bar regarding the same issues that he raised with the trial court creating, he contends, a further conflict.

However, criminal defendants routinely complain in open court about the quality of their representation by appointed counsel, and this does not create a conflict of interest. Lawyers have a duty to, and are presumed to, overlook such slights, and, indeed, at the hearing where trial counsel rebutted Petitioner's assertions, trial counsel stated that he intended "to defend [Petitioner] as vigorously as possible." [12-13] at 5.

Nor are the facts of this claim akin to those from the cases cited by Petitioner. In *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992), trial counsel had argued before the

trial court that his joint representation of codefendants was a conflict because the two defendants interests were opposed. In *United States v. Blackledge*, 751 F.3d 188 (4th Cir. 2014), Blackledge's lawyer had filed a motion to withdraw and had voiced her opinion to the judge that her relationship with Blackledge was irretrievably broken and that she could not communicate with him or advise him. *See also Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding that conflict existed when defense counsel objected that he could not adequately represent the divergent interests of three codefendants). Put simply, this Court concludes that Petitioner's complaints regarding trial counsel's performance did not create a conflict of interest.

Petitioner next complains that trial counsel had a conflict of interest based upon the fact that trial counsel's caseload was so heavy because of his contract with Spalding County as the public defender. In another § 2254 death penalty petition before this Court, *Whatley v. Upton*, 3:09-CV-0074-WSD, 2013 WL 1431649 (N.D. Ga. Apr. 9, 2013), petitioner Whatley raised this same claim against this same trial counsel. In an extended discussion that this Court will not repeat here, *id.* at *43-46, Judge Duffey concluded that trial counsel did not have "an actual conflict of interest that affected his representation of Whatley" and further concluded that the state court's same conclusion was entitled to § 2254(d) deference. *Id.* at *46. As in *Whatley*, the state habeas corpus denied Petitioner relief on this claim. This Court adopts Judge Duffey's reasoning and likewise concludes that Petitioner has failed to establish that trial counsel had a conflict of interest based on his heavy caseload. This Court further points out that, to the degree that such a conflict had existed, Petitioner

would have been able to demonstrate that his trial counsel had been ineffective, which as is noted above, he has not done.

Finally, Petitioner claims that in his role as the county public defender, trial counsel had previously represented both the victim and the victim's boyfriend, Charles Puckett, who was an intended victim and a witness for the state at Petitioner's trial. "The Sixth Amendment right to effective assistance of counsel encompasses the right to counsel untainted by conflicts of interest. This right is violated when the defendant's attorney has an actual conflict of interest that adversely affects the lawyer's performance." *Lynd v. Terry*, 470 F.3d 1308, 1318 (11th Cir. 2006) (citations omitted). In order to obtain relief on this claim, Petitioner must demonstrate the existence of an actual conflict and that when counsel was faced with inconsistent interests, he made a choice that served one interest over the other. Whether an actual conflict exists is a fact-specific inquiry, requiring Petitioner to make a factual showing of inconsistent interests or point to specific instances in the record to suggest an actual impairment of his interests. *Quince v. Crosby*, 360 F.3d 1259, 1264 (11th Cir. 2004). A mere speculative or hypothetical conflict of interest is insufficient to establish an ineffective-assistance claim. *Id.* To show that a conflict of interest adversely affected counsel's performance, the "petitioner must show: (1) the existence of a plausible alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy of defense." *Pegg v. United States*, 253 F.3d 1274, 1278 (11th Cir. 2001).

In denying relief on this claim, the state habeas corpus court pointed out that trial counsel had thoroughly cross-examined Puckett and concluded that Petitioner had failed to establish that there was any actual conflict or any adverse effect from trial counsel's representation of Puckett. [20-40] at 71. The state court further concluded that Petitioner had failed to demonstrate that trial counsel's representation of the victim created an actual conflict. *Id.* at 72.

Petitioner's arguments in support of his contention that an actual conflict existed are based on trial counsel's failure to elicit testimony that purportedly would have been helpful to Petitioner during the cross-examination of Puckett, including Puckett's initial suspicion that the victim had stolen his property and other negative evidence regarding the victim. However, the manner in which trial counsel cross-examined Puckett does not, by itself, support the existence of an actual conflict. An actual conflict arises only "when counsel actively represents conflicting interests," *Lynch v. United States*, No. 16-16243-C, 2017 WL 4570524 at *12 (11th Cir. June 26, 2017) (citation omitted), and Petitioner has failed to show how trial counsel had any active ethical obligation to either the victim or to Puckett at the time that he represented Petitioner that would have caused him to compromise his zealous representation of Petitioner. This Court thus concludes that trial counsel did not have a conflict that compromised Petitioner's constitutional rights.

E. CLAIM VI: Counsel's Representation Violated the Rule of *United States v. Cronic*, 466 U.S. 648 (1984)

In his final brief, Petitioner provides sparse argument that "[a]s a result of the overwhelming obligations of trial

counsel . . . there was a breakdown in the adversarial process and trial counsel was unable to be [Petitioner's meaningful advocate," [34] at 355, in purported violation of the Supreme Court's holding in *United States v. Cronic*, 466 U.S. 648 (1984). As both parties mention, the state habeas corpus did not directly address this claim. However, Petitioner has provided no factual support for this claim in his final brief. In this Court's scheduling order of September 12, 2013, Petitioner was admonished that he "must include every argument he wants the Court to consider." [21] at 2. This Court is under no obligation to mine the record searching for facts to support Petitioner's claims. *Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) (noting that "district court judges are not required to ferret out delectable facts buried in a massive record, like the one in this case, which was more than 25,000 pages of documents and transcripts").

Moreover, this claim is simply another way of arguing that Petitioner did not receive effective assistance of trial counsel, which claim this Court has already determined lacks merit.

F. CLAIM VII: Petitioner Is Not Eligible for the Death Penalty Because He Is Intellectually Disabled

In Petitioner's Claim VII, he argues that he is intellectually disabled and thus not eligible for the death penalty under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002). Under Georgia law, which tracks the current clinical definition, "intellectual disability means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." O.C.G.A. § 17-7-131. Under this statute,

criminal defendants convicted of capital crimes cannot be executed if the court or the jury finds, beyond a reasonable doubt,[6] that they are intellectually disabled. *Id.* § 17-7-131(c)(3), (j). The Supreme Court instructs that courts are to use a two-pronged approach to determine intellectual disability. First the defendant must demonstrate "significantly subaverage intellectual functioning." *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002). As a general matter, "significantly subaverage intellectual functioning" is established if the defendant's IQ is at or below approximately 75. *See generally Hall v. Florida*, 134 S. Ct. 1986 (2014). Second, he must demonstrate "related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work," the onset of which limitations occurred before the defendant reached the age of eighteen. *Id.* These adaptive skill areas are those identified in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, American Psychiatric Association, 2014.

It appears that there is no dispute that Petitioner has significantly subaverage intellectual functioning, as even the state's expert concluded that Petitioner's IQ is approximately 68. Rather, the dispute is whether Petitioner

[6] In *Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011), the Eleventh Circuit noted that the Supreme Court in *Atkins* left the procedural aspects of determining intellectual disability to the states and concluded that federal courts must therefore defer under § 2254(d) to a Georgia state court's application of the reasonable doubt standard for determining intellectual disability.

has shown the requisite impairment in adaptive functioning.

1. <u>The State Habeas Corpus Court's Findings and Conclusions</u>

The state habeas corpus court held that this claim was procedurally defaulted. In establishing that Petitioner did not establish prejudice to overcome the default, however, the state court analyzed Petitioner's claim of intellectual disability on its merits and determined that Petitioner had failed to prove beyond a reasonable doubt that he was intellectually disabled.

Petitioner presented the testimony of four mental health experts whose testimony generally agreed. One of those experts, Dr. Victoria Swanson, specializes in the field of intellectual disability, and she provided the testimony relevant to the question of whether Petitioner suffers from deficits in adaptive functioning. In order to evaluate Petitioner's adaptive functioning, she interviewed three of Petitioner's family members: Petitioner's mother regarding Petitioner at age six; Petitioner's sister regarding Petitioner at age sixteen, and Petitioner's brother regarding Petitioner at age twenty-five. In interviewing Petitioner's mother, Dr. Swanson used a portion of the Adaptive Behavioral Assessment Scale, Second Edition ("ABAS"). With Petitioner's sister and brother, she used the Vineland Adaptive Behavior Scales, Second Edition ("Vineland"). Based on her assessments, Dr. Swanson concluded that Petitioner suffered significant deficits in all but one of the adaptive skill areas.

Respondent presented the testimony of Dr. Glen King. Dr. King has performed thousands of tests of intellectual

capacity, and in the case of Petitioner, he administered an IQ test, an ABAS assessment by interviewing Petitioner, and reviewed a great many documents and records. Dr. King concluded that Petitioner does not suffer from any significant deficits in adaptive functioning.

The state habeas corpus court dedicated significant discussion to its conclusion that Petitioner had failed to meet his burden of proving intellectual disability beyond a reasonable doubt. [20-40] at 19-39. The state court credited Dr. King's testimony and found that Dr. Swanson's methodology suffered from serious flaws. In finding Dr. King's testimony more credible, the state court first noted that Dr. King has been hired by the states of Alabama and Georgia to evaluate several habeas petitioners and that in some of those evaluations, he has concluded that the petitioners were intellectually disabled, resulting in either acknowledgment by the state or Dr. King testifying on the petitioner's behalf. *Id.* at 20-21. The state court further noted that in addition to his assessments, Dr. King's conclusions were supported by independent sources such as medical records, school records, police records, court documents, affidavits, and Dr. Swanson's raw test data. *Id.* at 21. The state court described the testing performed by Dr. King:

> One of the many sources of data considered by Dr. King in his evaluation was his psychological interview of Petitioner. Dr. King testified that during the psychological interview, in which he obtained a self reported history of Petitioner, Petitioner answered and understood all his questions, responded appropriately, was forthright, and able to engage in a back and forth dialog. Dr. King further

> noted that even though the exchanges were primarily questions which involved direct answers, Petitioner even engaged in some spontaneous explanations.

Id. at 22 (citation to the internal record omitted).

The court also pointed out that Dr. King learned that one of Petitioner's siblings was diagnosed as intellectually disabled and another had a history of mental illness and received SSI benefits. This is "significant in that despite evidence of mental illness and mental retardation in his family, revealing an obvious awareness of the symptoms of such illnesses, Petitioner was not previously affixed with a label of either mental retardation or mental illness, nor did Petitioner receive any disability benefits." *Id.* at 23.

The court discussed the ABAS assessment that Dr. King used, and found that it was the most reliable assessment tool for Petitioner given the fact that Petitioner was then living in a prison. *Id.* at 25. The court found that Petitioner's scores on Dr. King's assessment indicated that Petitioner's adaptive functioning is in the low range in certain areas, but that "none of the scores demonstrate a significant deficit." *Id.* at 26.

The court also noted Dr. King's testimony that he reviewed other sources and that those sources corroborated the ABAS assessment results. For example, Petitioner's prison records included Petitioner's requests for address changes for visitation, which demonstrated knowledge of phone numbers, names, and addresses, and the ability to make and articulate written requests, which are not con-

sistent with what you expect from somebody who is mentally retarded." *Id.* at 28. His responses to prison infraction charges, demonstrated

> practical ability to deal with the system by addressing these appellate situations and in attempting to answer charges and defend himself; conceptually, Petitioner did not go off on tangents but dealt with the issues alleged against him directly and tried to provide a defense; and socially, Petitioner was interacting with the system in defending himself as well as demonstrating clear indications of multiple social interactions with officers.

Id. at 27.

Petitioner's school records reflect that while Petitioner performed poorly in school, he was not diagnosed as intellectually disabled or placed in special education classes, and his poor performance was likely due to his poor attendance. *Id.* at 28. Dr. King also testified that Petitioner's work history allowed him to purchase automobiles and help support his girlfriend and her children. *Id.* at 28. In addition, the record evidence from Petitioner's crime—including Petitioner's use of a mask, checking into a motel under an assumed name, attempting to wipe away fingerprints, and attempting to convince police that he was not involved in the victim's murder—indicate "predetermination, premeditation, and goal directedness with an attempt to avoid apprehension and detection, which reflect adaptive behaviors." *Id.* at 29. The state habeas corpus court also noted that Petitioner's father testified during the penalty phase of the trial that Petitioner "acted as a caregiver providing food, housing and other necessities for his family." *Id.*

With respect to Petitioner's expert, Dr. Swanson, the state court found that her evaluation was unreliable for a number of reasons. The court first noted that Dr. Swanson's methodology in applying the Vineland and ABAS assessment scales was non-standard and flawed because the respondents—Petitioner's mother, sister and brother—all had a motive to report deficits in the hope that a intellectual disability diagnosis would help Petitioner avoid execution. *Id.* at 31.

The court also pointed out that the use of multiple respondents in using the Vineland assessment scale results in severe limitations in the scale's interpretability, and that the manner in which Dr. Swanson administered the ABAS—in an semi-structured interview format and administering only certain parts of the assessment—to Petitioner's mother was flawed and unreliable. *Id.* at 32. The court further questioned the reliability of Petitioner's mother's responses given that she was in her seventies, had suffered two cerebral vascular accidents, is bedridden, and has diabetes and was rendering opinions about events that had occurred thirty-seven years previously at a time when she spent little to no time with Petitioner. *Id.* at 33.

As to the Vineland assessment Dr. Swanson administered to Petitioner's sister, the state court found material inconsistencies between her responses to the assessment and her trial testimony. For example, at the trial, she testified that Petitioner often babysat her children for free, but during the assessment with Dr. Swanson, she said that she never left her children with Petitioner because he was not capable of babysitting. Likewise, Petitioner's brother reported to Dr. Swanson that Petitioner was an

inept drug dealer, whereas at trial he testified that he knew nothing of Petitioner's drug dealing activities. This Court also notes that Petitioner's brother told Dr. Swanson that Petitioner was incapable of using a mop, sweeping, or vacuuming. [19-18] at 102-103. However, Petitioner himself asserts that while he was a Lee Arrendale State Prison, he "became a trusted janitorial worker," [43] at 63, and the affidavits that he submitted in the state habeas corpus proceeding discussed how well Petitioner waxed the floor and the fact that guards liked him because "he did so much work to keep the dorm clean," [16-24] at 4731.

The state habeas corpus court also noted that while Dr. Swanson refused to admit any errors in her report, there were several instances where she scored Petitioner with a zero without confirming that Petitioner had access or opportunity to display the requisite behavior. For example, she noted that he did not have a favorite television show, that he did not watch the news, and that he did not know how to answer the telephone, but there was no telephone or television in the house where Petitioner grew up. [20-40] at 37. Finally, the state court concluded that the testimony of Petitioner's other experts was not relevant because their evaluations were not focused on Petitioner's adaptive functioning. *Id.* at 38-39.

2. Petitioner's Argument that the State Court Is Not Entitled to Deference

Petitioner challenges essentially all of the state court's findings and conclusions. According to Petitioner, the state court erroneously relied on Dr. King's testimony and entirely discounted the testimony of his experts. Pe-

titioner argues that Dr. King does not have the credentials and background to qualify him to assess Petitioner's adaptive functioning, particularly in comparison to Dr. Swanson's extensive background in working with the intellectually disabled. Pointing to the ABAS assessment directions and the testimony of one of the assessment's authors, Petitioner further claims that Dr. Swanson's methodology was proper while Dr. King's was flawed because (1) the ABAS is not appropriate in a prison setting because the structured environment skews the results of the assessment; (2) interviewing Petitioner is inappropriate given his level of intellectual functioning and the likelihood that he would tend to inflate his capabilities; (3) Dr. King's ABAS assessment of only Petitioner to the exclusion of other respondents did not produce valid results; and (4) Dr. King's assessment was improperly based on his subjective opinion of the capabilities of someone who is mentally retarded, such as his opinion that getting a driver's license and supporting a family are not things that retarded people would normally do. Petitioner also disputes Dr. King's opinion that Petitioner's school records support his conclusion and counters that the school records in fact support his claim of intellectual disability.

Regarding the prison writings that Dr. King opined were not indicative of someone with intellectual disability, Petitioner contends that those writings could not be relied on as a valid indication of Petitioner's adaptive functioning because there was no assurance that Petitioner did not receive help in drafting those writings. Petitioner also disputes Dr. King's contention that Petitioner's work history reflects adaptive skills, pointing out that Petitioner only held menial jobs.

Finally, Petitioner has submitted two supplemental briefs [57, 61], claiming that two recent Supreme Court opinions, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), bolster his claims that the state court erred in determining that he is not intellectually disabled.

3. The State Court's Opinion is Entitled to Deference under Section 2254(d)

While Petitioner has pointed out potential flaws in the state court's findings, this Court cannot determine that reasonable jurists would all agree that the state court's findings were unreasonable in light of the evidence presented in the state habeas corpus proceeding. Petitioner may argue about Dr. King's qualifications, but the fact is that he is a board certified clinical and forensic psychologist who has conducted thousands of tests of intellectual functioning and who has been qualified as an expert witness assessing intellectual disability more than a few times. It was thus not unreasonable for the state habeas corpus court to credit his testimony regarding Petitioner's adaptive functioning as well as the proper methodology for conducting such assessments over that of Respondent's witnesses. It was further not unreasonable for the state court to question the reliability of Dr. Swanson's assessments using family members with obvious biases. Petitioner's aged, ailing mother was not necessarily a reliable witness regarding thirty-seven-year-old events, and, as the state court noted, there were clear discrepancies between what Petitioner's brother and sister told Dr. Swanson and their trial testimony. With respect to the competing methodologies that Dr. King and Dr. Swanson

employed in conducting their assessments, there is certainly sufficient evidence in the record to support the state court's finding that Dr. King's methods were proper. Dr. King's explanation that Petitioner was the best person to serve as the respondent in the ABAS assessment and that other family members did not meet the criteria of the assessment was more than adequate to support the court's finding to that effect. As the state court noted, the ABAS manual itself states that the assessment can be used in a prison setting, and regarding the issue of whether Petitioner's school records, his prison writings, and his work history are indicative of Petitioner's intellectual disability, those are subjective judgments, and the § 2254 standard of review prevents this Court from favoring its own judgment of such matters over the state court's.

Put simply, this Court "must accept the state court's credibility determination." *Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998). "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 Corr.*, 664 F.3d 842, 845 (11th Cir. 2011); *see also Gore v. Sec'y for Dep't Corr.*, 492 F.3d 1273, 1300 (11th Cir. 2007) (deference to credibility determinations is heightened on habeas review). The state court heard these witnesses testify, and this Court has "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983); *see also Smith v. Kemp*, 715 F.2d 1459, 1465 (11th Cir. 1983) ("Resolution of conflicts in evidence and credibility issues rests within the province of the state habeas court, provided petitioner has been afforded the opportunity to a full and fair hearing.").

4. The Recent Supreme Court Cases

Finally, this Court concludes that the two Supreme Court cases that are the subject of Petitioner's two supplemental briefs do not provide Petitioner with a basis for relief. This Court first agrees with Respondent that *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), is inapposite. In *Brumfield*, the Court concluded that a state court erred in (1) concluding that the petitioner was not intellectually disabled based solely on his IQ of 75 without making any inquiry into his adaptive functioning, and (2) in failing to provide Petitioner a hearing despite the fact that Petitioner had raised a reasonable doubt as to his intellectual disability. Here, Petitioner had a fair and adequate hearing, and the main point of contention among the parties was whether Petitioner's adaptive functioning was sufficiently impaired. The Court in *Blumfield* did not alter the standard of review under *Atkins*, which the state habeas corpus properly applied to Petitioner's claim.

In *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Supreme Court identified numerous problems with the manner in which the Texas Court of Criminal Appeals (CCA) reversed the state habeas corpus trial court's conclusion that Bobby James Moore was intellectually disabled. The Court first faulted the CCA's reliance on guidelines for determining intellectual disability adopted by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (2004), rather than those currently used by the medical community. The *Briseno* guidelines were modeled on the since-superceded 1992 edition of the American Association on Mental Retardation manual and included a list factors which had no apparent clinical or scientific basis. *Moore*, 137 S. Ct. at 1046. The Court further held that the CCA erred in its

determination that Moore had failed to prove significantly subaverage intellectual functioning. The CCA determined Moore's IQ to be 74 but violated the holding in *Hall v. Florida*, 134 S. Ct. 1986 (2014), by discounting the lower end of the standard-error range associated with that score. *Moore*, 137 S. Ct. at 1047, 1049. The Supreme Court also held that the CCA erred in its determination that Moore had failed to demonstrate deficits in adaptive functioning. The CCA further erroneously credited the testimony of the state's expert, who acknowledged that Moore's adaptive functioning assessment indicated sufficient deficits but discounted that result because Moore had no exposure to certain tasks included in the assessment such as writing checks and using a microwave oven. *Id.* Finally, the Supreme Court faulted the CCA for "improperly requiring Moore to show that his adaptive deficits were not related to 'a personality disorder'" and for the fact that the CCA overemphasized Moore's adaptive strengths: "living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison." *Id.* at 1047, 1050, 1051.

Respondent raises two procedural arguments that *Moore* is not applicable to the analysis of Petitioner's claims. First, Respondent claims that *Moore* was not "clearly established" under § 2254(d) when the Georgia Supreme Court rendered its decision denying Petitioner's certificate of probable cause. Second, Respondent contends that *Moore* is not retroactively applicable under *Teague v. Lane*, 489 U.S. 288 (1989). This Court could locate only two cases that discussed the first issue, *Cain v. Chappell*, 870 F.3d 1003, 1024 n.9 (9th Cir. 2017), and

Smith v. Dunn, 2:13-CV-0557-RDP, 2017 WL 3116937 (N.D. Ala. July 21, 2017), and only *Smith* discussed the second issue. Both cases indicate that Respondent is correct on both issues.

More importantly, this case is materially distinguishable from *Moore*. At the outset, Georgia's standard for evaluating intellectual disability, O.C.G.A. § 17-7-131, tracks the current clinical definition. Moreover, while Dr. King did consider factors outside of the ABAS assessment in rendering his conclusion that Petitioner did not suffer from significant deficits in adaptive functioning, he testified that this evidence confirmed and complimented the results of his ABAS assessment of Petitioner, which did not show significant deficits. Unlike the state's expert in *Moore*, Dr. King did not discount the results of his assessment. The state habeas corpus court also did not require Petitioner to demonstrate that his adaptive deficits were not related to a personality disorder.

Most significant to this Court's analysis, however, are the layers of deference to the state court that apply in this case that did not apply in *Moore*. *Moore* was not a § 2254 proceeding, but a direct appeal of a state court judgment. As a result, the petitioner in *Moore* did not have to overcome the burden of § 2254(d) and the presumption of correctness of the state court's factual determinations under § 2254(e)(1). Additionally, the CCA in *Moore* did not preside over the evidentiary hearing and thus could not have made a credibility determination regarding which experts to believe in reversing the trial court, and the Supreme Court did not have to defer to those credibility determinations. In this case, as discussed above, the state habeas

corpus court, "having actually presided over the . . . evidentiary hearing, is in a better position than this court to judge and weigh the credibility of the witnesses who testified on the extent, duration, and causes of [Petitioner]'s adaptive functioning limitations." *Rivera v. Quarterman*, 505 F.3d 349, 363 (5th Cir. 2007).

Accordingly, this Court defers to the state court's conclusion that Petitioner has failed to establish beyond a reasonable doubt that he is intellectually disabled.

G. CLAIM VIII: The Prosecution Violated *Batson v. Kentucky*

Petitioner has withdrawn his Claim VIII.

H. CLAIM IX: The Trial Court Limited the Scope of Voir Dire and Failed to Properly Qualify Jurors

In Claim IX, Petitioner argues that the trial court failed to ask prospective jurors if they could give consideration to mitigating evidence and whether they would automatically vote for the death penalty if Petitioner was found guilty of murder in violation of the Supreme Court's holdings in *Morgan v. Illinois*, 504 U.S. 719 (1992), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Penry v. Johnson*, 532 U.S. 782 (2001). Petitioner raised this claim in his direct appeal. In affirming Petitioner's convictions and sentences, the Georgia Supreme Court discussed this claim as follows:

> [Petitioner] complains that the trial court failed to ask prospective jurors on voir dire whether they would consider mitigating circumstances or would

> automatically impose a death sentence if [Petitioner] was convicted of murder. Because [Petitioner] did not request the trial court to ask these questions, he cannot now complain. Moreover, [Petitioner] could have asked the questions himself and, in fact, did so in some instances. Therefore, any error was harmless.

Pye, 505 S.E.2d at 9 (citations omitted).

Petitioner states in conclusory fashion that the Georgia Supreme Court's resolution of this claim was contrary to and an unreasonable application of United States Supreme Court precedent, but he entirely fails to explain how or provide citation to a case which states that a claim under *Morgan*, *Witherspoon*, *Woodson*, or *Penry* cannot be waived. Moreover, in *Morgan*, the Supreme Court held that trial courts in death penalty cases must inquire into whether a potential juror would automatically impose the death penalty upon the defendant's conviction, but the requirement arises only upon the defendant's request. *Morgan*, 504 U.S. at 730.

Additionally, the Supreme Court established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), that a state procedural waiver of a constitutional claim bars federal habeas corpus review absent a showing of cause and prejudice, and Petitioner has made no argument to establish cause or prejudice. Accordingly, Petitioner is not entitled to relief on this claim.

I. CLAIM X: The Trial Court Improperly Excused Jurors & CLAIM XII: Trial Judge was Biased

Petitioner does not address his Claims X and XII in his final brief. In this Court's scheduling order of September 12, 2013 [21], Petitioner was directed to raise all arguments that he want this Court to consider in his final brief. Further, in the order of September 18, 2014 [40], this Court directed Petitioner to "submit a brief that addresses each of his claims for habeas corpus relief." In light of these instructions, this Court concludes that Petitioner's attempt to preserve all of his unbriefed claims by noting that he did "not intend to waive, and explicitly reasserts, any claim previously raised," [43] at 370, is inadequate to obtain review of those claims. Accordingly, Petitioner's Claims X and XII are deemed abandoned.

J. CLAIM XI: Juror Misconduct

Petitioner has withdrawn his Claim XI.

K. CLAIM XIII: Georgia's Unified Appeal Procedure Violated Petitioner's Rights

Petitioner has withdrawn his Claim XIII.

L. CLAIM XIV: Petitioner's Sentence Was Arbitrarily Imposed

In his Claim XIV, Petitioner asserts that Georgia's application of the death penalty violates *Bush v. Gore*, 531 U.S. 98 (2000), which, according to Petitioner, held that when a fundamental right is at stake, due process requires states to have uniform and specific standards to prevent the arbitrary and disparate treatment of similarly situ-

ated citizens. [43] at 364. According to Petitioner, the unfettered discretion of prosecutors in determining whether to pursue a death sentence results in arbitrary and unequal treatment. This claim is materially identical to the petitioner's claim in *Crowe v. Terry*, 426 F. Supp. 2d 1310, 1354 (N.D. Ga. 2005). In that case, Judge Evans provided an extensive discussion in denying relief on that claim, in which she pointed out that the system that the Supreme Court criticized in *Bush* involved a system for recounting ballots where the rules for determining voter intent "varied from county to county and 'within a single county from one recount team to another.'" *Id.* (quoting *Bush*, 531 U.S. at 106). Judge Evans then noted that in the case of prosecutorial discretion in determining whether to pursue the death penalty, "no similar risk of unequal treatment is involved." *Id.* at 1354-55.

> It is true that Georgia prosecutors have discretion to seek the death penalty; however, "[d]iscretion is essential to the criminal justice process [and thus] we would demand exceptionally clear proof before we would infer that the discretion has been abused." *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987):
>
>> [T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.' . . . Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchal-

> lenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States and Georgia laws permit imposition of the death penalty.
>
> *Id.* at 296-97.

Crowe, 426 F. Supp. 2d at 1355.

Here, the jury convicted Petitioner of murder and further found the existence of a statutory aggravating circumstance. Accordingly, the prosecutor's decision to seek the death penalty was consistent with Georgia law and was not arbitrary.

As also pointed out by Judge Evans, the Supreme Court in *Gregg* expressly upheld Georgia's death penalty system, rejecting a claim that the system was unconstitutional because of a prosecutor's "unfettered authority to select those persons whom he wishes to prosecute for a capital offense." *Gregg*, 428 U.S. at 199. In *Gregg*, the Court upheld Georgia's death penalty scheme because Georgia limits the risk of arbitrary and capricious action by bifurcating the sentencing proceeding, requiring a finding of at least one aggravating circumstance, allowing the defendant to introduce mitigating evidence, requiring an inquiry into the circumstances of the offense and the propensities of the offender, and providing for automatic, mandatory appeal. The Supreme Court further explained:

> [T]he existence of [ ] discretionary stages is not determinative of the issue . . . At each of these stages an actor in the criminal justice system makes a de-

> cision which may remove a defendant from consideration as a candidate for the death penalty .... Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution .... In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant .... Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today.

Id. at 199-200 n. 50; *see also Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (rejecting a petitioner's contention that the Florida death penalty system is arbitrary because the prosecutor decides whether to charge a capital offense and accept or reject a plea to a lesser offense).

Petitioner further points to other cases in which criminal defendants more culpable than he did not receive the death penalty. In response, this Court notes that the Georgia Supreme Court held that

> The death sentence in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Also, the death sentence is not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case, as all involve a deliberate killing during the commission of kidnapping with bodily injury, rape, armed robbery, or burglary.

Pye, 505 S.E.2d at 14 (citing O.C.G.A. § 17-10-35(c)). This Court must defer to this factual determination because Petitioner has not put forth clear and convincing evidence to demonstrate that the state court was incorrect. 28 U.S.C. § 2254(e)(1); *see Crowe*, 426 F. Supp. 2d at 1355.

In response to Petitioner's contention that the Georgia Supreme Court has abdicated its statutory responsibility to conduct a proportionality review, this Court notes that in *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court struck down Georgia's system of imposing the death penalty in part because of the random nature in which the death penalty was imposed.

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant.
>
> Left unguided, juries imposed the death sentence in a way that could only be called freakish.

Gregg v. Georgia, 428 U.S. 153, 206 (1976).

The main focus of *Furman* was the fact that the decisionmakers—juries or judges—in various state statutory death penalty schemes were not given adequate guidelines under which to impose death. *See Gregg*, 428 U.S. at 195 ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

The Georgia legislature then passed a new death penalty statute that the Supreme Court evaluated and approved in *Gregg*. Part of Georgia's death penalty scheme is a proportionality review, O.C.G.A. § 17-10-35(c)(3), pursuant to which the Georgia Supreme Court is required to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." In approving Georgia's death penalty scheme, the Supreme Court cited favorably to the proportionality review requirement as a "provision to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," *Gregg*, 428 U.S. at 204, and noted that "[i]t is apparent that the Supreme Court of Georgia has taken its [proportionality] review responsibilities seriously," *Id.* at 205. The Court also noted that

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id. at 206.

This Court stresses, however, that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's dis-

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

For these reasons, this Court concludes that Petitioner is not entitled to relief based on his Claim XIV.

N. CLAIM XVI: Cumulative Error

Finally, in his Claim XVI, Petitioner raises a claim of cumulative error, asserting that when all of the constitutional errors from his trial are viewed cumulatively, they cannot be deemed harmless, as they deprived Petitioner of a fundamentally fair trial.

> "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) (internal quotation marks omitted). We ad-

> dress claims of cumulative error by first considering the validity of each claim individually, and then examining any errors that we find in the aggregate and in light of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial. *See United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997).

Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1132 (11th Cir. 2012).

However, in order for this Court to perform a cumulative-error analysis, there first must be errors to analyze. The only possible errors that this Court has identified in its analysis of Petitioner's claims are the two items of withheld evidence[7] discussed in relation to Petitioner's *Brady* claim. However, as required by *Kyles*, 514 U.S. at 436, this Court has already performed a cumulative-error analysis regarding that evidence and determined that there was no reasonable probability that the evidence would have changed the outcome of the trial under *Brady*. Accordingly, Petitioner is not entitled to relief for this claim.

IV. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to relief. Accordingly, the petition for a writ of habeas corpus is **DENIED** and the instant action is **DISMISSED**.

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[7] Those items of evidence are the 1993 summary prepared by Dr. Gibson regarding what Anthony Freeman told him and the notation in Paula Lawrence's criminal file that put her case on hold until after Petitioner's trial was completed. *See supra* discussion in § III.A.3.

Pursuant to 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." Having reviewed the record, this Court finds that Petitioner is entitled to a certificate of appealability with respect to his Claim IV asserting ineffective assistance of counsel and his Claim VII asserting that he is intellectually disabled.

IT IS THEREFORE ORDERED that a **CERTIFICATE OF APPEALABILITY** shall issue as to Petitioner's Claims IV and VII.

IT IS SO ORDERED this [**19th**] day of January, 2018.

[***/s/ Timothy C. Batten, Sr.***]
TIMOTHY C. BATTEN, SR.
UNITED STATES DISTRICT
JUDGE

APPENDIX F

SUPREME COURT OF GEORGIA
Case No. S12E1536

Atlanta, April 15, 2013

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

WILLIE JAMES PYE v. STEPHEN UPTON, WARDEN

From the Superior Court of Butts County.

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

Trial Court Case No. 2000-V-85

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

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

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

[***/s/ Pamela M. Fishburne***], Deputy Clerk

APPENDIX G

IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

WILLIE JAMES PYE,	*	
	*	**CIVIL ACTION NO.**
Petitioner,	*	**2000-V-85**
	*	
v.	*	**HABEAS CORPUS**
	*	
STEPHEN UPTON,	*	
Warden, Georgia	*	
Diagnostic and	*	
Classification Prison,	*	
	*	
Respondent.	*	

FINAL ORDER

Following a three day evidentiary hearing and after the review of all the evidence and arguments presented by both parties, the Court hereby DENIES Petitioner's petition for writ of habeas corpus.

The court gave serious consideration to all of the proposed findings of fact and conclusions of law submitted by the parties in their draft orders while at the same time independently researching the cases for the most current statements of the precise state of the law on the numerous legal arguments raised. The court declines to allow either party's proposed order to substitute for the court's own research on the law and facts of the case and deliberation on the issues presented by the habeas petition. As such, the Court hereby finds as follows:

STATEMENT OF THE CASE

Petitioner, Willie James Pye, was indicted by the Spalding County grand jury on February 7, 1994, for malice murder, felony murder, kidnapping with bodily injury, armed robbery, burglary, rape and aggravated sodomy. (R. 5-7). Following a jury trial, on June 4, 1996, Petitioner was convicted of malice murder, kidnapping with bodily injury, armed robbery, burglary and rape. (R. 595). Petitioner was sentenced to death for malice murder on June 7, 1996. (R. 596). In addition to the death sentence, the trial court sentenced Petitioner to consecutive life sentences for kidnapping with bodily injury, armed robbery and rape, as well as, an additional 20 years for the burglary conviction.

The Georgia Supreme Court affirmed Petitioner's convictions and sentence of death on September 21, 1998. Pye v. State, 269 Ga. 779 (1998). Thereafter, Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on February 5, 1999. Pye v. Georgia, 526 U.S. 1118 (1999). Petitioner filed the above-styled habeas corpus petition on February 4, 2000.

CLAIMS THAT ARE *RES JUDICATA*

This Court finds that the following claims are not reviewable based on the doctrine of *res judicata* as the claims were raised and litigated adversely to Petitioner on his direct appeal to the Georgia Supreme Court. Gunter v. Hickman, 256 Ga. 315 (1986); Roulain v. Martin, 266 Ga. 353 (1996).

That **portion of Claim VI**, wherein Petitioner alleges that the State procured improper character

and reputation evidence, was addressed and decided adversely to Petitioner on direct appeal. Pye v. State, 269 Ga. at 785, 788 (9) and (17). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

That **portion of Claim VI**, wherein Petitioner alleges that the prosecutor made misleading, improper, and unconstitutional closing arguments, including regarding Petitioner's potential future dangerousness at both guilt/innocence and sentencing phases of Petitioner's trial, was addressed and decided adversely to Petitioner on direct appeal. Pye v. State, 269 Ga. at 787-789(15) and (19). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default;

That **portion of Claim IX**, wherein Petitioner alleges that his death sentence was imposed arbitrarily and capriciously, and pursuant to a pattern and practice of discrimination in the administration and imposition of the death penalty in Georgia, was addressed and decided adversely to Petitioner on direct appeal. Pye v. State, 269 Ga. at 789 (21);

and

Claim XVIII, wherein Petitioner alleges that the trial court's improper rulings and other errors denied him a fair trial and reliable sentencing, was addressed and decided adversely to Petitioner on direct appeal. Pye v. State, 269 Ga. at 781-784, 786-787, 789 (2)(3)(6)(7)(12)(16) and (20). To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and may not be addressed on its merits in this proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice to overcome the procedural default.

CLAIMS THAT ARE PROCEDURALLY DEFAULTED

This Court finds that Petitioner failed to raise the following claims on direct appeal and has 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).

Claim I, wherein Petitioner alleges juror misconduct that included, but was not limited to, 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) having personal knowledge of and personal relationships with;[1]

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

8) improperly communicating with third parties;

9) improperly communicating with jury bailiffs;

10) improperly communicating ex parte with the trial judge;

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

12) improperly preparing a statement or speech during deliberations;

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

14) improperly involving alternates during the deliberations;

---

[1] To the extent Petitioner alleges that an alternate juror committed misconduct in that he had commented that he was the victim's cousin, this claim was addressed and decided adversely to Petitioner on direct appeal. Pye v. State, 269 Ga. at 781-782(3).

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

16) compromising on the verdict;

That **portion of Claim VI**, wherein Petitioner alleges prosecutorial misconduct. Specifically, Petitioner alleges the following:

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 trial;

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

4) the State suppressed information favorable to the defense at both phases of trial;

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

6) the State presented false testimony by the State's witnesses and corresponding evidence that 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;

7) the State presented false testimony regarding crime scene evidence and its significance in relation to the victim's manner of death;

8) the State made averments regarding Co-defendant Anthony Freeman's mental competence; and

9) the State misrepresented evidence.

This Court finds that Petitioner's specific allegations that the District Attorney made improper and misleading arguments at trial including: arguing evidence he knew was false; presenting arguments not supported by the record; and vouching for the strength of the State's evidence are not properly before the Court as they have either been previously litigated or are procedurally defaulted, and Petitioner has failed to show cause and prejudice or a miscarriage of justice to excuse the default.

Petitioner's claim that the District Attorney vouched for evidence he knew was false, namely the trial testimony of State Witness Anthony Freeman, is procedurally defaulted as Petitioner failed to present the claim either at trial or on appeal. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985). Further, Petitioner has failed to demonstrate, or even allege, cause or prejudice necessary to overcome the default. As Petitioner's claim of misconduct is solely based upon the previously addressed veracity of Mr. Freeman's trial testimony, it is clear Petitioner failed to establish prejudice to overcome the default as he failed to establish Mr. Freeman's trial testimony was false. Thus, this Court finds that the claim is procedurally defaulted.

In a similar vein, Petitioner has failed to demonstrate prejudice necessary to cure the default as to Petitioner's claim regarding prosecutorial assertions that Co-defendant Anthony Freeman was limited in his mental ability. Mr. Freeman testified as to his capacity at trial under oath confirming the substance of the statement, and Petitioner himself provided evidence corroborating the same. Thus, this Court finds that Petitioner has failed to show that the State's statements were false and the claim is procedurally defaulted.

> **Claim VII**, wherein Petitioner alleges that the trial court erred in excusing for cause jurors whose views on the death penalty were not extreme enough to warrant exclusion;
>
> **Claim VIII**, wherein Petitioner alleges that the trial court erred in failing to dismiss for cause or bias several unspecified venire members who showed a clear bias against Petitioner;
>
> **Claim X**, wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional;
>
> **Claim XI**, wherein Petitioner alleges that improper and prejudicial racial considerations by the decision makers permeated the proceedings in this case and made it impossible for Petitioner to receive a fair trial and reliable sentencing;
>
> **Claim XI**,[2] wherein Petitioner alleges that the trial court erred in denying his motion to proceed

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[2] Petitioner has submitted two separate claims identified as Claim XI.

ex parte and on a sealed record on applications of expert and investigative assistance;

Claim XII, wherein Petitioner alleges that the jury pools from which his grand and traverse juries were chosen were composed in violation of his constitutional rights. Specifically, Petitioner alleges the following:

1) that the Spalding County jury commission that selected the grand jury in Petitioner's case was unconstitutionally composed in that the commission systematically excluded cognizable groups present in the community from jury service;

2) that O.C.G.A. § 15-12-40 is unconstitutional in that it requires that the commission first pick for service persons from the official registered voters' lists that eliminated from consideration a significant portion of the population;

3) that there was racial discrimination in the selection of grand jury forepersons;

4) that there was an inclusion of personally biased grand jurors;

5) that there was an inclusion of grand jurors prejudiced by pervasive and prejudicial pretrial publicity;

6) that the prosecution failed to present to the grand jury exculpatory and impeaching evidence in its possession;

7) that the traverse jury list under-represented relevant and cognizable groups in the community; and

8) that the jury commission that compiled the traverse jury list was unlawfully and unconstitutionally comprised;

Claim XIII, wherein Petitioner alleges that the grand jury and grand jury foreman were discriminatorily selected, and the pools from which Petitioner's grand jury were drawn underrepresented cognizable groups;

Claim XIV, wherein Petitioner alleges that the grand jury that returned the indictment against him engaged in misconduct, considered extrinsic evidence and was subject to undue and prejudicial influence;

Claim XV, wherein Petitioner alleges that the trial court's restrictive actions during voir dire, as well as its unequal treatment of the defense versus the prosecution during voir dire, deprived Petitioner of his rights to a fair and impartial jury and the effective assistance of counsel;

Claim XVI, wherein Petitioner alleges that the trial court erred by not removing unspecified jurors for cause or bias, either because they were clearly biased or incapable of considering a sentence other that death and/or considering mitigating evidence;

Claim XVII, wherein Petitioner alleges that he was denied due process and the right to be present at all proceedings; and

Claim VIX, wherein Petitioner alleges that because of his mental condition Petitioner's execution would violate the Eighth and Fourteenth Amendments of the United States Constitution.

Accordingly, as Petitioner did not raise these issues at trial and/or appeal and did not make a showing of cause and actual prejudice or of a miscarriage of justice which would be sufficient to excuse his procedural default of these claims, the claims are procedurally defaulted and therefore are not reviewable by this Court.

Brady **and** ***Napue/Giglio*** **Claims (Anthony Freeman Statements) are Procedurally Defaulted**

This Court also finds that Petitioner's Brady claim, specifically that the State failed to disclose pre-trial statements made by Co-defendant Anthony Freeman, is procedurally defaulted. See Strickler v. Greene, 527 U.S. 263 (1999) (holding Brady claims can be procedurally defaulted).

To overcome the procedural default, Petitioner had to show adequate cause for failure to object or to pursue this issue on appeal and actual prejudice. Black, 255 Ga. at 240. Petitioner has alleged that two pre-trial statements of Co-defendant Anthony Freeman were not disclosed to trial counsel as they do not appear in trial counsel's files and were not included in any notice of discovery filed by the State prior to trial. Trial counsel was deceased at the time of the evidentiary hearing, thus firsthand information as to whether trial counsel saw these statements during his reviews of the State's file is unavailable. Moreover, this Court finds that trial counsel had ample notice of additional statements made by Mr. Freeman as evi-

denced through the testimony of State Witness, Investigator Charles Ted Godard. (TT. 1192-1195). Thus, this Court finds that Petitioner has failed to show that the factual basis for the claim was not reasonably available to counsel prior to the motion for new trial. Therefore, Petitioner failed to establish cause to excuse the procedural default.

Moreover, while finding that Petitioner failed to prove cause, this Court also analyzed Petitioner's Brady claim for possible prejudice to overcome the default and determined that Petitioner failed to prove prejudice, the second prong of the cause and prejudice test to overcome his procedural default of the claim.

The analysis of whether there is sufficient prejudice to overcome procedural default parallels the issue of Brady "materiality" such that if information is not material for Brady purposes, no prejudice to excuse the procedural default of the Brady claim has been established. Strickler, 527 U.S. 263, 282 (1999). This Court finds that Petitioner failed to establish any "materiality" and thus resulting prejudice, as discussed under Brady v. Maryland, 373 U.S. 83 (1963), and this claim remains procedurally defaulted.

Petitioner has the burden of showing that the evidence withheld "so impaired his defense that he was denied a fair trial within the meaning of the Brady rule." Dennis v. State, 263 Ga. 257(5) (1993). "Evidence is material only if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." U.S. v. Bagley, 473 U.S. 667, 682 (1985). The mere

fact that some undisclosed information might have helped the defense does not establish its materiality in a constitutional sense. Castell v. State, 250 Ga. 776 (1983); Kyles v. Whitley, 514 U.S. 419, 421 (1995).

Petitioner alleges the combined impact of two undisclosed statements of one of Petitioner's co-defendants is exculpatory and impeaching, and undermines confidence in the verdict. This Court finds that Co-defendant Freeman was not the only witness to directly implicate Petitioner and that Freeman's statements were consistent, the two statements were not exculpatory and Petitioner has failed to prove materiality.

In September 7, 1995, approximately two full years after the murder of Alicia Lynn Yarbrough, Co-defendant Freeman was interviewed by Investigator Godard. It is this statement that Petitioner claims to not have had knowledge of prior to or during his trial. Petitioner alleges that this statement differs in material respects from Freeman's testimony at trial. However, pretermitting the fact that he was put on notice during the trial that other statements of Co-defendant Freeman existed, the 1995 statement is not exculpatory for Petitioner and is clearly not material.

Specifically, in his 1995 statement, Co-defendant Freeman told Investigator Godard: Petitioner "smashed" in the front door of Alicia Lynn Yarbrough's residence and came out with the victim; the victim was taken to a room at the Griffin Motel where she was ordered by Petitioner to "strip" and have sex with Freeman, Adams and Petitioner; Petitioner beat the victim in the head as he had sex with her; acting on the instructions of Petitioner, the three men and the victim left the motel driving around

trying to lure Charles Puckett in order to kill him; returning to the Griffin Motel, Petitioner again forced the victim to have sex with Freeman, Adams and himself; leaving the Motel the second time, Petitioner told Co-defendant Adams to pull the car over, told the victim to get out, and then told her to lie down; Petitioner then shot the victim at least twice. (HT. Vol. 42, 10658).

This Court finds that after reviewing all of the statements made by Co-defendant Freeman prior to, during and after Petitioner's trial, that the September 1995 statement was neither exculpatory nor are there any material inconsistencies in the 1995 statement and Freeman's November 1993 statements and trial testimony. Compare HT. Vol. 42, 10657, TT 944-968, HT. Vol. 42, 10658.

Petitioner also alleges that he did not have Co-defendant Freeman's December 3, 1993 hearsay statement to Dr. Donald Gibson, which was made during a mental health evaluation of Freeman as part of his own criminal charges stemming from the murder of Ms. Yarborough. Without addressing the discoverability or admissibility of these hearsay statements, this Court finds that.there is no reasonable probability that the outcome of the trial would have been different if the statement had been made available to Petitioner's trial counsel.

As acknowledged by Petitioner, the hearsay statement was made pursuant to a mental health evaluation requested by Anthony Freeman's counsel, Harold A. Sturdivant, approximately two weeks following Co-defendant Freeman's initial statements to authorities. (HT. Vol. 30, 7289). At the time of his evaluation by Dr. Gibson, Freeman had been charged with felony murder, malice murder, kidnapping with bodily injury, aggravated sodomy

and armed robbery. (HT. Vol. 30, 7290). The statement to Dr. Gibson was not made under oath or with any independent statement of veracity by Mr. Freeman, unlike his testimony at trial and video-taped statements to authorities. Moreover, the statements are self-serving statements consistent with Mr. Freeman's contention at the time of the evaluation that he was innocent of all charges. (HT. Vol. 30, 7290).

Furthermore, despite the minor discrepancies from previous statements and his new decrying of all criminal liability, to Dr. Gibson that Petitioner, and Petitioner alone, directed all activity surrounding the murder of Alicia Yarbrough and ultimately shot her multiple times. (HT. Vol. 30, 7289-7293). Thus, this Court finds that after reviewing the totality of the circumstances, the statement is clearly unreliable and entitled too little, if any consideration, thus Petitioner has not established materiality or that this self-serving, hearsay statement to Dr. Gibson would have undermined the verdict in the case.

This Court also takes into consideration that Co-defendant Freeman was not the only witness directly implicating Petitioner in the murder of Ms. Yarbrough as Co-defendant Chester Adams also gave a video-taped statement to authorities approximately 24 hours after the crime directly implicating Petitioner. In his interview of November 16, 1993, Co-defendant Adams told investigators: wearing ski masks, he, Anthony Freeman and Petitioner went to the residence of Alicia Yarbrough and Charles Puckett; Petitioner, carrying a gun, kicked in the front door to gain entry; Petitioner forced the victim out of the house with the gun in her back and into the car and took her to a motel; after a period of time at the motel,

Petitioner, Adams, Freeman, and the victim left together, Petitioner telling Adams to turn off on a dirt road and stop; Petitioner and the victim exited the vehicle, Petitioner shot the victim, telling Adams and Freeman he had "wasted" her; shortly after killing Ms. Yarbrough, Petitioner made a motion with his wrist appearing to throw the gun out the window of the moving car and later Petitioner threw the three ski masks out while crossing Interstate 75. (HT. Vol. 42 10659).

Despite the contentions of Petitioner regarding alleged exculpatory discrepancies, this Court finds that the "material" aspects of the crimes recounted by Co-defendant Freeman in his statements to authorities are consistent. Petitioner broke into the residence of Alicia Lynn Yarbrough and forcibly removed her at gunpoint. Taking her to the Griffin Motel, Petitioner and the co-defendants forced her to have sex on two different occasions. Petitioner then instructed Co-defendant Adams to drive into a secluded area where Petitioner shot and killed the victim. Given the overwhelming consistency of the key aspects of the multiple statements of Anthony Freeman and statement of Chester Adams, Petitioner has failed to show the requisite Brady materiality with regard to the statements he alleges he did not obtain prior to or during trial. Accordingly, this Court finds that Petitioner has failed to establish the prejudice necessary to overcome the procedural default of the claim.

This Court also finds that Petitioner's claims that the two pre-trial statements of Anthony Freeman that he alleges he did not receive are "solid evidence" that Freeman's trial testimony was false in violation of Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois,

360 U.S. 264 (1959), are procedurally defaulted and Petitioner failed to demonstrate cause or prejudice to excuse the default.

As with Petitioner's Brady claims, Petitioner's Giglio/Napue claims were not raised on appeal and may not be litigated in this habeas proceeding absent a showing of cause and prejudice or a miscarriage of justice. Black v. Hardin, 255 Ga. 239 (1985); Valenzuela v. Newsome, 253 Ga. 793 (1985). This Court finds that Petitioner has failed to present either to excuse the default. As set forth above, Petitioner has failed to show cause as he was made aware, at least by the time of trial, that Co-defendant Freeman had made additional statements to law enforcement.

As to prejudice, Petitioner failed to show that the testimony presented was false, that the prosecutor knew the evidence was false and "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 153-154 (1972), citing Napue v. Illinois, 360 U.S. 264, 271 (1959). Thus, this Court finds that Petitioner failed to demonstrate prejudice as Petitioner failed to establish the elements of the underlying Giglio/Napue claim as Petitioner failed to demonstrate that Mr. Freeman's testimony was false or that the State knowingly presented false testimony.

As set forth above, Co-defendant Freeman made two statements to authorities with independent assertions of veracity captured on video-tape which were both consistent with his trial testimony under oath regarding the essential facts of the kidnapping, repeated rape and murder of Alicia Lynn Yarbrough. This Court finds that mi-

nor discrepancies between the two statements to authorities and the trial testimony do not render Freeman's testimony inaccurate. Moreover, given the consistent and repeated nature of the statements previously detailed, this Court finds that Petitioner failed to establish Co-defendant Freeman's trial testimony false.

Even the self-serving, hearsay statement encompassed in Dr. Gibson's competency evaluation, previously cited to by Petitioner in his Brady claim, readily supports Anthony Freeman's assertions at trial and two videotaped statements that Petitioner and Petitioner alone fired the multiple shots that killed Ms. Yarbrough. (HT. Vol. 30, 7292).

Petitioner's support for his contention that Mr. Freeman's testimony was false stems from the undated, incomplete, and improperly executed affidavit of Mr. Freeman, himself. This Court seriously calls into question the credibility of this affidavit. Moreover, in the affidavit Mr. Freeman never states that his trial testimony was false or refutes that Petitioner burglarized the home of the victim, kidnapped her, raped her repeatedly and ultimately shot and killed her. Further, the affidavit fails to show, as Petitioner contends, that the plan on the day of the crime did not involve harming Ms. Yarbrough. The affidavit testimony fails to speak to the intentions of Petitioner in taking the victim to Jackson, which were well detailed in Mr. Freeman's testimony at trial. (TT. Vol. V 966).

This same statement of Petitioner's intentions regarding returning to Jackson had been made previously to authorities by Mr. Freeman in his September 7, 1995 statement, a statement which Petitioner now claims is exculpatory.

Anthony Freeman: [Petitioner said] **"I'm taking you to my mama's house so you won't say I raped you."**

(HT. Vol. 36, 8993; HT. Vol. 42, 10658).

Likewise, this Court finds that Petitioner's claim that as he, Adams, Freeman, and Yarbrough drove around and encountered Charles Puckett also driving around, the victim hid herself from view of her own accord is somehow exculpatory and implies prior false testimony is directly refuted by Mr. Freeman's September 7, 1995 videotaped explanation of the same event. (HT. Vol. 36, 8982-8983).

Further, consistent with all prior statements within the record, the affidavit testimony of Mr. Freeman presented still asserts that Petitioner shot and murdered the victim. (HT. Vol. 19, 4679). This Court finds that the only inconsistency between Mr. Freeman's affidavit and his previous statements and testimony is that Co-defendant Adams also shot the victim. Given the totality of the record, this Court finds that Petitioner has failed to establish that Anthony Freeman's trial testimony regarding the facts of the crime were false, thus Petitioner has failed to establish the requisite Strickland prejudice necessary to overcome the procedural default of his Giglio/Napue claim.

Moreover, this Court finds that by way of Petitioner's failure to demonstrate the falsity of Freeman's consistent statements prior to and at trial, Petitioner has also failed to establish that the State knowingly presented false testimony. Petitioner argues that he was far less culpable in Ms. Yarbrough's death than portrayed at trial; however,

as described above, this Court finds that there is no evidence to support this allegation, and therefore nothing to indicate that the State violated its duty in any way.

In a similar vein, Petitioner's attempts to discredit and impute false testimony from the District Attorney's description in his opening statement of Anthony Freeman as "somewhat limited mentally". However, this Court finds that the very evidence pointed to by Petitioner as negating the District Attorney's assertions of Mr. Freeman as mentally limited, provides evidence for Mr. McBroom's assertion. (TT. 930-931). Moreover, in his determination of mental status for competency to stand trial, Dr. Gibson reported Mr. Freeman as having below average intelligence, evidencing poor judgment and insight, slowed speech and a borderline IQ in the low normal range. (HT. Vol. 30 7292). Thus, Petitioner's assertions to the contrary are unfounded.

This Court finds that Petitioner did not establish that testimony presented at trial was false or that the State knowingly presented testimony it knew was false. This Court finds that a failed Napue/Giglio claim on the merits cannot support a finding of prejudice, thus Petitioner's claim is procedurally defaulted.

Brady Claim (Paula Lawrence) is Procedurally Defaulted

This Court finds that Petitioner's allegation that an undisclosed benefit was conferred upon State's witness Paula Lawrence as charges of insurance fraud from September of 1994 were not resolved until after her testimony in Petitioner's trial is procedurally defaulted. Petitioner failed to show that any deal was actually afforded to Ms. Lawrence in exchange for her testimony, thus Petitioner

failed to meet the cause and prejudice test to overcome the procedural default of this claim.

Petitioner's claim stems from a note in Ms. Lawrence's file reading "Hold per WTM." Petitioner argues that jurors likely would have concluded that the District Attorney delayed resolution of the case so that Ms. Lawrence would not have a conviction for a crime of dishonesty at the time of Petitioner's trial, however this Court finds there is no evidence to support this contention.

The jury was made aware of the specifics of the pending charges against Paula Lawrence allowing them to draw their own conclusions about her credibility and her motivation testifying. (TT. 1102-1103). Accordingly, as the Petitioner was aware, at least by the time of trial of the pending charges against Ms. Lawrence, he cannot establish cause for not raising this claim at the motion for new trial or on direct appeal.

This Court also notes that Ms. Lawrence's testimony at trial was entirely consistent with her statement to authorities given on November 17, 1993, approximately 48 hours after the murder of Alicia Lynn Yarbrough and approximately ten months prior to Ms. Lawrence being charged with insurance fraud. (R. 868). This Court finds that Petitioner provided no evidence supporting an agreement or understanding between the prosecutor and Ms. Lawrence requiring disclosure beyond that notation of "5/14/96 Hold per WTM." The Eleventh Circuit has held that "where there is, in fact, no agreement, there is no duty to disclose." Alderman v. Zant, 22 F.3d 1541, 1555 (11th Cir. 1994). As Petitioner failed to present any evidence in support of this claim, this Court finds that Petitioner did not show any materiality and thus failed to show

prejudice necessary to overcome the procedural default of this Brady allegation.

Claim Of Mental Retardation Is Procedurally Defaulted

Petitioner alleges he is mentally retarded and is ineligible for the death penalty under the holding in Atkins v. Virginia, 536 U.S. 304 (2002).

This Court finds that Petitioner has procedurally defaulted his substantive claim of mental retardation as he failed to raise the claim at trial or on appeal. Head v. Hill, 277 Ga. 255, 256 (2003). Petitioner must demonstrate cause and prejudice or a miscarriage of justice to overcome that default. Id. This Court finds that Petitioner has failed to prove mental retardation beyond a reasonable doubt, and therefore, he did not prove cause and prejudice or a miscarriage of justice to overcome the default.

In making its determination, this Court is bound by well-established Georgia law which states that in order to establish his substantive claim of mental retardation, Petitioner has to prove he is mentally retarded beyond a reasonable doubt. Jenkins v. State, 269 Ga. 292(17) (1998) (citing Burgess v. State, 264 Ga. 777, 789(36) (1994)).

The standard in Georgia and in Atkins for determining mental retardation is as follows:

> Our statutory definition of "mentally retarded" is consistent with that supplied by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Third Edition 1980) (hereinafter DSM III). The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or

> associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period. O.C.G.A.. § 17-7-131 (a) (3).
>
> "Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. DSM III, supra at 36. However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. **Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."** DSM III, supra at 37.

Stripling v. State, 261 Ga. 1, 4 (1991). (Emphasis added). Based on this standard and the record before this Court, this Court finds that Petitioner is not mentally retarded.

IQ alone is not determinative of Mental Retardation

It is undisputed among the mental health professionals who have evaluated Petitioner that Petitioner's intellectual functions are in the low to borderline range.[3] (HT. Vol. 1, 104; HT. Vol. 3, 377; HT. Vol. 40, 10131). However, as held by the Georgia Supreme Court, persons "with IQs

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[3] Dr. Jethro Toomer administered the Wechsler Adult Intelligence Scale-Third Edition (hereinafter "WAIS III") to Petitioner on April 12, 2001, finding a full scale IQ score of 70,. Dr. Glen King administered the WAIS III to Petitioner on March 21, 2007, Petitioner scoring a full scale IQ of 68.

somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning." Stripling v. State, 261 Ga. at 4. This Court finds that it can not make a determination of mental retardation solely on Petitioner's IQ score, thus this Court looked to determine whether the other two prerequisite for a diagnosis of mental retardation has been proven, which if Petitioner does not prove exist beyond a reasonable doubt, his claim fails.

Petitioner Failed to Establish Significant Limitations in Adaptive Functioning

As established in the record before this Court, Georgia law requires that, in order to establish mental retardation, a defendant must prove **beyond a reasonable doubt** that, before the age of 18, he had **significant** impairment in two of ten adaptive functioning categories listed in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter, "DSM-IV-TR"). (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, American Psychiatric Association, Fourth Edition, 2000). This Court determined that Petitioner failed to establish the requisite adaptive deficits or that these deficits occurred prior to age 18, thus he has failed to support his claim of alleged mental retardation and thus it is denied.

The record before this Court establishes that adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. (DSM-IV-TR, p. 42). Adaptive functioning can be influenced by various factors, such as, education, motivation, personality characteristics, social and

vocational opportunities, and the mental disorders and general medical conditions that may coexist with mental retardation. Id. Moreover, it is important that the adaptive behavior be examined in the context of the individual's own culture that may influence opportunities, motivation and performance of adaptive skills. (Mental Retardation, "Definition, Classification, and Systems of Supports", American Association for Mental Retardation, 10th Edition, 2002, p. 75).

The evidence shows that the most recent publications of the American Association for Mental Retardation (hereinafter, "AAMR") also require that for the diagnosis of mental retardation, "significant limitations in adaptive behavior should be established through the use of standardized measures [ ]." Id. at 76.

The adaptive functioning categories assessed for mental retardation evaluations are: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. (DSM IV-TR, p. 41). It is the interpretation of Petitioner's adaptive functioning where Petitioner and Respondent's mental health experts diverge in their expert opinions. Petitioner's experts found deficits in Petitioner's adaptive behavior. Dr. Glen King, a mental health expert retained by Respondent determined that Petitioner does not suffer significant deficits or impairments in adaptive behavior. Instead, Dr. King specifically found that Petitioner had "reasonably good adaptive skills." (HT. Vol. 40, 10132). This Court finds that Petitioner has failed to show significant impairment in at least two of the ten DSM-IV areas required, Petitioner has also failed in

establishing one of the three prerequisites necessary to find mental retardation.

Glen D. King, J.D., Ph.D., ABPP, a licensed psychologist has conducted thousands of tests of intellectual functioning over the course of his career, and at the time of his testimony in this Court was conducting approximately 20 evaluations per week (HT. Vol. 3, 359). Further, Dr. King is a certified forensic examiner having completed approximately 4,000 evaluations, an area which occupies approximately 40 percent of his current practice. (HT. Vol. 3, 362). Additionally, as in this case, Dr. King has evaluated approximately 50 post-conviction habeas petitioners in both Alabama and Georgia. (HT. Vol. 3, 363). Since Atkins v. Virginia, 536 U.S. 304, (2002), Dr. King has been retained several times to evaluate petitioners in death penalty habeas corpus proceedings for determination of mental retardation. (HT. Vol. 3, 365). On no less than five occasions, two of which occurred shortly prior to his testimony here, Dr. King found habeas petitioners mentally retarded, resulting in either acknowledgment by the State of Alabama or Dr. King's retention by the petitioner to testify on the petitioner's behalf. (HT. Vol. 3, 365). Dr. King has clearly demonstrated that he is able to give an unbiased opinion in these evaluations, and where his position is that the Petitioner is mentally retarded, he is unwavering in that assessment. (HT. Vol. 3, 366).

The DSM IV-TR and all of the mental health professionals involved in Petitioner's case agree that an assessment of Petitioner's adaptive functioning is not complete by relying solely on one report, whether that is the ABAS-II test, family accounts, or teacher accounts alone. Thus

this Court finds reliability in Dr. King's assessment of Petitioner's adaptive functioning as, in addition to the results of the ABAS-II, results which were corroborated by the independent sources, Dr. King reviewed several other sources, such as other history data, medical records, school records, police records, and other affidavit information in making his assessment as to Petitioner's adaptive functioning.

Dr. King's Adaptive Behavior Evaluation

Dr. King defines adaptive functioning as a collection of social, practical, and conceptual skills that a person acquires in order to engage in necessary, everyday activities without assistance from others. (HT. Vol. 3, 377). In the case here, Dr. King administered a standardized instrument to measure adaptive functioning, but also looked at multiple other pieces of data which relate to and corroborated his findings regarding Petitioner. (HT. Vol. 3, 377).

In the preparation of his report regarding the evaluation of Petitioner, Dr. King examined numerous data sources including: the Georgia Supreme Court opinion in this case; school records of Petitioner from the Butts County Schools, correspondence from Roderick W. Pettis, M.D. regarding Petitioner; a report of a neuropsychological examination by Neuropsychological Associates, and accompanying raw data; approximately 29 affidavits from family and other individuals familiar with Petitioner; and his own psychological interview of Petitioner with accompanying mental status examination and psychological testing. (HT. Vol. 40, 10126-10127). Subsequent to his report and prior to his testimony, Dr. King also reviewed: a report and raw data obtained by Dr. Victoria Swanson in her evaluation of Petitioner; records of Petitioner from

the Georgia Department of Corrections; school records of Petitioner's siblings Pamela Pye [Bland], Curtis Pye, Andrew Pye and Ricky Pye, and; the trial testimony of Petitioner and members of Petitioner's family. (HT. Vol. 3, 368; Vol. 45, 11723).

Psychological Interview: One of the many sources of data considered by Dr. King in his evaluation was his psychological interview of Petitioner. Dr. King testified that during the psychological interview, in which he obtained a self reported history of Petitioner, Petitioner answered and understood all his questions, responded appropriately, was forthright, and able to engage in a back and forth dialog. (HT. Vol. 3, 370). Dr. King further noted that even though the exchanges were primarily questions which involved direct answers, Petitioner even engaged in some spontaneous explanations. (HT. Vol. 3, 370). Within the psychological interview, an examination of Petitioner's physical history was also conducted, Dr. King noted it is important to know a person's physical health as there are a number of physical conditions that can affect responses on psychological tests and the ability to answer interview questions. (HT. Vol. 3, 371). Dr. King testified that Petitioner was able to understand all of his questions without difficulty. (HT. Vol. 3, 372).

Dr. King also questioned Petitioner regarding his genetic history, noting that a sibling of Petitioner was diagnosed as mentally retarded and another has a history of mental illness and is receiving SSI benefits. (HT. Vol. 3, 372; Vol. 40, 10129). Dr. King testified that this was significant in that despite evidence of mental illness and mental retardation in his family, revealing an obvious awareness of the symptoms of such illnesses, Petitioner was not

previously affixed with a label of either mental retardation or mental illness, nor did Petitioner receive any disability benefits. (HT. Vol. 3, 372-373).

Mental Status Exam: Subsequent to the psychological interview, Dr. King conducted a mental status exam of Petitioner which incorporated a series of observations and questions designed to get a cursory idea of Petitioner's cognitive and emotional functioning and memory skills. (HT. Vol. 3, 373). Dr. King testified that Petitioner's overall cognitive functioning was "normal in progress and form" meaning Petitioner: answered questions as they were asked; did not go off on tangents; did not state irrelevant things; and demonstrated no evidence for any psychosis or strange thinking patterns. (HT. Vol. 3, 373-374). Further, Dr. King stressed that Petitioner: did not show any overt signs of depression or anxiety or any other kind of emotional disturbances; was oriented as to the person, place, and time; and made consistent eye contact throughout the course of the evaluation. (HT. Vol. 3, 374).

Dr. King's Use of a Standardized Instrument - ABAS II: Dr. King testified that the assessment of adaptive behavior involves looking at multiple pieces of data including data obtained through the use of a standardized instrument. In order to assess Petitioner's adaptive behavior, Dr. King administered the Adaptive Behavior Assessment System Second Edition (hereinafter "ABAS-II"). (HT. Vol. 3, 377). Consistent with Dr. King's statement that an assessment of adaptive behavior involves examining multiple sources of data including use of a standardized instrument, the ABAS-II manual notes "the information obtained with the ABAS-II can be used by the clinician as part of a comprehensive assessment of adaptive

skills and enables him or her to evaluate the extent to which an individual displays the skills necessary to meet environmental demands." (HT. Vol. 6, 1094).

Dr. King noted that while the Vineland instrument, which was utilized by Dr. Victoria Swanson, Petitioner's habeas expert, may also be considered useful for establishing adaptive behavior for adults in a prison setting, the ABAS II is the only instrument that has norms for self-reporting, which allows for a comparison of the individual's report of what happened in their life relative to a normative sample, "so that your score means something." (HT. Vol. 3, 380). Further, the ABAS-II Manual makes specific reference to the appropriateness of the instrument's application in a prison setting:

> Similarly, the ABAS-II may be used in a variety of programs and settings for adults including public and private service provider agencies, medical and health facilities, residential facilities or group homes, community programs and agencies, vocational and occupational training programs, and prisons.

(HT. Vol. 6, 1094).

In his testimony, Dr. King stressed the great importance of the self-reporting norms present in the ABAS-II:

> Both the [ABAS-II and Vineland] require that if you have a respondent other than the person themself fill out the assessment device that they meet certain requirements, and the requirements are, for both of the instruments that they have regular, frequent contact with the individual now, meaning

> almost a daily basis, that the contact has to be lengthy, meaning a number of hours per day, that it has to be recent, meaning that it has be have occurred over the last one to two months. Nobody meets those requirements other than the respondent himself.

(HT. Vol. 3, 380).

Further, the test/retest reliability on self-reporting on the ABAS co-efficient is .99 for the general adaptive composite. Dr. King explained that you get the same result when you test them and retest them over and over again, making it more reliable than what you get from multiple respondents on the same instrument. (HT. Vol. 3, 403).

Dr. King testified that he introduced the instructions for the ABAS-II by informing Petitioner that he was going to go through an interview kind of style test incorporating a number of different areas in Petitioner's life that had to do with normal things like communicating, eating, dressing, etc. (HT. Vol. 3, 381). He then explained the rating system associated with the ABAS-II and told Petitioner to respond: with a "1" if Petitioner never does these things or almost never did these things in the past; with a "2" if he sometimes engaged in the activity when needed, and; with a "3" if he always does the thing or activity when needed or almost always does them when needed. (HT. Vol. 3, 381). Dr. King added that he did not ask Petitioner to read the instructions for the instrument to himself as Dr. King had previously assessed Petitioner was reading at a 4.2 grade level and the ABAS-II requires a six to six and half grade level of reading. (HT. Vol. 3, 381).

Dr. King further stressed that in reading questions to Petitioner from the ABAS-II it is vitally important that

the questions be read literally as failing to do so reduces the applicability of the norms you are using to score the test. (HT. Vol. 3, 385-387). Dr. King added that though there may have been occasions in which he asked follow-up questions to Petitioner, he always initially read the item directly, which is different from beginning with a semi-structured interview. (HT. Vol. 3, 386-387). Dr. King further noted that Petitioner answered all questions directly and honestly and never presented anything which would raise a red flag as far as malingering was concerned. (HT. Vol. 3, 407).

Petitioner's ABAS-II Results: After scoring Petitioner's results, Dr. King found that Petitioner did not meet the criteria to score any of the areas of adaptive behavior as a three or below which would demonstrate a significant deficit. (HT. Vol. 40, 10132). In fact, Petitioner's adaptive scores place him in the borderline to low average range of functioning compared to other individuals his same age and indicate the presence of reasonably good adaptive skills. (HT. Vol. 40, 10132).

Significantly, the results of Petitioner's ABAS-II revealed scaled scores of: 11 in communication; 8 in community use; 6 in functional academics; 8 in home living; 7 in health and safety; 6 in leisure; 7 in self-care; 7 in self-direction; and 5 in social. (HT. Vol. 40, 10132.). Dr. King's conversion of the scaled scores to composites which allow comparison to an average of 100 result in a GAC of 85, Conceptual of 90, Social of 75, and Practical of 85. (HT. Vol. 40, 10132).

This Court finds that while Petitioner's scores in home living, health and safety, functional academics, leisure, self-care, self-direction, and social are in the low range, as

Dr. King testified, none of the scores demonstrate a significant deficit. (HT. Vol. 3, 390-393). Thus, this Court concludes that even looking at only the scores of the standardized measure, Petitioner does not meet the burden of proving beyond a reasonable doubt that he has "significant limitations in adaptive functioning," for the diagnosis of mental retardation as defined in the DSM-IV-TR and applied in Georgia law to diagnose someone as mentally retarded, and therefore his claim is denied. (DSM-IV-TR, O.C.G.A. § 17-7-131 (a) (3)).

Other Data Reviewed by Dr. King: Dr. King testified that in assessing adaptive behavior of Petitioner he also reviewed numerous documents including records generated during Petitioner's time in the Georgia Department of Corrections (hereinafter "DOC"), achievement test scores, school records of Petitioner. (HT. Vol. 3, 397). Dr. King also reviewed Petitioner's work history, the details of the crime itself, along with trial testimony and affidavits submitted by Petitioner in his habeas proceeding. Thus this Court finds reliability in Dr. King's assessment of Petitioner's adaptive functioning as, in addition to the results of the ABAS-II, results which were corroborated by the independent sources, Dr. King reviewed several other sources in making his assessment as to Petitioner's adaptive functioning.

The documents from the DOC reviewed by Dr. King included numerous entries requesting address changes for visitation and responses to infraction charges against Petitioner while in custody such as "I don't want to answer this until I get to court, or a lengthy set of responses to certain infractions that may have spanned, like, five, six pages, in which [Petitioner] detailed . . . the incident, who

was involved, why he felt the charges were unfair, and so on." (HT. Vol. 3, 397-398).

Dr. King testified that he found the documents informative because they demonstrated adaptive behavior in the prison system, showing that Petitioner is able to articulate multiple appellate situations using language which is "not indicative of what I would consider to be typical for somebody mentally retarded." (HT. Vol. 3, 398-399). Petitioner demonstrated practical ability to deal with the system by addressing these appellate situations and in attempting to answer charges and defend himself; conceptually, Petitioner did not go off on tangents but dealt with the issues alleged against him directly and tried to provide a defense; and socially, Petitioner was interacting with the system in defending himself as well as demonstrating clear indications of multiple social interactions with officers. (HT. Vol. 3, 399-400). Dr. King added the disciplinary appeals all appeared to be in Petitioner's handwriting and reflect information only Petitioner would have personal knowledge. (HT. Vol. 3, 400).

Dr. King also found Petitioner's multiple requests asking for changes in prison visitation logs informative as, Petitioner demonstrated knowledge of phone numbers, names, and addresses, and the ability to make and articulate written requests, which are not consistent with what you expect from somebody who is mentally retarded. (HT. Vol. 3, 401).

Dr. King also examined a paragraph writing test, (HT. Vol. 36, 8970), conducted by one of Petitioner's retained experts and found the results consistent with other examples of Petitioner's handwriting. (HT. Vol. 3, 402). Petitioner was able to employ a sentence with proper syntax

and use language that Dr. King testified was at a level above what he expected to see from someone who is mentally retarded. (HT. Vol. 3, 402).

Reflecting on Petitioner's school records, Dr. King reiterated that Petitioner was not diagnosed with mental retardation, was not in special education classes but rather was in Title I or remedial classes, was progressing adequately, then later performed more poorly partly due to Petitioner's declining attendance. (HT. Vol. 3, 404-405). Melissa Durrett, one of Petitioner's former teachers, corroborated Dr. King's findings regarding attendance, testifying Petitioner missed nearly two months of school out of the school year which "makes it even more difficult to catch up because you're getting behind even in a lower level class. You're missing a lot of basics." (HT. Vol. 1, 44). It would certainly be a factor in the student's performance. (HT. Vol. 1, 52).

For indicia of adaptive behavior, Dr. King also pointed to Petitioner's work history. Despite being incarcerated for a lengthy portion of his life, Petitioner did work: at a golf course doing landscaping and maintenance; with his family, assisting in their tree cutting business; and, developing a fairly lucrative trade in illegal drugs. (HT. Vol. 3, 405). Dr. King testified that Petitioner's work history allowed him to purchase two automobiles and Petitioner obtained a driver's license, which is also highly indicative of an individual who has adaptive skills. (HT. Vol. 3, 405).

Dr. King also reviewed the facts of the crime itself, noting that Petitioner's use of a mask, attempts to eradicate fingerprints, his wiping down of the motel room and attempt to dispose of the victim are all indicative of predetermination, premeditation, and goal directedness with

an attempt to avoid apprehension and detection, which reflect adaptive behaviors. (HT. Vol. 3, 407). Likewise Dr. King reviewed: Petitioner's trial declaration that he registered at the Griffin Motel under an alternative name; Petitioner' statement to police that he would make change for $50 for someone to buy crack; Petitioner's interaction with authorities at the time of arrest in which Petitioner provided information about himself, where he lived, where he went sequentially during and after the crime occurred, and how long he had been there, and; Petitioner's statements that he had not seen the victim for two weeks prior to the crime. Dr. King found all these factors demonstrative of attempts to avoid apprehension and thus showing adaptive behavior. (HT. Vol. 3, 408-409).

Supportive of Dr. King's ABAS-II findings was the testimony of Petitioner's father who confirmed at trial Petitioner had acted as a caregiver, providing food, housing and other necessities for his family:

> [Petitioner] and the victim seemed to have been getting along okay to me. [Petitioner] had—get money; he would give it to her and he would give her money to help her with her kids. I know that for a fact because I have seen him give her money. I believe it was '91 or '92 when he got them a house in Griffin on Thirteenth Street. He rented one and she lived with him. So [Petitioner], he taken care of Alicia. She stayed in the house with him. He fed her, he bought her what she wanted.

(TT. 1544).

Again, Dr. King stressed that an analysis of adaptive behavior in light of the legal and corresponding DSM def-

inition involves a consideration of the "totality of the circumstances." Considering this totality, Dr. King concluded that Petitioner does not have significant deficits in adaptive behavior and therefore is not mentally retarded. Thus, this Court finds that Petitioner failed to meet his burden of proving beyond a reasonable doubt that he is mentally retarded, particularly as he has failed to prove that he has significant deficits in adaptive behavior and therefore cannot establish prejudice to overcome his procedural default of this claim.

Dr. Swanson's Adaptive Behavior Evaluation

Petitioner alleges that based on a finding by Petitioner's expert, Dr. Victoria Swanson, that Petitioner exhibits significant deficits in adaptive functioning consistent with mild mental retardation, specifically in the areas of conceptual domain as measured by the ABAS-II, and in the communication, daily living and socialization areas as measured by the Vineland-II. This Court finds that the results of Dr. Swanson's evaluation are unreliable as they are the result of: relying completely upon individuals who are inherently biased and have presented conflicting testimony, effectively impeaching their credibility, and; 2) utilizing standardized instruments for the assessment of Petitioner's adaptive functioning in a manner which undermines their reliability and interpretability when compared to the ABAS-II administration utilized by Dr. King.

Dr. Swanson's Selection of Respondents: Like Dr. King, Dr. Swanson chose to assess the adaptive behavior of Petitioner through the use of standardized instruments, namely the Adaptive Behavior Assessment Scale, Second Edition (ABAS-II), and the Vineland-II Adaptive

Behavior Scales (Vineland). (HT. Vol. 40, 10210). However, unlike Dr. King's proper utilization of the ABAS-II through a self-report of Petitioner's abilities, Dr. Swanson chose to conduct a non-standard and flawed retrospective assessment of Petitioner's adaptive functioning by utilizing Petitioner's mother, Lolla Pye, Petitioner's sister, Pamela Bland, and Petitioner's brother, Ricky Pye. Given the non-standard and selective usage of these instruments, this Court finds that the results claimed by Dr. Swanson to support her findings of significant deficits in adaptive functioning are not reliable or indicative of an overall finding of mental retardation.

The Manual for the ABAS-II clearly states that "careful selection of respondents is critical for obtaining valid ratings," further emphasizing:

> Respondents generally should have the following qualifications: (a) frequent contact with the individual (e.g., almost everyday); (b) contacts of long duration (e.g., several hours for each contact); (c) recent contact (e.g., during the past 1 to 2 months); and (d) opportunities to observe the variety of skills measured by the ABAS-II.

(HT. Vol. 6, 1098).

The interviewer must exercise careful judgment to obtain the most objective information possible as family members may be motivated to report deficits in adaptive behavior in hope that a diagnosis of mental retardation will help their family member to avoid execution. (HT. Vol. 6, 1294).

Similar to the ABAS-II, the manual for the Vineland Adaptive Behavior Scales states that careful selection of

a qualified respondent is critical for obtaining valid results. (HT. Vol. 6, 1259). The manual further emphasizes:

> The respondent must be the adult who is most familiar with the everyday behavior of the individual being evaluated. In general, the respondent should have frequent contact with the individual (preferably daily) over an extended period of time to allow multiple opportunities to observe the individual responses to a variety of environmental demands.

(HT. Vol. 6, 1259).

Standard or normal Vineland application involves the use of a single respondent, as during standardization of the test, a single respondent provided information for each individual. (HT. Vol. 6, 1260). Thus, no normative data are based on multiple respondents and every attempt should be made to locate one respondent who is familiar with the individual's activities in all domains. (HT. Vol. 6, 1260). The manual notes that it is important to emphasize that use of more than one respondent is a nonstandard administration method that should be clearly noted in the report. (HT. Vol. 6, 1260). This Court finds that results obtained through of the Vineland instrument to members of Petitioner's family here are, therefore, subject to severe limitations in their interpretability.

<u>Dr. Swanson ABAS-II results:</u> Dr. Swanson claims that due to Petitioner's mother's poor health and reduced stamina, she chose to administer the ABAS-II rather than the Vineland to Lolla Pye, asking Ms. Pye as "primary caregiver" to rate and recall the Petitioner at the age of 6 years, 9 months, a period of time approximately 37 years in the past. (HT. Vol. 40 10210). Dr. Swanson opined that

the ABAS-II was the appropriate standardized instrument where Ms. Pye was concerned because various subscales could be used independently when a total score cannot be obtained. (HT. Vol. 40, 10210). However, the actual manual detailing administration and scoring for the ABAS-II makes no mention of the validity of individual pieces of the test, (HT. Vol. 6, 1063-1254), a fact confirmed by Dr. King in his testimony. (HT. Vol. 3, 413).

Dr. Swanson also chose to administer the ABAS-II to Ms. Pye through the use of a semi-structured interview format. Though the ABAS-II Manual states that where reading the instrument to the respondent, users may read items as part of an overall interview, the manual stresses that each item should be read verbatim prior to asking the respondent his or her rating. (HT. Vol. 6, 1106). As Dr. King emphasized during his testimony:

> I think that anytime you stray from the literal questions you're reducing the applicability of the normative, of the norms that you're supposed to use to score the test. So, you know, you rely on the scoring to begin with but semi-structured interviewing is a little different from, I think, collecting information that helps you understand what the person's response means, in this particular case.

(HT. Vol. 3, 387).

Dr. King added that specifically in the case of Ms. Pye, Dr. Swanson is asking a 70 year old who has had two cerebral vascular accidents, is bedridden, and has diabetes to render opinions about behavior that took place 25 to 30 years ago. (HT. Vol. 3, 411). Significantly, Ms. Pye testified by affidavit: Petitioner was the seventh of her ten children; when Petitioner was small, she spent little to no

time with him as she had to work all day leaving before dawn and not returning until very late; when the family moved to their home in Indian Springs, she spent much time alone in bed and sent her children off into the local woods where they would not bother her; and, Ms. Pye did not pay close attention to her children's medical conditions and could not even guess what happened to Petitioner during his time growing up. (HT. Vol. 19, 4712-4725).

This Court finds that Dr. Swanson's use of the ABAS-II with Petitioner's mother is beset with flaws and departs from a standardized administration of the instrument which renders the overall results unreliable. Dr. Swanson conducted an analysis by administering a selective portion of the instrument through a semi-structured interview to Ms. Pye, a woman with ailing health who by her own testimony indicated that she had little contact with Petitioner during his youth.

Dr. Swanson Vineland-II results: Similarly, this Court also calls into question the reliability of the results of Dr. Swanson's use of the Vineland-II with Petitioner's siblings Pamela Bland and Ricky Pye, as both sets of results are based upon inaccurate recollections given the record in this case as set forth below.

Dr. Swanson reported that she chose Pamela Bland and Ricky Pye as respondents for the Vineland-II as they were familiar with Petitioner's ability to adapt to his environment. (HT. Vol.40, 10210). Dr. Swanson has further asserted in both her evaluation of Petitioner, and in testimony before this Court that prior to the preparation of

her report, she reviewed all trial testimony of family members from Petitioner's trial. (HT. Vol. 40, 10224; HT. Vol. 2, 196, 200).

Dr. Swanson conducted a retrospective evaluation of Petitioner by administering the Vineland-II to Petitioner's sister Pamela Bland through a semi-structured interview format, asking Ms. Bland to recall a period in time approximate 28 years prior. (HT. Vol. 39, 9787). This Court finds that there were material inconsistencies between the testimony of Ms. Bland at trial and the testimony that Dr. Swanson used in her assessment of Petitioner's adaptive behavior.

During the sentencing phase of Petitioner's trial, Ms. Bland testified on Petitioner's behalf:

> I had my first kid when I was 19. And sometimes, you know, I didn't want to ask my mom to baby-sit for me and I used to ask Willie James to do it for me. And most of my other brothers, I asked them to do it, but they want money, you know, to do it. And Willie James, I said, here, Willie James, here's you [f]ive [d]ollars, you see about Alika—(phonetically)—for me—that's my oldest daughter. And he would do it. He wouldn't take the money, he would just do it, you know.

(TT. 1522-1523).

During her deposition, Dr. Swanson was asked about her administration of the Vineland-II to Ms. Bland:

> Q: Did she [Pamela Bland] trust him [Petitioner] as a caregiver?

A: No, she was very specific about that, because we talked about that. And she said no, primarily it was she'd let him walk them to the store. She did not leave them in his care because he wouldn't remember to take care of them. He would not know that . . .

Q: babysitting, per se?

A: Not babysitting, no, nothing like that, and because I specifically asked that, "Could you trust him to do this or that or another," and the answer to all of that was "no."

(HT., Vol. 39, 9788-789).

Dr. Swanson testified that, unlike Ms. Bland's trial testimony claiming Petitioner had regularly been given responsibility for the care of Ms. Bland's children, her responses to interview questions pursuant to the Vineland-II were not made under oath. (HT. Vol. 2, 198).

Dr. Swanson also administered a Vineland-II to Petitioner's brother Ricky Pye, however, Mr. Pye's responses focused on the time period when Petitioner lived with him, when Petitioner was age 25, shortly after Petitioner was released from prison. (HT. Vol. 39, 9721). This Court considers this factor when determining the reliability of the data, as clearly the results do not assist in establishing mental retardation prior to the age of eighteen as the retrospective administration focused upon Petitioner at age 25. (HT. Vol. 39, 9721).

Respondent further avers that like the Vineland-II administered to Pamela Bland, it should have been obvious to Dr. Swanson that Ricky Pye was unable to report accurately on Petitioner's adaptive behavior and his results

should be wholly discounted by this Court. In her report, Dr. Swanson asserted that Ricky Pye told her:

> When [Petitioner] resided in Griffin, he primarily sold drugs for a living. Ricky Pye noted [Petitioner] was not a very successful drug dealer. He would frequently "get busted" but the cops never found enough dope or money to make a strong case against him ... He moved back to his parents' home but continued to make trips to Griffin to sell drugs.

(HT. Vol. 2, 200; HT. Vol. 40, 10217).

During Petitioner's trial, as with Petitioner's sister Pamela Bland, Ricky Pye testified under oath on Petitioner's behalf:

Mr. McBroom:	Ricky, when Willie got—went to prison, by his own admission, he has gotten out of prison and he's now selling drugs. Did you know that about your brother?
Ricky Pye:	No.
Mr. McBroom:	You didn't know that he was selling drugs?
Ricky Pye:	When I got out, drugs were the—were the last thing I wanted to be around. I got out, got me a family; and what Willie did was Willie's thing. What I did—
Mr. McBroom:	You don't know what Willie did, do you?
Ricky Pye:	(No response.)

Mr. McBroom:	You don't know what Willie does, do you?
Ricky Pye:	If he sold drugs, I have no idea.

(TT. 1539).

When confronted with the obvious disparity in Ricky Pye's representations regarding Petitioner's activity, Dr. Swanson attempted to dismiss the trial testimony, stating "[Ricky Pye] claims it in that one, but didn't claim that with me," later admitting, however, that the trial testimony was made under oath while Ricky Pye's statements to her were not. (HT. Vol. 2, 201-202). It is clear that Ricky Pye was unable to present a clear and accurate retrospective picture of Petitioner and therefore was an inappropriate choice as a respondent for the Vineland-II. This Court seriously calls into question the reliability of Ricky Pye's Vineland-II results as Dr. Swanson confirmed they do not contribute to a finding of mental retardation prior to the age of 18, and given Ricky Pye's trial testimony, it is clear that he is unable to present an accurate retrospective account of Petitioner's behavior.

This Court also finds that because the scored responses of the Vineland-II are subject to a greater range of subjectivity on the part of the examiner, and the instrument's scoring criteria effectively penalizes the individual being evaluated even though they may not have had opportunity to engage in the subject task or activity, this Court considers these factors in weighing the reliability of the results.

Though refusing to admit any errors in her scoring, Dr. Swanson confirmed that she assigned Petitioner a value of "0" in several instances despite not being able to

confirm Petitioner's access or opportunity to the item being questioned:

1. In evaluating Ms. Bland's response to the Vineland-II question "Watches or listens to programs for information (for example weather report, news, educational program, etc.)," Dr. Swanson retrospectively scored Petitioner "0" even though she could not directly confirm the presence of a television or radio in the home. (HT. Vol. 39, 9793; HT. Vol. 40, 10250).

2. In evaluating Ms. Bland's response to the Vineland-II question "Uses savings or checking account responsibly (for example, keeps some money in account, tracks balances carefully, etc.)," Dr. Swanson retrospectively scored Petitioner a "0", alleging that by simply not having an account, the score for Petitioner was appropriate. (HT. Vol. 39, 9797; HT. Vol. 40, 10250). (Emphasis supplied).

3. In evaluating Ms. Bland's response to the Vineland-II question "Obeys curfew parent or caregiver sets," Dr. Swanson retrospectively scored Petitioner "0" despite her admission that she could not confirm a caregiver had instituted a curfew, claiming she based it on the fact that Petitioner did not always return when the family anticipated he should have. (HT. Vol. 39, 9790-9791; HT. Vol. 40, 10250).

Further exemplifying the obvious degree of subjectivity or latitude given the examiner in scoring a Vineland-II, Dr. Swanson admitted that the examiner is not limited in any way by the number of questions which may be

asked of the respondent, claiming "you are supposed to restate and go back and forth," and "because it's a semi-structured interview . . . , at any point . . . you're not happy with it, you can move backwards in time." (HT. Vol. 39, 9799). Given Dr. Swanson's confirmation of the ability of the examiner to shape the results, this Court gives lesser weight to this measurement than the ABAS-II normed results.

Recalling that the American Association on Mental Retardation's publication Mental Retardation: Definition, Classification, and Systems of Supports, 10th Edition clearly states that "for the diagnosis of mental retardation, significant limitations in adaptive behavior should be established through the use of standardized measures," a position confirmed by Dr. Swanson in her evaluation of Petitioner, Respondent asserts that Petitioner has failed in this regard. Dr. Swanson's ABAS-II and Vineland-II administrations to Petitioner's mother, sister, and brother are all beset with serious flaws rendering the results lacking in any credibility. Further, as exemplified by Dr. King's testimony and corroborated by one of Petitioner's own experts, the results obtained by Dr. Swanson are simply not subject to interpretation given the lack of a proper normative sample. Therefore, Petitioner has failed in his burden of establishing significant deficits in adaptive behavior which were onset prior to the age of 18 and by extension failed to demonstrate he is mentally retarded.

Other Experts Retained by Petitioner

In addition to Dr. Swanson, Petitioner has retained other experts in an attempt to bolster her findings regarding adaptive behavior. This Court finds that neither Dr.

Eisenstein nor Dr. Pettis conducted independent standardized evaluations of Petitioner's adaptive behavior and, thus, this Court considers that factor in giving little weight to their testimony regarding Petitioner's alleged mental retardation.

Dr. Hyman Eisenstein testified that he was retained on Petitioner's behalf to conduct a neuropsychological examination in this case, not an assessment of adaptive behavior. Dr. Eisenstein relied solely upon affidavits for his conclusions surrounding Petitioner's deficits in social and interpersonal skills. (HT. Vol. 2, 295). His conclusions regarding alleged deficits in self-direction are based solely upon his neuropsychological measures. (HT. Vol. 2, 296). In his determination that Petitioner has significant deficits in functional academics, Dr. Eisenstein again did not conduct any standardized measures but rather chose to solely rely upon Petitioner's school records. (HT. Vol. 2, 297; HT. Vol. 4, 468).

As Dr. Eisenstein admittedly conducted no standardized measures regarding Petitioner's adaptive behavior and further made unsupported conclusions contrary to the evidence, this Court gives little weight to his findings as they fail to show or demonstrate significant deficits in Petitioner's adaptive behavior. (HT. Vol. 2, 297; HT. Vol. 4, 468; TT. 1360, 1364-1365).

As with Dr. Eisenstein, Petitioner attempts to bolster Dr. Swanson's results suggesting Petitioner has significant deficits in adaptive behavior, alleging "Dr. Pettis concluded [Petitioner] suffers from long-standing intellectual deficits and organic brain damage," adding that his evaluation serves to establish that Petitioner's adaptive functioning limitations manifested during the developmental

period. However, these conclusions do little to support to Petitioner's claim that he is mentally retarded, and thus this Court gives little weight to Dr. Pettis' evaluation with regard to Petitioner's mental retardation claim.

No Sub-Average Intellectual Functioning Prior to Age 18

The final prerequisite for a diagnosis of mental retardation is that significantly sub-average intellectual functioning exhibits itself before age 18. This Court finds that the absence of any IQ score below 70 prior to age 18 in Petitioner's life history, Petitioner's school records and the absence of any documentation in Petitioner's past that Petitioner may be mentally retarded is additional compelling evidence that Petitioner does not meet the third prerequisite for a finding of mental retardation. Petitioner does not meet the requirements for a finding of mental retardation, thus Petitioner has not met his burden of establishing significantly subaverage intellectual functioning in existence prior to the age of 18.

No Cause or Prejudice or Miscarriage of Justice to Overcome the Procedural Default of This Claim

After a review of all of the evidence presented at Petitioner's evidentiary hearing, as well as, evidence available from all prior proceedings, this Court finds that Petitioner has failed to establish his mental retardation beyond a reasonable doubt. See Head v. Hill, 277 Ga. 255, 260-263, (II) (B) (2003). Thus, by failing to prove that Petitioner is mentally retarded, Petitioner failed to prove prejudice to overcome the default of his claim.

In Schofield v. Holsey, 281 Ga. 809, 816-817 (2007), Holsey, a death sentenced inmate, presented testimony in

his state habeas proceedings from three psychologists indicating that he was mentally retarded. In that case, the respondent presented testimony from three experts that Holsey was not mentally retarded. As noted by the Georgia Supreme Court, "There was no dispute among the experts who testified, nor was there any conflict in the non-testimonial portions of the record, regarding the fact that Holsey has consistently scored near the highest intelligence quotient score in the mild mental retardation range as defined in the mental health field." Id. However, the experts disagreed on adaptive behavior and the reasons for Holsey's low scores on the intelligence testing. The Georgia Supreme Court concluded:

> In light of the conflicting evidence, including the expert and lay testimony and the non-testimonial evidence, this Court concludes that the habeas court did not err in finding that Holsey had failed to prove his alleged mental retardation beyond a reasonable doubt.

Id.

Likewise, this Court finds that although Petitioner's IQ scores are in the borderline range, the experts clearly disagree on whether Petitioner has significant adaptive deficits establishing his mental retardation. In light of this conflicting evidence, this Court follows the reasoning in Holsey and finds that Petitioner failed to prove his mental retardation beyond a reasonable doubt, and the claim remains procedurally defaulted.

CLAIMS PROPERLY BEFORE THIS COURT FOR REVIEW

Inneffective Assistance Of Counsel

Petitioner's claim of ineffective assistance of counsel is properly before this Court for review. To prevail on his ineffectiveness claim, Petitioner must show this Court the following:

> That trial counsel's performance was deficient. This requires showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, Petitioner must show that the deficient performance prejudiced the defense. This requires showing that trial 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 v. Washington, 466 U.S. 668 (1984). See also Wiggins v. Smith, 539 U.S. 510 (2003) (reaffirming the Strickland standard as governing ineffective assistance of counsel claims).

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).

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.

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 also 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)).

With reference to the prejudice prong, the Georgia Supreme Court has expressly 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." Head v. Carr, 273 Ga. 613, 616 (2001).

Further, the United States Supreme Court has specifically declined to adopt the American Bar Association

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") as governing the review of counsel's performance, by stressing that no set of guidelines can encompass all of the totality of the circumstances faced by counsel in representing specific defendants. See Strickland v. Washington, 46 U.S. at 688-689.

Additionally, in reviewing claims of ineffective assistance of counsel, the United States Supreme Court specifically held in Strickland, 466 U.S. at 681, "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." Accordingly, this Court notes that at the time of Petitioner's trial, trial counsel Johnny Mostiler had been practicing law for approximately 24 years. (HT. Vol. 1, 79; HT. Vol. 45, 11493). Over the course of his career, Mr. Mostiler was appointed as lead counsel on at least six capital cases including that of Petitioner. (HT. Vol. 1, 59). Notably, Mr. Mostiler has been found by Courts to be "an experienced criminal defense attorney and prima facie presumed qualified to represent a person confronting the possibility of receiving a death sentence." (HT. Vol. 45, 11597).

Working closely with Mr. Mostiler over much of the course of his tenure in capital cases was death penalty experienced investigator Dewey Yarbrough. (HT.. Vol. 1, 57-58). Mr. Yarbrough, an investigator with the State of Georgia Public Defender, had been working in criminal justice for approximately 18 years at the time he was hired as Mr. Mostiler's lead investigator for Spalding

County's indigent defense. (HT. Vol. 1, 56-57). Mr. Yarbrough's work exclusively involved felony investigations due to Mr. Mostiler's contract with the county for indigent defense as well as investigations of any death penalty cases in which Mr. Mostiler was appointed. (HT. Vol. 1, 58). His primary duties were interviewing witnesses, attending hearings, putting the files together, and meeting with state investigators and prosecuting attorneys. (HT. Vol. 37, 9016). Mr. Yarbrough had received his extensive investigative training, including specific training in the interviewing of witnesses through a P.O.S.T. certified Georgia Police Academy, public safety training at the Forsyth Public Officer Training Center, involving at least 20 hours annually, and in service training classes offered through the Spalding County Sheriff's Department. (HT. Vol. 1, 57-58; Vol. 37, 9014-9015). Mr. Yarbrough further testified that he and Mr. Mostiler were receiving assistance from Mike Mears and the Multi-County Public Defender's Office during the course of Petitioner's representation. (HT. Vol. 1, 73-74, 81; HT. Vol. 45 11679).

Guilt Phase Effectiveness

Investigation and Preparation

As the lead investigator for Mr. Mostiler's office, Mr. Yarbrough testified that he would normally conduct an initial interview of the client. (HT. Vol. 1, 59). However, as in the case here, Mr. Yarbrough testified that where the State gave notice that the death penalty was being sought, Mr. Mostiler would also take part. (HT. Vol. 1, 59). In fact, Mr. Mostiler's billing records indicate that he conducted an initial interview of Petitioner on December 6, of 1993, and a second with Mr. Yarbrough also present two days later. (HT. Vol. 37, 9080).

The records further show that on December 16, 1993, prior to his actual appointment, Mr. Mostiler was investigating the case and corroborate Mr. Yarbrough's testimony that he and Mr. Mostiler would have been working on Petitioner's case as soon as they were appointed. (R. 4; HT. Vol. 1, 89; HT. Vol. 37, 9016).

Mr. Mostiler's billing records in this case reflect approximately 211 hours worked, though Mr. Yarbrough stated that Mr. Mostiler spent more time than he recorded. (HT. Vol. 37, 9013, 9082). Mr. Yarbrough recounted that, specifically in death penalty cases, Mr. Mostiler would regularly take an entire week prior to trial and go to Florida where he could not be interrupted for the sole purpose of extensively studying the case. (HT. Vol. 37, 9013). Mr. Mostiler never asked to be paid for the time. (HT. Vol. 1, 89-90; HT. Vol. 37, 9013). Mr. Yarbrough confirmed that he also worked more hours than recorded. (HT. Vol. 1, 89; HT. Vol. 37, 9019).

Petitioner initially told trial counsel that he and the codefendants had met with the victim the day of the crime, but he knew nothing of the shooting. (HT. Vol. 37, 9022). In attempting to establish Petitioner's claimed innocence, trial counsel investigated multiple theories including: Petitioner was not the triggerman; Petitioner was not in the City of Griffin at the time of the incident; Petitioner was never in the vehicle with the victim and co-defendants, and; Petitioner did not know Co-defendant Anthony Freeman. (HT. Vol. 37, 9036). Further, Petitioner worked actively with trial counsel and Mr. Yarbrough in developing his defense, understood Mr. Mostiler and Mr. Yarbrough's role as his defense team, understood all communications regarding case development, and thought both

were doing the best job possible to prove his innocence. (HT. Vol. 1, 84; HT. Vol. 37, 9023). Mr. Yarborough testified that he and Mr. Mostiler did their best to pursue every lead discovered or given to them by Petitioner. (HT. Vol. 37, 9022).

Trial counsel also attempted to contact each and all of the State's witnesses during their investigation even though many refused to talk. (HT. Vol. 37, 9032, 9111-9117). Further, trial counsel also had an "open file" policy with the district attorney's office and "never had a problem with the district attorney's office in regards to [file access] . . . ." (HT. Vol. 37 9059-9060).

Further, both Mr. Mostiler and Mr. Yarbrough reviewed: all the Spalding County Sheriff's Office reports; any and all police reports on the case; and The Georgia Bureau of Investigation Report on Victim Alicia Yarbrough. (HT. Vol. 37, 9038-9040).

Trial counsel's billing records further reflect that within a month of his appointment, Mr. Mostiler interviewed family members regarding a possible alibi and reviewed family interviews in preparation for the preliminary hearing. (HT. Vol. 37, 9080). Also early in the investigation, the billing records reflect that Mr. Mostiler met with Petitioner's parents.[4]

Mr. Mostiler and Mr. Yarbrough also attempted to actively engage members of Petitioner's family in his defense but found them less than cooperative in the effort. Mr. Yarborough testified that the family members were

[4] The time entry incorrectly identifies Petitioner's parents as Mr. and Mrs. Robert Pye as opposed to Mr. and Mrs. Earnest Pye. (HT. Vol. 37, 9080).

not willing to work with the defense team in preparing a defense and did not put forth any effort. (HT. Vol. 37, 9027). One family member informed Mr. Yarboruogh that Petitioner "got himself into this, he can get himself out of it." Id. Mr. Yarbrough added that it was always very important for Mr. Mostiler to make sure he had the support of the client's family in a case, but this was a case where the defense team did not have such support. (HT. Vol. 37, 9037; HT. Vol. 1, 82-83). Despite the lack of cooperation with Petitioner's family, trial counsel continued to try and pursue any and all leads and potential witnesses, seeking support from Petitioner's neighbors and friends. (HT. Vol. 37, 9029). Mr. Yarborough testified, "I wasn't going to, you know, let it stop me from doing what I needed to do." (HT. Vol. 37, 9028).

Also pertinent in attempting to establish Petitioner's innocence was trial counsel's pursuit of an independent investigator to examine crucial Deoxyribonucleic Acid (DNA) evidence. (HT. Vol. 42, 10695-10696). On Petitioner's behalf, their independent expert traveled to the GBI headquarters in Atlanta, examined the DNA evidence in the case and discussed the results of the examination with Mr. Yarbrough on several occasions prior to trial. (HT. Vol. 42, 10699). Upon review of the "DNA-Work-up," trial counsel ultimately decided not to have their expert testify in the case, deciding her testimony would not help the defense. (HT. Vol. 37, 9081; HT. Vol. 42, 10698).

In the guilt phase of trial, trial counsel presented the testimony of Petitioner. During his testimony, Petitioner provided the jury with his version of the crime wherein he maintained his innocence and placed the blame entirely on

Co-defendants Adams and Freeman. (TT. 1351-1371). Specifically, Petitioner stated that Co-defendants Adams and Freeman arrived at the Griffin Motel with the victim. (TT. 1355-1356). The victim, who had willingly gone to the motel, smoked a crack rock at the motel and had consensual sex with Petitioner and Co-defendants Adams and Freeman. (TT. 1357-1359). Petitioner testified that Co-defendants Adams and Freeman then left the motel room with the victim. (TT. 1359). Approximately twenty minutes later, Co-defendants Adams and Freeman returned to the motel room without the victim. Id. The next morning, Petitioner learned through his aunt that the victim had been murdered. (TT. 1362-1363). Petitioner testified that he immediately called the Spalding County Sheriff's Department and gave a statement to the police. (TT. 1363-1364).

This Court finds that Petitioner has not shown that trial counsel's performance in investigating and presenting Petitioner's claims in the guilt phase was not reasonable.

No Guilt Phase Prejudice

The second required prong of Strickland places the burden upon Petitioner to demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Further "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 699. "If it is easier to dispose of an inef-

fectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id.

This Court finds that Petitioner has failed to demonstrate a probability sufficient to undermine mandated confidence in the outcome as it relates to: alleged evidence that the victim was not forcibly removed and subsequently raped, and; alleged evidence surrounding the timing and circumstances of the victim's death after she was shot by Petitioner.

Charges of Kidnapping and Rape: Petitioner claims that had trial counsel introduced the statements of Co-defendant Anthony Freeman as well as the testimony of potential witnesses Linda Lyons and Leon Berry, there is reasonable probability jurors would have concluded the victim was not robbed, kidnapped and raped multiple times, but rather was part of a plan to steal from her current boyfriend, Charles Puckett.

This Court finds that the affidavit statements of Ms. Lyons and Mr. Berry are significantly different than their statements made to investigators at the time of crime and thus lack reliability. Further, the multiple statements of Co-defendant Anthony Freeman made under oath and other evidence present a consistent picture of the crime establishing that the victim Alicia Yarbrough was: removed at gunpoint from her residence after Petitioner kicked in her front door; and forcibly taken to a Griffin Motel where she was raped repeatedly by all three co-defendants, while pleading for her life prior to being shot and killed by Petitioner.

Affidavit Testimony of Linda Lyons: In her affidavit testimony presented to this Court, Linda Lyons testified

in part that the victim called a local hotel and specifically asked for Petitioner's room. She also testified in her affidavit that she was under the impression that, when the victim left her, the victim had "arranged for someone to get her." (HT. Vol. 19, 4693).

In contrast, in her statement to authorities shortly after Ms. Yarbrough's body was found and within approximately twelve (12) hours of seeing the victim, Ms. Lyons told the investigator:

> The last time Ms. Lyons saw Alicia Yarbrough was on November 15, 1993 between the hours of 11:45 P.M. and 11:50 P.M. when Ms. Yarbrough came to her house to get hair grease. When Ms. Yarbrough arrived she had her small infant child with her.
>
> While Ms. Yarbrough was at her residence, Ms. Yarbrough **called someone at a local motel.** Ms. Lyons knew Ms. Yarbrough had called a motel because she could overhear the victim ask for room #27. During this conversation with the **unknown party** at the motel, Ms. Lyons could hear the victim telling the person that [Ms. Yarbrough] was going to call the police on them for selling drugs out of the motel.

(R. 776). (Emphasis supplied).

Additionally, the record further undermines Ms. Lyons' new testimony as, on the day of the murder, Ms. Yarborough's infant child was uncharacteristically left at the Yarborough home unattended. (TT. 1076-1078). Witness Marvin Tysinger told investigators shortly after the crime, that the victim would never leave the baby alone, and that whenever Ms. Yarbrough was not around, Mr.

Tysinger would always be the one called to watch the baby. (R. 350).

The record also shows that State investigators examining the residence within approximately 24 hours of the crime determined that forced entry was gained by way of the front entrance door, and the wooden front door, doorjamb, and locking mechanisms were broken and shattered from a violent force initiated from the exterior. (R. 215). This is entirely consistent with the trial testimony and video taped statements of Co-defendant Anthony Freeman as well as the video taped statement of Co-defendant Chester Adams that Petitioner kicked in Ms. Yarborough's door when forcing himself into the home.

Based on the foregoing, this Court finds Ms. Lyons' new affidavit testimony unreliable and that it would not have, in reasonable probability, changed the outcome of the guilt phase of trial.

Affidavit Testimony of Leon Berry: Petitioner further alleges that trial counsel should have presented Leon Berry to testify that the victim may have been involved in a scheme with Petitioner and Petitioner's co-defendants to rob the victim's boyfriend Charles Puckett.

In an affidavit presented to this Court, Mr. Berry testified that "a few days prior to the murder" he saw Ms. Yarborough in a car with Petitioner, Chester Adams and a "younger kid." (HT. Vol. 19, 4651). In this affidavit, provided eight years after the crimes, Mr. Berry testified that "the four of them wanted to know where they could purchase a gun." Id.

In contrast, within 48 hours of the crime, Mr. Berry told investigators:

> Mr. Berry . . . advised Sgt. Sanders that on the weekend of November the 13th and 14th, he had believed, he was not sure of the date, Saturday or Sunday, the 13th or the 14th, **that [Petitioner] had come by in a small vehicle** with a Fulton County tag on it, he was unable to recall the tag number, **and had a black male with him, Chester Adams, and a black male juvenile he was not familiar with.** He stated Petitioner had come by and talked with Leon Berry in regards to purchasing a handgun from [Mr.] Berry. Leon had advised [Petitioner] that he did not have a gun to sell him, and **[Petitioner] and the other two subjects left the area in this small vehicle**.

(R. 414-415). The statement makes no mention of Alicia Yarbrough being with Petitioner and the two co-defendants at the time.

Further, calling Mr. Berry as a potential witness as Petitioner now suggests would have posed a potential significant detriment to Petitioner's case as Mr. Berry also told investigators that during the summer preceding Ms. Yarbrough's murder, he had observed Petitioner chase the victim down several streets, near where he lived, with Petitioner screaming at Ms. Yarbrough, that he was going to kill her. (R. 414). Further, Mr. Berry stated he had seen Ms. Yarbrough approximately four times that summer, and during each of these four occasions, he recalled Petitioner and the victim involved in a domestic argument, sometimes resulting in physical violence or Petitioner threatening to kill or harm Ms. Yarbrough. (R. 414). Additionally, the State would also have been able to

introduce Mr. Berry's multiple felony convictions including one for burglary and another for Violation of the Controlled Substances Act. (HT. Vol. 44, 11298, 11306).

Based on the foregoing, this Court finds Ms. Berry's new affidavit testimony unreliable and that it would not have, in reasonable probability, changed the outcome of the guilt phase of Petitioner's trial.

Evidence of Victim's Cocaine Habit: Petitioner also asserts that trial counsel should have introduced, through two witnesses, the fact that the victim had cocaine in her system at the time of her death. Petitioner wrongly claims "Mr. Mostiler made no subsequent attempt to introduce evidence of the victim's cocaine use and jurors did not hear evidence that she had cocaine in her system at the time of death." Petitioner claims that such evidence would have readily allowed jurors to infer that Alicia Yarbrough was part of a plan to steal from her boyfriend Charles Puckett and that she left home to obtain cocaine in Mr. Pye's motel room.

The record establishes that Mr. Mostiler brought out evidence of the victim's cocaine habit and the inference that she had cocaine in her system at the time of death through the direct testimony of Petitioner himself. (TT. 1356-1357).

This Court finds that additional evidence of the victim's cocaine use would not have, in reasonable probability, changed the outcome of the guilt phase of Petitioner's trial in light of the overwhelming evidence of Petitioner's guilt.

Independent Forensic Pathologist: Dr. Leroy Riddick, the forensic pathologist retained by Petitioner for

purposes of the habeas proceeding testified by affidavit that Ms. Yarbrough suffered three gunshot wounds, the most serious of which was the gunshot wound to the left buttock, which severed the left external iliac artery, causing severe hemorrhage. (HT. Vol. 29, 7191). Despite this general concurrence in the victim's manner of death and the number of shots fired which killed her, Petitioner claims that trial counsel was ineffective in not hiring an independent pathologist who allegedly could have shown: 1) that the bullet which traveled through the victim's shoulder should have been found beneath her if she had been shot while on the ground as asserted by the State; and 2) dirt and debris on the victim's socks suggested she was standing upright in the road at some point, thus refuting statements of the co-defendant that all three shots were fired when she was on the ground.

As to Dr. Riddick's statements regarding dirt being present on the victim's socks showing the victim was standing at some point without her shoes on, Co-defendant Freeman testified that acting on the instructions of Petitioner, Co-defendant Adams pulled off onto a dirt road and the victim got out of the car, indicating the victim was standing up. (TT. 967). There is no indication by Freeman that the victim was wearing shoes when she exited the vehicle or at what point her shoes were removed.[5]

Further, the Court further finds that the fact that the bullet that traveled through Ms. Yarborough's shoulder

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[5] Officer Bridgett Bridges, the officer who first arrived on the scene testified that she saw shoes. (TT. 905). A summary report of the crime scene filed by Special Agent R. G. Fuller indicates two white tennis shoes were found in an area apart from the victim. (R. 178).

was not found on the ground underneath her does not establish that the victim was not on the ground. Petitioner has failed to establish the bullet could not have ricocheted or that the victim's body was not positioned so that the bullet could have traveled through the victim's body.

Thus, the Court finds that Dr. Riddick's statements as to the position of the victim's body when she was shot would not have, in reasonably probability to undermine Petitioner's guilty verdict.

Length of Time to Die: During Petitioner's trial, when asked how long it took Victim Alicia Yarbrough to die after being shot three times by Petitioner, Medical Examiner Stephen Dunton testified:

> I would guesstimate that it took a minimum of ten minutes or so, a maximum of maybe 30 minutes or so . . . It's going to vary from individual to individual as to how briskly the bleeding may have occurred, the activity that they're going through at the time, whether lying still versus fleeing, fighting, which increases the heartbeat, would have some effect on that also.

(TT. 1236).

Dr. Dunton's testimony's at trial was that there is a considerable degree of latitude in the time it took for the victim to die based upon many variables. Dr. Dunton could only offer an educated estimate as to the actual time.

Thereafter in closing argument, the District Attorney used a timer to demonstrate the time it took for the victim to die after being shot. The State's use of a timer for five minutes during closing argument is half of the minimum of Dr. Dunton's "guesstimate" and was not misleading or

prejudicial. The Court notes that Dr. Leroy Riddick, retained by Petitioner in this proceeding, did not take issue in his affidavit with Dr. Dunton's conclusion that the victim was alive or conscious for a period of time after being shot. Nor did Dr. Riddick contest that the time period could have been at least the five minutes represented by timer utilized by the State or even 10 the minutes which Dr. Dunton proposed as his estimate for a minimum. (HT., Vol. 29, 7188-7195). Rather, Petitioner's expert merely disagreed with Dr. Dunton that Ms. Yarbrough was conscious for a full 30 minutes. (HT., Vol. 29, 7194).

Thus this Court finds that Petitioner failed to establish prejudice from trial counsel not having retained an independent pathologist to rebut the State's case or the prosecutor's argument in this regard.

Conclusion as to Guilt Phase Effectiveness

A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. See Strickland, 466 U.S. at 695. Thus, the Court finds that when Petitioner's habeas evidence is considered individually or collectively, there is simply no reasonable probability that the result of the guilt phase of Petitioner's trial would have been different if the new evidence had been submitted at trial.

Penalty Phase Effectiveness

During the sentencing phase of the trial, Mr. Mostiler presented the testimony of eight witnesses. Pam Bland, who was Petitioner's sister, testified that she had eight brothers and one sister. (TT. 1522, 1524). Their father worked for the Butts County Road Department, and their mother was unemployed as she was disabled. (TT. 1524).

Growing up, the family lived in a four bedroom house that was located in Indian Springs. Id. Regarding the sleeping arrangements, Ms. Bland testified that she shared a bedroom with her sister, and her brothers were split up between two bedrooms. Id. Each bedroom in the house had two beds. Id.

Regarding Petitioner, Ms. Bland testified that he would frequently baby-sit her children and would never accept the money offered for watching her children. (TT. 1522-1523). Ms. Bland stated that Petitioner spent a significant amount of time with her children and would do things for them such as play with them, take them to the store and give them money. (TT. 1523). Concerning the relationship between Petitioner and her children, Ms. Bland testified that her children love Petitioner. (TT. 1525).

In addition, Ms. Bland described Petitioner as "nice," "free-hearted" and was willing to help others. (TT. 1523). She never observed Petitioner act in a violent manner. (TT. 1526). Regarding the relationship between Petitioner and the victim, Ms. Bland testified that they "always seemed happy together" and "seemed like they was so much in love." (TT. 1525). Ms. Bland stated that she observed Petitioner and the victim arguing; however, she never saw them in a physical fight. (TT. 1526).

In concluding her testimony, Ms. Bland pleaded with the jury to spare Petitioner's life. (TT. 1526). As part of her plea for mercy, Ms. Bland stated that a death sentence "would be just like taking my mother's life" as she was suffering from various health problems and was not strong enough to handle it. Id.

Ricky Pye, who was Petitioner's brother, testified that he and Petitioner had a very close relationship during their childhood. (TT. 1532). As a child, Petitioner was quiet and preferred to stay at home. (TT. 1533). Regarding the relationship between Petitioner and the victim, Mr. Pye stated they were "lovey-dovey;" however, they did have their "ups and downs." (TT. 1534). Despite their arguments, Mr. Pye believed that Petitioner and the victim "really loved each other." Id. Mr. Pye observed arguments between Petitioner and the victim, and he would stop the argument prior to it resulting in a physical fight. Id. Mr. Pye concluded his testimony by pleading for mercy as a death sentence would hurt him and his mother. (TT. 1535).

Trial counsel then presented Petitioner's father, Ernest Pye. Mr. Pye testified that Petitioner was a "friendly" child who enjoyed playing with other children and who was always smiling. (TT. 1542). He never observed Petitioner in a physical fight. Id. At some point, Petitioner assisted his father with his business as a tree surgeon. (TT. 1542-1543). Specifically, Petitioner would pull the rope while his father was cutting the trees. (TT. 1543).

Regarding the relationship between Petitioner and the victim, Mr. Pye stated that he thought they were getting along. (T. 1544). Mr. Pye testified that Petitioner took care of the victim and "bought her what she wanted." Id.

Specifically, Petitioner gave the victim money to assist with her children. Id. In addition, Petitioner rented a house for him and the victim around 1991 or 1992. Id. Mr. Pye further stated that he had observed Petitioner and

the victim argue, but he never saw them in a physical fight. (T. 1544-1545).

In pleading for mercy, Mr. Pye stated to the jury that he loved Petitioner and the victim. (TT. 1543). Similar to the other witnesses, Mr. Pye testified that a death sentence would be traumatic for Petitioner's mother. (TT. 1544).

Chanika Lashanda Pye, who was Petitioner's niece, testified that Petitioner used to take her to the park. (TT. 1545-1546). After leaving the park, Petitioner would take her to the store and would purchase whatever she wanted. (TT. 1546). When she got older, Ms. Pye would spend the night with Petitioner and the victim and would watch rented movies. Id. Ms. Pye testified that she had a lot of fun with Petitioner. Id.

Regarding the relationship between Petitioner and the victim, Ms. Pye testified that she never saw them argue or fight. (TT. 1546). She described Petitioner and the victim as a "lovely couple." Id. Ms. Pye concluded her testimony by pleading with the jury for a sentence less than death. (TT. 1547).

Trial counsel then presented the testimony of Bridgett Elaine Geiger Pye. Ms. Pye, who was Petitioner's sister-in-law, testified that Petitioner was a "friendly" and "free-hearted" person who was easy to talk to and enjoyed having fun. (TT. 1547-1548). Petitioner and his brother, Ricky, had a very close relationship. (TT. 1548). Ms. Pye testified that Petitioner was "real friendly with kids," and that he developed a good relationship with her son. Id.

In regards to the relationship between Petitioner and the victim, Ms. Pye stated that they were very close. (TT.

1549). Ms. Pye observed physical altercations between Petitioner and the victim; however, they would always make up. (TT. 1549-1550). She further stated that Petitioner and the victim frequently argued, but those arguments rarely resulted in a physical fight. (TT. 1550).

Dantarius Bernard Usher, who was Petitioner's nephew, testified that Petitioner had a "good heart" and was a "loving man." (TT. 1554). Mr. Usher then pleaded with the jury to spare Petitioner's life. (TT. 1555-1556). Trial counsel then presented Lillian Buckner, who knew Petitioner and his family for about eighteen years. (TT. 1558). Ms. Buckner testified that Petitioner was "very friendly and very respectful and very kind." (TT. 1559).

The final witness presented by trial counsel was Sandy Usher Starks. Ms. Starks, who was Petitioner's sister, testified they were raised in a "household where we didn't have the things like a lot of people had." (TT. 1560-1561). Specifically, she stated that they did not have running water or heat. (TT. 1561). They did, however, have love within the family. Id. Ms. Starks testified that she and Petitioner had a close relationship. (TT. 1562). Regarding the relationship between Petitioner and the victim, Ms. Starks stated that they were "meant for each other, the way they acted." (TT. 1563).

During the State's presentation of evidence during the sentencing phase of trial, evidence was presented that:

> In the summer preceding the murder, Petitioner engaged in an argument with a Marcus Driver. During the course of the argument Petitioner retrieved a gun, shot it into the air and threatened a

bystander. Shortly thereafter, Petitioner assaulted the victim by striking her in the back with the same gun. (TT. 1500-1503);

In 1984, Petitioner had been arrested for the burglary and entering an automobile at the residence of an 81 year old woman who lived alone. (TT. 1516); and

Petitioner had a very bad reputation in the Indian Springs and Flovilla communities of Butts County for violence. (TT. 1519-1520).

In its sentencing phase closing argument, the State emphasized that the murder of Alicia Lynn Yarbrough was committed while Petitioner was engaged in the commission of multiple capital felonies: armed robbery; rape; kidnapping with bodily injury; and burglary. (TT. 1575-1576). The State further argued that Petitioner had the opportunity to show the victim mercy on several occasions, but failed to do so including when the victim begged him not to shoot her in the head and he did so anyway. (TT. 1577-1578). The State further emphasized that Petitioner would be a continuing danger while in prison and would kill a guard to get out, as Petitioner had a history and propensity for violence. (TT. 1581-1582). The medical examiner testified that it took somewhere between 10 and 30 minutes for the victim to die, during which time she crawled and around in the dark before dying. (TT. 1582-1583).

Statutory Aggravators: Petitioner alleges that trial counsel should have utilized the forensic pathologist to introduce the evidence as set forth, the affidavits of Lyons and Berry and the victim's cocaine habit to mitigate multiple aggravators presented by the State. However, for

the same reasons as set forth above, this Court finds that there is no reasonable probability that had the additional evidence submitted to this Court through the testimony of Dr. Riddick, Lyons or Berry been submitted to the jury that it would have affected the outcome of the sentencing phase of trial.

Mitigation Investigation: To attempt to find mitigation evidence, trial counsel initially looked to family members who might testify regarding the facts and circumstances surrounding Petitioner's upbringing but also looked for anybody who might have something good and helpful to say. (HT. Vol. 37, 9031).

Supporting Mr. Yarborough's testimony that Petitioner's family members were not helpful to their investigation, a memo from Mr. Mostiler's files, contemporaneous with trial counsel's representation of Petitioner prior to trial, indicates Petitioner's sister Pam Bland to be a good potential witness while Petitioner's brothers did not respond to phone calls. (HT. Vol. 37, 9096). As previously noted and corroborated by the same memo, Petitioner's family was generally unwilling to cooperate in Petitioner's defense. Despite this fact, Mr. Yarbrough noted that it was not unusual for him and Mr. Mostiler to go out and see as many people as possible that could come to court and say something good and wholesome about the client. (HT. Vol. 37, 9031).

Mr. Yarbrough also gathered information directly from Petitioner in this effort, including background on his family, where they lived, the size of the family, and their present living conditions. (HT. Vol. 37, 9024-9025). In addition, Mr. Yarborough testified that, specifically in death penalty cases, Mr. Mostiler would have placed importance

on questions about the defendant's childhood. (HT. Vol. 37, 9025). Mr. Yarbrough testified that he did ask such questions about Petitioner's childhood and background as part of his investigation. Id. Further, it is evident in the record that Mr. Mostiler also made requests for school records from at least four of the schools attended by Petitioner. (HT. Vol. 37, 9098-9099).

Also supportive of a reasonable mitigation investigation are several conclusions noted within Mr. Mostiler's files that Petitioner had no military history, no psychiatric history, nor any evidence of serious illness or major traumas. (HT. Vol. 37, 9097). Mr. Mostiler's time records in Petitioner's case also reflect investigation and preparation of mitigation testimony through entries "Discuss mitigation with family" and "Final interview with family witnesses." (HT. Vol. 37, 9082).

No Penalty Phase Prejudice

Mental Retardation: As set forth above, this Court finds that Petitioner has failed to prove beyond a reasonable doubt, pursuant to O.C.G.A. § 17-7-131 (a)(3), that he is mentally retarded. Further, as to Petitioner's claim that trial counsel was ineffective in not investigating or presenting this type of evidence at either phase of trial, this Court finds that if Petitioner had presented the same evidence to the jury that was presented to this Court, there is no reasonable probability of a different outcome during the either phase of trial under a Strickland analysis.

Future Dangerousness: Petitioner alleges that he was prejudiced by trial counsel not attempting to present evidence to contest the State's contention of future danger-

ousness. Petitioner bases his claim upon the affidavit testimony of corrections officers William Ellenberg and James Pittman who testified in part that Petitioner was respectful, not menacing, not threatening, and got along with other inmates. (HT. Vol. 19, 4676-4677, 4698).

However, in contrast to the affidavit testimony, disciplinary reports contained in Petitioner's correctional records from his period of incarceration prior to the murder of Alicia Yarbrough reflect a different picture:

- August 6, 1986 (Georgia Industrial Institute)—Petitioner charged with assaulting an inmate, insubordination, and failure to follow instructions where Petitioner was atop another inmate swinging down at him, refused to stop when told, and Petitioner "smart mouthed" officers. (HT. Vol. 9, 2016);
- December 31, 1986 (Georgia Industrial Institute)—Petitioner charged with failure to follow instructions and failure to perform where he was told to cut bushes three times but refused to perform his job assignment (HT. Vol. 9, 2019);
- August 7, 1987 (Georgia Industrial Institute)—Petitioner charged with failure to follow instructions, escape from authority, and insubordination where Petitioner was told to come back to the dining hall with a cup, he ran off, and replied "this is my dam (sic) cup and you're not going to get it and to hell with you." (HT. Vol. 9, 2018);

- July 18, 1988 (Georgia Industrial Institute)—Petitioner charged with unauthorized presence, insubordination, and failure to follow instructions where Petitioner came into a room without authorization and when told to leave said "you can't tell me what to do, I'm not tucking my shirt in," and continued to mouth off at the officer. (HT. Vol. 9, 2020);
- July 19, 1988 (Georgia Industrial Institute)—Petitioner charged with failure to follow instructions where while being counseled concerning a disciplinary report, he got up from the chair, left the room and refused to return, had to be chased down and completely ignored officers orders. (HT. Vol. 9, 2022);
- September 2, 1988 (Georgia Industrial Institute)—Petitioner charged with failure to follow instructions where he failed to report to his work assignment detail. (HT. Vol. 9, 2023);
- December 15, 1988 (Youthful Offender C.I.)—Petitioner charged with failure to follow instructions and failure to perform work or assignment where inmates were instructed there will be no laying down, Petitioner was lying on his bed, and refused his work assignment. (HT. Vol. 9, 2025);
- December 16, 1988 (Youthful Offender C.I.)—Petitioner charged with failure to perform work assignment and failure to follow instructions where Petitioner refused to sweep a back porch as instructed. (HT. Vol. 9, 2024);

- August 14, 1989 (Youthful Offender C.I.)—Petitioner charged with failure to follow instructions and assaulting an inmate where Petitioner was physically fighting with a fellow inmate and refused to stop when ordered. (HT. Vol. 9, 2034);
- September 5, 1989 (Youthful Offender C.I.)—Petitioner charged with insubordination, failure to follow instructions and unauthorized absence where Petitioner became argumentative and hostile and told officer he wanted to see his "fucking counselor," later fled from the dormitory. (HT. Vol. 9, 2039); and
- October 12, 1989 (Frank Scott C.I.)—Petitioner became hostile and aggressive after being removed from the dorm. After being instructed to assume a shakedown position, Petitioner came off the wall in an aggressive manner requiring officers to use force to restrain him. (HT. Vol. 9, 2042, 2044).

The records, not all of which are included in this recitation,[6] indicate a history of insubordination, aggressiveness and propensity for violence toward those in authority.[7] Thus, this Court finds there is no reasonable probability that had trial counsel found witnesses who would have offered the same testimony as Ellenberg and

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[6] See also HT. Vol. 9, 2027, 2033, 2035, 2041, 2043.

[7] Since the time Petitioner has been incarcerated for the murder of Alicia Lynn Yarbrough, Petitioner has continued to demonstrate a propensity for violence and insubordination in assaults upon at least two correctional officers. (HT. Vol. 41, 10389, 10453, 10455).

Pittman, the result of the sentencing phase of trial would have been different.

Background History

Alleged Brain Damage: During this habeas proceeding, Petitioner retained experts to attempt to establish that he is brain damaged and suffers numerous cognitive deficits caused by the circumstances of an impoverished background and claims this testimony would changed the outcome of the sentencing phase of trial.

However, the record shows that Petitioner engaged in a concerted effort to plan a robbery, led two fellow co-defendants in the kidnapping, rape, and murder of his former girlfriend, and then attempted to avoid detection by authorities through disposal of the murder weapon and accessories used in the crime. Petitioner then fabricated an alternative sequence of events. The Court finds that evidence presented to this Court of Petitioner's alleged brain damage would not have, in reasonable probability, changed the outcome of the sentencing phase of Petitioner's trial.

Petitioner's habeas expert, Dr. Hyman Eisenstein, testified that Petitioner suffers from specific deficits in cognitive functioning as a result of frontal lobe brain damage. (HT. Vol. 2, 227). Dr. Eisenstein indicated that the frontal lobes control executive functioning, and alleged Petitioner exhibited an impaired ability to plan and control impulses. (HT. Vol. 2, 144). However, Dr. Eisenstein openly admitted that he did not know of any independent CAT scan or PET scan evidence to affirm such findings of frontal lobe impairment. (HT. Vol. 2, 302-303). Further, Dr. Eisenstein admitted the cause of Petitioner's brain

damage was unclear and one can only surmise, speculating it may have been in vitro problems with alcohol but he had no evidence that Petitioner's mother was drinking during pregnancy. (HT. Vol. 2, 302).

Dr. Glen King was retained by Respondent to evaluate Petitioner's mental health. Dr. King has significant experience in administering neuropsychological testing. (HT. Vol. 3, 421). Dr. King found Dr. Eisenstein's determination of frontal lobe impairment and brain damage "unsupported by the evidence." (HT. Vol. 3, 422). Dr. King testified that in the absence of MR1s, CAT scans, PET scans, or x-rays to corroborate them, neuropsychological tests are not sophisticated enough to identify that particular kind of brain damage. (HT. Vol. 3, 422).

Dr. King further testified that the facts of the crime in this case are wholly inconsistent with brain damage as diagnosed by Dr. Eisenstein:

> When individuals have frontal lobe damage which might impair their ability to inhibit certain kinds of behaviors, it isn't selective. I mean, if your brain's not working, it's not working all the time and you would have disinhibition of responses and impulses in all areas. You wouldn't choose out a particular victim at a particular time and then engage in premeditation, goal directedness, trying to cover your tracks by wearing ski masks and that sort of thing.

(HT. Vol. 3, 423-424).

Dr. Roderick Pettis, also retained by Petitioner's habeas counsel, concluded Petitioner's small size, history of nutrition and childhood suggested a diagnosis of "Failure

to Thrive" and that Petitioner may have suffered from Fetal Alcohol Syndrome, which both interfere with normal brain development. (HT. Vol. 2, 319-320, 338). Dr. Pettis admitted he conducted no independent testing of any kind to support his findings. (HT. Vol. 2, 336).

Dr. King testified that he had not seen any indication which would lead him to believe Petitioner had the condition. (HT. Vol. 3, 426).

This Court finds that, upon review of the totality of the experts' testimony, Petitioner failed to establish that there was a reasonable probability that, if findings such as those presented by Dr. Eisenstein and Dr. Pettis had been presented to the jury, the outcome of Petitioner's sentence would have been different.

Alleged Deprivation: The record reflects that although the family was not cooperative with the defense team during the pre-trial investigation, trial counsel and trial counsel's investigator did learn, to some extent, of the family's impoverished circumstances, (HT. Vol. 1, 69), and presented those facts to the jury through Petitioner's sisters.

During the sentencing phase of trial, Petitioner's sister Sandy Usher Starks testified:

> We came up in a household where we didn't have the things like a lot of people had. Maybe, you know, where a lot of people might have had running water in the bathroom, we didn't have that. Might of—people might have had heat, we didn't have that. We had like a wooden heater or a fireplace.

(TT. 1561).

Additionally, Petitioner's sister Pam Bland added additional detail surrounding the crowded living conditions experienced by Petitioner:

> Well, me and my sister, we slept together. And my brothers—I have eight brothers and one sister. Four of my brothers slept in the same room. My mama had like two beds in each room, and my other four brothers slept in the other room. And my mom and dad were—I have babies—okay, as the babies were born, when we first moved to Indian Springs—been living in Indian Springs about 27 or 28 years—each time they were born, they always slept in the room with my mom and dad—the babies. And—well, it was just like split in half on the boys, four boys in one room and four boys in the other room.

(TT. 1524).

Petitioner's newly presented evidence allegedly documenting Petitioner's upbringing is largely based upon affidavit testimony. As held by the Eleventh Circuit Court of Appeals, "It is common practice for petitioner's attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called," but "the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." Waters v. Thomas, 46 F. 3d, 1506, 1513-1514 (1995). Such affidavits usually prove at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specified parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. Id. at 1514.

Artful drafting as pointed out by the Eleventh Circuit in Waters is directly reflected in this case. The Court specifically notes that affidavits were presented by Petitioner, which were misleading and later corrected through additional affidavit testimony. Social Worker Arthur Lawson initially testified by an affidavit submitted by Petitioner that "[Petitioner's Mother] was not as flagrant as her husband with her drinking, but I showed up at the home to find her intoxicated on many visits. This was equally true when she was pregnant; there were times when she was carrying one of the younger children that I showed up to find that she was high." (HT. Vol. 19, 4688). Mr. Lawson later issued a subsequent affidavit correcting the statement, "During the time I worked with the Pye family I was aware that Mrs. Pye drank alcohol, however, I had no direct knowledge she did so while pregnant. I have agreed to give this affidavit to clarify the inaccurate statement in my prior affidavit." (HT. Vol. 44, 11323-11324).

Additionally, Curtis Pye testified through an affidavit submitted by Petitioner, "No one talked to me . . . before Petitioner's trial. Johnny Mostiler and his assistant Dewey know me . . . He didn't get in touch with me." (HT. Vol. 19, 4710). However, Mr. Mostiler's billing records in Petitioner's case reflect that Mr. Mostiler interviewed Curtis Pye for one hour approximately one month prior to trial. (HT. Vol. 37, 9081).

Ricky Pye also testified through an affidavit submitted by Petitioner, "I never spoke to Mostiler about what to say [at trial], and he didn't meet with me or ask me any questions before my turn for testimony." (HT. Vol. 19, 4726). The affidavit makes no mention of Mr. Mostiler's

one hour interview with him, also approximately one month prior to trial. (HT. Vol. 37, 9081).

Petitioner's mother Lolla Mae Pye testified through an affidavit submitted by Petitioner, "No one took the time to talk to me about all (sic) anything before [Petitioner's] trial," despite Investigator Dewey Yarbrough's testimony and Mr. Mostiler's billing records to the contrary. (HT. Vol. 19, 4724; HT. Vol. 1, 82; HT. Vol. 37, 9080).

Further, in addition to the previously addressed inconsistent affidavit testimony of both Linda Lyons and Leon Berry, the Court also notes Co-defendant Chester Adams also issued an affidavit in this case containing multiple material inconsistencies when compared his video-taped statement made to authorities approximately 24 hours after the murder of Alicia Yarbrough. (See HT. Vol. 41, 4643-4646, compared to HT. Vol. 42, 10659).

Accordingly, this Court has reviewed Petitioner's affidavit evidence with caution, including the affidavit evidence alleging abuse and deprivation of Petitioner, where affidavit testimony is extensively relied upon.

The Court also finds that there is little, if any, connection between Petitioner's impoverished background and the premeditated and horrendous crimes in this case.

Further, Petitioner was 28 years old at the time of these crimes, trial counsel could have reasonably decided, given the heinousness of this crime and the overwhelming evidence of Petitioner's guilt, that remorse was likely to play better than excuses. See Housel v. Head, 238 F.3d 1289, 1295 (11th Cir. 2001). In Tompkins v. Moore, 193 F.3d 1327, 1337 (11th Cir. 1999), Tompkins was 26 years

old at the time he committed his capital crimes. In finding that Tompkins had failed to establish prejudice as to trial counsel not presenting Tompkins' background, the Eleventh Circuit Court of Appeals held that "evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight" when the defendant is "not young" at the time of the offense. See also Francis v. Dugger, 908 F.2d 696, 703 (11th Cir.1990) (petitioner was thirty-one years old at the time of the capital offense); accord Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir.1995) ("We note that evidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime."). Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir.1994) (same holding where petitioner was twenty-seven years old at the time of the capital offense).

Based upon this review, the Court finds that Petitioner has failed to show that he was prejudiced under Strickland by trial counsel not presenting the additional details surrounding his upbringing, especially when considered in light of evidence suggesting Petitioner's family's unwillingness to cooperate with trial counsel in Petitioner's defense, and extensive evidence presented in aggravation by the State during sentencing.

Conclusion as to Penalty Phase Effectiveness

The Court finds that when Petitioner's habeas evidence is considered individually or collectively, there is simply no reasonable probability that the result of the penalty phase of Petitioner's trial would have been different if the new evidence had been submitted at trial.

Conflict-Free Counsel

Petitioner claims that he was denied his right to counsel free from any conflicts of interest.

In Cuyler v. Sullivan, the 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, 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, 446 U.S. at 348). See also Burger v. Kemp, 483 U.S. 776 (1987).

Complaints of Counsel During Trial: This Court fmds Petitioner's complaints during a pretrial conference that trial counsel had not interviewed unspecified witnesses and counsel's alleged lack of communication with Petitioner actually allege claims of ineffective assistance rather than a conflict of interest claim and that Petitioner has failed to show either prong of Strickland to support this claim. (PHT 2/13/1995, 6-8).

As evidence of his zealous representation of Petitioner, Mr. Mostiler responded to the Court at the February 16th arraignment of Petitioner that he and members of his office had met with Petitioner no less than nine times, that he had informed Petitioner he was likely to see him once or twice a week until the trial was over, and that he had traveled to Flovilla, and Jackson, Georgia, and the

Butts County Jail to interview witnesses. (PHT 2/16/1995, 3-5). Mr. Mostiler's actions to that point showed his interest was, as Mr. Mostiler put it, "to defend Mr. Pye as vigorously as possible." (PHT 2/16/1995, 6).

Further, the Court further finds that Petitioner failed to establish that the trial court erred in not sua sponte inquiring about an alleged conflict resulting from the comments concerning trial counsel's investigation and contact with Petitioner prior to trial. As held by the Georgia Supreme Court:

> 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 . . . .").

This Court finds that Petitioner failed to establish an actual conflict of interest that adversely affected his lawyer's performance and finds that the trial court was not required to sua sponte initiate an inquiry into the existence of this alleged conflict.

Caseload: Petitioner also argues that Mr. Mostiler could not have competently represented Petitioner due to his heavy caseload as the contract defender for Spalding County. However, the Supreme Court of Georgia held in Whatley v. Terry that Mr. Mostiler's caseload is "irrelevant." 284 Ga. 555, 562 (2008). There, Petitioner Whatley raised an identical conflict of interest claim against Mr. Mostiler. Whatley, 284 Ga. at 563. Georgia's Supreme Court agreed with the findings of the habeas court in that "it is the amount of time *actually* spent by Mostiler on Whatley's case that matters, not the number of other cases he might have had that *potentially* could have taken his time." Id. at 562. Further agreeing with the habeas court they noted that:

> Mostiler was a highly experienced attorney, was experienced in death penalty cases, was appointed two years before Whatley's trial, and "spent over 157 hours on [Whatley's] case in addition to the 96 hours that his investigator logged." The habeas court further noted with approval testimony by the defense investigator stating that it was likely that Mostiler's billing records under-represented the time he actually spent on the case.

Id. at 562. See also Osborne v. Terry, 466 F.3d 1298, 1315, n.3 (11th Cir. 2006). This Court finds that Petitioner failed to show that Mr. Mostiler's caseload created an actual conflict of interest that adversely affected his lawyer's performance.

Representation of the Victim and a State's Witness: An actual conflict is not established by the mere "possibility that a conflict might have developed." Hudson v. State, 250 Ga. 479, 482, 299 S.E.2d 531 (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 alleges a conflict through Mr. Mostiler's prior representation of the Victim Alicia Yarbrough and State Witness Charles Puckett in Mr. Mostiler's role as the contract public defender in Spalding County, specifi-

cally faulting Mr. Mostiler for not disclosing the prior representations to Petitioner.[8] The Court finds that the record establishes that Petitioner has failed to show that counsel's prior representation of State Witness Charles Puckett, in fact, caused him to make choices or resulted in omissions that were harmful to Petitioner's case.

Instead, the record is clear that Mr. Mostiler attempted to thoroughly cross-examine and re-cross-examine Mr. Puckett. In fact, Mr. Mostiler cross-examined Mr. Puckett twice, bringing out that Petitioner had never made claims to the victim's child, and that the child's paternity had never been a point of contention between the Petitioner and Mr. Puckett. Further, Mr. Mostiler also objected to the admissibility of State's Exhibit No. 23, a picture of the victim's child during the course of Mr. Puckett's testimony, effectively preventing it from being admitted into evidence. (TT. 1078).

In asserting a conflict, Petitioner alleges that Mr. Mostiler failed to elicit testimony from Mr. Puckett that Ms. Yarbrough frequently used cocaine to support a defense that the victim herself had sold the missing items for drugs and was murdered by some unknown person. However, the record shows that Mr. Mostiler did attempt to elicit such testimony but was prohibited from that line of questioning when the State objected based on the relevancy of the victim's cocaine use. (TT. 1084). The trial judge sustained the objection and would not allow trial

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[8] Petitioner's reference to Mr. Mostiler's representation of the victim stems from a joint indictment of Petitioner and Ms. Yarbrough for Violation of the Georgia Controlled Substances Act. (HT. Vol. 9, 2071). Thus, it is highly unlikely Petitioner was not aware of Mr. Mostiler's representation.

counsel to proceed with questions relating to the victim's cocaine use at that time. (TT. 1085-1087). Accordingly, Petitioner has failed to establish that there was any actual conflict or any adverse affect resulting from Mr. Mostiler's prior representation of Mr. Puckett.

Similarly, the fact that Mostiler previously represented the victim in this case does not constitute an actual conflict of interest based on the mere speculation that he may or may not have obtained exculpatory information from that representation. Petitioner's allegations that trial counsel was made aware of facts surrounding the victim's cocaine habit through his prior representation of her, but failed to proffer them in this case, in and of itself does not create a conflict of interest. As previously addressed, Mr. Mostiler attempted to introduce the victim's cocaine use at trial through multiple witnesses. Thus, Petitioner has failed to demonstrate any conflict of interest arising from his prior representation of the victim.

Petitioner claims 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. The Court finds that the per se presumption does not apply in the instant case as Petitioner has failed to show he was adversely affected by trial counsel's previous representation of Mr. Puckett or the victim, much less that he was denied his "right to counsel altogether." Accordingly, the Court finds that Petitioner failed to establish an actual conflict of interest.

CLAIMS THAT ARE NON-COGNIZABLE

That **portion of Claim IX**, wherein Petitioner alleges that his death sentence is disproportionate, is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings that resulted in Petitioner's convictions and sentence. The exclusive procedure for conducting a sentence review proceeding is set forth in O.C.G.A. § 17-10-35(b), et. seq. and this statute clearly contemplates that this sentence review will occur only on direct appeal before the Georgia Supreme Court. The Georgia Supreme Court performed this statutory sentence review and specifically held:

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

Pye v. State, 269 Ga. 779, 789 (21) (1998). Because the proportionality of Petitioner's death sentence was appropriately adjudicated by the Georgia Supreme Court on direct appeal, this Court finds Petitioner's claim may not be relitigated in this habeas corpus proceeding. See Hall v. Lee, 286 Ga. 79, 97 (Ga. 2009) (holding that the state habeas court correctly found Lee's proportionality challenge was *res judicata*); Lee v. State, 270 Ga. 798, 804 (1999)

(The Court refused to "re-examine the issue" of proportionality); Schofield v. Meders, 280 Ga. 865, 871 (2006) (declining to re-examine proportionality on habeas corpus); Davis v. Turpin, 273 Ga. 244 (2000) (same). Accordingly, this portion of Petitioner's claim is denied.

Moreover, **Claim XX**, wherein Petitioner alleges that the statute under which he was sentenced to death, O.C.G.A. § 17-10-38, was declared unconstitutional in Dawson v. State, 274 Ga. 327 (2001), is non-cognizable as it fails to allege a substantial violation of constitutional rights in the proceedings that resulted in Petitioner's convictions and sentence. Furthermore, this claim was available to Petitioner during his direct appeal thus this Court finds that to the extent that it is a proper claim for this Court to review, the claim is procedurally defaulted. This Court finds Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome this default. Thus, were the claim cognizable before this Court, the claim would be denied as procedurally defaulted.

Moreover, the Georgia Supreme Court has continuously rejected challenges to the manner in which it conducts its statutory proportionality review. See Hall v. Lee, 286 Ga. 79, 97-98 (2009) (holding that the "method by which th[e] Court conducts its proportionality review satisfies Georgia statutory requirements and is not unconstitutional); Gissendaner v. State, 272 Ga. 704(16) (2000) (holding that the Court's proportionality review is neither unconstitutional nor inadequate under statutory law); McMichen v. State, 265 Ga. 598, 611 (1995) (citing McCleskey v. Kemp, 481 U.S. 279, 306-308 (1987) (The method by which the Georgia Supreme Court conducts its review of the proportionality of death sentences is constitutionally

sound.)); Smith v. State, 270 Ga. 240, 251 (1998). Accordingly, even if this Court were to assume this claim is properly before it, which the Court does not, the Court finds in the alternative that this claim is without merit and is denied.

This Court finds that Petitioner's allegation in **Claim XXI** of his Amended Petition that lethal injection is cruel and unusual punishment is non-cognizable in these habeas proceedings as it is not an assertion of a "substantial denial" of Petitioner's constitutional rights "in the proceedings which resulted in his conviction." O.C.G.A. § 9-14-42(a). Insofar as it is cognizable, it 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) (finding Georgia's method of execution constitutional).

Petitioner alleges that the cumulative effect of the errors that allegedly infected his trial deprived him of his constitutional rights. The Court finds that this claim does not allege a constitutional violation in the proceedings that resulted in Petitioner's conviction and sentence and is therefore barred from review by this habeas corpus court as non-cognizable under O.C.G.A. § 9-14-42(a). Additionally, the State of Georgia does not recognize a cumulative error rule and therefore this claim has no merit. See, e.g., Rogers v. State, 282 Ga. 659, 668 (2007), Schofield v. Holsey, 281 Ga. 809, 812 n. 1 (2007); Smith v. State, 277 Ga. 213, 219 (2003): Head v. Taylor, 273 Ga. 69, 70 (2000).

CONCLUSION

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

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

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

SO ORDERED, this [**25th**] day of [**January**], 201[**2**].

[*/s/ John H. Bailey, Jr.*]
HONORABLE JOHN H. BAILEY, JR.
Sitting by Designation in
Butts County Superior Court

PREPARED BY:

Richard Tangum
Assistant Attorney General
40 Capitol Square
Atlanta, Georgia 30334

APPENDIX H

[**Date Filed: 03/09/2023**]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12147-P

WILLIE JAMES PYE,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Willie James Pye is DENIED.

ORD-41

APPENDIX I

Title 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-1219, provides:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) 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 due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.