**No. ___**

IN THE

# Supreme Court of the United States

EDWARD THOMAS JAMES,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

***THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR THURSDAY, MARCH 20, 2025, AT 6:00 P.M.***

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## INDEX TO APPENDIX

# A1
# Eleventh Circuit Order Denying Reconsideration, February 27, 2025

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-14162

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EDWARD THOMAS JAMES,

Petitioner-Appellant,

*versus*

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:18-cv-00993-WWB-RMN

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Before WILLIAM PRYOR, Chief Judge, and GRANT and BRASHER, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the February 3, 2025, order denying motion for certificate of appealability is **DENIED**.

Appellant's motion for stay of execution is **DENIED**.

# A2
# Eleventh Circuit Order Denying COA Motion, February 3, 2025

In the

# United States Court of Appeals

## For the Eleventh Circuit

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No. 24-14162

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EDWARD THOMAS JAMES,

Petitioner-Appellant,

*versus*

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

---

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:18-cv-00993-WWB-RMN

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ORDER:

Edward Thomas James, a Florida inmate sentenced to death, seeks a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. He argues that this Court should issue a certificate of appealability on the district court's procedural rulings. After careful review, I **DENY** James's application for a certificate of appealability.

**I.**

In April 1995, James pleaded guilty to two counts of first-degree murder, aggravated child abuse, attempted sexual battery, kidnapping, grand theft, and grand theft of an automobile. He also pleaded nolo contendere to two separately charged counts of capital sexual battery. After a penalty-phase trial, a jury returned an advisory recommendation for a sentence of death for each of the first-degree murder convictions. The court sentenced James to death on both first-degree murder convictions.

James appealed, and the Florida Supreme Court affirmed his convictions and sentences. *James v. State*, 695 So. 2d 1229 (Fla. 1997). James then petitioned the Supreme Court of the United States for a writ of certiorari, which was denied on December 1, 1997.

On May 27, 1998, James, through counsel, moved for state postconviction relief. The trial court set an evidentiary hearing on some of his claims. But before it held a hearing, James filed a *pro se* notice that sought dismissal of his postconviction proceedings without prejudice. The trial court held a hearing and engaged in a colloquy with James to ensure that he understood the

consequences of his actions. On April 21, 2003, the trial court discharged James's counsel and allowed James to withdraw his motion for postconviction relief.

More than two years later, James sought reappointment of counsel and reinstatement of his state postconviction proceedings. After holding a hearing, the trial court denied that motion. The Florida Supreme Court affirmed. *James v. State*, 974 So. 2d 365 (Fla. 2008).

In 2018, James filed a petition for federal habeas relief under 28 U.S.C. § 2254. James's habeas petition was stayed while he exhausted claims in state court. The state trial court denied his postconviction motion as untimely, the Florida Supreme Court affirmed that decision, and the Supreme Court of the United States denied James's petition for a writ of certiorari. Afterward, the district court lifted the stay on James's federal habeas petition. In 2022, James filed an amended habeas petition.

The district court denied James's amended petition as untimely filed and dismissed his case with prejudice. The district court also denied James a certificate of appealability. James then asked this Court to issue a certificate of appealability.

**II.**

A prisoner must receive a certificate of appealability to appeal the denial of a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1). If a district court denies a prisoner's habeas petition on procedural grounds, we should issue a certificate of

appealability only if the prisoner establishes "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

"Ordinarily, when a state prisoner's conviction becomes final following the termination of his direct appeal, he has one year in which to file a federal petition for a writ of habeas corpus." *Downs v. McNeil*, 520 F.3d 1311, 1317 (11th Cir. 2008) (citing 28 U.S.C. § 2244(d)(1)). "That time is tolled by statute whenever a properly filed motion for state postconviction relief is pending." *Id.* (citing 28 U.S.C. § 2244(d)(2)).

Two pathways may provide relief to a petitioner who faces a procedural bar due to an untimely filed petition. One pathway is equitable tolling, which "may apply 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'" *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1332 (11th Cir. 2008) (quoting *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006)).

Another pathway is "actual innocence," which, "if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, . . . or . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To succeed in making an actual-innocence gateway claim, a petitioner must "persuade[ ] the district court that, in light of the

new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.*

**III.**

James argues that this court should issue a certificate of appealability on the district court's procedural rulings for two reasons. First, James contends that reasonable jurists could debate whether he alleged facts that entitled him to equitable tolling. James contends that he provided the court with new evidence that he was incompetent when he discharged his postconviction counsel and withdrew his motion for postconviction relief. According to James, his habeas petition "proffered multiple mental health experts who opined on indicia that (1) [James] was incompetent at the time of his postconviction waiver, and (2) that incompetency persisted after his waiver."

Reasonable jurists could not debate the district court's conclusion that James failed to establish that he was entitled to equitable tolling. Equitable tolling requires that a petitioner "show both extraordinary circumstances and due diligence." *Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 701 (11th Cir. 2004). As to extraordinary circumstances, "mental impairment is not a *per se* reason to toll a statute of limitations." *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). James neither alleges facts nor provides evidence of how any mental impairment caused him to discharge his counsel or discontinue his state postconviction proceedings. That is, none of the evidence established a "causal connection between [James's] alleged mental incapacity and his ability to file a timely petition,"

which is necessary to justify equitable tolling. *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (quoting *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005)).

James also failed to allege that he acted with reasonable diligence between when he discontinued his postconviction proceedings and the end of the one-year limitation period. James has not established that his mental health problems prevented him from timely filing a petition for habeas relief. Therefore, reasonable jurists would not debate the district court's denial of equitable tolling.

Second, James argues that reasonable jurists could debate the district court's procedural ruling as to his actual innocence gateway claim. Not so. James's newly offered evidence cannot overcome the sole eyewitness's identification of James as the killer, James's possession of one of the victim's car and jewelry, his cross-country flight from the crime scene, and his own confession to the crimes. James's new evidence fails to establish that no reasonable jury could have convicted him of the crimes.

**IV.**

James's application for a certificate of appealability is **DENIED**.

/s/ Andrew L. Brasher
UNITED STATES CIRCUIT JUDGE

# A3
# District Court Order Denying Reconsideration, November 18, 2024

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

EDWARD THOMAS JAMES,

Petitioner,

v. Case No. 6:18-cv-993-WWB-RMN

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.
_____/

**ORDER**

THIS CAUSE comes before the Court on Petitioner's Motion to Alter or Amend Judgment and/or for Reconsideration of the Denial of a Certificate of Appealability. (Doc. 93).

On September 6, 2024, the Court denied Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 66), which challenged his state convictions for murder, aggravated child abuse, attempted sexual battery, kidnapping, grand theft, and grand theft of an automobile, as well as his death sentence, as untimely. (Doc. 90 at 119). The Court also denied Petitioner a certificate of appealability. (*Id.* at 118–19).

Petitioner now moves to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). That rule permits courts to alter or amend a judgment based on "newly-discovered evidence or manifest errors of law or fact." *Anderson v. Fla. Dep't of Envitl. Prot.*, 567 F. App'x 679, 680 (11th Cir. 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). "A movant 'cannot use a Rule 59(e) motion to relitigate old matters' or 'raise argument or present evidence that could have been raised prior to the entry of

judgment." *Levinson v. Landsafe Appraisal Servs., Inc.*, 558 F. App'x 942, 946 (11th Cir. 2014) (quoting *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)).

Petitioner does not demonstrate any basis warranting reconsideration of the Court's order of dismissal, as the motion generally attempts to re-litigate issues already considered and rejected.

Petitioner also requests reconsideration of the Court's denials of a certificate of appealability and leave to proceed *in forma pauperis*. Petitioner argues the first part of the Court's denial—that "Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" (Doc. 90 at 119)—does not make sense, because the Court denied the Amended Petition on procedural grounds. (Doc. 93 at 15). Petitioner contends that the Court's analysis instead "should have focused on whether reasonable jurists could debate this Court's procedural rulings, or whether Petitioner's arguments are otherwise adequate to deserve encouragement to proceed further." (*Id.* at 15). Petitioner also argues that he can assert multiple arguments on appeal that are not clearly frivolous. Notwithstanding the standard language included in the Order regarding assessment of constitutional claims, the Court also ruled that jurists of reason would not find the Court's procedural rulings debatable. (Doc. 90 at 119). Petitioner's arguments to the contrary do not persuade the Court to reconsider the denials.

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Alter or Amend Judgment and/or for Reconsideration of the Denial of a Certificate of Appealability (Doc. 93) is **DENIED**.

2. This Court should grant an application for certificate of appealability only if the Petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2) ("A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Therefore, Petitioner is **DENIED** a Certificate of Appealability.

**DONE** and **ORDERED** in Orlando, Florida on November 18, 2024.

WENDY W. BERGER
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

# A4
# District Court Order Denying
# § 2254 Petition, September 6, 2024

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

EDWARD THOMAS JAMES,

Petitioner,

v. Case No.: 6:18-cv-993-WWB-RMN

SECRETARY, DEPARTMENT OF CORRECTIONS, *et al*,

Respondents.
_____/

**ORDER**

THIS CAUSE comes before the Court on Petitioner Edward Thomas James's Amended Petition for Writ of Habeas Corpus ("**Amended Petition**," Doc. 66) filed under 28 U.S.C. § 2254. Respondents filed a Response to the Amended Petition ("**Response**," Doc. 73), and Petitioner filed a Reply ("**Reply**," Doc. 79).

At the Court's direction (Doc. 80), Petitioner filed a list ("**Records Cited List**," Doc. 85) identifying each record cited in the Amended Petition and Reply and indicating the location of each such record on the docket or in the state court record provided by Respondents. Petitioner also attached to the list copies of the records that were cited but not yet filed in this action. (Doc. 85-1). Respondents filed a Response (Doc. 86) to the list, and Petitioner filed a Reply (Doc. 89).

For the reasons set forth below, the Amended Petition is denied as untimely.

## I. PROCEDURAL HISTORY

On October 19, 1993, Petitioner was indicted in Seminole County, Florida, for two counts of first-degree murder (Counts One and Two), aggravated child abuse (Count Three), attempted sexual battery (Count Four), kidnapping (Count Five), grand

theft (Count Six), and grand theft of an automobile (Ground Seven). (Ex. A-1 at 23–25). Pursuant to a written plea agreement, Petitioner pleaded guilty to all counts, as well as pleading nolo contendere to two counts of capital sexual battery charged by separate information. (Ex. A-14 at 350–78). Following a penalty phase trial, the jury returned advisory penalty recommendations of death for each murder conviction. (Ex. A-11 at 1076–81). Following further argument at a separate hearing (Ex. A-11 at 1108–57), Petitioner was sentenced to death for each of Counts One and Two, the first-degree murder convictions. (Ex. A-11 at 1088–1105). He was sentenced to fifteen years' imprisonment for each of Counts Three (aggravated child abuse) and Four (attempted sexual battery); to life in prison on Count Five (kidnapping); and to five years in prison on each of Counts Six (grand theft) and Seven (grand theft of an automobile). (Ex. A-11 at 1086–87). Petitioner was sentenced to life in prison for each of the two capital sexual battery convictions. (Ex. A-11 at 1087).

Petitioner appealed (Exs. B, C, D), and the Florida Supreme Court affirmed his convictions and sentences. *James v. State*, 695 So. 2d 1229 (Fla. 1997) ("***James I***"); (*see also* Ex. E). Petitioner then petitioned the United States Supreme Court for writ of certiorari (Exs. I, J), which was denied on December 1, 1997. (Ex. K).

On May 27, 1998, Petitioner, through counsel, moved for post-conviction relief under Florida Rulesof Criminal Procedure 3.850,[1]. (Ex. L-1 at 28–54). Petitioner amended the motion twice (*see* Exs. L-2 at 261–305; L-3 at 359–410), and the trial court set an evidentiary hearing on some claims. (Ex. L-2 at 348–50). However, on

[1] It is unclear why the post-conviction motion was filed under Florida Rule of Criminal Procedure 3.850, rather than Rule 3.851, which governs "Collateral Relief After Death Sentence Has Been Imposed and Affirmed on Direct Appeal".

March 10, 2003, Petitioner filed a *pro se* notice of voluntary dismissal in which he sought dismissal of his post-conviction proceedings without prejudice. (Ex. L-3 at 473–74). The post-conviction court held a hearing on the notice and undertook the requisite *Faretta*-type[2] inquiry, as set forth in *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). (Ex. L-4 at 583–97). On April 21, 2003, the trial court allowed Petitioner to withdraw his pending Rule 3.850 motion and discharged collateral counsel. (Ex. L-3 at 493–95). No appeal was filed.

On October 31, 2005, Petitioner wrote to the Office of Capital Collateral Regional Counsel ("**CCRC**"), informed the office that he had changed his mind, and requested reappointment of counsel and reinstatement of his postconviction proceedings. (Ex. L-3 at 501–05). CCRC counsel moved for reappointment and to resume the collateral proceedings. (Ex. L-3 at 501–03). A hearing was held on the motion on January 12, 2006. (Ex. L-3 at 522). On January 17, 2006, the motion was denied. (Doc. L-3 at 523–26).

Petitioner then wrote a letter to the Florida Supreme Court, which was dated January 24, 2006, and filed with the Court on January 30, 2006. (Ex. L-4 at 576–77). On February 20, 2007, following the State's filing of a response (Ex. L-4 at 527–32), the

[2] In *Faretta v. California*, 422 U.S. 806, 835 (1975), the Supreme Court explained that, "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (citation and internal quotation marks omitted). At a *Faretta* hearing, a court "should inform the defendant of the nature of the charges against him, possible punishments, basic trial procedure and the hazards of representing himself. The purpose of this hearing is to allow judges to determine whether the defendant understands the risks of self-representation." *United States v. Kimball*, 291 F.3d 726, 730 (11th Cir. 2002) (internal citation omitted).

Florida Supreme Court construed Petitioner's letter as a "notice of appeal of the denial of the motion to reappoint counsel and resume collateral proceedings." (Ex. L-4 at 576). CCRC counsel was appointed for Petitioner (Ex. L-4 at 580–81), and on January 24, 2008, the Florida Supreme Court affirmed the trial court's denial of the motion to reappoint counsel and resume collateral proceedings. *James v. State*, 974 So. 2d 365 (Fla. 2008) ("***James II***"); (Ex. P).

On August 10, 2018 (more than ten years later), the Capital Habeas Unit ("**CHU**") for the Office of the Federal Public Defender for the Northern District of Florida was appointed to represent Petitioner for purposes of federal habeas claims. (Doc. 13). On December 18, 2018, Petitioner, through CHU counsel, filed a Petition for Writ of Habeas Corpus (Doc. 23) under 28 U.S.C. § 2254. The same day, Petitioner moved to temporarily stay the action pending a decision by the state court regarding appointment of CCRC counsel for the purpose of exhausting Petitioner's claims in state court. (Doc. 25). On February 4, 2019, this Court granted the motion to stay. (Doc. 29).

On January 29, 2019, the Middle Region of CCRC moved in state court for reappointment, certifying a conflict of interest and requesting appointment of the Northern Region. (Ex. S at 39–275). The motion was granted on February 8, 2019. (Ex. S at 276). On November 14, 2019, Petitioner, through CCRC counsel, filed in state court a collateral motion under Florida Rules of Criminal Procedure 3.851, (Ex. S at 279–300), which was dismissed on March 17, 2020. (Ex. S at 482–86). Petitioner moved, unopposed, for rehearing on the basis that Florida law required the court to hold a case management hearing on his successive motion. (Ex. S at 517–18). On April 13, 2020, the post-conviction court granted the motion and vacated the order of dismissal.

(Ex. S at 558). A case management hearing was held on May 7, 2020 (Ex. S at 569), and the post-conviction court summarily dismissed the Rule 3.851 motion as untimely on June 8, 2020. (Ex. S at 571–74). Petitioner appealed. (Exs. T, U, V). The Florida Supreme Court affirmed the decision on July 8, 2021, and denied Petitioner's motion for rehearing on August 30, 2021. (Exs. W, X, Y). Petitioner petitioned the United States Supreme Court for a writ of certiorari (Exs. AA, BB, CC), which was denied on April 18, 2022. *James v. Florida*, 142 S. Ct. 1678 (2022) (Mem); (Ex. DD).

In the meantime, the stay in this federal action was lifted, and, on December 5, 2022, Petitioner filed the pending Amended Petition for federal habeas relief. (Doc. 66). Because the Court can resolve the Petition on the basis of the record, an evidentiary hearing is not warranted. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

## II. STATEMENT OF FACTS

The facts, as set forth by the Supreme Court of Florida, are as follows:

> The record reflects that on the evening of Sunday, September 19, 1993, James attended a party at Todd Van Fossen's house. James rented a room from one of the victims in this case, Betty Dick, and lived about two blocks away from the Van Fossens. He arrived at 6 p.m. and stayed until approximately 10:30 p.m. Todd's girlfriend, Tina, noticed that James seemed intoxicated by the end of the evening and asked him if he wanted to spend the night, but James declined. James drank between six and twenty-four cans of beer during the party, as well as some "shotguns"—three beers drunk through a funnel in a very short period of time. Shortly after leaving the party James ran into Jere Pearson who lived nearby and was returning from the Handy Way convenience store. Jere Pearson was interviewed by the assistant state attorney and the assistant public defender before trial. An audiotape of the interview was played for the jury during the trial.[3]

[3] The Supreme Court of Florida noted:

> Jere Pearson was called by the defense to testify at trial, but came to court intoxicated. Mr. Pearson failed an Intoxilyzer test and the trial judge

> Pearson stated that when the two met, James was on his way to visit Tim Dick, the victim's son, and his girlfriend, Nichole, who also lived nearby. They stopped and talked for about ten minutes and Pearson watched James ingest about ten "hits" of LSD on paper. James told Pearson he had been drinking at Todd Van Fossen's party, but he appeared sober to Pearson.
>
> After briefly visiting Tim Dick and Nichole where he drank some gin, James returned to his room at Betty Dick's house. When he entered the house, James noticed that Betty Dick's four grandchildren were asleep in the living room.[] One of the children, Wendi, awoke briefly when James arrived. She observed that he was laughing and appeared drunk. James went to the kitchen, made himself a sandwich and retired to his room. Eventually, he returned to the living room where he grabbed Betty Dick's eight-year-old granddaughter, Toni Neuner, by the neck and strangled her, hearing the bones pop in her neck. Believing Toni was dead, he removed her clothes and had vaginal and anal intercourse with her in his room. Toni never screamed or resisted. After raping Toni, he threw her behind his bed.
>
> James then went to Betty Dick's bedroom where he intended to have sexual intercourse with her. He hit Betty in the back of the head with a pewter candlestick. She woke up and started screaming, "Why, Eddie, why?" Betty's screaming brought Wendi Neuner to the doorway of her grandmother's bedroom where she saw James stabbing Betty with a small knife. When James saw Wendi he grabbed her, tied her up, and placed her in the bathroom. Thinking that Betty was not dead, James went to the kitchen, grabbed a butcher knife and returned to Betty's room and stabbed her in the back. James removed Betty Dick's pajama bottoms, but did not sexually batter her.
>
> Covered with blood, James took a shower in the bathroom where Wendi remained tied up and then threw together some clothes and belongings. He returned to Betty's room and took her purse and jewelry bag before driving away in her car. James drove across the country, stopping periodically to sell jewelry for money. He finally was arrested on October
>
> refused to let him testify at that time. As an alternative to Pearson's testimony, defense counsel proposed that the audiotape of the interview with Pearson conducted at the State Attorney's Office be played for the jury. The state agreed to defense counsel's proposal and James told the court that he also agreed with his counsel's proposal.

*James*, 695 So. 2d at 1230 n.1.

6, 1993, in Bakersfield, California, and gave two videotaped confessions to police there. A videotape containing the relevant portions of James' statements was played for the jury.

Dr. Shashi Gore, the chief medical examiner for Seminole County, testified that he performed autopsies on Betty Dick and Toni Neuner. Betty Dick suffered twenty-one stab wounds to the back with the knife still embedded. The wounds damaged both lungs, the liver, and the diaphragm and fractured several ribs. Dick also suffered major stab wounds to the left side of the neck, below the left eye, and on the left ear. A knife blade was also discovered in Dick's hair. Dick died of massive bleeding and shock from the multiple stab wounds to her chest and back. Dr. Gore opined that she died within a few minutes of her assailant's attack.

Toni Neuner suffered contusions to her lips and hemorrhaging in her eyes caused by lack of oxygen from strangulation. Gore opined that the extensive force necessary to create the contusions on her neck indicated that a ligature had been used. Dr. Gore also found contusions around the anal and vaginal orifices. The roof of the vaginal wall was completely torn. Although the substantial amount of blood pooled in the pelvic cavity indicated that Toni Neuner was alive at the time she was sexually assaulted, Dr. Gore could not state that she was conscious when she was raped. Toni Neuner died of asphyxiation due to strangulation.

Dr. E. Michael Gutman, a psychiatrist, testified as a mental health expert witness on James' behalf. He conducted neuropsychological tests on James in August of 1994. Dr. Gutman learned that James' father and grandfather had been alcoholics and James used crack cocaine, LSD, cocaine, marijuana, alcohol, and pills. In Dr. Gutman's opinion, James suffers from alcohol dependence and has an addictive craving for alcohol which he is unable to break. James has above average intelligence and his performance IQ is in the superior range.

James told Dr. Gutman that on the day of the offense, he had been drinking, had used crack cocaine and cannabis, and had taken some pills. He could not remember if he had taken LSD in the hours preceding the offense. Dr. Gutman determined that James has a passive aggressive or an addictive personality. In his opinion, James suffers from poly-substance dependence and abuse, as well as severe dysthymia, a chronic depressive disorder. James also has unresolved conflicts associated with being abandoned by his father.

Dr. Daniel E. Buffington, a clinical pharmacologist at the University of South Florida, testified for the defense about the effects of alcohol and drug addictions. He explained that if a person like James has an underlying psychological problem, LSD ingestion will most likely unmask it

and allow it to come to the surface. The acute phase of affectation due to LSD ingestion is two to twelve hours after ingestion. Possible reactions to LSD include, among others: a psychotic adverse reaction which is accompanied by hallucinations; a psycho-dynamic/psychedelic experience which results in a slow emergence of the subconscious idea or psychological condition; and a cognitive psychedelic reaction which overcomes an individual's ability to control himself.

Dr. Buffington opined that if James had drunk between twenty and thirty cans of beer between the hours of 6 and 11:30 p.m., he most likely had a blood alcohol level of more than three times the legal limit. If James ingested ten "hits" of LSD, about 200 micrograms at a minimum—which is a heavy dose—when considered in conjunction with the alcohol use, the peak effect of the LSD ingestion would have occurred between 12:30 a.m. and 1 a.m. The description of the crimes is consistent with the effects that the LSD and alcohol would have had on James. Dr. Buffington explained that such a large dose of LSD could have caused a physical or mental breakdown and a sudden release of aggressive action in someone like James, who suffers from a passive aggressive personality.

Dr. Buffington concluded that James was most probably under the influence of extreme mental or emotional disturbance due to his psychotic reaction and psychodynamic/psychedelic reaction to LSD. James further suffered from a decreased ability to control his behavioral pattern.

Betty and John Hoffpauir testified that they had known James for years. Once James made Betty Hoffpauir's grandson some golf clubs just out of kindness. James worked off and on with John Hoffpauir in his lawn business and would never take any money for helping him.

Betty Lee, who also testified on James' behalf, knew James through her daughter, who had lived next door to Betty Dick. When Betty Lee would visit her daughter, she often would see James playing with Toni and Wendi Neuner out in the front yard. James was also always willing to help Betty Lee's daughter whenever she called on him.

Anthony Mancuso is a volunteer with the Seminole County Correctional Facility and counsels inmates on religious matters. He testified that James is well-liked by the jail personnel as being a non-trouble maker. Once when Mancuso was ill, James wrote him a letter that Mancuso believes reflects James' spiritual growth while in custody. Mancuso explained that he has seen an incredible change in James since he entered the facility.

James also testified on his own behalf at the penalty phase. He was born in Pennsylvania in 1961. At the age of ten, he learned that his biological father had left him when he was just a baby. He eventually went to live

> with his biological father in Indianapolis when he was fourteen. However, James' father turned out to be a drug dealer and introduced James to marijuana. James moved with his father to Massachusetts, but his father returned to Indianapolis without James two weeks after the move. James has never heard from his father since that time. James subsequently moved to Florida with his mother after she separated from her second husband. He started experimenting with drugs, including marijuana and PCP, and eventually dropped out of school. He did get his GED, however, and entered the army at age seventeen. He started using more drugs in the army and received a general discharge under honorable conditions. James then spent eighteen months hitchhiking around the country and ultimately had a son who was born in March of 1983. James went to San Francisco where he graduated from a computer learning center. One day, James received a phone call from his son's mother who threatened to kill his son unless James would take him. James returned to Florida and took custody of his son, Jesse. However, James soon realized he was not prepared to raise his son, and his drinking and drug usage increased. His drug abuse caused his relationship with his girlfriend to break up and he distanced himself from his son. From James' birthday on August 4, 1993, until the day of the offense on September 20, 1993, James was steadily intoxicated. James feels ashamed for what he did, especially because he loved Betty and her grandchildren and felt that they were like his own family. James explained that he does not believe his drug abuse excuses his conduct, but it does help to explain it. On the other hand, James also testified that he had never had an adverse reaction when he took LSD and always had good experiences. In addition, he did not remember taking LSD prior to the murders.

*James I*, 695 So. 2d at 1230–33.

## III. STANDARD OF REVIEW UNDER THE ANTITERRORISM EFFECTIVE DEATH PENALTY ACT

Title 28 U.S.C. § 2254 governs this Court's authority to adjudicate a state prisoner's application for writ of habeas corpus. The Antiterrorism Effective Death Penalty Act of 1996 ("**AEDPA**"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), which amended § 2254 and took effect on April 24, 1996, "applies to all petitions filed after its effective date." *Henderson v. Campbell*, 353 F.3d 880, 889–90 (11th Cir. 2003). Because Petitioner filed the initial Petition in this action on December 18, 2018 (Doc. 23), the AEDPA applies to this case.

Pursuant to AEDPA, a federal court may not grant federal habeas relief with respect to a claim adjudicated on the merits in state court 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.

28 U.S.C. § 2254(d). The phrase "clearly established Federal law," encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

"[S]ection 2254(d)(1) provides two separate bases for reviewing state court decisions; the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005). The meaning of the clauses was discussed by the Eleventh Circuit Court of Appeals in *Parker v. Head*, 244 F.3d 831, 835 (11th Cir. 2001):

> Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

*Id.* (quoting *Williams*, 529 U.S. at 412–13). Even if the federal court concludes that the state court applied federal law incorrectly, habeas relief is appropriate only if that application was "objectively unreasonable."[4] *Id.* (quotation omitted).

Finally, under § 2254(d)(2), a federal court may grant a writ of habeas corpus if 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." However, the state court's "determination of a factual issue . . . shall be presumed correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Parker*, 244 F.3d at 835–36.

## IV. ANALYSIS

### A. Non-Record Evidence

Respondents contend that five of the exhibits Plaintiff attaches to his Amended Petition and Reply were not a part of the record before the state court and, therefore, must be stricken (Doc. 73 at 14–15; Doc. 86 at 1–2): (1) Petitioner's Mental Health Record from the Florida Department of Corrections ("**FDOC Mental Health Record**," Doc. 66-1 at 39–43), (2) the Neuropsychological Evaluation Report from Hyman H. Eisenstein, Ph.D., A.B.N. (Doc. 66-1 at 44–54), (3) the Psychological Report from

[4] In considering the "unreasonable application inquiry," the Court must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of law must be assessed in light of the record before the state court. *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (per curiam); *see also Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether the state court's decision was contrary to federal law).

Yenys Castillo, Ph.D. (Doc. 66-1 at 55–79), (4) the Declaration of Nicole House (Doc. 66-1 at 28–33), and (5) the Report of Erik D. Christensen, M.D. (Doc. 79-1; Doc. 86 at 2).

> Under the AEDPA, if a prisoner
>
> 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.

28 U.S.C. § 2254(e)(2) (emphasis added). These restrictions also apply "when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." *Holland v. Jackson*, 542 U.S. 649, 653 (2004).

However, new evidence *unrelated to a substantive claim* for habeas relief (*e.g.*, evidence related to tolling of the statute of limitations or to actual innocence arguments) may be presented to and considered by the Court. *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (emphasis added)) ("Schlup's claim of [actual] innocence is . . . not itself a constitutional *claim*, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."); *Dieterle v. Warden, Marion Corr. Inst.*, No. 1:22-cv-648, 2023 WL 6392439, at *3–4 (S.D. Oh. Oct. 2, 2023).

Consequently, the Court will consider the above-identified non-record exhibits in connection with Petitioner's tolling and actual innocence arguments.[5]

**B. Timeliness**

Pursuant to 28 U.S.C. § 2244:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C § 2254(d)(1)–(2).

[5] There are also a variety of other documents cited by Petitioner and provided with the Amended Petition and Records Cited List that Respondents do not specifically challenge but that do not appear to have been made a part of the state court record. To the extent those documents are cited or considered in conjunction with the Amended Petition, the Court considered them only in connection with Petitioner's tolling and actual innocence arguments.

*1. The Amended Petition is Untimely Under § 2244(d)(1)(A)*

Under § 2244(d)(1)(A), Petitioner's judgment of conviction became final on December 1, 1997, when the Supreme Court of the United States denied his petition for writ of certiorari following the Florida Supreme Court's affirmance of his convictions and sentences. Petitioner, therefore, had until Wednesday, December 2, 1998, absent any tolling, to file a federal habeas corpus petition. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (applying Fed. R. Civ. P. 6(a)(1) in computing the AEDPA's one-year limitation period to run from the day after the day of the event that triggers the period); *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (finding the AEDPA's one year "limitations period should be calculated according to the 'anniversary method,' under which the limitations period expires on the anniversary of the date it began to run") (citing *Ferreira v. Sec'y Dep't of Corr.*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)).

Under § 2244(d)(2), the limitations period tolls during the pendency of "a properly filed application for State post-conviction or other collateral review." But regardless of any such tolling, Petitioner waited more than two and a half years after withdrawing his Rule 3.850 motion[6] to contact the CCRC to begin attempting to reinstate the collateral proceedings; during that time, Petitioner's AEDPA limitations period necessarily expired. Petitioner also waited more than ten years from January 24, 2008 (the date the Florida

[6] At the time Petitioner initially moved for post-conviction relief, he had time remaining on his AEDPA limitations period. The limitations period ran for only 176 days from and including December 2, 1997, (the date following the Supreme Court's denial of Petitioner's petition for writ of certiorari), to but not including May 27, 1998, (the date Petitioner moved for post-conviction relief under Rule 3.850). The limitations period was then tolled through the conclusion of those post-conviction proceedings. Thus, at the time Petitioner waived his post-conviction proceedings, he had 189 days remaining of untolled time to file a timely § 2254 petition.

Supreme Court affirmed the post-conviction court's denial of the motion to reappoint counsel and resume collateral proceedings) to file his initial § 2254 Petition on December 18, 2018. Consequently, the Amended Petition is untimely under § 2244(d)(1)(A).

*2. Equitable Tolling*

Petitioner argues for the application of equitable tolling from the time he withdrew his Rule 3.850 motion in 2003 through the filing, by CHU counsel, of his initial § 2254 Petition in December 2018. (Doc. 66 at 17). Petitioner broadly claims that he was incompetent at and after the time he withdrew his Rule 3.850 motion (Doc. 66 at 20–22). He explains that his

> inability to think abstractly or elaborately made him uniquely vulnerable to coercion and manipulation and ultimately contributed to his belief that he deserved to die. Those vulnerabilities interfered with [his] ability to recognize that he may not be guilty of the charged offenses and [with] his ability to rationally assist in his own defense at various stages.

(Doc. 66 at 112). Petitioner argues that "the impediment of [his] incompetency was compounded by the failures of Petitioner's post-conviction counsel." (Doc. 66 at 22–23).

*a. Legal Standards Regarding Equitable Tolling and Competency*

The Supreme Court has held that that § 2244(d) is "subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). "Equitable tolling may apply 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1332 (11th Cir. 2008) (quoting *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006)) (citing *Helton v. Sec'y for the Dep't of Corr.*, 259 F.3d 1310, 1313

(11th Cir. 2001); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001)). "The diligence required for equitable tolling purposes is reasonable diligence." *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011) (citation and internal quotation marks omitted).

The federal standard for competence is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").

To justify the application of equitable tolling due to a petitioner's incompetency, a petitioner must "establish a 'causal connection between [the petitioner's] alleged mental incapacity and his ability to file a timely petition.'" *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (quoting *Lawrence v. Florida*, 421 F.3d 1221, 1226–27 (11th Cir. 2005), *aff'd*, 549 U.S. 327 (2007)). To do so, the petitioner must establish that a mental impairment "prevented him from understanding his rights and obligations under AEDPA and acting upon them in a timely fashion." *Id.* at 1309. Further, "[b]ecause equitable tolling is 'an extraordinary remedy,' it 'is limited to rare and exceptional circumstances' and 'typically applied sparingly.'" *Id.* at 1308 (quoting *Lawrence*, 421 F.3d at 1226).

*b. Petitioner's Evidence of Incompetency*

Petitioner urges that "numerous experts have found red flags indicating that [he] was incompetent at the time of his postconviction waiver[] and that incompetency persisted during the time after his waiver." (Doc. 66 at 20).

Petitioner explains that the FDOC Mental Health Records show he suffered from "impaired" thinking. (Doc. 66 at 20 (citing Doc. 66-1 at 43)).

Dr. Kessel, a board-certified Psychiatrist and Neurologist, evaluated Petitioner in September 2018 at the request of his CHU counsel. (Doc. 66-1 at 4). Dr. Kessel observed that Petitioner "appeared to have impairments of memory." (Doc. 66-1 at 4). Specifically,

> [h]e appeared to have difficulty finding words and frequently lost his train of thought in the middle of a sentence. . . . He had problems organizing his thoughts [and] problems expressing his thoughts clearly, and he acknowledged that he had gaps in his memory and sometimes could not tell if he actually recalled something or if someone told him about that same thing and he was recalling the report of what happened.

(Doc. 66-1 at 4). Dr. Kessel explained that

> [t]he deficits he described appear to be longstanding, possibly as the result of organic brain damage, his history of head injuries, and his extensive prior alcohol and drug use. [Petitioner] . . . describe[d] a worsening of his memory, organization of thought and word finding ability over the years and into the present. It is possible that [Petitioner's] cognitive functioning is deteriorating. His cognitive deficits are longstanding; the worsening of his cognitive function is likely also longstanding, may have become manifest prior to his offense in 1993, and continues through today.

(Doc. 66-1 at 5).

In addition to his memory impairments, Petitioner described to Dr. Kessel "a history of chronic periods of cognitive lapses, lasting under one minute but beginning in his childhood, coupled with learning problems and difficulty in school. He also reported

periods of longer 'blackouts' which were . . . sometimes likely [sic] prompted by drugs or alcohol." (Doc. 66-1 at 5). These described symptoms and observed facial tics led Dr. Kessel to express "some concern that [Petitioner] may have a longstanding, undiagnosed seizure disorder" that "may drive cognitive decline over time, particularly if untreated," and "for the foreseeable past, has likely . . . impaired [Petitioner] in abstract thinking, memory, taking initiative, and discerning relevant information." (Doc. 66-1 at 5). Dr. Kessel opined that

> [a] cognitive disorder—including one that may be the result of head trauma, chronic drug and alcohol use, and/or the presence of a seizure disorder—would likely interfere with [Petitioner's] ability to use and organize information in a meaningful way, consider consequences, and manage his behavior, particularly in an unstructured situation or under the influence of drugs.

(Doc. 66-1 at 5).

Petitioner further reported to Dr. Kessler "long periods of depression from the time of his youth and into his adulthood." (Doc. 66-1 at 5). Dr. Kessel observed unspecified "symptoms suggestive of the presence of depression even at the time of [her] evaluation." (Doc. 66-1 at 5). She opined that, "[g]iven the chronic nature of his depression, it is likely he experienced mood instability during the critical times of his legal entanglements, including around the time of his arrest, guilty plea, and state post-conviction waivers." (Doc. 66-1 at 5). Her "preliminary examination indicate[d] that, prior to his guilty plea and post-conviction waivers, [Petitioner] developed a nihilistic preoccupation that he should be executed." (Doc. 66-1 at 5). She also explained that Petitioner's cognitive dysfunction and brain damage "may very well aggravate [Petitioner's] depression, particularly given his memory impairments around the time of the offense." (Doc. 66-1 at 5). Additionally, his "heavy alcohol and drug consumption

would have exacerbated any pre-existing cognitive dysfunction and/or dementia, traumatic brain injury, underlying seizure vulnerability, and mental illness." (Doc. 66-1 at 5).

Finally, Dr. Kessel opined that further examination was needed to "understand the extent of [Petitioner's] cognitive impairments and the chronicity, quality and timeline of his depression, . . . [and] to explore whether or not he has or is suffering from other undiagnosed cognitive impairment[s], dementia and[/]or mental illnesses." (Doc. 66-1 at 5). She recommended a "full battery of neuropsychological tests[,] . . . functional imaging studies of his brain such as a PET or SPECT scan[,] . . . an anatomic imaging study such as a CT or MRI[,] . . . [and] an EEG." (Doc. 66-1 at 6).[7]

Dr. Regnier evaluated Petitioner in December 2018. He noted Petitioner's reported history of head injuries, including a concussion after being hit in the back of the head at age fourteen while on a boat, a rollover car accident at age fourteen or fifteen

[7] Prior to trial, Petitioner was evaluated by forensic psychiatrist Michael Gutman, M.D., who ordered both an EEG (electroencephalogram) and a SPECT (Single Positron Computerized Tomography) scan of Petitioner's brain. (Ex. A-8 at 486–87, 491–92). Dr. Kessel opined that "an EEG may help identify areas of the brain that may show abnormal electrical activity such as what one may see with seizure activity, though a negative test will not rule out seizure activity." (Doc. 66-1 at 6). At the sentencing phase trial, Dr. Gutman similarly explained that the EEG "is a brain waive test which measures the electrical activity of the brain . . . to determine whether or not there's an abnormal part of the brain or seizure activity." (Ex. A-8 at 491). Petitioner's results were normal. (Ex. A-8 at 491–92). Dr. Kessel explained that "functional imaging studies of [the] brain such as a PET or SPECT scan . . . show blood flow as a function of [one's] thought process." (Doc. 66-1 at 6). Dr. Gutman described the SPECT scan as "measur[ing] . . . whether or not there's any abnormal parts of the brain. When a certain isotope is infused, injected into the blood stream, it goes to the brain and passes over into brain tissue." (Ex. A-8 at 492). "When a computer readout is made of the brain, it will show where the abnormal tissue is[,]" because "[i]f there's abnormal brain tissue, there will not be the passing over of that isotope into that tissue." (Ex. A-8 at 492). Dr. Gutman described Petitioner's SPECT scan results as being within normal limits. (Ex. A-8 at 492).

due to which Petitioner was hospitalized for loss of consciousness and possible skull fracture, and head injuries resulting in loss of consciousness that he incurred during fights. (Doc. 66-1 at 9–10). Dr. Regnier observed that Petitioner's "mood was flat and his affect was restricted. He exhibited some signs of depression." (Doc. 66-1 at 8). Further, Petitioner reported that "his short-term recall was poorer than his long-term memory," but Dr. Regnier noted that "impairments in [Petitioner's] long-term memory were observable during [the] evaluation." (Doc. 66-1 at 8). Petitioner also reported that, although he used to be able to perform arithmetic in his head without using pencil and paper, he can no longer do so; he has difficulty finding the right words and spelling simple words; he "easily loses track of conversations and has difficulty recalling things that happened the day before"; his concentration is poor; and, "more recently, . . . he has become more emotional and gets angry or sad, crying for reasons that he can't explain." (Doc. 66-1 at 9, 11).

Overall, Dr. Regnier opined that Petitioner "presents with multiple red flags for a cognitive impairment, such as dementia," and suggested that "he return to administer specific tests of [Petitioner's] cognitive functioning" and that Petitioner be scheduled for a brain MRI. (Doc. 66-1 at 11).

Dr. Eisenstein evaluated Petitioner in June and July of 2022. Petitioner reported a history of multiple head injuries from car accidents, "head butting" the refrigerator door as a teen, and bar fights, some of which resulted in loss of consciousness. (Doc. 66-1 at 47–48). He also reported a long history of substance abuse including, among other things, marijuana, PCP, acid, LSD, cocaine, speed, valium, and sniffing hair spray and glue. (Doc. 66-1 at 48).

Dr. Eisenstein administered a variety of tests to evaluate Petitioner's intelligence, executive function, learning, memory, language, and visuospatial ability. (Doc. 66-1 at 51–53). He determined that Petitioner has had "a significant decline of cognitive skills over time[,] . . . [as] demonstrated in fluid reasoning, both verbal and visual, areas of academic functioning, and memory skills." (Doc. 66-1 at 54). Petitioner's "[e]xecutive functioning, such as complex information processing, judgment, and reasoning, as well as decision making skills, were all below expectation." (Doc. 66-1 at 54). Based on these findings, Dr. Eisenstein diagnosed Petitioner with "a neurodegenerative disorder, marked by significant decline over time. This disorder is consistent with his history of multiple head trauma and substance abuse." (Doc. 66-1 at 54).

Dr. Castillo evaluated Petitioner in May of 2022. He noted that Petitioner "demonstrated a history of impaired judgment" and that Petitioner "acknowledged a tendency to act without thinking and difficulty establishing life goals." (Doc. 66-1 at 58). Dr. Castillo thoroughly detailed Petitioner's adverse developmental and neurodevelopmental factors (including transgenerational family distress; substance abuse; head injuries; academic performance; and cognitive decline as relayed by Drs. Kessel, Regnier, and Eisenstein); family and parenting history; community factors (such as rejection by peers, association with individuals involved in illegal behaviors and substance abuse, living in poor and dangerous neighborhoods, and lack of community support); and disturbed trajectory factors (including social and emotional disturbances from childhood, irritability and mood dysregulation; estrangement, restlessness, and homelessness; coping skills and functioning difficulties; and deficient early interventions). (Doc. 66-1 at 59–75).

Regarding suggestibility, Dr. Castillo explained that "[s]uggestibility, defined as the tendency to accept and act on external influences, can be found in individuals with traumatic brain injuries and other cognitive deficits." (Doc. 66-1 at 75 (citation omitted)). Regarding Petitioner's confessions, Dr. Castillo noted:

> Mr. James made some statements to the police that raise the issue of whether he was suggestible to providing information. After reviewing videos and transcripts of Mr. James' statements to the police, we can note that he consistently reported not remembering the homicides or having any motive for them. However, after police encouraged him to think and visualize the homicides and offer some answers, Mr. James begins to go along with them and "remember" some details. Throughout his confession, though, he interjects cautionary statements such as "I guess," indicating he is not completely sure of the information he is providing. For instance, he reportedly "guessed" he had a knife. Based on the fact that Mr. James had neurocognitive deficits and brain damage, it is my concern that in the interrogation videos he is not offering accurate memories of the homicides but is going along with detectives when they say things like "close your eyes and visualize" or "give some detail."

(Doc. 66-1 at 75–76).

As for competency, Dr. Castillo described:

> A review of [Petitioner's] statements and records raises some competency concerns. [Petitioner] consistently indicated that he does not remember the homicides or his behavior leading up to them. However, he desired to be punished and even executed throughout the years. This desire comes from his attachment and depressive disturbances. For instance, during our interview, [Petitioner] indicated that he once wanted to be sentenced to die to avoid a lengthy process for the family and because, if he committed the offense, he did not deserve to present mitigation. However, once he realized he would not be executed immediately, he was willing to allow his attorneys to offer mitigation on his behalf. It is unclear whether [Petitioner] truly appreciated the seriousness and finality of being sentenced to die during his initial penalty phase and postconviction proceedings, and these competency concerns persist into the present day. Also, although [Petitioner] reported trusting his attorneys and did not seem guarded or paranoid, he has probably had impaired decisional capacities during prior proceedings. It is unclear whether he had been able to fully appreciate the finality and weight of the sentence he faces and the importance of collaborating with his attorney for his own defense.

> At a minimum, given his insistence on foregoing his legal rights and admitting to facts he did not seem to remember, the issue of whether he possessed or possesses (1) sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and (2) a factual and rational understanding of the sentence he faces should have been explored. Based on the information reviewed, it is possible that a neurocognitive condition coupled with depression rendered him incompetent to proceed in his capital legal proceeding and subsequent appeals, as both conditions would compromise a person's capacity to concentrate, sustain attention, learn, reason through hypothetical legal scenarios, make sound decisions, and conform his behavior to the requirements of a courtroom. That is, his flawed thinking, based on psychological trauma, brain damage, depression, self-loathing, and low self-esteem, could have impacted his ability to rationally understand the charges against him, appreciate the penalties he faces, understand the legal system, and assist his attorneys.

(Doc. 66-1 at 76–77).

Dr. Castillo concluded that the numerous adverse developmental factors Petitioner experienced "acted singularly and collectively to increase the likelihood of psychological and social maladjustment, morality deficits, poor impulse control, poor judgment, and violent criminal offending. These factors could have also led to problems involving suggestibility and competency to proceed." (Doc. 66-1at 79).

In addition to the reports from the mental health experts, Petitioner also provides a sworn statement from Keith McCauley, who "lived for several years in the early-to-mid 1990s . . . in the same neighborhood as [Petitioner]" and let Petitioner live with him "for several months." (Doc. 66-1 at 13). Mr. McCauley describes that, "at least once a month" (Doc. 66-1 at 14), Petitioner "would sometimes stop talking mid-sentence and appear as if his mind wandered off. He'd stare off into space and not respond, even if [Mr. McCauley] called his name. [Mr. McCauley would] have to snap [his] fingers at [Petitioner] to get his attention." (Doc. 66-1 at 13). Further, Petitioner "did not want to

be a burden" to others (Doc. 66-1 at 13), "had a loneliness about him[,] and always seemed to think the worst of himself." (Doc. 66-1 at 14).

Mr. McCauley described Petitioner as a heavy alcohol drinker and drug user. Mr. McCauley explained that Petitioner drank a six- or twelve-pack of beer "whenever [they] were together, which was about every day [that Petitioner and McCauley] were friends." (Doc. 66-1 at 15). Petitioner was also "not shy about drinking" liquor and "regularly used marijuana, shrooms, Quaaludes, hydros, cocaine, and LSD." (Doc. 66-1 at 15). Petitioner "took a lot of pills that [Mr. McCauley] couldn't identify, and [Mr. McCauley was] not sure [Petitioner] knew what he was taking much of the time. If it was a drug, and [Petitioner] could get his hands on it, he'd take it." (Doc. 66-1 at 15).

Michelle Yentz-Gill also submitted an affidavit. Petitioner lived with Ms. Yentz-Gill and her significant other, Wayne Montgomery, "[f]or about a year in 1991." Ms. Yentz-Gill relayed that Petitioner "said numerous times that he was worthless and nobody wanted him. He got down on himself when any problems would come up with his jobs or relationships." (Doc. 66-1 at 26). She believed Petitioner "self-medicate[d] with alcohol and drugs" and "regularly drank alcohol and smoked marijuana in [her] presence." (Doc. 66-1 at 26).

Mr. Montgomery, who knew Petitioner since Mr. Montgomery was "in diapers," similarly averred that Petitioner used "large amounts" of alcohol and "marijuana, downers (like Valium), psychedelic mushrooms, cocaine, PCP, and LSD." (Doc. 66-1 at 35–36). Petitioner "often showed . . . signs [that he was using drugs], and it seemed like he kept using more as the time went on." (Doc. 66-1 at 35). Mr. Montgomery explained that "[s]ome people thought [Petitioner] was crazy because his expression

occasionally looked vacant, and he had problems with his memory." (Doc. 66-1 at 36). Mr. Montgomery "used to joke that [Petitioner] had 'CRS'—'can't remember shit.' He'd forget people's names a lot. When [they] were working together at a landscaping company, [Mr. Montgomery would] have to keep showing him how to do certain tasks because he'd forget." (Doc. 66-1 at 36). Mr. Montgomery noted that Petitioner "was afraid of being a burden to other people." (Doc. 66-1 at 37). Petitioner "had this belief that if he couldn't get something on his own, he didn't deserve it. He thought being a man meant being completely independent[,] and when he wasn't, he felt worthless." (Doc. 66-1 at 37).

*c. Analysis*

The evidence identified by Petitioner, as summarized above, depicts Petitioner as an individual with a troubled upbringing that involved developmental trauma, a history of head injuries, extensive substance abuse, depression, and low self-esteem. The mental health experts agree that, likely stemming from those circumstances, Petitioner suffers from significant cognitive decline. Such decline would be exacerbated by further drug use and would aggravate his symptoms of depression.

However, "mental impairment is not a *per se* reason to toll a statute of limitations." *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (citation omitted). Instead, Petitioner must show a causal connection between his mental impairments and his ability to file a timely petition. *Hunter*, 587 F.3d at 1308. This Petitioner does not do.

The FDOC Mental Health Record shows that, on November 9, 2005, (*i.e.*, shortly after writing to CCRC counsel to request reinstatement of his collateral proceedings), Petitioner presented for a "psych eval prior to clemency hearing." (Doc. 66-1 at 41).

While the record notes that Petitioner suffered from "impaired" thinking (Doc. 66-1 at 43), no explanation was provided about how or to what extent his thinking was impaired. On the same date, the record describes that Petitioner was alert; displayed appropriate behavior, a cooperative attitude, and a neat appearance; and was oriented to person, place, time, and situation. (Doc. 66-1 at 42). Petitioner also had good immediate, recent, and remote memory; had good concentration and a fair ability to think abstractedly; denied hallucinations; presented with no delusions; denied suicidal or homicidal ideation; and had an appropriate affect and fair insight. (Doc. 66-1 at 42–43). The record contained notations that Petitioner self-reported IQ scores of 120 from 1994 and 121 from 2000 on the Wechsler Adult Intelligence Scale, (Doc. 66-1 at 40), and that "[n]o active symptoms [were] reported at pr[esent.] Expresses guilt, remorse. Mild sleep disturbances are not 'a problem' for him." (Doc. 66-1 at 41). The psychologist also noted, "[n]o indications for need for M[ental] H[ealth] T[reatment] at this time." (Doc. 66-1 at 40). Petitioner's past psychiatric history was described as "polydrug abuse on the streets." (Doc. 66-1 at 41). Nothing at all was listed regarding any psychiatric hospitalization, treatment, or medication; suicide attempt; or history of violence occurring prior to that evaluation (*i.e.*, during the time after he withdrew his Rule 3.850 motion and his AEDPA limitations period ran, untolled, until it expired).

Although Dr. Kessler opined that a cognitive disorder "would likely interfere with [Petitioner's] ability to use and organize information in a meaningful way, consider consequences, and manage his behavior, particularly in an unstructured situation or under the influence of drugs," (*see* Doc. 66-1 at 5, 40), the controlled prison environment both provided structure and assisted Petitioner to enter remission from his

polysubstance dependence, thereby minimizing those factors as they might relate to Petitioner's level of cognitive functioning while his AEDPA limitations period ran.

Dr. Regnier determined that "[t]here were no apparent symptoms of thought disorder, ideas of reference or delusions." (Doc. 66-1 at 8). Further, Petitioner's judgment was average, and despite the symptoms described, Petitioner's intelligence quotient as measured on the Wechsler Abbreviated Scale of Intelligence-II was average; he scored 99 (average) on the Verbal Comprehension Index, he scored 110 (high average) on the Performance Reasoning Index, and his Full-Scale IQ score was 105 (average). (Doc. 66-1 at 10).

While Dr. Eisenstein diagnosed Petitioner with a neurodegenerative disorder, Dr. Eisenstein also found that Petitioner's "mood was good," he "did not display any mental symptomology that would be concerning," and "[h]e did not appear depressed or anxious." (Doc. 66-1 at 48, 54). Petitioner's thinking "processes appeared coherent, lucid, rational, and organized." (Doc. 66-1 at 48). His "overall cognitive functioning was in the Superior range," and included a "Full Scale IQ score of 120[, which] is in the Superior range of intellectual functioning." (Doc. 66-1 at 54). Although Dr. Eisenstein described Petitioner's executive functioning as "below expectation," the test results shared by Dr. Eisenstein showed that Petitioner was only "mildly impaired" regarding arranging shapes from memory while blindfolded, regarding "nonverbal reasoning and problem[-]solving skills using error correcting feedback," and regarding his "ability to form abstract concepts, to maintain and shift set, and to utilize feedback." (Doc. 66-1 at 51). Petitioner otherwise scored average or above average on the remaining six measures, including on the Brief Cognitive Status Exam, "which evaluates basic

cognitive functions through tasks that assess orientation to time, incidental recall, mental control, planning/visual perceptual processing, inhibitory control, and verbal productivity." (Doc. 66-1 at 51–52).

Dr. Castillo similarly determined that Petitioner "exhibited rational and coherent thought processes, presenting his history with sufficient detail, consistency, and logic. He did not endorse or show delusional thoughts, hallucinations, or other psychotic symptoms." (Doc. 66-1 at 58).

Considering his IQ scores, Petitioner argues that his intelligence does not preclude incompetency. (Doc. 79 at 8). In support, he cites *Odle v. Woodford*, 238 F.3d 1084, 1088 (9th Cir. 2001), and *In re Heidnick*, 112 F.3d 105, 111 (3d Cir. 1997). (Doc. 66 at 171–72). But *Odle* and *Heidnick* are factually distinguishable.

In *Odle*, the petitioner, James Odle, argued in his federal habeas petition that he was denied due process because the trial court failed to hold a competency hearing. Odle presented evidence that, after a portion of his brain was removed following a traumatic brain injury, he was "'a different guy,' one who appeared mentally unstable and out of control." *Odle*, 238 F.3d at 1087. "He seemed confused and talked slowly, like a child; he had trouble controlling his impulses and often acted bizarrely and wildly. He would get a 'hot look in his eye like a junk-yard dog' and would 'beat his head against the wall.'" *Id.* at 1087–88. "While county health records revealed no mental disturbances or mental health visits prior to the accident, [he] was involuntarily committed to a psychiatric ward three times in as many years following the accident." *Id.* at 1088. On one occasion, "he was hospitalized after taking twelve Tylenol tablets," and during his hospital stay he was "combative, assaultive, agitated [and] disoriented."

*Id.* Another time, "[h]e had become violent, he threatened himself [and] others[,]" and "he seemed to have little control over these outbreaks." *Id.* (internal quotation marks omitted). Later, he was "committed again, after someone found him prowling around a stranger's backyard, incoherent, reliving combat or war somewhere, confused and hallucinating." *Id.* (internal quotation marks omitted). Across time in and out of psychiatric wards, Odle was prescribed a variety of medications, "[b]ut nothing altered his erratic, out-of-control behavior." *Id.* Once convicted and sent to prison, he attempted suicide. *Id.* Although the state argued "that this evidence of mental impairment [was] irrelevant because Odle appeared calm in the courtroom," the Ninth Circuit explained that "calm behavior in the courtroom is not necessarily inconsistent with mental incompetence. Some forms of incompetence manifest themselves through erratic behavior, others do not. Odle's behavior in the courtroom does not refute the large body of clinical evidence which tended to cast doubt on his competence." *Id.* The Ninth Circuit also noted that "records from the county jail suggest that [Odle's] calm [at trial] masked continuing mental impairment," as "[l]ess than a year before the trial began, prison officials found Odle lying face down in his jail cell, apparently unconscious. Odle had attempted to commit suicide by setting fire to his cell." *Id.* Ultimately, the Ninth Circuit "remand[ed] the case to [the] district court with instructions to grant the writ unless the state trial court conduct[ed] a hearing within sixty days to determine whether Odle was competent at the time he stood trial." *Id.* at 1090.

In *Heidnick*, the petitioner, Gary Heidnik, "personally petitioned the state courts to conduct no appellate review and to expedite his execution." 112 F.3d at 107. "The state supreme court . . . engaged in statutorily mandated review of limited issues of

state law and affirmed the judgment of sentence." *Id.* Thereafter, "Heidnik made no further effort to challenge his sentence," but "attorneys seeking to represent [him subsequently] filed a petition in the Philadelphia Court of Common Pleas asserting that Heidnik was incompetent to be executed." *Id.* At a hearing on the matter, "Heidnik reaffirmed his previous position that he did not want to appeal his sentence," but "[c]ounsel elicited from him his belief in various conspiracy theories, centering on his assertion that he was innocent of the murders and had been framed by the victims and corrupt police officers." *Id.* Counsel argued that his "protestations of innocence demonstrated that he must be delusional and that his willingness to be executed was a product of mental illness." *Id.* at 108. Heidnik underwent a psychiatric evaluation, and when the hearing reconvened, the forensic psychiatrist testified that Heidnik "understands that he is to be executed, and why, and that he is able to make his own decisions about his fate." *Id.* Crediting the psychiatrist's testimony, the trial court denied the request for a stay of execution. *Id.* On appeal of that decision, the Pennsylvania Supreme Court temporarily stayed the execution. *Id.*

Heidnik's daughter contemporaneously moved for a federal stay of execution and next friend standing. The district court denied the motion. *Id.* at 107. On appeal, the Third Circuit remanded the case to the district court for further proceedings and to continue the stay of execution. *Id.* at 112. The Third Circuit explained:

> In the final analysis the record reflects a situation in which a paranoid schizophrenic suffering from broad-based delusional perceptions has made a decision to die immediately rather than pursue available judicial remedies that conceivably might spare his life. The only explanation he has advanced for having chosen immediate death is that after his death the public will become convinced that he was an innocent victim of a conspiracy and that the realization that he has been executed though innocent will end capital punishment once and for all. Petitioners' three

> experts unanimously concluded that [the petitioner's] death decision is based on his delusional perception of reality—and has no rational basis. [The forensic psychiatrist] has simply failed to explain how [the petitioner's] choice has a rational basis and is not based on his delusional perception.
>
> In short, the record does not support a rational explanation as to why, even if [the petitioner] has rationalized to himself that he was innocent, he could, despite his delusions, make a rational decision to die. A psychiatric expert might have supplied this, but [the forensic psychiatrist] did not.

*Id.*

In the present case, there is no evidence that Petitioner was disoriented, a threat to himself, combative, erratic, or out of control during the relevant time period—*i.e.*, immediately before, during, or after Petitioner's waiver of his collateral proceedings and through the end of his limitations period under the AEDPA. Similarly, no evidence is presented that he suffered from delusions or hallucinations or that he required commitment to a psychiatric facility during the relevant time. Nor does the evidence demonstrate that Petitioner's mental impairments prohibited him from complying with prison rules or otherwise managing life within the prison environment, as Petitioner reported to Dr. Eisenstein that he had only three disciplinary reports over his thirty years of incarceration. (Doc. 66-1 at 54).

Moreover, Dr. Regnier noted that Petitioner reported decline in his cognitive functioning for only the "several years" before the December 2018 evaluation—not for more than a decade, which would be required to encompass the time during which Petitioner's limitations period under the AEDPA expired. (Doc. 66-1 at 9, 11). Similarly, though Mr. McCauley, Ms. Yentz-Gill, and Mr. Montgomery noted that Petitioner's mind would wander, that he was a heavy user of drugs and alcohol, that he often forgot names and work-related tasks, and that he thought badly of himself, none of their

statements pertained to his ability to manage his legal proceedings or to his daily abilities during the time immediately before, during, or after his waiver of collateral proceedings and through the end of his limitations period under the AEDPA. Simply stated, no one, not even Petitioner himself, provides specific allegations or evidence of the effect of his mental impairments on his daily life during the relevant time.

Even if Petitioner had demonstrated that his mental impairments constitute an "extraordinary circumstance" warranting the application of equitable tolling, "equitable tolling is available only if a petitioner establishes *both* extraordinary circumstances and due diligence." *Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 702 (11th Cir. 2004).

"While . . . any assessment of what is 'reasonable' diligence must take into account [a petitioner's] mental illnesses," *see Spears v. Warden*, 605 F. App'x 900, 905 (11th Cir. 2015), even considering Petitioner's alleged mental impairments, he does not allege reasonable diligence between the waiver of his post-conviction proceedings and the end of his AEDPA limitations period. Petitioner alleges no account of how his mental health status or impairments affected his ability to timely file a habeas petition under § 2254 during the period between when he moved to withdraw his post-conviction motion and when he sought to reinstate it more than two years later. For example, while he points to his belief that he deserves to die as a reason for being unable to rationally assist with his own defense (Doc. 66 at 112), Petitioner does not allege how his mental impairments, such as memory lapses and depression, affected his daily life in prison during the relevant time. He does not allege an inability to manage daily prison activities or responsibilities, nor does he describe that (1) he had thoughts of or

attempted suicide or other self-harm or that (2) he required or obtained any form of mental health therapy or treatment.[8]

It is true that Petitioner demonstrated some diligence in pursing his rights when, *after* being denied reappointment of CCRC counsel and reinstatement of his collateral proceedings, Petitioner unsuccessfully appealed the decision to the Florida Supreme Court. But, by that time, the limitations period had already expired. Moreover, Petitioner similarly alleges no account of how his mental health status or impairments affected his ability to pursue his rights under the AEDPA during the following *ten-year period* before he moved in this Court for appointment of the CHU in June 2018 to pursue his federal remedies.

Given Petitioner's failure (1) to show a causal connection between his mental impairments and his ability to timely file a § 2254 petition and (2) to demonstrate reasonable diligence, Petitioner does not demonstrate entitlement to equitable tolling.[9]

[8] The Court notes that undergoing mental health treatment reasonably could support Petitioner's claim of mental incompetency by providing an explanation for his renewed desire to pursue his collateral proceedings—*i.e.*, that, through such treatment, he was able to improve his mental health and reassess his legal position and related decisions. However, Petitioner does not allege that he ever sought or obtained such treatment or that any medical or mental health professional at the prison opined that he required such treatment.

[9] In the complete absence of specific allegations regarding how Petitioner's mental impairments during the relevant time affected his ability to timely file a federal habeas petition, no evidentiary hearing is warranted. *See Chavez v. Sec'y, Fla. Dep't Corr.*, 647 F.3d 1057, 1060–61 (11th Cir. 2011) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)) (citing *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 763 (11th Cir. 2010); *San Martin v. McNeil*, 633 F.3d 1257, 1271 (11th Cir. 2011)) ("'In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.' That means that if a habeas petition does not allege enough specific facts that, if they were true, would warrant

*d. Alleged Failures of Post-Conviction Counsel Related to Petitioner's Competency Do Not Entitle Petitioner to Equitable Tolling*

Petitioner claims that he was "constructively abandoned" by post-conviction counsel because counsel failed to challenge the post-conviction court's perception that there existed "no indication whatsoever that [Petitioner] ha[s] any mental problems . . . [and] that [he was] capable of exercising [his] best judgment." (Doc. 66 at 23 (quoting Ex. L-4 at 594)). Petitioner further faults counsel for not raising concerns regarding and not appealing the post-conviction court's decision discharging counsel and permitting Petitioner to waive his state post-conviction proceedings. (Doc. 66 at 23). Petitioner argues that counsel's ineffective assistance in this regard "compounded" the "impediment of [his] incompetency," (Doc. 66 at 22–23), and led to Petitioner's incompetent waiver of his post-conviction proceedings. (Doc. 79 at 11).

As determined above, Petitioner does not demonstrate that his mental impairments impeded his ability timely file a § 2254 petition. Therefore, there is no impediment for counsel's alleged ineffectiveness to "compound."

Moreover, the fact that Petitioner was on death row at the time he chose to relinquish his right to post-conviction proceedings does not automatically render his decision irrational. *See Lenhard v. Wolff*, 443 U.S. 1306, 1312–13 (1979) ("The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever

relief, the petitioner is not entitled to an evidentiary hearing. . . . The allegations must be factual and specific, not conclusory. Conclusory allegations are simply not enough to warrant a hearing.").

cost is the *summum bonum*, a proposition . . . with respect to which the United States Constitution by its terms does not speak.").

Instead, to show counsel erred in failing to object to the post-conviction court's determination and in failing to raise concerns about Petitioner's competency, Petitioner "must show that his counsel failed to bring 'information raising a bona fide doubt as to [his] competency' to the trial court's attention when *every* reasonable attorney would have done so." *Pompee v. Sec'y, Fla. Dep't of Corr.*, 736 F. App'x 819, 822 (11th Cir. 2018) (emphasis added) (quoting *James v. Singletary*, 957 F.2d 1562, 1570 (11th Cir. 1992)). Petitioner does not make this showing.

Petitioner claims that his "impairments . . . were or should have been obvious to counsel at the time of his 2003 waiver." (Doc. 66 at 23). Petitioner fails in the pertinent section of the Petition, (*see, e.g.*, Doc. 66 at 22–23), to explain why the impairments were or should have been obvious. But he notes elsewhere that "trial counsel had long been in possession of [his] inculpatory statements [to law enforcement] and were on notice that he lacked memory regarding the offenses," (Doc. 66 at 140), and "that he had given a statement to the media shortly after [his] arrest[] in which he expressed a belief that he deserved to die." (Doc. 66 at 141). Petitioner also states that counsel "were in possession of Dr. Gutman's report, which detailed Petitioner's history of substance abuse, head injuries, chronic depressive disorder, and previous overdose on prescription medication." (Doc. 66 at 141).[10]

[10] This argument was made in connection with Ground One (B)(2)(a), in which Petitioner argued that counsel did not protect Petitioner from entering into his guilty and nolo contendere pleas despite the red flags presented to them about his competency. (*See* Doc. 66 at 140–46).

Dr. Gutman, a forensic psychiatrist, testified for Petitioner at the penalty phase trial. He indeed acknowledged Petitioner's history of substance abuse (including crack cocaine, cocaine, LSD, cannabis, uppers, downers, and alcohol) and determined that Petitioner suffered from alcohol dependence, alcohol abuse, polysubstance abuse, polysubstance dependence, an addictive personality,[11] and chronic depressive disorder. (Ex. A-8 at 487, 493–97, 505–06).

Nonetheless, Dr. Gutman also testified that Petitioner's intelligence was above average; that his depression, though chronic, was mild (so mild that it may go unnoticed by those around him); and that results from EEG and SPECT scan testing were normal,[12] indicating Petitioner did not suffer from abnormal parts of the brain or seizures. (Ex. A-8 at 491–92, 499–500, 506–07, 520, 530). Dr. Gutman further testified on cross-examination that he found Petitioner competent. (Ex. A-8 at 519).

Dr. Gutman's penalty phase testimony occurred in the summer of 1995, and it was not until April 2003 (roughly eight years later) that a hearing was held on Petitioner's request to withdraw his Rule 3.850 motion. While a defendant's mental health may certainly change over time, Petitioner does not indicate that anything occurred in the intervening time that would cause counsel to have a bona fide doubt about his competency. For example, Petitioner does not allege (1) an inability to communicate with, understand, or assist counsel regarding the preparation and filing of

[11] Dr. Gutman described an addictive personality as "one where he does have addictive tendencies towards drugs and alcohol, that he has an avoidant or elements of shyness and introversion, and a passive aggressive personality." (Ex. A-8 at 507).

[12] *See supra* note 7.

his Rule 3.850 motion; (2) any particular development in his mental health impairments; or (3) any interaction or pattern of interactions with counsel that would give counsel reason to doubt his competency at that stage of the proceedings.

Further, the following colloquy (for which Petitioner was placed under oath) was held during the April 2003 *Faretta*-type hearing:

> MR. STRAIN [(post-conviction counsel)]:Judge, . . . this was a, the notice of voluntary dismissal was purely pro se filed by Mr. James not with the authority or concurrence of CCRC.
>
> THE COURT: Okay. And what is Mr. James' position?
>
> MR. STRAIN: Mr. James' position is he does want to proceed under *DeRosier*, which is a two-step procedure as we understand it that he would first ask the Court to dismiss our services and if the Court agrees under *DeRosier* and *Faretta*, that our services would be dismissed.
>
> Then Mr. James has indicated to us that he would intend to ask the Court to withdraw his 3.850 motion and inform the Court that he will not be proceeding with any further post-conviction proceedings.
>
> THE COURT: You wish to be heard?
>
> MR. HASTINGS [(for the State)]: No. I think that's the appropriate course of action to be taken at this time given the circumstances.
>
> . . .
>
> THE COURT: . . . All right. Mr. James, would you step up here to the podium so I can talk to you better.
>
> I need you to understand that I have to ask you certain questions to make sure that you understand what you're doing at that this [sic] what you want to do, okay?
>
> MR. JAMES: Yes.
>
> . . .
>
> THE COURT: All right. You are Edward T. James?
>
> MR. JAMES: Yes, sir.

THE COURT: Mr. James, I know you're aware of it, but I need to start off by making sure that you understand that you are a person who has been convicted by a jury of this state of a crime of first degree murder and you've been sentenced to death; do you understand that?

MR. JAMES: Yes.

THE COURT: Counsel for the Collateral Counsel has filed an action for post-conviction relief in this case and what all those big words mean is that they're asking me to review the case again to see if there's anything that happened during the case or anything that's been discovered after the case that might justify granting you some kind of relief such as a new trial or a reduction of sentence or something else; do you understand that?

MR. JAMES: Yes, sir.

THE COURT: All right. Now, Collateral Counsel has been appointed to represent you and you have the right to have a lawyer appointed to represent you and totally free of charge; do you understand that?

MR. JAMES: Yes.

THE COURT: It's not going to cost you a thing. It's not going to cost you any time, effort, energy, or money; do you understand?

MR. JAMES: I understand.

THE COURT: All right. Now, I need to tell you a little bit about some of the advantages of having a lawyer represent you in this kind of proceeding.

First, a lawyer can advise you as to whether or not you have any grounds for the court to grant you some sort of relief from your sentence.

A lawyer has the experience to help you work through that and to negotiate with the State in the event there is something in the record or something that's been discovered that might be able to give you some relief; do you understand that?

MR. JAMES: Yes, I understand.

THE COURT: The lawyer can tell you what your chances are to have relief granted and can make the decision to present witnesses on your behalf and can advise you as to whether or not you should testify at the hearing of post-conviction relief; do you understand that?

MR. JAMES: I understand.

THE COURT: And you understand that if you decide not to have a lawyer represent you and I hear what he said, he said that you not only do not want a lawyer to represent you, but you want to withdraw this motion, we got [sic] to take it a step at a time.

MR. JAMES: I understand.

THE COURT: You understand that if you did not have a lawyer representing you, then I'm not going to be able to give you any particular advantage or any particular benefit over the fact that you don't have a lawyer. In other words, if you're going to represent yourself you're on your own.

MR. JAMES: I understand.

THE COURT: All right. Now, I need to ask you a series of questions to make sure that you are able to waive your right to counsel.

First, how old are you?

MR. JAMES: Forty-two.

THE COURT: And can you read, write, speak and understand the English language?

MR. JAMES: Yes, sir, I can.

THE COURT: How many years of school have you completed?

MR. JAMES: Got my GED after ten years.

THE COURT: All right. Are you currently under the influence of any alcohol or drugs?

MR. JAMES: No, sir.

THE COURT: Do you think you're in good physical and mental health?

MR. JAMES: Yes, sir.

THE COURT: Has anybody told you that you have any sort of mental illness?

MR. JAMES: No, sir.

THE COURT: Has anyone told you not to use a lawyer?

MR. JAMES: No, sir.

THE COURT: Has anybody threatened you to require you to discharge counsel?

MR. JAMES: No, sir.

THE COURT: I've already told you you understand that court-appointed counsel will represent you without charge.

MR. JAMES: Yes.

THE COURT: All right. Now, you've been advised of the right to have a lawyer, you've been advised of the advantages of having a lawyer, you've been told, and I'm going to tell you again, this is about the last opportunity that you're going to have to have this judgment and sentence tested as to its validity.

MR. JAMES: Yes, I understand that.

THE COURT: And you understand that without an attorney the post-conviction relief motion is going to be much more difficult to present because you'd have to do it on your own and you're in custody and that just makes it very, very difficult.

MR. JAMES: Yes, sir, I understand.

THE COURT: All right. Are you satisfied, are you convinced that you do not want Collateral Counsel to represent you?

MR. JAMES: Yes, sir, I am.

THE COURT: All right. Mr. Hastings, do you have any questions you would like to ask Mr. James in furtherance to his decision not to have a lawyer?

MR. HASTINGS: Yes. Just to get something on the record.

Mr. James, you realize that your present counsel has filed a motion for post-conviction relief and that certain grounds have been granted[] an evidentiary hearing [that] is scheduled in June?

MR. JAMES: Yes, sir.

MR. HASTINGS: And you understand that your counsel has arranged to subpoena and so forth witnesses to testify on your behalf—

MR. JAMES: Yes.

MR. HASTINGS: —in that proceeding?

MR. JAMES: Yes, sir.

MR. HASTINGS: And you understand that if you discharge counsel, if the judge allows you to do so and if you continue with your request to voluntarily dismiss this, that that will be the end of the post-conviction relief motion?

MR. JAMES: Most definitely, yes.

THE COURT: Okay. Because we have to take this one step at a time I need to cover one more area with you. I cannot assume at this point that you're going to tell me, Judge, I want to withdraw this motion, all right. At this point, I'm just making sure you understand what you're doing.

MR. JAMES: Yes, sir.

THE COURT: You understand that if you decide that you want to withdraw, to discharge counsel in the case and represent yourself, that I have the authority if you ask me to, to appoint standby counsel to assist you in the event you decide to go forward with your motion without a lawyer; do you understand that?

MR. JAMES: Yes.

THE COURT: All right. Now, you've told me that you don't want to do that, so I'm not going to waste time and effort talking about it. But I'm now going to make some findings first. I have had an opportunity to see you and talk with you and discuss this matter with you. There is no indication whatsoever that you have any mental problems or any, or that you are under the influence of alcohol or drugs, or anything else. It appears that you are an alert and intelligent individual, that you're capable of exercising your best judgment, that you've made a decision you wish to discharge your counsel and I'm going to allow you to do that.

MR. HASTINGS: Your Honor, may I make one more inquiry?

THE COURT: All right.

MR. HASTINGS: Mr. James, are you aware of what the witnesses will be testifying to and the content of their testimony?

MR. JAMES: I have a pretty good idea.

MR. HASTINGS: Have you spoken, I don't mean what your attorney has talked with you about, what the different witnesses would say?

MR. JAMES: As far as what evidence they have to present?

MR. HASTINGS: Yes.

MR. JAMES: Yes.

MR. HASTINGS: Sorry.

THE COURT: All right. Now, Mr. James, your lawyer, whom I have just discharged, has told me that you want to withdraw this plea.

MR. JAMES: Yes.

THE COURT: I gave you a little bit of a basic idea of what that means, but I want to make sure on the record that you understand. If you withdraw this plea or this motion and more than—what is it? One year? They have one year to file a motion?

MR. SQUIRES: One year.

THE COURT: More than the one year passes, you will not be able to file another motion.

MR. JAMES: Yes, sir.

THE COURT: And that means that this case is basically going to be over.

MR. JAMES: I'm sort of hoping that that's going to be the outcome of this hearing here.

THE COURT: All right.

MR. JAMES: It will be all said and done with and the State can go ahead and proceed in carrying out its sentence.

THE COURT: Okay. I am convinced that that is what you want to do and I'm going to allow you to do it, to withdraw your motion.

MR. JAMES: Thank you very much.

(Ex. L-4 at 585–95).

A criminal defendant is competent if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)). Although Petitioner's statements at the hearing were brief, they were coherent and demonstrated that he had a rational and factual understanding of the proceedings against him (including the nature of his convictions and death sentence and the consequences that would stem from his decision to withdraw his post-conviction motion). *See, e.g.*, *Wright v. Sec'y, Dep't of Corr.*, 278 F.3d 1245, 1259 (11th Cir. 2002) ("The best evidence of [the defendant's] mental state at the [relevant time] is the evidence of his behavior around that time, especially the evidence of how he related to and communicated with others then.").

Given Petitioner's statements at the hearing and his failure to allege sufficient facts or circumstances demonstrating that counsel had or should have had a bona fide doubt about his competency, the Court cannot find that "every reasonable attorney would have" raised the issue of Petitioner's competency and objected on competency grounds to his decision to waive his post-conviction proceedings, *Pompee*, 736 F. App'x at 822, or that counsel constructively abandoned Petitioner and led him to waive his post-conviction proceedings while incompetent.

Finally, to the extent Petitioner faults counsel for not appealing the post-conviction court's decision to discharge counsel and permit Petitioner to waive his post-

conviction proceedings, his position is unfounded. For the reasons stated above, such appeal would not have succeeded on the allegations presented. *See, e.g.*, *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance.").

*3. Statutory Tolling Under 28 U.S.C. § 2244(d)(1)(B)*

Petitioner additionally claims that statutory tolling should apply under 28 U.S.C. § 2244(d)(1)(B), which provides that the one-year limitations period shall run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." Petitioner claims that the state courts created an impediment to his ability to timely file a federal habeas petition "[b]y failing to reinstate [his] [post-conviction] proceedings and reappoint counsel after [his] 2005 request." (Doc. 66 at 28–29). He points to two other death-sentenced petitioners who the state courts ultimately permitted to waive and reinstate their proceedings multiple times. (*See* Doc. 66 at 25–28). Under § 2244(d)(1)(B), Petitioner seeks tolling "from the time [he] sought to have counsel and his [collateral] proceedings reinstated" (*i.e.*, November 2005, when CCRC counsel moved to reappoint the Office of the CCRC and resume Petitioner's collateral proceedings after receiving Petitioner's letter (Ex. L-3 at 501–03)) through the filing of his initial § 2254 Petition in December 2018. (Doc. 66 at 18).

However, § 2244(d)(1)(B) requires that the alleged impediment be one "created by State action in violation of the Constitution or laws of the United States." Petitioner argues the state impediment was the deprivation of counsel to reinstate his post-

conviction proceedings and advance his post-conviction claims. But "[t]he Supreme Court has long held that there is no constitutional right to counsel in post-conviction proceedings, even in capital cases." *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 944 (11th Cir. 2014); *see also Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Consequently, the state courts' denial of counsel is not an impediment that violates the Constitution or laws of the United States, and § 2244(d)(1)(B) is inapplicable here.

*4. Actual Innocence*

Petitioner's remaining argument to overcome the time-bar is that, despite the untimeliness of the Amended Petition, his actual innocence provides a gateway through which the Court may consider the merits of his claims for habeas relief. (Doc. 66 at 18).

The Supreme Court has held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House* [*v. Bell*, 547 U.S. 518 (2006)], or . . . expiration of the statute of limitations," *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), as it is here. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousely v. United States*, 523 U.S. 614, 623 (1998). "To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. "[T]enable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329).

Petitioner presents the following evidence that was not presented at trial in support of the theory that Tim Dick[13] killed the victims rather than himself: the declarations of Keith McCauley (Doc. 66-1 at 13–21), Sandra Dichiara (Doc. 66-1 at 23–24), Michele Yentz-Gill (Doc. 66-1 at 26–27), Nicole House[14] (Doc. 66-1 at 29–33), and Wayne Montgomery (Doc. 66-1 at 35–38); and the report of Kamala London, Ph.D. (Doc. 66-1 at 83–124). Petitioner also presents the following mental health evidence not presented at trial in support of his theory that he falsely confessed: the Preliminary Assessments of Drs. Kessel and Regnier (Doc. 66-1 at 4–6, 8–11), the Neuropsychological Evaluation Report from Dr. Eisenstein (Doc. 66-1 at 44–54), and the Psychological Report from Dr. Castillo (Doc. 66-1 at 55–79).

*a. Theory that Tim Dick Perpetrated the Crimes*

Petitioner argues that the statements of Wendi Neuner, the only eyewitness, are not reliable and that it was Tim Dick—not Petitioner—who perpetrated the crimes. Petitioner claims that, "[b]iased conditions in her interviews, exacerbated by [her] specific vulnerabilities, undermine her account of what she witnessed." (Doc. 66 at 42). Further, Petitioner argues that "Wendi Neuner's multiple statements are rife with discrepancies and became increasingly embellished over time." (Doc. 66 at 42).

Based on Wendi Neuner's various statements, the following occurred:

On the night of September 19, 1993, nine-year-old Wendi Neuner; her eight-year-old sister, victim Toni Neuner; and their two- and four-year-old brothers were

[13] Tim Dick is the adult son of murder victim Betty Dick. He is also the uncle of murder victim Toni Neuner and kidnapping victim Wendi Neuner.

[14] Ms. House was known as Nicole Angel at the time of the offenses and as Nicole Jarvis at the time of the penalty phase trial (Ex. A-9 at 607).

supposed to sleep at the home of Nicole House. (Ex. A-8 at 106, 109, 580). Ms. House was dating Tim Dick (uncle to Wendi and her siblings) at the time. (Ex. A-8 at 580; Ex. A-9 at 607). Wendi explained that they were all supposed to go to a waterpark together the next morning. (Ex. A-8 at 580–81; Doc. 85-1 at 90). However, they could not stay at Ms. House's residence because Ms. House and Mr. Dick were drunk and did not want them there. (Ex. A-8 at 581–83; Doc. 85-1 at 96–97). So instead, they slept at their grandmother's—victim Betty Dick's—home, where Petitioner[15] also lived at the time. (Ex. A-1 at 110–114; Ex. A-6 at 134; Ex. A-8 at 583; Doc. 85-1 at 12, 47–48).

The evening of September 19, 1993, Betty Dick took Toni Neuner with her to go pick up Mr. Dick and Ms. House. All four returned to Betty Dick's house, and Mr. Dick and Ms. House then went to Ms. House's residence for the night. (Ex. A-1 at 114; Ex. A-6 at 135). After falling asleep in the living room, (Ex. A-6 at 136; Doc. 85-1 at 13, 48–49), Wendi awoke when she heard Petitioner come in the front door around eleven-thirty[16]; he was laughing at something, and he walked to his bedroom. She then fell back asleep. (Ex. A-1 at 116, 119–20; Ex. A-6 at 137–38; Doc. 85-1 at 15, 50–51).

Later, Wendi awoke[17] to her grandmother yelling and screaming, "Stop, Eddie, stop, Eddie" or "Eddie, stop, Eddie, stop." (Ex. A-1 at 120–21; Ex. A-6 at 140; Ex. A-8

[15] In her initial police interview, Wendi stated that she had seen Petitioner earlier in that day playing hack ball at her dad's friend's house. (Ex. A-8 at 583). However, in a statement to law enforcement the following day, Wendi stated she had not seen him. (Ex. A-1 at 115–16).

[16] She knew it was eleven-thirty at night because she could see the clock on the microwave. (Ex. A-1 at 116; Ex. A-6 at 137).

[17] Wendi did not know what time it was when she awoke. She reported to Detective Toole that the clock on the microwave was no longer working when she

at 584–85; Doc. 66-1 at 96; Doc. 85-1 at 4, 16–17, 52). Wendi Neuner turned on a light in the living room, rubbed her eyes, knocked on her grandmother's bedroom door, then opened the door and entered the bedroom. (Ex. A-8 at 585–87; Doc. 85-1 at 17, 52–53).

The details of what happened next differ a bit between Wendi Neuner's various statements. According to Detective Valerie Mundo, who was the first law enforcement officer to speak to her, Wendi stood within inches of her grandmother and watched her being stabbed, but she did not know the weapon being used because it was so dark. She recognized Petitioner's voice when he told her grandmother, "If you're not dead by the time I count to three." (Doc. 66-1 at 96; Doc. 85-1 at 4–5). Petitioner kept stabbing, and when her grandmother's head dropped back and she lost consciousness, Petitioner "covered her [grandmother's] mouth with his hand and grabbed her neck with the other hand." (Doc. 85-1 at 5).

During the September 20, 1993 interview with Assistant State Attorney Stewart Stone, Wendi similarly described that when she entered her grandmother's bedroom, she saw Petitioner "stabbing and hitting [her] grandmother." (Doc. 85-1 at 9, 17). Although she did not see the weapon, she saw in his hand "something going up and down . . . with blood on it." (Doc. 85-1 at 17–18). Thereafter, Petitioner started kicking her grandmother in the ribs, then "pushed [Wendi] down and . . . picked [her] up and threw [her] on [her] grandmother's bed." (Doc. 85-1 at 19). Petitioner told her grandmother, "If you're not dead by the count of three, I'm gonna start stabbing some

awoke to her grandmother's screams. She stated that Petitioner unplugged the microwave. (Ex. A-1 at 139–40).

more." (Doc. 85-1 at 19). Petitioner then proceeded to stab her grandmother more, and he held his hand over her grandmother's mouth. (Doc. 85-1 at 20). After Betty Dick was dead, Petitioner put his hand over Wendi's mouth, picked her up and dragged her to the bathroom, where he tied her up. (Doc. 85-1 at 20–22).

Wendi later told Detective Toole that she saw Petitioner choking and stabbing her grandmother, (Ex. A-6 at 140), and that, when she came in, he "grabbed [her] by the neck and threw [her]." (Ex. A-1 at 121). She smelled beer on his breath. (Ex. A-1 at 121). Then, Petitioner said to Betty Dick, "If you're not dead in the count of three, I'm going to stab some more." She was not dead, though, so "he started stabbing some more" and continued choking her. (Ex. A-1 at 122; Ex. A-6 at 144).

At her deposition in May 1994, Wendi testified that when she entered the bedroom, Petitioner came towards her and she fell back into the door, closing it. (Ex. A-8 at 587). He was stumbling, she smelled beer on his breath, and his speech was hard to understand. (Ex. A-8 at 587–88). Wendi stated that, "when he was close to the end" with Betty Dick, "I guess[,] he said give up, give your life up to the ghost or something." (Ex. A-8 at 588).

Wendi told Officer Mundo that she did not recall seeing her sister while Betty Dick was being stabbed, but Wendi believed Toni had been sleeping with her grandmother in the same bed. (Doc. 66-1 at 96; Doc. 85-1 at 5, 16). Wendi was not aware of Toni's death at that time. (Doc. 66-1 at 96; Doc. 85-1 at 5). She similarly told Mr. Stone that her sister was in her grandmother's bed, (Doc. 85-1 at 18–19, 49), but she did not know what Toni was doing because she could not see her. (Doc. 85-1 at

18–19). Wendi also reported to Detective Toole that she believed Toni was sleeping next to her grandmother. (Ex. A-1 at 144).

At her November 1994 deposition, Wendi stated that when she opened the door to her grandmother's room, Petitioner grabbed her by the arm and threw her into the room. She fell and cut her knee. Petitioner closed the door, grabbed her by the arm, and threw her onto her grandmother's bed. (Doc. 85-1 at 54). She watched Petitioner stab her grandmother multiple times with something sharp. Her grandmother was on her back, and Petitioner then put his hand over her grandmother's mouth. He said if she was not dead by the count of three, he would stab her more. (Doc. 85-1 at 55). Once her grandmother was dead, Petitioner grabbed Wendi by the wrist, dragged her to his room to get a sock and pillowcase, then dragged her by the wrist to the bathroom, where he tied her up. (Doc. 85-1 at 56–58).

Petitioner did not take a shower in the bathroom where she was tied up at any time that she was in there. (Doc. 85-1 at 93–94). However, she affirmed that there was also a working shower in the bathroom attached to her grandmother's room. (Doc. 85-1 at 94). Further, on the night of the murders, she "had an earache and . . . a fever and . . . wasn't feeling well." (Doc. 85-1 at 95). While tied up, she "stuck her head on the toilet to try to cool it down" and tried to keep her eyes open to stay awake. (Doc. 85-1 at 95).

She also reported during the November 1994 deposition that she "had time to think it over and . . . remember everything that happened," and decided that Petitioner was not stumbling while committing the crimes. (Doc. 85-1 at 83–84).

Wendi reported to Detective Mundo that she asked Petitioner if he would hurt her brothers, to which Petitioner responded, "No. They're fast asleep." (Doc. 66-1 at 96; Doc. 85-1 at 5). Petitioner then escorted Wendi into a bathroom by the arm, reversed the doorknob so she would be locked inside, and left the scene. (Doc. 66-1 at 96; Doc. 85-1 at 5). She told Detective Mundo that "[s]he kn[ew] [Petitioner] committed the murders because she saw him in the full light of the bathroom, blood-soaked, directly after witnessing him stab and kill her grandm[other] in the dark bedroom." (Doc. 66-1 at 96; Doc. 85-1 at 5).

To Detective Toole, Wendi described that Petitioner threw her down, grabbed her by the throat and hair, ordered her to "[g]et on [her] knees and start walking," and dragged her to a bathroom unconnected to the master bedroom. (Ex. A-1 at 122–23; Ex. A-6 at 142–143; *see also* Ex. A-8 at 589). There, he bound her hands behind her back with a white sock, tied a pillowcase around her mouth, stuffed the pillowcase into her mouth to keep her from speaking, and took off his bloody shirt and bound her legs with it. (Ex. A-1 at 124–25; Ex. A-6 at 142–143). Wendi reported that, at some point, she asked Petitioner to turn the bathroom light on, which he did. She also asked him if he was going to hurt her brothers; he said no, because they were sound asleep. (Ex. A-1 at 125).

Photographs of Wendi were introduced into evidence showing "a contusion on her neck and redness," as well as "redness and contusions at the wrist area." (Ex. A-6 at 143–44).

Wendi "was able to scoot to the entrance of the bathroom and peer down the hallway." (Ex. A-6 at 145; Ex. A-1 at 150). From there, she saw Petitioner take Betty

Dick's purse, keys, and wallet (which was in the purse) from Ms. Dick's bedroom. (Ex. A-1 at 126–27; Ex. A-6 at 144–45; Doc. 85-1 at 23–24). She stated she also saw Petitioner wearing Betty Dick's jewelry on the same hand in which he held Ms. Dick's car keys. (Ex. A-1 at 127; Ex. A-6 at 145). They were the rings given to Betty Dick by Wendi's grandfather, Betty's earrings, and Betty's bracelets. (Ex. A-1 at 127).[18] After that, Petitioner left through the front door, locked the front door,[19] and drove away in Betty Dick's car. (Ex. A-1 at 128–29; Ex. A-6 at 145; Doc. 85-1 at 23–24, 59). Although Wendi could not see him driving away, she knew the sound of her grandmother's car, as it was loud with a distinctive rumbling sound, and she heard the car start and drive away. (Ex. A-1 at 129–30; Ex. A-6 at 145–46; Doc. 85-1 at 59).[20]

Petitioner returned in the same car a few minutes later and entered the home through the front door. (Ex. A-6 at 146; Doc. 85-1 at 25–26). Petitioner went to where he had left Wendi bound in the bathroom, and he pointed to her and laughed. (Ex. A-1

[18] Wendi implied that her grandmother had been wearing those items of jewelry. She stated that Petitioner "took off all [her grandmother's] rings that [Wendi's grandfather] gave her, took off her, I guess, her earrings and her bracelets." (Ex. A-1 at 127). When asked how she could see that Petitioner had done that, she answered, "'Cause he was wearing them." (Ex. A-1 at 127). Petitioner did not remember removing any jewelry from Betty Dick's body, and, instead, recalled that the rings he pawned were found in her purse and "in that bag that she brings home from the jewelry store" where she worked. (Ex. A-4 at 630).

[19] It is unclear whether Wendi Neuner heard Petitioner lock the door. She later stated that Petitioner told her he was going to lock the door. (*See* Ex. A-1 at 151).

[20] At Wendi's November 1994 deposition, she similarly described scooting to the bathroom door, peering down the hallway, and seeing Petitioner coming out of her grandmother's room with the jewelry, as well as her grandmother's purse and car keys. (Doc. 85-1 at 61–62). But at that time, she described those events as happening after he returned with coffee and before leaving the house for the final time in her grandmother's car. (Doc. 85-1 at 61–63).

at 132–33; Ex. A-6 at 146; Doc. 85-1 at 26–28, 60). He had a foam cup of coffee with him; she thought the cup may have said "Handy Way Food Store" on it because she heard her grandmother's car drive away in the direction of that store. (Ex. A-1 at 130–31; Doc. 85-1 at 26). Petitioner remained in the house only a "few seconds," (Ex. A-1 at 133), or about five minutes, and left again. (Ex. A-6 at 146).[21]

Next, Wendi heard her aunt arrive with her two nephews; she beeped the horn about three times. (Ex. A-1 at 134–35; Ex. A-6 at 147). Wendi explained that her aunt dropped off her two small children each morning around five-thirty or six o'clock. She heard her aunt knock on the door[22] and heard one of the children faintly knocking.[23]

[21] Wendi did not hear the car leave again, she heard only a "little knocking sound." (Ex. A-1 at 134). When she eventually escaped the house, she noticed the car was gone; she told Officer Michael Toole that "she believed that he had taken the car and maybe done something to the gears to make it not so loud." (Ex. A-6 at 046–47; Ex. A-1 at 134).

[22] Wendi stated that her aunt "knew something was wrong because [Betty Dick's] car was gone." (Ex. A-1 at 135). Wendi could not have known what her aunt was thinking at the time, thus, Wendi must have inferred it or learned it after the fact.

[23] Petitioner argues that Wendi was inconsistent regarding how many cousins—one or two—arrived with her aunt that morning. (Doc. 66 at 64 n.28). But the record is not clear on that point. On September 20, 1993, Wendi told Mr. Stone that she knew her three-year-old cousin Chrissy approached the front door and knocked with Wendi's aunt because "I know how she bangs." (Doc. 85-1 at 31). The interviewer only asked who was with Chrissy when she knocked on the door, to which Wendi replied that her aunt was with Chrissy. The interviewer did not ask if another child was with Chrissy and the aunt, perhaps straggling behind or still in the car. (Ex. A-1 at 31). On September 21, 1993, Wendi told Detective Toole that her two cousins were with her aunt that morning, that she knew they were with her aunt because her aunt drops them off each morning at Betty Dick's house, and that she knew one of the cousins knocked on the door because the knock was fainter than when her aunt knocks. (Ex. A-1 at 135–36).

(Ex. A-1 at 135–36; Ex. A-6 at 147; Doc. 85-1 at 30–31, 70–71).[24] Wendi could not communicate with her aunt, as she was still bound and gagged. (Ex. A-6 at 147–48; Doc. 85-1 at 30).[25] Her aunt left, and Wendi was eventually able to free herself from all but the binding around her mouth and neck—she was able to pull it down, but she could not untie it. (Ex. A-1 at 136–37; Ex. A-6 at 148; Doc. 85-1 at 32, 63–64). Wendi reported to Detective Mundo that she "played with the doorknob and reversed the doorknob again to escape," having learned to do so by watching Petitioner when he originally locked her in. (Doc. 66-1 at 96; Doc. 85-1 at 5).

When she freed herself, Wendi looked around to "see if anyone was there, turned some lights on and off and then eventually went out the back door" into the backyard,[26] where she propped an object against the fence and climbed over it. She hid from a few approaching cars, believing they might be Petitioner returning, and then she ran to find her uncle, Tim Dick. (Ex. A-1 at 137–38; Ex. A-6 at 148–49; Doc. 66-1 at 96; Doc. 85-1 at 5, 33, 68–69, 71–72). Ms. House opened the door when Wendi knocked. (Ex. A-6 at 149, Doc. 85-1 at 72). Ms. House confirmed to Detective Toole

[24] Detective Toole confirmed that, during the investigation, law enforcement determined the aunt, indeed, came by around that time and knocked on the door. (Ex. A-6 at 147).

[25] At her November 1994 deposition, Wendi also explained that she was afraid it could have been Petitioner. (Doc. 85-1 at 71).

[26] At her November 1994 deposition, Wendi described that, after freeing herself, she first went to her grandmother's room, where her grandmother was "still" laying on her back, and tried to perform CPR by pinching her grandmother's nose and giving mouth to mouth breaths, but she could not tell if her grandmother was breathing, and her grandmother was not moving. (Doc. 85-1 at 65–66). So, she concluded it did not work, left the house through the door in the laundry room, and escaped through the back yard. (Doc. 85-1 at 66–68).

that when she arrived, Wendi still had the pillowcase tied around her neck. (Ex. A-6 at 149; *see also* Doc. 85-1 at 73–74). Ms. House told Detective Post that Wendi had blood on her, that Wendi stated that she had been tied up, and that she stated she thought her grandmother was dead. (Ex. S at 361).

Wendi's uncle, Tim Dick, appeared and asked what happened. When she told him her grandmother (his mother) was dead, he did not believe her at first and asked Wendi if she was lying. When she told him she was not lying and to go look, he did so. (Ex. A-1 at 138; Doc. 85-1 at 34, 72–73). While Mr. Dick was gone, Wendi told Ms. House that Eddie tied her up with her wrists together and put her in the bathroom, and Wendi kept repeating that she thought her grandmother was dead. (Ex. S at 362, 373). Both Wendi and Ms. House reported to Detective Mundo that they heard Mr. Dick's screams across the neighborhood when he found his mother's body. (Doc. 85-1 at 6).

Wendi called her mother, Lisa Neuner, during the time Mr. Dick went to check on Betty Dick. (Ex. S at 362). Sandra Dichiara, who lived in the neighborhood, states in her declaration that, at some point, Wendi told Lisa Neuner that "Uncle Timmy told me Eddie did it." (Ex. S at 414).

When Mr. Dick came back to Ms. House's residence after finding Betty Dick deceased, the police were called. (Ex. A-1 at 138; Doc. 85-1 at 34).[27] Later that day, when Wendi and Ms. House were alone again, Wendi told Ms. House that Petitioner said during the murder that Tim told him to or made him do it. (Ex. S at 371–73; Doc. 66-1 at 31).

[27] Ms. House reported to Detective Post that the police were called within ten to fifteen minutes of the time Wendi knocked on their door. (Ex. S at 359).

*i. Petitioner's New Evidence*

*A. Report of Kamala London, Ph.D.*

Petitioner points to the report of Kamala London, Ph.D. (Doc. 66-1 at 83–124), in support of his position that Wendi's statements were unreliable. In the report, Dr. London explains that,

> [t]o assess the reliability of a child[]'s report, it is critical to determine if their first statements were made spontaneously to neutral interviewers or if they were elicited by adults who held pre-existing beliefs about the occurrence of a particular event that tended to introduce into the interview a range of suggestive interviewing techniques.

(Doc. 66-1 at 93). After reviewing the record of Wendi's statements, Dr. London opined that "Wendi's reports were gathered in a manner that mars the reliability of her statements. The final recorded deposition of Wendi's account on 21 November 1994 must be interpreted in light of the earlier conversations and interviews." (Doc. 66-1 at 93).

First, Dr. London notes that, before Wendi gave her initial formal statement to police—to Detective Mundo on the date of the murders (September 20, 1993)—Wendi spoke to both her uncle and Ms. House. (Doc. 66-1 at 95–96). Dr. London explains that Mr. Dick and Ms. House "could have intentionally or unintentionally influenced Wendi's report about seeing [Petitioner] at the crime scene," (Doc. 66-1 at 96–97), in several ways: (1) if "they suspected [Petitioner] and asked questions . . . tend[ing] to elicit such information from [Wendi]," (Doc. 66-1 at 97); (2) "[i]f they w[ere] involved in the crime," (Doc. 66-1 at 97); (3) if they "intentionally or unintentionally misinterpret[ed] or misremember[ed] the nature of Wendi's account when speaking with the police

officers,"[28] (Doc. 66-1 at 97); and (4) if Mr. Dick and Ms. House (or others) spoke about their suspicions in front of Wendi, or if they mentioned their suspicions about Petitioner when they called Wendi's mother that morning in Wendi's presence.

Second, Dr. London opines that Wendi's first recorded interview[29] (by prosecutor Stewart Stone on the morning of the murders) "did not comport with best practice guidelines in interviewing child witnesses." (Doc. 66-1 at 98). Dr. London explains that three adults (rather than just one) were in the interview room with Wendi,[30] which is a circumstance that "increases the power differential between children and adults" and "increases . . . children[s'] deference to authority." (Doc. 66-1 at 98). Dr. London notes that there was "[n]o information . . . provided about whether the adults talked to Wendi to build rapport or if they broached the topic of the interview before turning on the recorder." (Doc. 66-1 at 98).

Additionally, the interviewers "d[id] not engage in narrative practice," an interview style that "shows the child that [the child] will be the one to do the talking and leads to more elaborate open-ended recall from children." (Doc. 66-1 at 98–99). Instead of

[28] Dr. London points out that Wendi's "initial accounts . . . were not electronically recorded" and that Mr. Dick and Ms. House "were described as intoxicated the night before the incident and were just waking up when Wendi arrived." (Doc. 66-1 at 97–98). Thus, she explains, "[s]uch circumstances would be unlikely to produce optimal circumstances for their questioning and memory of Wendi's account." (Doc. 66-1 at 98).

[29] Dr. London notes that, by that time, Wendi had already spoken with at least three other people: her uncle, Ms. House, and her mother. Neighbors were also present at the crime scene, and "[t]he extent to which Wendi conversed with the neighbors or overhead Tim [Dick] and [Nicole House] talk about the events is not documented in the evidence." (Doc. 66-1 at 98).

[30] The three adults were prosecutor Stewart Stone, Victim Advocate Bonnie Summers, and Victim Advocate Katie Moncrief. (Doc. 66-1 at 98, 102).

relying on open-ended questions and similarly open-ended follow-up to the responses given, those interviewing Wendi mainly relied on directive and leading questions that "constrain the child's response and elicit short answers." (Doc. 66-1 at 99).

Dr. London also laments that the interviewers did not generally comply with an "overriding principle of evidence-based child forensic interviews . . . that the interviewer should be an objective fact-finder and test out different possibilities for the child's reports." (Doc. 66-1 at 99). Dr. London notes that:

> The interviewer asked no questions about Tim and Nikki. The interviewers asked no questions about the extent of the conversations between Tim, Nikki, and Wendi's mother. The interviewer asked no questions about "What did Tim/Nikki/your mom say to you about what happened." . . . I saw no questions about whether Wendi could have seen other people in the house that evening.

(Doc. 66-1 at 99).

Further, although Wendi provided answers to the directive questions, Dr. London indicates that she sometimes "d[id] so regardless of [her] knowledge of the answer or even [her] understanding of the interviewers' questions." (Doc. 66-1 at 100). "A frequent theme of Wendi's reports in all four recorded interviews is that she makes inferences about what happened." (Doc. 66-1 at 100). For example, the prosecutor asked where Wendi's sister, Toni, was when their grandmother was being stabbed. Wendi answered that Toni was in her grandmother's bed. Yet, when asked, Wendi did not know what her sister was doing because Wendi did not see her. (Doc. 66-1 at 100). "Wendi apparently used her common sense to infer that Toni had been sleeping with her grandmother . . . because she 'knew' Toni typically slept in with her grandmother," (Doc. 66-1 at 100), not because Wendi actually saw her there. And, while the "interviewer sought to clarify elements of Wendi's report that seemed implausible" or

"that may have contradicted the known circumstances of the crime," Dr. London states that "simply because a child gives a plausible statement does not mean the plausible statement must be true." (Doc. 66-1 at 101). The clarifications Wendi provided regarding her inferences "suggest Wendi may [have been] confabulating details to fill in the gaps of her memory." (Doc. 66-1 at 101).

Third, Dr. London opines that the same deficiencies noted regarding the first recorded interview also apply to Wendi's next recorded statement the following day (September 21, 1993). There, Wendi was again subjected to an interview with three adults,[31] a "lack of ground rules and narrative practice, mostly directive versus open-invitation questions, [and a] lack of alternative hypothesis testing." (Doc. 66-1 at 102). Dr. London states that Wendi appeared to be speculating at times, and "she first reports the inferred details as actually happening" until she is challenged on those details. (Doc. 66-1 at 106–07). "While the interviewer challenged some of the implausible details Wendi provided, it is impossible to know the validity of some of the more plausible-sounding statements simply because they are plausible." (Doc. 66-1 at 105, 106–09). "For example, . . . one might ask whether Wendi heard her grandmother yelling 'stop, stop' or 'Stop, Eddie.'" (Doc. 66-1 at 105).

Additionally, during the interview, Detective Toole introduced information that Wendi had not yet reported — *e.g.*, by "immediately stating and spelling Wendi's full name and date of birth" at the beginning of the interview and by noting that Wendi's mother had dropped her off at Ms. House's residence before the murders because

[31] The three adults were Detective Toole, Detective Jimmy Post, and Victim Advocate Bonnie Summers. (Doc. 66-1 at 102).

Wendi's mother was going to the beach. (Doc. 66-1 at 103). Dr. London explains that an interviewer's introduction of information "acts to inform the child that the interviewer has knowledge about the event," (Doc. 66-1 at 102), which can "increase[] [the] child[]'s tendency to go along with the interviewer." (Doc. 66-1 at 103). Detective Toole additionally "relie[d] heavily on yes/no questions," which "have high inaccuracy rates in children because they can simply pick an option." (Doc. 66-1 at 104).

Dr. London also points out that, in this interview, Wendi mentioned things she had not previously mentioned, such as that Petitioner had a drinking problem, that Petitioner took her grandmother's jewelry that had been given to her by Wendi's grandfather, and that she saw Petitioner with the knife. (Doc. 66-1 at 104–05). Dr. London expresses concern that Wendi could have picked up the information about Petitioner having a drinking problem from the adults around her, rather than from knowing about his alcoholism first-hand. (Doc. 66-1 at 105). Similarly, Wendi's statement that her grandfather gave her grandmother the rings "indicat[es] Wendi has other sources of information about the jewelry. Since Wendi conversed with others before any interview, it is unknown which information comes from Wendi's actual memory for the event . . . versus post-event conversations." (Doc. 66-1 at 105).

Next, Dr. London notes that portions of Wendi's interview were shown on an episode of America's Most Wanted on October 5, 1993, and that America's Most Wanted also interviewed her for the episode. (Doc. 66-1 at 109). Photos and video of Petitioner were shown during the episode, Petitioner's "mother made statements about [Petitioner's] bad character[,] [m]ention was given that [Petitioner] once went to San Francisco, staying long enough to commit grand theft auto[,] [and] Tim [Dick] was

interviewed for the episode and provided his account of the events from the day of the murders." (Doc. 66-1 at 109). "During a later interview,[32] Wendi provides some details and then states that she knew th[at] information based on the [America's Most Wanted] episode."[33] (Doc. 66-1 at 109).

Wendi was then deposed on May 16, 1994, and November 21, 1994. Dr. London asserts that Wendi's deposition testimony "should be interpreted in light of all of the conversations that came before it," (Doc. 66-1 at 110), as well as all the interviews that came before it. (Doc. 66-1 at 112). Dr. London opines that "[a]ll of these conversations and interviews provide fodder for memory reconstruction." (Doc. 66-1 at 112).

Finally, in between the two depositions, Wendi underwent a psychological evaluation by Dr. Barbara Mara to "assess[] [her] current psychological status and ability to testify in court." (Doc. 66-1 at 111, 126–32). Dr. Mara found that Wendi's "[s]hort and long[-]term memory [were] intact, she was oriented times three, and [her] attention and concentration were good." (Doc. 66-1 at 126–27). Wendi "became very agitated while discussing her history of trauma.[34] . . . [H]er hands were shaking and became wet with sweat while discussing the murders." (Doc. 66-1 at 127). Wendi's "[e]xpressive and receptive language skills were good. She was cooperative with

[32] Dr. London does not identify which interview or specify the date of the interview. (Doc. 66-1 at 109).

[33] Dr. London does not describe which details were provided that Wendi purportedly knew based on the America's Most Wanted episode.

[34] Wendi discussed with Dr. Mara that when she was seven years old, the boy next door raped her, and when she went to court to testify, she was so scared that she "froze up on the stand and couldn't say anything." (Doc. 66-1 at 127).

psychological testing; however, anxiety appeared to interfere with her performance. There were indications of dissociative processes and she clearly presented with trauma side-effects." (Doc. 66-1 at 127, 131).

Dr. Mara also reported that Wendi Neuner had a full-scale IQ of 86, which was low average; her verbal IQ was average; and her performance IQ was low average. "Her relative strength [was] in the area of anticipation of behavioral consequences . . . . Her lowest scores [were] in the areas of ability to follow directions and anticipation of relationship among parts[.]" (Doc. 66-1 at 129). Based on the intelligence testing results, Dr. Mara further opined:

> This profile suggests average abstract thinking abilities and variable attention and concentration in a young female who presented as anxious and self-conscious during this measure. These scores appear to be an underestimate of her true abilities due to interference from anxiety. Wendi presented with poor problem solving skills during Object Assembly and tended to give up easily when tasks became difficult. Her profile suggests below average common sense and poor coping skills; however, she is capable of anticipating the effects of her behavior. Overall, this profile suggests an anxious, insecure young female who may have difficulties with staying on task and following directions due to her psychological issues.

(Doc. 66-1 at 129).

Other measures depicted Wendi as "overanxious[] and insecure with projected feelings of helplessness," "sad," "asking for stability, security, and affection," having "strong needs for protection, attention, and affection," feeling "obsessed with her needs to see the perpetrator punished,"[35] "anxious," "angry," and "having intense fears of aggression and physical assault," among other things. (Doc. 66-1 at 129–30).

[35] At one point, Wendi told Dr. Mara that she wished Petitioner "to be dead." (Doc. 66-1 at 127).

Overall, Dr. Mara opined that "[t]estifying in open court in front of the accused would clearly severely psychologically damage Wendi." (Doc. 66-1 at 132). Dr. Mara recommended "[t]he use of a video camera, in a separate room, for testifying." (Doc. 66-1 at 132).

Dr. London takes issue with the fact that Dr. Mara's evaluation was not recorded, so there is no "complete account of Wendi's statements or Dr. Mara's questions." (Doc. 66-1 at 111). Additionally, because Dr. Mara and Wendi discussed the murders, Dr. London opines that "[p]rior conversations . . . should be considered in terms of the reliability of the information Wendi reportedly provided to Dr. Mara[,] [and] Dr. Mara's discussion of the homicides with Wendi then need to be considered as a possible influence on any downstream reports." (Doc. 66-1 at 111). Dr. London explains that the term "[d]issociative processes refers to a disconnect between a person's thoughts, memories, or sense of identity" and notes that Dr. Mara did not "offer[] . . . examples of Wendi's behaviors that show such dissociations." (Doc. 66-1 at 111). Dr. London expresses concern that "Dr. Mara's suggestion that Wendi displayed dissociative tendencies draws into question what statements or behaviors Wendi made that were interpreted as dissociative. One possibility is that Dr. Mara believed Wendi displayed a disintegrated memory of the homicides." (Doc. 66-1 at 111). Dr. London further remarks that the four projective tests that Dr. Mara administered to Wendi "are not evidence-based tools and lack validity in predicting mental health." (Doc. 66-1 at 111).

Dr. London concludes:

> Throughout this report, I have summarized the evidence regarding the unfolding of Wendi's accounts of what happened the night her sister and grandmother were killed. Taken together, Wendi was exposed to numerous potential sources of influence. The most important source of

> influence in my opinion is her Uncle Tim and Tim's then-girlfriend Nikki. Tim and Nikki spoke with Wendi before Wendi ever discussed the event with the police. Nikki provided information to the police about what Wendi initially reported yet left out information that Wendi had mentioned Tim when describing the incident. Although Wendi eventually provided testimony about her memory for the events surrounding the homicides during her 21 November 1994 deposition, many conversations preceded that testimony that could act as sources of influence.
>
> Wendi was 9 years old when she was first interviewed. By that point, Wendi reportedly had already witnessed the crime scene of the murder of one of her friends. She also had experienced a sexual assault by a neighbor. Wendi's past traumatic experiences could give her details to draw upon when filling in any potential gaps in her memory.

(Doc. 66-1 at 112–13).

*B. Declaration of Keith McCauley*

As summarized above in reviewing Petitioner's evidence of incompetency, (*see supra* Section IV(B)(2)(b)), Keith McCauley describes in his declaration Petitioner's substantial substance use, the tendency for Petitioner's mind to wander occasionally, and Petitioner's loneliness and low self-esteem. (Doc. 66-1 at 13–15). Mr. McCauley also states:

> The last three or four days before Toni and Betty's deaths, Eddie looked like he was on a drug binge. I saw Eddie outside Tim's girlfriend (Nicole)'s home smoking crack cocaine, sometimes with Tim, during the day and evening. This was unusual for Eddie. He had always done a lot of drugs, but this was way more than I had seen him do before. Lisa may have also been with Eddie once or twice, but I mainly remember Tim. He just kept giving Eddie drugs. It seemed like Tim was trying to keep Eddie under the influence, even when Eddie wasn't feeling well or enjoying the high. I spoke with Eddie a few times on those days and he appeared to be physically worn down and exhausted. He complained he was getting brought down by Tim and Nicole's drug use and was feeling poorly about himself. Eddie had previously mentioned that he wanted to get away from Tim because he was a negative influence but he was so dependent on Tim as a source of drugs that he was under Tim's control. Tim seemed to be manipulating Eddie during those days. He knew Eddie was an addict and would take any drugs offered to him, so he kept pushing drugs on him.

(Doc. 66-1 at 16). Mr. McCauley also states that he helped Betty Dick move all her jewelry to her car the night before the murders because she was moving the next day, and that Petitioner had commented to him about the move, saying "he was happy for her to be moving because this way Tim couldn't freeload off of her anymore." (Doc. 66-1 at 16–17). Mr. McCauley explains that Tim Dick took advantage of Betty, and he observed Tim Dick steal from her on more than one occasion. (Doc. 66-1 at 17). From his conversations with her, Mr. McCauley knew that Betty Dick

> was planning to cut [Tim Dick] off financially and physically distance herself from him because he was taking advantage of her and refused to look for work. Betty couldn't afford to financially support Tim, especially with him stealing from her. She wanted to kick Tim out of the house but didn't know how. Then she decided to move to Pennsylvania and sell the house.

(Doc. 66-1 at 17). Petitioner was a "huge help around the house" for Betty Dick and refused to let her pay him for his assistance.

Tim Dick, however, "complained to [Mr. McCauley] that Betty was planning to move away. He was upset because she was trying to sell her house, and he thought he should get it." (Doc. 66-1 at 20). According to Mr. McCauley, Tim Dick "complained that he was going to be homeless if Betty sold the house, but that if she were to die, he would get the house." (Doc. 66-1 at 20).

The day before the murders, Mr. McCauley

> saw [Petitioner] multiple times, starting around 9:00 am. He kept going back and forth from Nicole's house to Betty's house. Eddie would be smoking crack around Tim at Nicole's house, then he'd walk back and I'd see him at Betty's while I was helping her move. He was doing something in the back of the house. I think it had to do with a pipe or something with Betty's water line. Betty said he was helping her get her house in the best shape possible, because someone was coming to see it and maybe buy it. The last time I saw Eddie that day was at Nicole's home in the early

> evening, maybe between 5:00 PM and 6:00 PM. He was smoking crack cocaine outside while I passed and waved at him. I made a comment about how much energy he had been burning that day walking back and forth between houses and all of the physical labor he was doing to help Betty. Eddie said he barely felt it because he was so "fucked up" on crack.

(Doc. 66-1 at 18).

Mr. McCauley states that, on the morning of the murders,

> Tim ran to my place and said someone killed his mother, Betty. My girlfriend and I went with Tim to Betty's home along with Frank Salvaggio, who also lived nearby. Tim, Frank, and me entered Betty's place and found her lying dead on her bed with a knife sticking out of her. We searched the other rooms but didn't find anyone else. I now know that Toni was dead in the house, but I still don't know why we didn't see the two little boys in the house. Tim came over before calling the police.

(Doc. 66-1 at 18). Mr. McCauley stayed with Tim Dick "until after the police arrived." (Doc. 66-1 at 18). When discussing who could have murdered Betty Dick, Mr. McCauley relays that Petitioner

> was mentioned because he lived in the house. Tim said there was no way [Petitioner] could have murdered his mom. He didn't say it in a disbelieving way, or like he was in shock. He said it in a way that sounded like he knew something more than he was telling us. When I asked him how he could be so sure, Tim said "There's no way he could have done it. He was with me all night."

(Doc. 66-1 at 19). Mr. McCauley also mentions that Tim Dick "did not cry or show emotion when seeing Betty dead on her bed or even discussing her or Toni's deaths. . . . He acted way differently once he was around the police. It was like he was performing." (Doc. 66-1 at 19).

Finally, Mr. McCauley remarks that Tim Dick "was not a good person towards his family." (Doc. 66-1 at 19). He worked only enough to buy drugs, did not like having his nieces and nephews around the house, "was inappropriate toward the kids," and once "laughed and bragged about Wendi and Toni seeing him naked on the couch." (Doc.

66-1 at 19–20). He also "act[e]d aggressively or attempt[ed] to intimidate people using his self-proclaimed status as a drug-dealer. It seemed like he thought if he acted intimidating enough, he could manipulate people into getting what he wanted from them." (Doc. 66-1 at 20). Mr. McCauley explained that Tim Dick's "aggressiveness came out especially when he drank alcohol, which was daily. He'd get a couple beers in him and want to beat everybody up. This frequently happened when he was sober, too." (Doc. 66-1 at 20).

*C. Declaration of Sandra Dichiara (Doc. 66-1 at 23–24)*

Sandra Dichiara, who "lived in the same neighborhood as [Petitioner] and Tim Dick until the mid[-]1990s," avers that Petitioner "tried to help and protect people who were weak or vulnerable" and was adored by the children in the neighborhood. (Doc. 66-1 at 23–24). But Tim Dick "did not act kindly toward [her] or toward his family. . . . He was disrespectful and frequently drunk, and [he] didn't take responsibility for his actions. He let other people pay for his misdoings."[36] (Doc. 66-1 at 23). "A week or two before the murders, Tim went to sleep naked in front of Wendi and Toni, who were spending the night at Betty's house. . . . Tim told [her] about being naked in front of [them] and acted like he was proud of it." (Doc. 66-1 at 24).

Ms. Dichiara states that "she lived across the street from Tim Dick at the time of the murders. Tim came over to where [she] was living before he called the police on the morning that the bodies were found. He told [her] he had found his mother, Betty, murdered." (Doc. 66-1 at 24). She went to Betty Dick's house with Tim Dick, Frank

[36] For example, Ms. Dichiara stated that Tim Dick "once got into an accident while driving [her] car. He refused to pay what he owed for it, and [she] lost [her] license and tag because of it." (Doc. 66-1 at 23).

Salvaggio, and Keith McCauley, but did not go inside. Instead, she "stayed outside the house until after the police arrived." (Doc. 66-1 at 24). While waiting outside, "Lisa [Neuner] came to the house. . . . [Ms. Dichiara] talked to her on the day this happened and in the following days." (Doc. 66-1 at 24). Ms. Dichiara explains that Lisa Neuner told her that "Wendi said the way she knew [Petitioner] killed Betty and Toni was that 'Uncle Timmy told me [Eddie] did it.'" (Doc. 66-1 at 24). Although Ms. Dichiara did not speak with Wendi on the morning of the murders, she spoke with her "a few days after the crime," and Wendi "told [her Petitioner] had tied her up really loosely with socks. From what [Wendi] told [Ms. Dichiara], it didn't sound like she had seen Betty get stabbed." (Doc. 66-1 at 24).

*D. Michele Yentz-Gill and Wayne Montgomery*

As summarized above, (*see supra* Section IV(B)(2)(b)), Michelle Yentz-Gill and Wayne Montgomery, who were significant others at the time of the murders, describe in their declarations Petitioner's alcohol and substance use, forgetfulness, low self-esteem, and fear of being a burden to others. (Doc. 66-1 at 26, 35–37).

Mr. Montgomery also states that Petitioner "had a reputation in the neighborhood for protecting children, women, and anyone who was vulnerable." (Doc. 66-1 at 35). Mr. Montgomery explains that "[t]he day before the crime, [he] wanted to invite [Petitioner] to [his] wedding reception. [He] found [Petitioner] outside Betty Dick's house, pounding beers in the hot Florida sun. [Petitioner] looked more exhausted than [Mr. Montgomery] had ever seen him." (Doc. 66-1 at 36). According to Mr. Montgomery, Petitioner "had not slept in days, and was in the midst of a three-day alcohol binge" in which he drank "about two cases (or 24 beers) in a day. He wasn't drinking any water,

and he hadn't been eating except for maybe a burger at night. Yet, he still didn't seem drunk." (Doc. 66-1 at 36). "In [his] experience of knowing [Petitioner], that was a sign he was also using drugs like cocaine, LSD, PCP, or psychedelic mushrooms. When [Petitioner] comes down from using alcohol and some combination of hard drugs, he seems delirious." (Doc. 66-1 at 36).

Mr. Montgomery was a defense witness at Petitioner's penalty phase trial, and he states that, "[a]s a result . . . , [his] life was threatened by members of the victims' family and friend group." (Doc. 66-1 at 37). Ms. Yentz-Gill states that Petitioner's mother, Nancy Yinger, "receiv[ed] death threats from the victims' family" before Petitioner's trial. (Doc. 66-1 at 26). Ms. Yinger was "afraid for her family's safety and their lives. [She] was so afraid that she took her two daughters out of the local school and drove them to another school in a different town to keep them safe." (Doc. 66-1 at 26).

*E. Nicole House (Doc. 66-1 at 29–33)*

In her declaration, Ms. House explains that Tim Dick "was always fighting with Betty," his mother. (Doc. 66-1 at 30). Mr. Dick knew Betty Dick was planning to move, and he "was noticeably unhappy in the days leading up to Betty's murder." (Doc. 66-1 at 30). In the "several days" before the murders, Petitioner and Tim Dick "were together a lot more than usual, either at [her] home or out nearby in the neighborhood, smoking crack cocaine. The two were practically inseparable, . . . and [she] would have to ask Tim to get [Petitioner] to leave just so [she and Tim Dick] could be alone." (Doc. 66-1 at 30).

The day before the murders, "Tim and [Petitioner] were occasionally outside together at [Ms. House's] house, sometimes smoking crack cocaine." (Doc. 66-1 at 30).

That evening, Ms. House "was at a local bar with [her] brother and his friend. Betty drove Tim to the bar to get [her]. . . . When Tim entered the bar, some guy was talking with [Ms. House]. Tim was highly jealous and yelled at the guy, chasing him outside and up a hill." (Doc. 66-1 at 30). Ms. House then "drove [her]self, along with [her] brother and his friend, to Betty's house to pick up [her] two children. Tim arrived before [her] and was with [Petitioner]. After collecting [her] kids," she drove Tim Dick, her brother, and her brother's friend to her house; left Tim Dick and her kids there; and then drove her brother and his friend home. (Doc. 66-1 at 30). When Ms. House returned home, Tim Dick and Petitioner were outside. Ms. House was irritated and told Tim Dick to "get rid of [Petitioner]," but Petitioner left on his bike on his own. (Doc. 66-1 at 30).

Ms. House and Mr. Dick then went to bed. (Doc. 66-1 at 30). Ms. House explains that she "was and still continue[s] to be a heavy sleeper, more so than most. Tim could have gotten up from bed that night without waking [her] up. When Tim and [Ms. House] went to bed, [she] did not wake up until [she] heard a loud pounding on the front door from Wendi the next morning." (Doc. 66-1 at 31).

After the murders, "Wendi and [Ms. House] walked together in the cul de sac near Betty's house. Wendi told [Ms. House that] after [Petitioner] saw her, he said Tim made him do it." (Doc. 66-1 at 31). The police also asked Ms. House about Wendi's statement and Ms. House confirmed it. (Doc. 66-1 at 31).

Ms. House began to suspect Tim Dick committed the murders when, shortly after the deaths, "Tim stopped having sex with [her]." (Doc. 66-1 at 31). She "could not help but think Toni's rape had something to do with why he was no longer interested in [her], and his disinterest did not seem like it was simply due to grief and horror at the

situation." (Doc. 66-1 at 31). However, Ms. House did not share her thoughts with the police, or anyone, because she "loved [h]im so much then." (Doc. 66-1 at 31). In the weeks afterward, "neighbors discussed their beliefs that Tim was involved in Betty's and Toni's murders," and Ms. House withdrew from him. (Doc. 66-1 at 31). Ms. House explains that Tim Dick had "bec[o]me reclusive and on edge, barely speaking with [her] anymore and hostile toward everyone. [He] stopped working, providing no money for rent or food, . . . [and his] alcohol and drug use greatly escalated." (Doc. 66-1 at 31). Ms. House states that, "[n]ormally, [she] would have attributed this change in behavior to grief, but this seemed different." (Doc. 66-1 at 32).

Ms. House states that Mr. Dick's "grief . . . did not appear authentic. It seemed like he performed it for others but was not actually upset.[37] [He] was very angry about the insurance money his family received after Betty's death. It seemed like he was getting less than he expected." (Doc. 66-1 at 32). Shortly after the murders, he "yelled at his family as they were discussing money," and, according to Ms. House, his "hostility towards his family right after the murders was especially disturbing as there was no hint he was sad his mom and niece were gone." (Doc. 66-1 at 32). Ms. House and Tim Dick ended their relationship "a week or two after Betty's and Toni's funeral in late September, 1993," and Ms. House "had little to no contact with Tim and his family" thereafter. (Doc. 66-1 at 32).

[37] Petitioner notes that this opinion was held by others. (Doc. 66 at 80). In a pre-sentencing letter to the trial court judge from "Betty Lee, Sabrina Evans, and friends," the author wrote: "Betty's son . . . moved right in Betty's house and the day after the deaths, they sat in Betty's yard eating and laughing about insurance and money." (Ex. A-3 at 521).

*ii. Analysis*

The new evidence provided by Petitioner does not open a gateway through the AEDPA's time-bar to permit the Court to review his claims on the merits. *See McQuiggin*, 569 U.S. at 386.

Although Petitioner appears to place great weight on Dr. London's opinion, the opinion is based almost entirely on conjecture. For example, Dr. London merely speculates that Tim Dick and Angel House influenced Wendi's statements, misinterpreted or misremembered her account of the crimes, or spoke about their suspicions in front of her. Dr. London also speculates that Wendi's plausible statements (which were therefore not challenged by interviewers) were based only on inferences,[38] that Dr. Mara influenced Wendi's later deposition testimony, that Dr. Mara believed Wendi presented with a disintegrated memory of the homicides, or that Wendi used details from past traumatic experiences to fill in gaps in her memory. Further, the fact that Wendi provided more or different details across her statements over time does not necessarily mean that she obtained the information from others rather than her own memory.

Upon review of the various declarations provided by Petitioner, his position fares no better. Mr. McCauley states that, in the days before the murders, he observed Petitioner using more crack cocaine than usual and that the crack was provided by Tim Dick. But this statement is consistent with Petitioner's substantial history of drug abuse

[38] Indeed, Dr. London concedes that "the detectives appropriately challenge" Wendi "[w]hen she provides information that is highly implausible or that perhaps does not fit with their knowledge of the crime scene." (Doc. 66-1 at 105). This implies that Wendi's other statements were, in view of the interviewers, consistent with the other evidence known at the time.

and Mr. McCauley's own observation that "Tim Dick . . . was [Petitioner's] main source" to obtain drugs. Although Mr. McCauley notes that Petitioner "complained he was getting brought down by Tim and Nicole's drug use and feeling poorly about himself," he merely speculates that "[i]t seemed like Tim was trying to keep [Petitioner] under the influence." (Doc. 66-1 at 16). Mr. McCauley provides no explanation for that belief other than saying that Petitioner "was [doing] way more [drugs] than [he] had seen him do before," and "[Tim Dick] just kept giving [Petitioner] drugs." (Doc. 66-1 at 16). He similarly speculates that Tim Dick "knew something more than he was telling [them]" when stating that there was no way Petitioner could have murdered Betty Dick. (Doc. 66-1 at 18–19). Nonetheless, Mr. McCauley reports that Tim Dick explained his statement by asserting that Petitioner "was with him all night." (Doc. 66-1 at 19).[39]

Mr. McCauley also indicates that he helped Betty Dick move all her jewelry to her car the night before the murders. But this does not necessarily contradict Wendi's report that she saw Petitioner with Betty Dick's rings, earrings, and bracelets, as Wendi's statements implied that her grandmother had been wearing the rings, earrings, and bracelets that night. *See supra* note 18. Mr. McCauley states only that he "moved some boxes for her, including some that contained jewelry and a jewelry organizer," and

[39] While this statement contradicts Wendi's report that Petitioner came back to Betty Dick's house around 11:30 p.m., Ms. House stated at her initial law enforcement interview that Petitioner visited Tim Dick at Ms. House's residence the night before the murders: he was there when she left to drive her brother and his friend home around quarter to twelve at night, and he was still there when she returned; he then left and Ms. House and Tim Dick went to bed. (Ex. S at 352–53; *see also* Doc. 66-1 at 30). Petitioner also stated during his recorded interview with police that, although he did not remember going back to Betty Dick's house, he remembered drinking Tanqueray at Ms. House's residence that night. (Ex. A-7 at 344–45). Thus, it appears uncontradicted that, while he was not there *all* night, Petitioner was with Tim Dick until late into the night.

that he was "certain that we moved the jewelry that had been in the house into the car." (Doc. 66-1 at 16). He does not state that he witnessed Betty Dick remove the jewelry she was wearing before adding it to her boxes or jewelry organizer and packing it into her car.

Further, Mr. McCauley reports that Tim Dick did not cry or show emotion when they viewed Betty Dick's body. However, per Ms. Dichiara, before Tim Dick informed her and Mr. McCauley that his mother had been murdered, he had already found her body. (Doc. 66-1 at 24). Therefore, when Tim Dick and Mr. McCauley viewed her body together while searching the rest of the house, it was not the first time he had done so. A juror could reasonably infer that he braced himself to observe the scene again before reentering her bedroom.

As for Ms. Dichiara, she vaguely states that when she later spoke with Wendi, it did not seem like she had actually seen Betty Dick being stabbed. But Ms. Dichiara fails to explain how she came to that conclusion. Ms. Dichiara also states that Wendi told her Petitioner tied her up *loosely* with socks, implying that Wendi's other accounts were not credible. But regardless of the way Wendi described the tightness or looseness of her bindings as time passed following the crimes, photographs of Wendi were introduced into evidence at the penalty phase trial showing "a contusion on her neck and redness," as well as "redness and contusions at the wrist area." (Ex. A-6 at 143–44). Thus, physical evidence corroborates Wendi's reports that she had been bound by the wrists at least tightly enough to cause red marks and bruising.

Turning to the declarations of Mr. Montgomery and Ms. Yentz-Gill, Mr. Montgomery's observation that Petitioner had been drinking and his belief that

Petitioner had also likely been doing some form of illicit drugs does not weigh in favor of Petitioner's actual innocence claim. Petitioner's heavy alcohol use the day before the murders is largely undisputed in the record, and, in a recorded interview, Jere Pearson stated he watched Petitioner do "ten hits of acid" between ten and eleven p.m. the night of the murders. (Ex. A-9 at 628). The clinical pharmacologist who testified for the defense at the penalty-phase trial explained that ingestion of LSD by someone with passive aggressive personality traits presents a risk of "a sudden release or increase in aggressive action." (Ex. A-9 at 703). He also affirmed that the "description of the crimes that occurred . . . is consistent with the affects that LSD and alcohol might have had on [Petitioner] at the time these crimes occurred." (Ex. A-9 at 703).

Moreover, the sheer fact that Mr. Montgomery and Ms. Yinger (Petitioner's mother) received death threats leading up to the trial does not necessarily implicate Tim Dick in the murders. Neither Mr. Montgomery nor Ms. Yentz-Gill identified which members of the victims' family or friends issued the threats. Even so, as Respondents note, (Doc. 73 at 29–30), a juror could interpret such threats as an expression of anger against those helping the confessed rapist and murderer of his family members.

The idea that Wendi reported that Petitioner said Tim Dick made him do it does not contradict Wendi's reports that Petitioner actually committed the crimes. Nor does it absolve Petitioner of those crimes.

Ms. House also merely speculates that her relationship with Tim Dick and his demeanor (including yelling at his family about insurance money) and habits changed because he committed the rape and murders. She concedes that, normally, such things may be attributable to grief. Although she felt his change "seemed different" than grief,

she does not provide a solid explanation for that impression. Ms. House explains only that Tim Dick seemed to perform his grief for others, but she does not describe what about his actions caused her to reach that conclusion.

Overall, as Respondents argue,

> in quibbling about the details, Petitioner misses the forest for the trees. It is true, Wendi is inconsistent about how tight she was tied up, whether Petitioner left and came back or left only once[,] what exactly Petitioner said to her, where Toni might be sleeping, and other unimportant details. But what Petitioner cannot escape is that from the very beginning, all the way through trial, the core of Wendi's story is the same: she heard her grandmother screaming, "Stop, Eddie, stop!"; she saw him attacking her repeatedly; he tied her up in the bathroom; he took her grandmother's purse and keys and left. This version, which is consistent from the beginning, simply cannot gibe with Petitioner's theory that Tim was the actual killer.

(Doc. 73 at 31).

In light of the evidence against him, including Wendi's consistent identification of him as her grandmother's killer and her captor, Petitioner's possession of Betty Dick's car and jewelry, his flight from the scene and across the country,[40] and his own confessions, Petitioner does not persuade the Court that the new evidence he presents would prevent *any* reasonable juror from voting to find him guilty. *See McQuiggin*, 569 U.S. at 386.

[40] *See Murray v. State*, 838 So. 2d 1073 (Fla. 2003) ("The law is well established that '[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance.'" (quoting *Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981))).

*b. Reliability of Petitioner's Confessions*

Petitioner contends that his statements and confessions are unreliable given his cognitive and emotional vulnerabilities. He claims that his "statements were impacted by a combination of objectively suggestive interrogation techniques and his subjective vulnerability to providing statements for which he lacked independent memory." (Doc. 66 at 83). He points to the "sheer volume and variety of mind-altering substances" in his system that night, his "obvious desire to assist the police and fill in his memory gaps from the night of the murders," and the "[n]umerous inconsistencies in [his] confessions [that] cannot be reconciled with other witness statements and the physical crime scene." (Doc. 66 at 83). In support of his theory that he falsely confessed, Petitioner presents mental health evidence not presented at trial.

*i. Petitioner's Statements*

*A. Petitioner's October 6, 1993 Arrest and Informal Statements*

On October 6, 1993, in a Bakersfield, California unemployment office, someone identified Petitioner as a fugitive from the America's Most Wanted television show and reported him to the police. (Doc. 85-1 at 100). Deputy V. Kline was the first to arrive at the unemployment office. (Doc. 85-1 at 100). Deputy Kline, along with Deputies Simon and Galloway, took Petitioner into custody. Deputy Kline reports that, "[a]fter placing handcuffs on [Petitioner] and removing him from the building, [Deputy Kline] advised him that [he] would transport him to the Sheriff's Department where [he] would advise him of his Constitutional rights and [he] would take a statement from him if he was willing to talk." (Doc. 85-1 at 100). Petitioner told Deputy Kline that he did want to talk to police. Once placed in Deputy Simon's patrol car, Officer Kline asked Petitioner if he

knew why the police were there, and Petitioner "fully and voluntarily stated he knew why [they] were there and it was concerning two murders." (Doc. 85-1 at 100). Petitioner volunteered, "It was kind of sick the way I did it, but I did it." (Doc. 85-1 at 100).

Petitioner was then read his *Miranda* rights and affirmed that he understood them and that he wished to speak with police at that time. (Doc. 85-1 at 100). When asked who had been murdered, Petitioner "said he had murdered a woman by the name of BETTY and her granddaughter, TONI . . . . [who] was approximately seven to eight years old." (Doc. 85-1 at 100). According to Deputy Kline,

> [Petitioner] went on to explain that he had been staying at BETTY'S residence . . . . [Petitioner] advised he had been smoking pot and crack. He estimated he had had approximately two hundred dollars ($200.00) worth of crack that day. In addition, he advised that someone gave him some blue pills to help bring him down from the crack. . . . In addition, he advised he had drank approximately one half of a bottle of gin.
>
> [Petitioner] was having trouble remembering exactly what had happened. He said he could remember bits and pieces. He indicated he had returned home and it was sometime at night when the incident occurred. [Petitioner] was having trouble remembering the specific day. He said he thought it had occurred approximately two to three weeks earlier and it was possibly on a Monday or Tuesday.
>
> [Petitioner] advised that all of the children were in the living room area. He said BETTY was in her room and he thought he killed TONI in his bedroom. However, [Petitioner] was unable to tell me how she ended up in his room. [Petitioner] said he could remember strangling TONI until he thinks he broke her neck. [Petitioner] said after he had killed TONI, he went into BETTY'S bedroom where he "went off". He said he began stabbing BETTY with some type of knife. He could not remember what kind of knife and was unable to tell me what happened to it. [Petitioner] told me that BETTY began saying, "Why, EDDIE, why?" [Petitioner] said he was unsure why she was saying this. He did not know if she was aware of him killing TONI or if she was asking him why he was stabbing her.
>
> [Petitioner] was unable to tell me exactly where he had stabbed BETTY. He told me he had stabbed her "everywhere". He was unable to give me a specific number of times he had stabbed her. [Petitioner] told me he did not feel she was dead after he stabbed her numerous times. He,

therefore, went into the kitchen area where he obtained a butcher knife. He said he re-entered BETTY'S bedroom where he stabbed her through the back with the butcher knife. This knife was left in BETTY'S body.

During the interview with [Petitioner], I briefly spoke with the chief of the Casselberry Police Department. He advised me that the child, TONI, had been raped.

When I re-contacted [Petitioner], I asked him if he had ever been sexually attracted to TONI. [Petitioner] said he never had. He said there would be no reason for him to be sexually attracted to her because she was a little girl. I asked him if he had touched her sexually the night of the incident. [Petitioner] answered by saying, "Did I?" It was at this point that I told him, "I believe you did." [Petitioner] became very emotional. He made the statement that he hoped he had not. He went on to explain that TONI was like his daughter and he had never had a sexual attraction to her.

[Petitioner] said he could not remember why he had killed TONI and BETTY, however, he said he had been angry earlier in the day. He said he could remember being angry at the time of the murders, but he could not remember why.

[Petitioner] told me after he had murdered BETTY, he noticed that TONI'S sister, WENDY, had woken up. [Petitioner] said he tied WENDY up and put her in the bathroom. After doing this, he told her that she was to tell what had happened.

I asked [Petitioner] how TONI had been dressed. [Petitioner] answered, "I don't remember if she was dressed or not." I asked [Petitioner] where he had left TONI. He said he thought he had left her laying on the floor.

It should be noted that the news media was on scene and this appeared to concern [Petitioner]. [Petitioner] asked if we could continue the interview at another location. It was at this point that I told him I would transport him to the Sheriff's Office so we could continue the interview. I also advised him that I felt it would be a good idea to tape the interview. [Petitioner] told me he would do whatever I wanted because he was in custody. I explained to him that he did not have to talk to us if he did not want to. [Petitioner] told me he did want to continue the interview.

(Doc. 85-1 at 101–02).

*B. Petitioner's October 6, 1993 Videotaped Statement to Kern County Police*

Petitioner's subsequent interview that day at the Kern County Sheriff's Office was videotaped, and the redacted videotape was played for the jury. (Ex. A-7 at 331–32, 338–99; Ex. A-8 at 403–22).

At the beginning of the interview, Detective Johnson asked Petitioner to "go back to when this occurred, and tell us everything that you can remember, and then I will ask you some pointed questions obviously to try to refresh your memory or fill in some of the gaps[.]" (Ex. A-7 at 343). Petitioner began as follows:

> [Petitioner]: Oh, like I was saying earlier, ah, I don't know why I did what I did. I remember that day and the day before I'd been really doing some heavy drugs. I'd done probably a couple hundred dollars worth of crack. Some guys I met turned me on to some downers, little blue tranquilizer pills, I forget what kind they were, they really didn't say, I don't think I asked them. And, uhm, I was pretty wasted, smoking some dope, marijuana.
>
> I remember a little bit prior towards the evening that night, Betty's son Tim come over saying that he'd got in some trouble at the bar and these guys were coming over to beat him up and he needed some help. So I remember hanging outside waiting for, you know, whatever was gonna happen to happen that night. And what happened was, you know, was his girlfriend and her brother and a friend of his come . . . her brother's come over, and that, you know, nobody ever showed up to beat him up, you know, and stuff. So we wound up going over to her girlfriend's . . . his girlfriend's house. And I remember a bottle of gin, Tanquerey gin. And I drank, oh, probably half of it, there was probably about maybe less than half, half.
>
> MR. JOHNSON: What size was it?
>
> [PETITIONER]: Big fifth.
>
> MR. JOHNSON: Okay.
>
> . . .

[PETITIONER]: Uhm, after that there's really not much I remember. I don't remember going home. I remember anger. Being at home—I remember I was home in my room. This is at Betty's house. And I remember I was pissed off and fed up and frustrated, just mad.

And it's rough, you know, I don't remember why, what I did. I remember the anger and I remember . . . remember strangling the little girl Toni.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And I mean like breaking her neck, strangling, you know just . . .

And, ah, —

MR. JOHNSON: It's okay. Just take your time.

[PETITIONER]: They say—They say I had some sexual contact. I don't remember. I don't remember nothing like that.

MR. JOHNSON: Okay.

[PETITIONER]: I really don't. All right.

I remember—I think I went out to the living room, that's where Toni and the other kids, they had her granddaughters, Toni and Wendi, and the two grandsons were there.

MR. JOHNSON: Uh-huh.

[PETITIONER]: They were sleeping in the living room.

And I guess I got Toni out of the living room and took her to the bedroom 'cause I remember her being in the bedroom when I left, she was in the bedroom.

MR. JOHNSON: Okay.

[PETITIONER]: My bedroom.

I don't remember, you know, they say—Like I say, I don't remember other than strangling and hearing the bones in her neck just popping and cracking and stuff. Ah,—

MR. JOHNSON: Eddie, did she say anything while you were strangling her?

[PETITIONER]: Uhm, I don't re—I don't think so. I don't recall any words being said, no.

MR. JOHNSON: Just go on with your story.

[PETITIONER]: I guess I went from there to the bedroom where Betty was staying. It was dark, so I—the whole house was really dark.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And, ah, I don't know why, I guess I had a knife, or if I went back and got a knife, I don't know, but I remember having a knife. And I just, I hit her in the back of the head.

MR. JOHNSON: With the knife?

[PETITIONER]: I don't know, with the knife or my hand. I remember swinging, and I don't know if I was swinging with the knife at the time, but I remember she said, "Why, Eddie, why?"

MR. JOHNSON: Uh-huh.

[PETITIONER]: And I said, "Don't worry about it. Give it up," or something like that. I remember saying something to that extent. But I was stabbing her with this one knife, stabbing her and stabbing her and stabbing her and stabbing her.

And that's when Wendi—I remember turning around and Wendi was there, the other granddaughter.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And I took and I tied her up in the bathroom. And she was saying, "Don't hurt me. Don't hurt me." I remember that. I remember that.

MR. JOHNSON: Then what?

[PETITIONER]: Then I went back—I thought—I was afraid Betty wasn't dead.

MR. JOHNSON: Uh-huh.

[PETITIONER]: So I went back and I got the butcher knife, the big butcher knife, like you use to chop up carrots and stuff like that with.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And just stuck it right through her, I mean, deep, you know, just [to] make sure.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And I took a shower and changed, I packed my bags, just grabbed my clothes and threw them. I remember she . . . she worked in a jewelry store, Betty did.

MR. JOHNSON: Uh-huh.

[PETITIONER]: So I went and I got her purse and her bag she brings home from the jewelry store. She does like pearls, tied pearls and stuff. You know I figured, well, yeah, I can get money from this stuff.

And, ah, then left.

MR. JOHNSON: Okay.

[PETITIONER]: I got in the car and left. And then I don't remember—I suppose that's what I did, I don't remember, really. I had the—I guess I left 'cause I don't remember nothing till like two days later I was in the car and it was like coming to me, like, wow, you know, what the hell did I do.

MR. JOHNSON: Uh-huh.

[PETITIONER]: And by then I was on the road and I was scared and I kept driving and driving and driving, driving until, like I said, I ran out of gas here and somebody seen me.

(Ex. A-7 at 344–49).

Thereafter, Detective Johnson explained to Petitioner,

Okay. I think what we'll do now is go back and get a little background of prior to this and how long you lived there and everything else and walk you through it again. And by us walking through it, may help you remember some of the things. If I ask you certain questions, it's for the purpose of helping you remember because, you know, you need to get this out and everything.

(Ex. A-7 at 349).

In the process of that questioning, Petitioner stated that, on the night of the murders, Tim Dick had asked for Petitioner's help because Mr. Dick had been at a bar and gotten into a fight with someone over Mr. Dick's girlfriend, and Mr. Dick thought people would be coming over to his house to beat him up. (Ex. A-7 at 353–54). Petitioner and Mr. Dick waited outside, and Mr. Dick's then-girlfriend, Nicki, and her brother showed up, but no one showed up to fight them. (Ex. A-7 at 353–55). So, "[b]etween eleven [p.m.] and sometime early after twelve," they all went to Nicki's house where they talked and "smoked some joint," and Petitioner found and started drinking a bottle of gin. (Ex. A-7 at 355–58).

Later, Petitioner left and walked back to Betty Dick's house. At that time, the lights were out in the house and everyone was asleep. (Ex. A-7 at 358). He unlocked and entered through the front door. A small light was on in the kitchen so he could see where he was going, and the children were asleep in the living room, either on the floor or the couch. (Ex. A-7 at 359–61). Petitioner had trouble remembering what he did immediately after entering the house but explained:

> [PETITIONER]: I remember the light was on, the door was locked, 'cause I remember I dropped the key.
>
> MR. JOHNSON: Okay.
>
> [PETITIONER]: I went in, the kids were there. I was tired of the kids always being there.
>
> MR. JOHNSON: You was what?
>
> [PETITIONER]: I was tired of the kids always being there.
>
> MR. JOHNSON: Okay. That upset you, the kids always laying around the house?

> [PETITIONER]: I think that's—Yeah. I remember . . . Yeah, it was like, damned kids are here again. I remember . . . I remember that, damned kids are here again Betty. 'Cause she's always—the daughter was always taking advantage of her, dropping kids off and stuff, and you know, it's like—
>
> MR. JOHNSON: Whose kids are they?
>
> [PETITIONER]: They're Lisa's.
>
> MR. JOHNSON: Lisa's kids.
>
> [PETITIONER]: They're Lisa's kids.
>
> MR. JOHNSON: Okay. Okay. So you were a little upset—
>
> [PETITIONER]: Yeah.
>
> MR. JOHNSON: —or frustrated the fact that the kids were there when you got home? I mean, that's one of the thoughts that you thought—
>
> [PETITIONER]: Yeah.
>
> MR. JOHNSON: —that they're there?
>
> [PETITIONER]: Yeah, that's—
>
> MR. JOHNSON: Okay.

(Ex. A-7 at 362–64).

Petitioner explained that, after entering the house, he went to the kitchen to get something to eat or drink, made himself a sandwich, sat in the kitchen and ate the sandwich, then went to his room. (Ex. A-7 at 365–66). There, he changed into shorts and opened the windows because it was hot. (Ex. A-7 at 367–68). He then went to bed. (Ex. A-7 at 368).

Although Petitioner remembered Toni sleeping in the living room, he did not remember how she got from the living room to his bedroom, what she was wearing, or why he was choking her. (Ex. A-7 at 364, 368, 370–71, 374). He did not remember

having sex with Toni. (Ex. A-7 at 371–72). All he could remember was being angry and choking her, and her tongue swelled up. (Ex. A-7 at 369, 373). As Petitioner was speaking with Detective Johnson, Petitioner said the term "little bitch" "just popped into [his] head" when thinking of Toni. (Ex. A-7 at 374; Ex. A-8 at 413). He also "guess[ed]" he threw her on the floor after he choked her. (Ex. A-7 at 374).

Shortly thereafter, the first side of the tape on the tape recorder ran out, and Petitioner affirmed that "[t]he tape recorder was turned off momentarily only to turn the tape over." (Ex. A-7 at 376). Upon resuming the interview and the recording, Petitioner stated that he remembered Toni had been wearing "a green shirt and a light . . . white, like straps. What do they call it like a bib overall . . . type of thing." (Ex. A-7 at 377). The following exchange then occurred:

> MR. JOHNSON: Okay. That's good. So you're starting to remember some of this.
>
> [PETITIONER]: Yeah.
>
> MR. JOHNSON: When did [Toni's] clothes come off?
>
> [PETITIONER]: I—
>
> MR. JOHNSON: Close your eyes and think now. You were there—
>
> [PETITIONER]: I guess they were—She's—Oh, man, I hate that vision.
>
> MR. JOHNSON: I know. I know. 'Cause when you close your eyes and put your hands out in front of yourself like that, you can see her face again, can't you?
>
> [PETITIONER]: Yeah.
>
> MR. JOHNSON: Here you go. You can see her face again, huh? Go ahead. Let it out. You've got to get it out of you. It's like a demon inside of you now. You've got to get that out of you, Eddies. And it's—it's okay to cry on something like this, too. 'Cause reliving this is hell, but you've got to get it out of you.

[PETITIONER]: Oh, God.

Why did I do it?

MR. JOHNSON: I know. That's what we're trying to find out right now, Eddie. We're trying to find out why. Why did you do it?

You know what, you just remembered . . . you just remembered something, didn't you?

[PETITIONER]: Yeah.

MR. JOHNSON: I know. I know you did. I know it. You just saw something when you closed your eyes awhile ago. What was it?

[PETITIONER]: I mean, what the hell, she's dead anyway.

MR. JOHNSON: I know. So you took her clothes off, didn't you?

[PETITIONER]: Yeah.

MR. JOHNSON: And then you—

[PETITIONER]: Then I fucked her.

MR. JOHNSON: I know.

[PETITIONER]: She was dead. Goddamn it.

MR. JOHNSON: I know, Eddie.

That was hard to remember, wasn't it?

[PETITIONER]: Oh, God.

MR. JOHNSON: Like I said, some of this—some of the most painful memories are the . . . are the toughest.

[PETITIONER]: I did that. I did do it, though.

MR. JOHNSON: Huh?

[PETITIONER]: I said I don't believe I did that, but I guess I did.

MR. JOHNSON: I know. Like I said, certain things like this are gonna flash in, Eddie, as we're talking about the rest of this stuff. You're gonna remember things like this, it's gonna hurt.

So what you're saying is you choked her?

[PETITIONER]: Yeah.

MR. JOHNSON: And she was dead when you had sex with her; is that what you're saying?

[PETITIONER]: Yeah. Jesus.

MR. JOHNSON: Okay. So she had all her clothes on when you were choking her, and then after . . . and then after you choked her, she removed her . . . you removed her clothes?

[PETITIONER]: Yeah.

MR. JOHNSON: Okay.

[PETITIONER]: Yeah.

MR. JOHNSON: Okay. How long a period of time do you think you had sex with her?

[PETITIONER]: Ah, I don't know.

MR. JOHNSON: Was it—Did you stick your penis on in [sic] her vagina, or did you try to place it elsewhere, too?

[PETITIONER]: Just that way.

MR. JOHNSON: Okay. Did you ejaculate?

[PETITIONER]: I don't know. I hope not.

. . .

MR. JOHNSON: Okay. Now, what did you do with her after that? Did you try to hide her, or did you just leave her there?

[PETITIONER]: Threw her behind the bed.

MR. JOHNSON: Okay. Was she on her back or on her stomach, or you don't know?

. . .

> [PETITIONER]: See, nah, it's like . . . I remember thinking, Eddie, this ain't no fun. And that's when I threw her. I just grabbed her and threw her, and she was behind the bed.

(Ex. A-7 at 377–81).

Petitioner explained that, after discarding Toni, he "went to Betty's room figuring, well, I'll get me a grown woman." (Ex. A-7 at 382). So he went to Betty Dick's room for the purpose of sex, but "[he] killed her first." (Ex. A-7 at 382). He stated, "I stabbed her. I hit her. I hit her with like a candle holder" that he had taken from his room. (Ex. A-7 at 382–83). Petitioner stated, "I walked in her room, and I remember the lights were out, I just beat her in the back of the head with it," and "that's when she said, "Why, Why, Eddie, why?" (Ex. A-7 at 383).

At that point, Petitioner explained, he suddenly had a small knife in his hand, though he did not remember where he got the knife. When Betty Dick started asking "why," Petitioner told her, "Fuck, don't worry about it. Just give up the ghost;" he then started stabbing her. (Ex. A-7 at 384–85). At some point, Betty Dick said, "Tim, I'm dying. I'm dying, Tim." (Ex. A-7 at 385). When he spotted Wendi, he "grabbed her and . . . held her with [his] left hand . . . holding her down" while he stabbed Betty Dick. (Ex. A-7 at 386).

At first, Petitioner did not remember what happened to the knife, but a moment later he said it broke off in Betty Dick's head and said, "Right here." (Ex. A-7 at 385). Detective Johnson asked, "In her right temple?" and Petitioner responded, "I don't know—Yeah, maybe." (Ex. A-7 at 385).

When the knife broke, Betty was no longer moving, so Petitioner took Wendi, tied her up with some towels and a shirt and put her in the bathroom. (Ex. A-7 at 386–87). Wendi asked him if he was going to hurt her brothers, to which Petitioner replied, "No, I'm not gonna hurt your brothers, or I'm not gonna hurt you. You've been through enough pain." (Ex. A-7 at 387).

When Petitioner left the bathroom, he thought perhaps Betty Dick was not dead, so he got the big knife from the kitchen, returned to Betty Dick's room, and stabbed her through the back. (Ex. A-7 at 387). He left the knife in her back, and "started to" have sex with her; he "snatch[ed] down the bottom of her pajama bottoms off," but decided it was too much blood. (Ex. A-7 at 387–88). Petitioner did not remember why he killed Betty Dick, but he speculated it could have been the anger and rage he felt. (Ex. A-7 at 389).

Petitioner stated that, after stabbing Betty Dick and removing her pajama bottoms, he took a shower in the same bathroom Wendi was in. (Ex. A-7 at 390–91). He then got dressed, threw onto his bed the book of poetry he wrote while he was high on drugs, got his bag, and "told Wendi not to worry and that she's here to tell what happened." (Ex. A-7 at 391–92). Petitioner took Betty Dick's bag from work and her purse (in which he found money and Betty Dick's car keys), got in Betty Dick's car, and left. (Ex. A-7 at 393). Petitioner did not remember returning to the house, though he remembered beeping the horn as he was driving away. (Ex. A-7 at 393–94; Ex. A-8 at 406).

Petitioner stopped for gas somewhere and sold jewelry along the way to obtain money;[41] "little by little," while driving, he began to remember killing Toni Neuner and stabbing Betty Dick. (Ex. A-7 at 395–96). The rest he described had come back to him during the interview. (Ex. A-7 at 395–96). Petitioner also explained that he drove hoping "the farther away [he] got . . . [he'd] be able to put it out of [his] mind" and that he was heading to San Francisco because he had been there before, had friends, and could "get lost up in the city." (Ex. A-7 at 397; Ex. A-8 at 403–05). Nonetheless, he had been "actually hoping to get caught." (Ex. A-7 at 397). When the officer spotted him, Petitioner thought, "Thank God," because it was over, and he had "been wanting [to get caught] . . . for a while." (Ex. A-8 at 405–06).

At the end of the interview, Petitioner recalled that Toni ended up in his bedroom because he grabbed her from the couch. (Ex. A-8 at 411–12). He picked her up, and she did not have a chance to say anything because he choked her in the living room; she tried to grab his hands, but it "was just too late." She made no noise except a "gurgle." Petitioner then dragged her to his bedroom "like a ragdoll." (Ex. A-8 at 412–14).

*C. Petitioner's October 7, 1993 Statement to the Media*

On October 7, 1993 (the day after his arrest), Petitioner asked to make a statement to the media.[42] Petitioner highlights the following portions of that statement in

[41] There were two pawn tickets in his wallet, and Deputy Kline took them into evidence, along with Betty Dicks car keys and key ring. (Ex. A-8 at 408; Doc. 85-1 at 102).

[42] No transcript of the statement has been filed with this Court. Petitioner explains in his recently-filed Records Cited List that he will provide the video footage at

support of his actual innocence argument and his position that his confessions are unreliable because of his mental state and lack of memory, (Doc. 66 at 94–95 (quoting Petitioner's October 7, 1993 WEST TV 2 Orlando Interview)):

> Q: "What about extradition, there's some concern as . . . " A: "The sooner the better. They can come and get me and get it over with and . . . let me pay for my crime." Q: "You know you're facing the death penalty?" A: "Oh yeah. Oh yeah." Q: "Is that what you want?" A: "Yes, yeah." Q: "You want to die?" A: "Yeah. Yeah, I deserve to for what I did. You know."
>
> . . .
>
> Q: "Do you have a statement first off? A: "Yeah. Glad I got caught. I've been living with like a nightmare. I don't believe I did what I did. I don't know why I did what I did. Other than caught up with the drugs and alcohol seems like it's been for a few years." Q: "You said you don't know why? Go back to the night and without too much gory detail, do you remember much of it?" A: "Just the fact that I did it. I talked with some officers that I don't want to get into . . . " Q: "What about a statement to the family members of Betty Dick and her granddaughter?" A: "I don't know what I can say. Sorry isn't enough. I don't know why things went the way they did. It just. Maybe one day somebody might know." Q: "Do you appreciate the gravity of the crimes? First off . . . " A: "Yes. Yeah. It's pretty rough, you know, it's like, when I come to realize what I actually done, probably the next day, I just been driving and trying to run away from it."
>
> Q: "When did the remorse really start coming forward? The sheriff just told me a little while ago that you actually broke down and cried last night." A: "That's probably when it really hit me. When I realized from the start of remembering because they was asking questions that I was scared to ask myself I guess. And stuff I didn't remember doing came back and I was like in a flood."

*D. Petitioner's October 8, 1993 Statement to Kern County and Casselberry Police*

the Court's request. (Doc. 85 at 6). However, Petitioner quotes portions of his media statement that he claims support his actual innocence argument, (*see* Doc. 66 at 94–95), and Respondents do not challenge the accuracy of Petitioner's quotations. Consequently, the Court will review and consider the portions of Petitioner's media statement as presented in the Amended Petition.

On October 8, 1993, Petitioner attended an extradition hearing, following which he was interviewed by police from Kern County, California, and Casselberry, Florida, as a follow-up to his prior interviews.

Petitioner repeatedly stated that he did not believe he made any phone calls to anyone that night, and initially did not recall doing anything to the phone line. (Ex. A-4 at 582–86). For example, the following exchange occurred:

> SERGEANT JOHNSON: Is there a possibility that you could have and not remember it?
>
> [PETITIONER]: Yeah, there's a lot, like I said, there's a lot of things I still don't remember, you know, little things.
>
> SERGEANT JOHNSON: Okay. There is a possibility—
>
> [PETITIONER]: And I could assume there's a chance I might have, yes.
>
> SERGEANT JOHNSON: Okay. There's a possibility of that occurring and you didn't—
>
> [PETITIONER]: There's a chance I might have. I just don't remember doing it. There's a good chance.

(Ex. A-4 at 585).

Petitioner remembered stabbing Betty Dick just once with the butcher knife because he "was concerned with her not being dead," and when asked how many times he stabbed her with the smaller knife, he responded, "I know it had to be a bunch," but he could not give an estimate. (Ex. A-4 at 587–88, 598–99). He stated that he stabbed her in the back, and "in the side in the temple and [he thought] . . . that is where [the knife] was broken." (Ex. A-4 at 588). When coaxed by the detective, Petitioner affirmed that it would "probably" be a fair statement to "say that [he] stabbed her in the vicinity of twenty times, give or take five, before she actually lost consciousness and quit

struggling." (Ex. A-4 at 599). When asked what he did with the candlestick that he first struck her with, Petitioner explained that "[i]t broke" and "I don't know, I think I just dropped it." (Ex. A-4 at 589).

Sergeant Johnson asked Petitioner to describe where Betty Dick was in bed when he was attacking her. After saying "[h]old on one second," Petitioner described that Betty Dick was asleep and laying on her stomach on the left side of the bed. (Ex. A-4 at 590–91). He explained that she resisted by "[t]rying to push [him] away . . . with her feet," which he qualified by stating, "If I remember." (Ex. A-4 at 592). He also stated that "she was trying to crawl away on the bed." (Ex. A-4 at 592). He remembered "being on the bed when [he] was stabbing her," but could not remember exactly where he was kneeling when he did so or if he dropped the candlestick during the time he was kneeling on the bed or at some other time. (Ex. A-4 at 593–94).

Petitioner did not remember stuffing anything into Toni Neuner's mouth at any time. (Ex. A-4 at 594–95). Nor did he remember using any type of rope or other ligature to strangle her. (Ex. A-4 at 596–97). Petitioner explained that, "[w]hen that vision came back, . . . all I used was my hands." (Ex. A-4 at 596). As with other details, when asked whether he could have used something besides his hands to strangle Toni Neuner and simply not remembered doing so, Petitioner again qualified his answer: "I have to say there's a chance. But I'm—The vision I got in my mind, I don't think I really had to, you know. . . . But like I said, there's a lot of things that elude me still." (Ex. A-4 at 596).

Petitioner remembered that during the daytime before the murders occurred, he smoked marijuana, "drank quite a bit" of alcohol, smoked crack cocaine, and took

downers. (Ex. A-4 at 611). He also explained that drugs affect him differently depending on the mood he is in when taking them, and that he thought he was "in a pretty good mood" the night of the murders and "ha[d] a fairly good time at the party." (Ex. A-4 at 612). He had been on similar binges in the past and had "got[ten] in some serious fights," but had never raped or killed anybody during a binge. (Ex. A-4 at 614).

During the interview, Petitioner also described his cross-country road trip to Sergeant Johnson. Although he described some of his memory as being "shady," he was able to provide some detail including places he remembered stopping to rest and places he pawned some of Betty Dick's jewelry. (Ex. A-4 at 620–44). He recalled driving first to Valdosta, Georgia, where he stopped to rest and stashed items in his hotel room ceiling. (Ex. A-4 at 621–22). He then drove up through Macon, Georgia, stopped for a few hours to rest outside of Atlanta, Georgia, then over to Chattanooga and Knoxville, Tennessee; he stopped to rest outside of Knoxville. (Ex. A-4 at 622–26). Thereafter Petitioner decided to go to Indianapolis, because it was the last place he knew to find his father. He drove through Louisville, Kentucky, where he stopped to rest, and on toward Indianapolis. He pawned a gold item before reaching Indianapolis. (Ex. A-4 at 626–28). He did not find his father in Indianapolis, so he decided to go to St. Louis, Missouri, because he had never been there before. (Ex. A-4 at 628). He pawned "a few gold rings" in St. Louis, then proceeded to Tulsa, Oklahoma (outside of which he picked up a hitchhiker), stayed at a rest stop in or near Tulsa, and continued on to Oklahoma City. (Ex. A-4 at 628–30). Petitioner spent the night in Oklahoma City, "pawned some stuff there, too," and drove to Amarillo, Texas. He stayed at a rest area again near Amarillo, then headed toward Denver, Colorado, by way of Santa Fe, New

Mexico. Petitioner did some camping along the way and sold most of the remaining pearls to a jeweler in Glenwood Springs, Colorado. (Ex. A-4 at 631–36). From Colorado, Petitioner eventually drove through Las Vega, Nevada, then through Death Valley and Bad Water, California. (Ex. A-4 at 638–42). He proceeded through Baker, California, and then through Barstow and Mojave, California, before staying outside of then arriving in Bakersfield, California, where he was discovered and arrested. (Ex. A-4 at 643; Ex. A-10 at 855).

When speaking with Sergeant Johnson, Petitioner could not remember whether he knew what he was doing was right or wrong at the time of the offenses, and he remembered only that his "frame of mind was anger." (A-4 at 645–55). But he explained that after seeing Wendi standing at the door, "it was a, you know, like what have I done type of thing." (Ex. A-1 at 647–48). He guessed that "seeing her snapped [him] back from wherever [he] was at, maybe, maybe." (Ex. A-4 at 648). Nevertheless, he kept stabbing Betty Dick while holding Wendi down next to her, and he did not know why. (Ex. A-4 at 649). At that time, he realized what he was doing was wrong. (Ex. A-4 at 651). He stopped stabbing Betty Dick when the knife broke, and Wendi was crying, which made him feel bad. (Ex. A-4 at 653). Yet, after tying Wendi up, he also went to the kitchen to get the butcher knife and then stabbed Betty Dick again, even though he knew it was wrong. (Ex. A-1 at 652).

Petitioner stated that he no longer felt angry by the time he took Wendi to the bathroom to tie her up, and he did not feel angry when he used the butcher knife from the kitchen to make sure Betty Dick was dead. (Ex. A-4 at 653–54). He was, perhaps, angry at himself. (Ex. A-4 at 654). Sergeant Johnson asked if he stabbed Betty Dick

the last time out of fear, and Petitioner responded, "You've got me a little more confused now," (Ex. A-4 at 654), but he reiterated that he was no longer angry when he did it. (Ex. A-4 at 655). A bit later, Petitioner stated that he believed he stabbed Betty Dick with the butcher knife to put her "out of any suffering that she might be in." (Ex. A-4 at 668).

Petitioner also stated that after he stabbed Betty Dick with the butcher knife, he "snatched her bottoms off" and "rolled her over" onto her back and said out loud to himself, "Let them figure this out." (Ex. A-4 at 656). Further, while earlier Petitioner did not remember doing anything with the phone line, (Ex. A-4 at 582–86), at the end of the interview he remembered ripping the phone cords out of the wall in Betty Dick's room. (Ex. A-4 at 657–58, 669–70). Petitioner claimed to have just remembered that action at that moment because it "was like the last thing [he'd] done." (Ex. A-4 at 657). He did so "maybe" for the purpose of getting away. (Ex. A-4 at 657).

Petitioner explained:

> Like I said, the phone part was probably more than likely fear of getting caught at the time, you know. Uhm, 'cause the few days are hazy, the[] next days are hazy and stuff and I was scared. I'll admit that. I was scared of being caught and [also] wishing I was gonna be caught, but not so much . . . then as it was more down the road, you know.

(Ex. A-4 at 663).

Petitioner also stated that, after ripping the phone cord out of the wall, he took a shower in the bathroom Wendi was in, put the shorts he had been wearing during the offenses into the blue crate in his bedroom, then "packed [his] clothes, just grabbed stuff out of the drawer, got some things out of the closet, put them in the car, come back

and got the purse and the pearls and stuff, put them in the car, got in the car and left." (Ex. A-4 at 670, 669–70).

*E. October 12, 1993 Recorded Broadcast of America's Most Wanted*

On October 12, 1993, America's Most Wanted featured Petitioner on a recorded broadcast,[43] in which Petitioner stated:

> For what I did, you know, there's nothing I can do to even begin to make it right. You know. Or apologize or say I'm sorry. And just soon come get me and put me out. Do away with me. Sooner the better . . . Saying that I'm sorry is so insignificant. My death I think would be for a life for a life.

(*See* Doc. 66 at 95 (quoting the October 12, 1993 broadcast of Petitioner's statement to America's Most Wanted)).

*F. April 5, 1995 Guilty Plea and Colloquy*

At Petitioner's April 5, 1995 change of plea hearing, Petitioner affirmed under oath that, among other things, he read the plea agreement and understood it, he understood the rights he was waiving by entering a guilty plea, his guilty plea would end the case with regard to his culpability, he would be unable to appeal as to his guilt, no one had threatened him or promised him anything to enter the plea, and he faced life imprisonment or the death penalty. (Ex. A-14 at 351–64).

Additionally, the following exchange occurred:

THE COURT: Mr. James are you entering this plea of your own free will?

[43] As with Petitioner's October 7, 1993 media statement, no transcript of the broadcast has been filed with this Court. Petitioner explains in his recently-filed Records Cited List that he will provide the video footage at the Court's request. (Doc. 85 at 6). However, Petitioner quotes a portion of his media statement that he claims supports his actual innocence argument, (*see* Doc. 66 at 95), and Respondents do not challenge the accuracy of Petitioner's quotation. Consequently, the Court will review and consider the quoted portion of Petitioner's statement on the America's Most Wanted broadcast as presented in the Amended Petition.

> [PETITIONER]: Yes, I am.
>
> THE COURT: And for no other reason?
>
> [PETITIONER]: For no other reason. I feel it's the right way to go.
>
> THE COURT: Why do you feel it's the right way to go?
>
> [PETITIONER]: Just because I have, in the past—I confessed to the Court, I never felt comfortable pleading not guilty. It was recommended to me. I thought maybe this might be the way to go, not guilty, but as time goes on and thinking about it and talking about it with my lawyers, I feel a plea of guilty is the only honest thing I can do and be done with it.
>
> THE COURT: This comes from you and not from them?
>
> [PETITIONER]: This comes from me.

(Ex. A-14 at 364).

Thereafter, the trial court determined Petitioner was entering his plea knowingly, freely, and voluntarily, and asked Petitioner to describe "what [he] did that ma[de] [him] think [he's] guilty in this case." (Ex. A-14 at 635). Petitioner's response and the following exchange occurred:

> [PETITIONER]: I am pretty much, it's been a long time. I come home. For some reason, I was angry. I strangled Toni. Then I evidently did other things. Then I killed Betty. That's the best I can do, and after doing that, I guess I got scared. I grabbed some things I figured I could get some money on and took the car and I left.
>
> Wendi, speaking about Wendi, she come in when I was in the process of killing Betty. I took her and tied her up and put her in the bathroom and left her there.
>
> THE COURT: And did you sexually batter or rape her?[44]

[44] It is not clear to whom the trial court is referring—Wendi Neuner, Toni Neuner, or Betty Dick. Based on his response, Petitioner appears to believe the trial court was referring to Toni Neuner.

[PETITIONER]: Your Honor, they say I did. I have no memory of doing that, I really don't. I have a hard time accepting the fact, that's why I pleaded no contest to whether I did or didn't do it. My recollection is very vague . . . .

MR. ANDERSEN: There are two points concerning count one and two in 93-4019, first his recollection is not very clear on those. The other thing to his, the best of his ability, not being a medical doctor, he believed the child was dead.

[PETITIONER]: Not that that's an excuse for what I did or anything.

THE COURT: I under [sic] the legal problem.

MR. ANDERSEN: I talked to him about the legal defense, but the doctor's statement, his affidavit that the child was still alive doesn't necessarily mean the child was conscious. Those things will come out during the second phase of this proceeding.

THE COURT: It's also charged, Mr. James, that you—I see they've charged you with aggravated child abuse with the strangulation. Did you strangle Toni?

[PETITIONER]: I did.

THE COURT: The attempted sexual battery upon Betty had to do with using a candle holder or a knife?

[PETITIONER]: I beg your pardon?

THE COURT: Did you penetrate her with a candle holder or knife?

[PETITIONER]: No, sir, not in a sexual way. From what I confessed, it was an afterthought. I killed Betty. It's been so long now, it's not very clear, but the sexual attempt was an afterthought to the act.

THE COURT: But you did do it?

[PETITIONER]: I didn't have sexual contact with her, no. I did stab her and hit her with a candle stick as far as the murder goes.

THE COURT: . . . Did you take jewelry?

[PETITIONER]: I took jewelry and some money and keys to the car.

THE COURT: And the car is count seven. You took the car?

[PETITIONER]: Yes.

(Ex. A-14 at 365–68).

Thereafter, the prosecutor provided a complete factual basis for the plea, and Petitioner acknowledged that counsel had gone over the factual basis and evidence with him. (Ex. A-14 at 368–75). After further warning by the trial court that, if Petitioner's plea was accepted, he would "never be able to withdraw the pleas of guilty and no contest ever again in [his] entire life," Petitioner stated that he had "no wish to withdraw," and he was sure he wanted to enter the guilty plea. (Ex. A-14 at 377).

*G. June 3, 1995 Trial Testimony*

Finally, Petitioner testified at his penalty-phase trial.

When asked what happened during the arrest and whether he caused police any trouble at the time of his arrest, he responded, "Not to my knowledge, I didn't, no." (Ex. A-10 at 855). He explained that,

> [B]asically, I run out of gas in Bakersfield, trying to get some money to carry on my trip, trying to get to San Francisco.
>
> And I went to the unemployment office after trying to get some food stamps. I figured it would be a good idea to show them I'm looking for a job and decided to sit around and try and get a job. I'd rather do that than depend on the state. Don't know what I was thinking when I did it.
>
> But as I was sitting there, I heard the police enter, I heard the radio, and I knew then that they was coming for me, so I just sat there and waited.
>
> . . .
>
> [When the police approached,] [t]hey asked me who I was, I told them. They asked me if I knew why they was there, and I said, yeah, I'm pretty sure I know why you're here. Then they arrested me.

(Ex. A-10 at 855–56).

Petitioner confirmed that he made a statement to police on October 6, 1993, and responded to questions about his personal background. He stated that he was born on August 4, 1961, in Bristol, Pennsylvania, and that he did not remember a lot of his childhood. (Ex. A-10 at 857). Petitioner did not know that the man married to his mother was his stepfather until around age ten or eleven when he found photographs of his mother marrying someone else, and his mother told him the other man was his real father. (Ex. A-10 at 857–58). That year or the next year, he met his real father, Alfred James, when Mr. James came to visit him. (Ex. A-10 at 858–59). Later, Petitioner visited and lived with his father in Indianapolis through the fall and winter, though he could not remember his exact age at the time, explaining that he "might have been twelve." (Ex. A-10 at 859). The last time Petitioner saw his father, Petitioner was fourteen years old, Petitioner went to live with his father, and his father introduced him to marijuana and his operation dealing marijuana. (Ex. A-10 at 862–63). They moved to Massachusetts where they stayed with a cousin, but his father went back to Indianapolis two weeks later, and Petitioner did not hear from him again. (Ex. A-10 at 863). He went home to live with his mother. (Ex. A-10 at 863).

Petitioner described the schools he attended in the Central Florida area, as well as the blackouts he began experiencing in ninth grade. (Ex. A-10 at 864). By that time, he had smoked pot and used PCP. (Ex. A-10 at 865). He went to counseling, but it did not help. (Ex. A-10 at 865). Petitioner eventually got his G.E.D. and enlisted in the Army at age seventeen. (Ex. A-10 at 866). He was discharged after eighteen months due to his drug and alcohol use. (Ex. A-10 at 866–67). When he arrived back in the United States after being discharged, he hitchhiked across the country for between a

year and a year and a half. (Ex. A-10 at 868–69). His son was born in March of 1983, and Petitioner described himself as a "jack of all trades," having "had a lot of jobs," including concrete and brick work, painting, wallpapering, landscaping, and security at a nightclub. (Ex. A-10 at 869–70).

Petitioner earned a certificate in the computer field in San Francisco, California, worked as a printer operator for about nine weeks, and left when he realized he "couldn't handle" sitting in a chair during the graveyard shift. (Ex. A-10 at 870–72). Thereafter, Petitioner worked for Hertz Car Rentals in San Francisco, and he eventually moved back to Florida to take over raising his son after the child's mother threatened to kill the son. (Ex. A-10 at 873–74). Petitioner continued working at various jobs, and his partying and drug use increased, causing him to lose his girlfriend and distance himself from his son. (Ex. A-10 at 875–79).

Petitioner described that, from his birthday, August 4, 1993, through the murders on or between September 19 or 20, 1993, "was one big party" during which he "was pretty steadily intoxicated." (Ex. A-10 at 881). He "was doing pretty good for [him]self" as a day laborer in roofing; he "had the money to enjoy it and [he] did. . . . [I]t just carried on." (Ex. A-10 at 881).

Regarding his flight from the murder scene, Petitioner explained that he "[did not] recollect whether [he] was [initially] going any particular direction or not until the next day when [he] realized what [he] had done." (Ex. A-10 at 860). He stopped at a motel in Valdosta, Georgia, where it was "not long" before he "realized that [he] was driving Betty's car and what had happened, what memory [he] had, what had happened that night." (Ex. A-10 at 860). Petitioner explained,

> . . . I figured I'd sit at Valdosta and get myself together, and I just couldn't sit still, I had to go. I was scared, nervous, knew if they caught me, you know, that was it.
>
> So, I decide, well, last chance, let me go see my father, you know, settle things between us because we had had some problems in the past.

(Ex. A-10 at 860). But Petitioner was unable to find his father in Indianapolis. (Ex. A-10 at 861).

Petitioner explained that, when he was finally caught and arrested, he voluntarily spoke to the police because:

> I felt it was only right, you know, what I did. I was caught, there was no sense in denying it, you know, because I can't deny what I did. I was honestly one of the first people to admit that I did it.
>
> . . .
>
> More out of shame and, you know—It just—It just—I can't really explain some of the feelings I had. They were pretty rough, believe it or not. They were pretty rough.

(Ex. A-10 at 881–82). Petitioner also stated,

> [T]here is no excuse for what I did. I'm not looking for an excuse, no. I just want people to see that though I did what I did, it wasn't me, you know. I was caught up in lots of drugs, just . . . It wasn't me. I know I can't deny that I did it.

(Ex. A-10 at 882–83).

When questioned about struggling with his memory, Petitioner explained that he wanted to remember what happened:

> I wanted to offer as much help as I could to settle this, find out why it happened, because I had no idea why it happened. That's what bothers me more than anything, why did this happen.
>
> Now, the death of Betty and Toni bothers me quite a bit, but why would I do it.

(Ex. A-10 at 886).

At the time of his testimony, Petitioner "still d[idn't] know why it happened," and could only think that it was because of the drugs. (Ex. A-10 at 883). Petitioner remembered drinking from a bottle of gin at Nicole House's residence on the night of the offenses. (Ex. A-10 at 898). Petitioner also stated, "I'll admit I have a temper, everybody knows that know me that I had a temper. When I drink, sometimes it would come out. When I didn't drink, I could handle it pretty good. Maybe that was part of it, I don't know." (Ex. A-10 at 884).

But, regarding his LSD use, Petitioner explained:

> I've always had good experiences on LSD. Sometimes I would experience visions . . . like I might look at the chair and there'd be somebody sitting in an empty chair, that kind of thing. Generally, . . . laughing and giggling and having a good time, you know. That's what amazes me that with the combination, I don't understand why it affected me like it did.

(Ex. A-10 at 884). Petitioner felt that if he took LSD while drinking, the LSD "sobered [him] up." (Ex. A-10 at 884–85). He did not remember if he took LSD in close proximity to the murders. (Ex. A-10 at 885). Petitioner testified that he was intoxicated voluntarily the night of the offenses, and he did not know if or suggest that anyone had slipped him any drugs. (Ex. A-10 at 893). But he explained that "[he] was under the influence of a controlling substance . . . I don't remember actually committing the crimes, vaguely, all right? Normally, being myself, the person sitting here before you would never do nothing like that." (Ex. A-10 at 894).

When questioned about his awareness of his actions at the time of the offenses, Petitioner responded, "I may have been aware of it[.] [I]f[] I was, I don't recollect being aware of it other than the fact that after I come and was arrested, the memory come back." (Ex. A-10 at 896).

Petitioner did not recall using a ligature to strangle Toni Neuner; he remembered using his hands. (Ex. A-10 at 886–87). Petitioner also did not recall laughing at Wendi Neuner while she was tied up in the bathroom. He testified: "I don't remember. I can't say if she's lying or if she's being honest. She was sober, but she was distraught, too, you know. So, I don't know." (Ex. A-10 at 887).

When asked if there was anything he could do to "put things back into place," Petitioner explained:

> You know, y'all talk to me about a chance to put me on the death chair here. If that would bring them back, I would do it a thousand times and not think nothing of it.
>
> And I've come close to God . . . and I hope in that way, I might change somebody else's life to . . . keep them from being brought to a position where I'm at now, and maybe save a life or two. That's the only thing I know I can do to even begin to pay for this.
>
> . . .
>
> . . . I know my soul, I feel my soul may spend time with God in Heaven, which is my belief as a Christian, that he's forgive[n] me for what I done. I still have to pay [in] the flesh for what I've done.

(Ex. A-10 at 887–89).

*ii. Petitioner's New Evidence & Analysis*

Petitioner presents the following mental health evidence not presented at trial in support of his theory that he falsely confessed: the Preliminary Assessments of Drs. Kessel and Regnier (Doc. 66-1 at 4–6, 8–11), the Neuropsychological Evaluation Report from Dr. Eisenstein (Doc. 66-1 at 44–54), and the Psychological Report from Dr. Castillo (Doc. 66-1 at 55–79). These records were thoroughly described above in connection with Petitioner's argument that equitable tolling should apply to the

limitations period due to his incompetency during his state court post-conviction proceedings. *See supra* Section IV(B)(2)(b).

Petitioner argues that he repeatedly stated that he did not remember the crime and that his cognitive and emotional vulnerabilities, when combined with suggestive police interrogation techniques, rendered his inculpatory statements unreliable—a conclusion he asserts is supported by the numerous inconsistencies found in his inculpatory statements and the lack of physical evidence connecting him to the crime scene other than his possession of Betty Dick's car and jewelry.

However, while Drs. Regnier and Eisenstein both opined that Petitioner suffered cognitive decline over time, Dr. Regnier limited the decline to "several years" before his 2018 evaluation, and Dr. Eisenstein did not provide an estimated length of time. (Doc. 66-1 at 11, 54). Nor did either describe the possible level of Petitioner's cognitive function or any specific cognitive challenges or disabilities Petitioner would have experienced at the time of Petitioner's arrest and prosecution.

Dr. Kessel opined that Petitioner likely suffered from mood instability at the time of his arrest, which, in conjunction with his cognitive disabilities, would have affected his ability to fully understand his circumstances and act in his own best legal interest. However, she did not describe the severity or extent of his mood instability or the extent to which it would have affected his understanding and ability to assist in his defense. Although she stated that, prior to his guilty plea, Petitioner developed a "nihilistic preoccupation that he should be executed," (Doc. 66-1 at 5), she did not describe what statements or beliefs Petitioner shared that caused her to reach that conclusion, and

she did not explain if that preoccupation extended back to the time of the statements Petitioner made during and shortly after his arrest.

Further, although Dr. Castillo expressed concern about Petitioner's suggestibility and competency at and after the time of his arrest, the concern was simply speculation. Dr. Castillo was unable to say for certain that Petitioner was incompetent throughout his legal proceedings. Nor could Dr. Castillo opine for certain that Petitioner's "memory" of the crimes evolved over time due only to the information he was provided by law enforcement.

The vague and speculative nature of the new mental health evidence simply does not support a finding of actual innocence. Consideration of that evidence with the alleged inconsistencies between Petitioner's various statements and the other evidence does not change the outcome, as Petitioner has not shown that his inculpatory statements were the result of police suggestion or manipulation, and his statements were not as "wild[ly] inconsistent[]," (Doc. 79 at 16), as he contends.

For example, Petitioner argues that, "[i]n his October 6, 1993, statement to Kern County police, he said he started to have memories of the crime approximately two days after it occurred." (Doc. 66 at 104). Yet, "[a]t trial, he admitted he did not remember committing the crime until after he was arrested." (Doc. 66 at 104). In support, Petitioner points to a statement he made at the penalty phase trial that, "I may have been aware of it[.] [I]f[] I was, I don't recollect being aware of it other than the fact that after I come and was arrested, the memory came back," (Ex. A-10 at 896).

Petitioner's argument, however, is factually inaccurate. Petitioner consistently stated that he began to remember details from the crime as he traversed the country in

Betty Dick's car. (*See, e.g.*, Ex. A-4 at 633; Ex. A-7 at 349). Even at trial, Petitioner testified that it was the "next day" after the murders that he began to realize what he had done. (Ex. A-10 and 860). He remembered stopping at a motel in Valdosta, Georgia, and he explained: "It was not long after [that] I realized that I was driving Betty's car and what had happened, what memory I had, what had happened that night." (Ex. A-10 at 860).

Petitioner's statement that, after he "was arrested, the memory came back," (Ex. A-10 at 896), was not related to his general memory of committing the crimes. Instead, the statement arose during an exchange about Dr. Gutman's opinion that Petitioner knew what he was doing at the time of the murders—Petitioner explained that he may have been aware of what he was doing during the murders, but that he did not recall being so aware until after his arrest when more of his memories came back. (*See* Ex. A-10 at 895–96).

Petitioner also argues that his memory of taking Toni Neuner from the living room, "was inaccurate" because "Wendi Neuner was certain Toni Neuner was in her grandmother's bed." (Doc. 66 at 85, 105). However, it is unclear from the evidence exactly where Toni Neuner was sleeping at the time Petitioner grabbed her. Wendi told both Officer Mundo and Mr. Stone that she thought her sister had been sleeping in her grandmother's bed, but that she did not see her there when she observed Petitioner stabbing her grandmother. (Doc. 85-1 at 5, 16, 18–19). Given the fact that Wendi was sleeping until she heard her grandmother's screams, she did not actually know where Toni was at the time Petitioner grabbed and strangled her.

Additionally, Petitioner remembers strangling Toni with his hands, yet the medical examiner testified the contusions on Toni's neck were consistent with use of some form of ligature and were "somewhat similar" to injuries he had observed with other ligature-related deaths. (Ex. A-7 at 283–84). However, Petitioner also admitted during his October 8, 1993 statement that "there's a chance" he used a ligature but did not remember doing so, because a lot of details still eluded him at that time. (Ex. A-4 at 596).

Regarding Toni Neuner's rape, Petitioner claims that his sudden memor[y] of . . . vaginally raping her after her death [is] inconsistent with the Seminole County Medical Examiner's finding that Toni Neuner had been raped vaginally and anally while alive and conscious." (Doc. 66 at 105). However, this argument is factually incorrect, as the medical examiner actually testified that although Toni Neuner was alive while being raped, (Ex. A-7 at 289, 311, 315), there was no way to know if she was conscious at the time of the rape. (Ex. A-7 at 315). Thus, it is possible Toni Neuner was not conscious during the rape, and Petitioner could have believed she was dead at that time.

Petitioner states that it was only after police suggested the knife broke that Petitioner "recalled it breaking off in Betty Dick's head. Petitioner could not remember where in [her] head until the police suggested it was in her right temple." (Doc.66 at 92). This assertion involves Petitioner's videotaped statement the day of his arrest.

The transcript[45] details the following exchange between Petitioner and Detective Johnson:

> MR. JOHNSON: What happened to that knife?
>
> [PETITIONER]: I have no idea.
>
> MR. JOHNSON: Did it break?
>
> [PETITIONER]: Just left it there.
>
> MR. JOHNSON: Did it break or anything while you were stabbing her?
>
> [PETITIONER]: Oh, man, yeah.
>
> MR. JOHNSON: Where'd it break at?
>
> [PETITIONER]: In her head.
>
> MR. JOHNSON: Broke off in her head?
>
> [PETITIONER]: Right here.
>
> MR. JOHNSON: In her right temple?
>
> [PETITIONER]: I don't know—yeah, maybe.

(Ex. A-7 at 384–85).

Thus, it appears that, when questioned, Petitioner originally thought the question, "What happened to that knife?" was an attempt to find out *where the knife went* after he used it, rather than an attempt to find out if it broke. (Ex. A-7 at 384). Petitioner responded that he did not know and that he left it there. (Ex. A-7 at 384).[46]

[45] Only the transcript of the videotape (not the videotape itself) was filed with the Court.

[46] It appears from the context that Petitioner may not have heard the initial time Detective Johnson asked if the knife broke, as his answer "Just left it there" appears

Nonetheless, while Petitioner did not initially respond that the knife broke, once specifically asked if the knife broke, the transcript shows that Petitioner remembered on his own that it broke in her right temple—Petitioner stated, "Right here," *before* Detective Johnson suggested the right temple.

Petitioner also challenges that, although he originally said he stopped stabbing Betty Dick because the knife broke, due to police pressure during the October 8, 1993 interview he changed his story to explain that he stopped stabbing Betty Dick because Wendi was crying. (Doc. 66 at 99). However, this argument is not entirely accurate because at the October 8, 1993 interview Petitioner actually stated, "The knife broke, but there's something else, too, that—What was it? Wendi was crying." (Ex. A-4 at 653). Thus, it was not one or the other but both circumstances together that caused him to stop, and his original and later statements on this point were not entirely inconsistent.

Petitioner asserts that "[h]e remembered snatching Betty Dick's pajama bottoms off after she was dead and attempting to rape her, but Wendi's accounts indicate that never happened." (Doc. 66 at 105). However, there is no inconsistency. Petitioner stated that he did so after stabbing Betty Dick the final time with the butcher knife, which was after he tied Wendi up in the bathroom. (*See* Ex. A-4 at 653, 655–56; Ex. A-7 at 387–88). She was, therefore, no longer in her grandmother's bedroom and would not have been able to see any further actions Petitioner took against her grandmother.

responsive to Detective Johnson's first question, "What happened to that knife?" (Ex. A-7 at 384).

Petitioner argues that "[h]e claimed to remember showering after the murders, but Wendi Neuner was certain he did not shower." (Doc. 66 at 105). While it is certainly true that Petitioner stated that he showered in the same bathroom in which he confined Wendi Neuner, (Ex. A-4 at 670), and that Wendi stated he did not do so, (Doc. 85-1 at 93–94), Wendi also confirmed that there was more than one functioning shower at her grandmother's house and that the other one was in her grandmother's bedroom. (Doc. 85-1 at 94).

Petitioner also questions his "inexplicable" sudden ability during the October 8, 1993 interview to describe his road trip in detail, despite remembering fewer details about committing the crimes. (Doc. 66 at 96). But Petitioner provided his own answer to that concern when Sergeant Johnson commented on his memory during the interview: "You got a pretty good memory to remember all this." (Ex. A-4 at 632). Petitioner responded, "Well, out here—Out here it's not so bad. This stuff here is pretty, you know, clear. It's just like this beginning, these first three, four or five days . . . , they're still a little shady." (Ex. A-4 at 633). Given Petitioner's intoxication at the time of the crimes, it's reasonable that he became more clear-headed as he traversed the country.

Indeed, Petitioner's admitted level of intoxication at the time of the murders could explain the inconsistent details he provided on various points (and the inconsistency of the details provided with other available testimony or evidence), such as, among other things, what time he came back to Betty Dick's home on the night in question, his belief that he broke Toni Neuner's neck, which shower he may have used, whether he told Wendi he would or would not harm her, whether he raped Toni vaginally or both

vaginally and anally, whether he pulled the phone cord out of the wall, whether he strangled Toni with only his hands or also used a ligature, and where, when, and how he obtained the small knife used after he attacked Betty Dick with the candlestick.

Although Respondents concede that "the best possible police practices may not have been employed" in Petitioner's interrogations, (Doc. 73 at 37), Petitioner merely speculates that details about the crimes were provided to him by police during breaks in tape recording, through items present on the interview table, or at other times. (*See, e.g.*, Doc. 66 at 86, 92, 95). And the fact that Petitioner was able to remember and provide more details over time does not mean his memories were necessarily made up, developed entirely from police suggestion or manipulation, or derived from media reports.[47] It is equally as plausible that questioning by law enforcement assisted Petitioner to remember more detail about the crimes or encouraged him to admit to details that he did remember but had not yet disclosed.

While it is true that Petitioner's lack of memory permeates his description of the details, his overall story of the commission of the crimes is consistent and corroborated by Wendi Neuner's statements[48] and other evidence.

[47] Although Petitioner claims that facts he disclosed could have come from media reports during the weeks he traveled across the country, (*see, e.g.*, Doc. 66 at 84), Respondents argue that Petitioner "recall[ed] details he only could have known if he'd been the killer[.]" (Doc. 73 at 36). Neither party details what evidence was or was not publicly known.

[48] Petitioner notes Dr. London's opinion that Wendi's statements and Petitioner's statements "are not independent pieces of evidence" because details from Wendi were used to bring about Petitioner's confessions; then Wendi watched the America's Most Wanted episode on which Petitioner appeared, which "would reinforce her memory about what happened." (Doc. 66 at 66 (quoting Doc. 66-1 at 110)). But Petitioner does

From the day of his arrest, Petitioner stated that he was intoxicated and felt angry as he returned home to Betty Dick's house the night of the offenses. He strangled Toni Neuner, raped her,[49] and threw her behind his bed. He then proceeded to Betty Dick's room where he attacked her with a candlestick and a small knife that eventually broke. Wendi entered the room during the attack and observed him stabbing her grandmother. He took her to the bathroom that was not in the master bedroom and tied her up. He then went to the kitchen, grabbed the butcher knife, returned to Betty Dick's bedroom, and stabbed Betty Dick through the back to make sure she was dead. He showered, packed some personal items, took Betty Dick's purse and bag from the jewelry store, and fled in Betty Dick's car across the country, selling the jewelry as he went.

Similarly, Wendi Neuner consistently stated that she watched as Petitioner repeatedly stabbed her grandmother until her grandmother lost consciousness. Petitioner grabbed Wendi and dragged her to the bathroom that was not in the master bedroom and tied her up. She later saw Petitioner take Betty Dick's purse from Ms. Dick's bedroom, she saw Petitioner with Betty Dick's rings, earrings, and bracelets, and she heard Petitioner leave in Betty Dick's car.

Both Wendi Neuner and Petitioner indicated that Betty Dick identified Petitioner as the attacker. According to Wendi, Betty yelled something to the effect of "Stop,

not point to any particular statement he made during the America's Most Wanted interview that Wendi thereafter adopted as her own memory.

[49] Deputy Kline initially asked Petitioner if Petitioner had touched Toni Neuner sexually the night of the murders, and Petitioner asked, "Did I?" Deputy Kline told him, "I believe you did." (Doc. 85-1 at 101). But once transported to the Sheriff's Office, upon further questioning the same day, Petitioner admitted to raping Toni after strangling her and then throwing her behind the bed. (Ex. A-7 at 378–81).

Eddie!" (Ex. A-1 at 120–21; Ex. A-6 at 140; Ex. A-8 at 584–85; Doc. 66-1 at 96; Doc. 85-1 at 4, 16–17, 52). According to Petitioner, Betty asked something to the effect of "Why, Eddie?" (Doc. 85-1 at 101; Ex. A-7 at 383). Wendi stated that Petitioner said to Betty Dick during the attack "Give your life up to the ghost." (Ex. A-8 at 588). Petitioner similarly stated that, as he attacked her, Betty Dick asked him "why" and he told her, "Don't worry about it. Give it up," (Ex. A-7 at 347), or "Fuck, don't worry about it. Just give up the ghost." (Ex. A-7 at 384–85). Both Wendi and Petitioner stated that Petitioner tied Wendi up with a shirt. Both Wendi and Petitioner stated that Wendi asked him if he would hurt her brothers, and he said no.

Physical evidence of record also supports Petitioner's statements. Two knives and a bloody candlestick were found at the scene. (Ex. A-1 at 63, 165). A small knife blade and the broken handle of the knife were found in Betty Dick's hair, the dented and broken candlestick was found wedged underneath the waterbed mattress, and the butcher knife was found lodged in Betty Dick's back. (Ex. A-6 at 175, 179–82, 185–86, 209, 219–20, 225). Toni Neuner's nude body was found in another bedroom on the floor, in between the wall and mattress. (Ex. A-6 at 192, 206, 327). Petitioner argues that "none of the tested forensic evidence linked Petitioner to the offenses against Toni Neuner and Betty Dick." (Doc. 66 at 37). But no semen was found on or in the bodies of Toni Neuner and Betty Dick, (Ex. A-1 at 163–64), so there was no such evidence to link to Petitioner (or anyone else).

Caucasian head and pubic hairs were found on Toni Neuner's body, but they were not tested. (Ex. A-1 at 83–85). The FDLE report states, "[b]ased upon information received from the State Attorney's Office, hair examinations on evidence submitted in

this case are no longer necessary." (Ex. A-1 at 83). Petitioner speculates that, one reason for the failure to test the hair samples was because "the State Attorney's Office had reason to believe the hairs did not belong to Petitioner, and testing would not be helpful to its case against Petitioner." (Doc. 66 at 41 n.10). But, as Petitioner also concedes, another logical conclusion can be drawn that "the State Attorney's Office recognized there would be no probative value to hairs found on Toni Neuner's body[] due to the (nude) body having been located in Petitioner's bedroom, where presence of his hair would be expected." (Doc. 66 at 41 n.10).

Petitioner also notes that no trace debris or fingerprints were found on Betty Dick's body or the weapons used. But while a lack of such evidence means Petitioner can say that forensic evidence did not affirmatively link him to the crimes, the lack of such evidence does not acquit him. Petitioner argues that he "was under the influence of exorbitant quantities of mind-altering substances on the night of the crimes," that "[h]e was not able to recall the night in question, let alone make a concerted effort to avoid DNA transfer during messy killings committed at close range," and that "there is no evidence suggesting that [he] wore gloves, cleaned the crime scene, or otherwise took action to prevent the transfer of his DNA." (Doc. 66 at 41).

But Petitioner does not indicate what source of his DNA would be expected at the crime scene. Based on Petitioner's statements, he "hoped" he did not ejaculate while raping Toni Neuner, and he did not attempt to sexually penetrate Betty Dick. Thus, his statements are consistent with the absence of semen found on or in their bodies. Additionally, Petitioner does not identify any significant bodily injury Petitioner may have sustained that would have caused him to leave his own blood at the crime scene.

Finally, Petitioner points to the fact that, although Petitioner claims he took Betty Dick's purse and her bag containing jewelry, Keith McCauley explained that "the jewelry was already packed in Betty Dick's car prior to the murders." (Doc. 66 at 42; *see also* Doc. 66-1 at 16–17). But, as noted, he stated merely that he helped Betty Dick move boxes to her car that contained jewelry, along with a jewelry organizer. (Doc. 66-1 at 16–17). Mr. McCauley did not state that he moved or saw her move to the car a separate bag containing jewelry.

Given these circumstances, the Court does not find a reasonable likelihood that the new mental health evidence provided by Petitioner would prevent any reasonable juror from finding him guilty. *See McQuiggin*, 569 U.S. at 386.

*c. Conclusion*

Overall, Petitioner does not demonstrate that, based on the new evidence he presents regarding an alternative perpetrator and his mental health and suggestibility, "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* Consequently, the new evidence does not open a gateway through the AEDPA's time-bar to permit the Court to review his claims on the merits. The Amended Petition remains untimely and is, accordingly, denied.

**V. CERTIFICATE OF APPEALABILITY**

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v.*

*Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, at 529 U.S. 484; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

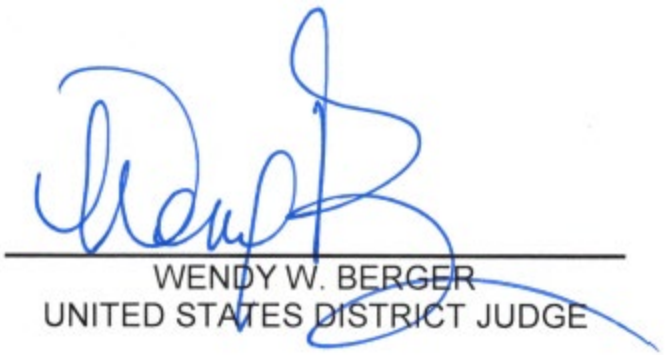
Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability and leave to proceed *in forma pauperis*.

**VI. CONCLUSION**

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus (Doc. 66) is **DENIED**, and this case is **DISMISSED with prejudice**.
2. Petitioner is **DENIED** a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal.
3. The Clerk of the Court is directed to enter judgment accordingly and **CLOSE** this case.

**DONE** and **ORDERED** in Orlando, Florida on September 6, 2024.



WENDY W. BERGER
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

# A5
# Letter to the Office of Executive Clemency, et al., February 20, 2025

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*NORTHERN DISTRICT OF FLORIDA*

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Office of Executive Clemency
Florida Commission on Offender Review
4070 Esplanade Way,
Tallahassee, Florida, 32399-2450

February 20, 2025

To the Office of Executive Clemency and the Clemency Board:

As federal counsel for Edward Thomas James, I respectfully submit this letter requesting that the Office of Executive Clemency and Clemency Board reconsider the denial of clemency in Mr. James' case. As I previously explained, and contrary to the impression provided to Governor DeSantis by the Attorney General of Florida, Mr. James' *initial round of federal appellate review remains pending. See* 2/18/25 Letter from Attorney General (attached to death warrant).

The Rules of Executive Clemency provide that the investigation conducted by the Florida Commission on Offender Review shall not commence until "after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the Eleventh Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor." Fla. R. Exec. Clem. R. 15(C). Yet, Mr. James' clemency proceedings were initiated in April 2024, while his initial petition for writ of habeas corpus was *still pending in the federal district court.*

Mr. James' initial petition for writ of habeas corpus was denied by the district court on September 6, 2024. On October 3, 2024, he timely filed a Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e), which was denied on November 18, 2024. On December 17, 2025, he timely filed a Notice of Appeal, followed by an Application for Certificate of Appealability to the Eleventh Circuit Court of Appeals on January 6, 2025. The application was denied by a single judge on February 3, 2025. Per federal and local court rules, Mr. James is now entitled to file a Motion for Reconsideration in the Eleventh Circuit Court of Appeals, which is not due until February 24, 2025. Only after this motion is ruled upon by the circuit court are Mr. James' clemency proceedings ripe for initiation.

As indicated in my previous submission, the timeliness of Mr. James' postconviction pleadings was among the primary legal issues before the federal district court, and at the time his clemency proceedings were initiated, the court had yet to make a determination on it. As a result, Mr. James' then-appointed clemency counsel notified the Florida Commission on Offender Review ("FCOR") that Mr. James' clemency proceedings were not yet ripe and requested a postponement of the proceedings on June 14, 2024. This request was denied on July 18, 2024, prompting clemency counsel to withdraw on July 22, 2024. FCOR contracted with new clemency counsel, conducted a clemency interview, and imposed a deadline for a formal written clemency submission—*all while Mr. James' initial federal litigation was still pending.*

Both federal law and the Rules of Executive Clemency are subverted by depriving Mr. James of the opportunity to exhaust his judicial remedies without the exigencies of an execution date. The United States Supreme Court has made clear that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice *where judicial process has been exhausted*." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (emphasis added). The Florida Constitution grants the Governor authority to commute punishment, and the Rules of Executive Clemency guarantee death-sentenced defendants the opportunity to make an oral presentation, and allow defendants, as well as "any other interested party," Fla. R. Exec. Clem. R. 15(G), the opportunity to make a written submission to the Office of Executive Clemency and Clemency Board in favor of granting clemency, all of which are to occur *after* one complete round of federal review has been concluded by the Eleventh Circuit.

These codified opportunities to be heard were never provided to Mr. James within the meaning of the Rules because his clemency proceedings took place while his initial federal litigation was still pending. Mr. James was thus forced to choose between (a) jeopardizing resolution of his pending federal litigation by discussing potentially dispositive facts and legal issues while outside of the presence of his federal counsel; or, as he did, (b) withholding argument on his worthiness of clemency and requesting that the proceedings be briefly stayed until the federal courts resolved his case. As Mr. James' prior clemency counsel reiterated, "[w]hile the clemency interview might not be impacted by the [pending] court proceedings, the opposite can not said [sic] to be true. Mr. James certainly can not [sic] divulge what would be required at a meaningful Rule 15 hearing to high-level Executive Branch officers." That inherent conflict eviscerated Mr. James' ability to meaningfully participate in his clemency proceedings and deprived him of even minimal due process at this critical stage of his capital sentencing process. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 274 (1998) (O'Connor, J., concurring) (convicted prisoners are still entitled to "minimal procedural safeguards [in] clemency proceedings.").

Mr. James is entitled to a full and fair opportunity at an interview before the Florida Commission on Offender Review as well as the opportunity to submit argument supporting a

commutation of his death sentences. This cannot take place until the conclusion of his pending federal appeals process. We respectfully request that the Office of Executive Clemency and Clemency Board reconsider the February 18, 2025, denial of clemency and permit Mr. James meaningful access to the clemency process, which can only take place after the conclusion of his pending federal habeas litigation.

Very Respectfully,

Katherine A. Blair
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(850) 942-8818
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# A6
# Excerpt from Clemency Submission, January 6, 2025

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**FEDERAL PUBLIC DEFENDER**
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January 6, 2025

Office of Executive Clemency
Florida Commission on Offender Review
4070 Esplanade Way
Tallahassee, Florida, 32399-2450

Re: Edward Thomas James, DC# 969121

To the Office of Executive Clemency and the Clemency Board:

Please accept this submission from the Capital Habeas Unit (CHU) of the Office of the Federal Public Defender for the Northern District of Florida, on behalf of Mr. Edward James. The CHU has served as Mr. James' appointed federal counsel since 2018. Based on our ongoing representation and close contact with Mr. James, we believe it is important to make you aware of a two significant issues with relevance to his clemency proceedings.

## I. Clemency proceedings are premature given the unique procedural posture of Mr. James' present litigation.

The most urgent piece of information we must bring to this Board's attention is that Mr. James has active litigation pending in the federal courts. Unlike other capital clemency applicants who have successive litigation pending or are attempting to resurrect previously adjudicated issues, Mr. James' present litigation pertains to an *initial* federal habeas petition challenging his convictions and death sentences. *See James v. Sec'y, Fla. Dep't of Corrs.*, Case No. 6:18-cv-993-WWB-RMN (M. D. Fla. 2018). By the time this letter reaches you, an application for a certificate of appealability from the district court's denial will be pending in the Eleventh Circuit Court of Appeals. *See James v. Sec'y, Fla. Dep't of Corrs. et al.*, Case No. 24-14162.

Per the Rules of Executive Clemency, the investigation conducted by the Florida Commission on Offender Review should not commence until "after the defendant's initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the Eleventh Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor." Fla. R. Exec. Clem. R. 15(C).

In Mr. James' case, the timeliness of his post-conviction pleadings is *the primary issue under review in the Eleventh Circuit*, which will soon make determinations regarding whether his 28 U.S.C. § 2254 petition may be construed as timely filed or otherwise reviewable on the constitutional merits via procedural gateways including equitable tolling and the miscarriage of justice exception. Due to the nature of these issues, Mr. James' pending initial litigation in the federal courts revolves almost exclusively around questions of his competency and culpability—the answers to which are vital to any clemency determination in his case.

Mr. James' situation illustrates the harm that occurs when clemency proceedings occur prior to the conclusion of a full round of appellate review. Every aspect of Mr. James' memory (or lack thereof) regarding the events underlying his death sentence is relevant to resolution of his pending litigation. As attorneys who are not only responsible for that litigation but aware of the extent of his mental impairments, we could not ethically advise Mr. James to answer any questions related to his case while outside of our presence. Nor could Jason Rosner, Esq., who—after unsuccessfully requesting that this Board postpone Mr. James' clemency proceedings—withdrew as counsel due to the ethical concerns posed by this situation.

Ultimately, because the clemency proceedings went forward amidst his federal litigation, Mr. James was unable to meaningfully participate in his clemency interview. Further, because the CHU cannot comment about matters that are the subject of ongoing litigation, we are presently unable to meaningfully advocate for clemency on his behalf. And, most recently, we have been made aware that Mr. James' trial attorneys, whose comments were solicited by a professional associated with FCOR, were similarly unable to meaningfully advocate on behalf of Mr. James because their experiences representing him at trial are the subject of ongoing litigation.

## II. Mr. James' preexisting cognitive decline has been greatly exacerbated by a 2023 heart attack.

Mr. James' physical and mental health have rapidly deteriorated following a near fatal heart attack he experienced in January of 2023. At the time of his heart attack, Mr. James was already experiencing cognitive decline, which was then exacerbated by prolonged oxygen deprivation from the cardiac event.

Mr. James' has, for years, suffered from a dementing process that has been observed by the undersigned and assessed by several mental health professionals retained in the course of his federal litigation. For the entirety of our representation, Mr. James has experienced both short and long-term memory loss, difficulty recalling words, and a disorganized thought process. Such deficits are a product of repeated head traumas, extensive prior drug and alcohol use, and a recent near-fatal heart attack.

In support of his federal habeas petition, several experts were retained to evaluate Mr. James' cognitive decline, all of which concurred in that diminishment. Dr. Julie Kessel, M.D., a board-certified neurologist who evaluated Mr. James in September of 2018, noted that Mr. James has "difficulty finding words and frequently lost his train of thought in the middle of a sentence." Kessel Report at 1. She noted "gaps in his memory" as well as "severe headaches over the years, with continuation into the present" and suggested that such deficits "appear to be longstanding,

possibly the result of organic brain damage, his history of head injuries, and his extensive prior alcohol and drug abuse." Kessel Report at 1-2. In addition to Mr. James' cognitive decline, Dr. Kessel opined that Mr. James "may have a longstanding, undiagnosed seizure disorder" where his observable, occasional facial tics present as "petit mal generalized seizures." Kessel Report at 2.

Dr. Eddy Regnier, MSW, MA, Ph.D., a forensic psychologist also evaluated Mr. James for cognitive impairments, and observed the same short and long-term memory problems and struggles with word recall. Regnier Report at 2. Similarly, Dr. Hyman Eisenstein, PhD, ABN, a neuropsychologist evaluated Mr. James and administered several tests to determine his psychological and neuropsychological functioning. Dr. Eisenstein concluded that Mr. James suffers from a significant decline of cognitive skills over time as well as possible neurodegenerative disorder due to repeated head trauma and substance abuse. Eisenstein 2022 Report at 10.

Mr. James' ongoing cognitive decline came to a head on January 11, 2023, when he was found in his cell unresponsive and blue in color. Three rounds of shocks were delivered via an automated external defibrillator followed by four rounds of compressions over a near thirty-minute period. Mr. James was then transported to the hospital where lifesaving measures were taken, and he was intubated. Overall, he suffered significant oxygen deprivation, multiple rib fractures associated with chest compressions, and placement of a cardiac stent. Mr. James was in the hospital for four days receiving treatment for the cardiac event. Such an event has led to a steep decline in Mr. James' cognitive functioning as well as the obvious worsening of his physical health.

The undersigned observed a clear deterioration in Mr. James' well-documented cognitive decline. Each manifestation described by Drs. Kessel, Regnier, and Eisenstein in their reports including word recall and short and long-term memory issues appeared to be exacerbated by the cardiac event. Consequently, vascular neurologist Dr. Lucia Rivera Lara, MD, MPH, was retained to review his medical records and opine how the cardiac event may have impacted Mr. James cognitive decline.

Dr. Rivera Lara noted that Mr. James' has pre-existing cognitive decline resulting from repeated head trauma, concussions, and substance abuse. Rivera Lara Report at 1. She concluded that Mr. James suffered a mild hypoxic-ischemic encephalopathy (HIE), a brain injury, "due to the absence of a pulse for 20 minutes and low oxygen levels, which could have worsened his longstanding cognitive decline." *Id.* Because Mr. James has pre-existing cognitive impairment, the resulting brain injury may be more difficult to recover from. Thus, Dr. Rivera Lara recommended that Mr. James undergo further cognitive testing, specifically a battery of neurocognitive tests.

Dr. Hyman Eisenstein, who is familiar with Mr. James' functioning mere months before his heart attack, conducted an evaluation on December 10, 2024, to more precisely assess Mr. James' cognitive functioning. He found that, as compared to the results from 2022, Mr. James had "several areas of significant decline." Eisenstein 2024 report at 2. Specifically:

> Executive functioning scores declined, and there was an increase in perseveration and lack of mental flexibility. Visual spatial graphic skills in both immediate and half hour delay conditions declined by over fifty percent from previous test scores.

> Motor speed declined by over three standard deviations, severely impaired, requiring much more time to complete a task.
>
> It is evident that Mr. James' cardiac arrest and lack of oxygen have resulted in residual brain behavior deficits. However, because of constraints in my own schedule as well as availability at the prison, my assessment may not have captured the full extent of Mr. James' cognitive decline. It is my recommendation that a more comprehensive neuropsychological evaluation be conducted to further compare present functioning to baseline pre-cardiac arrest levels, and to determine if an even greater decline is present than what my December 10, 2024, assessment detected.

Eisenstein 2024 report at 2.

## III. Allowing supplementation of the previous clemency materials and interview is vital to a meaningful process and just decision.

In light of the significant concerns we have detailed above, compliance with the minimal due process rights guaranteed in clemency, and fulfillment of clemency's role as "the 'fail-safe' in our criminal justice system[,]" *Herrera v. Collins*, 506 U.S. 390, 415 (1993), requires (1) that Mr. James have the opportunity to address representatives from the Clemency Commission at an in-person interview after the conclusion of his pending litigation; (2) that Mr. James' past and present counsel have the opportunity to supplement the formal clemency packet submitted by his clemency attorney; and (3) that our office be permitted an opportunity to submit additional medical findings at the conclusion of a full neuropsychological assessment.

Very respectfully,

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(850) 942-8818
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# A7
# Death Warrant and Letter from Attorney General, February 18, 2025

# RON DESANTIS
GOVERNOR

February 18, 2025

Warden David Allen
Florida State Prison
7819 N.W. 228th Street
Raiford, Florida 32036-1000

Re: Execution Date for Edward Thomas James, DC# 969121

Dear Warden Allen:

Enclosed is the death warrant that I signed to carry out the sentence for Edward Thomas James as well as certified copies of his judgment and sentence. I have designated the week beginning at 12:00 noon on Thursday, March 20, 2025, through 12:00 noon on Thursday, March 27, 2025, for the execution. I have been advised that you have set the date and time of execution for Thursday, March 20, at 6:00 p.m.

This letter is incorporated into and made a part of the death warrant identified above.

Sincerely,

Ron DeSantis
Governor

Enclosures

THE CAPITOL
TALLAHASSEE, FLORIDA 32399 • (850) 717-9249

cc:

Honorable Carlos G. Muñiz
Chief Justice
Supreme Court of Florida
500 S. Duval Street
Tallahassee, Florida 32399

Honorable Charles Crawford
Chief Judge, 18th Judicial Circuit
2825 Judge Fran Jamieson Way
Viera, Florida 32940

Secretary Ricky Dixon
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

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Raiford, Florida 32026-4000

# STATE OF FLORIDA

## ATTORNEY GENERAL

February 18, 2025

The Honorable Ron DeSantis
Governor
The Capitol
Tallahassee, Florida 32399—0001

RE: Edward Thomas James

Dear Governor DeSantis:

Edward Thomas James entered pleas of guilty on two counts of first-degree murder on April 6, 1995, for the September 19, 1993, murders of Betty Dick and Toni Neuner in Seminole County, Florida. James also entered guilty pleas for aggravated child abuse, attempted sexual battery, kidnapping, grand theft, and grand theft of an automobile. He entered separate no contest pleas to two counts of capital sexual battery. The trial court sentenced James to death for the murders on August 18, 1995.

The Florida Supreme Court affirmed James's convictions and sentences on direct appeal. *James v. State*, 695 So. 2d 1229 (Fla. 1997). The United States Supreme Court denied certiorari review on December 1, 1997. *James v. Florida*, 522 U.S. 1000 (1997).

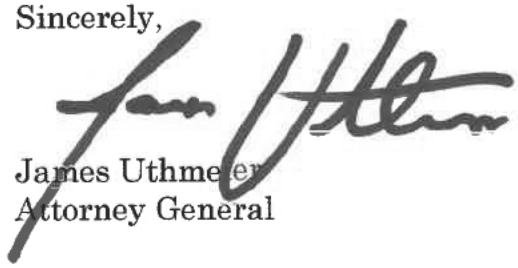
James filed an initial motion for postconviction relief on May 27, 1998. On March 10, 2003, James filed a *pro se* notice of voluntary dismissal of the postconviction proceedings. On April 21, 2003, upon a finding that James was competent and fully understood the consequences of his request for voluntary dismissal, the postconviction court entered an order discharging counsel and dismissing the proceedings. The Florida Supreme Court affirmed the postconviction court's denial of James's subsequent request to reappoint counsel and reinstate his postconviction proceedings. *James v. State,* 974 So. 2d 365 (Fla. 2008).

On November 14, 2019, James filed a successive motion for postconviction relief. The circuit court denied the motion as untimely, and the Florida Supreme Court affirmed. *James v. State*, 323 So. 3d 158 (Fla. 2021), *cert. denied*, 142 S. Ct. 1678 (2022).

On December 18, 2018, James filed a federal habeas corpus petition through counsel. The district court denied the petition on September 6, 2024 (unpublished). On December 23, 2024, James filed an Application for Certificate of Appealability to the United States Court of Appeals for the Eleventh Circuit case no. 24-14162. On February 3, 2025, the Court issued an Order Denying Certificate of Appealability and the Mandate (unpublished).

The record has been reviewed and there are no stays of execution issued by any court of competent jurisdiction in this cause. Based upon the above-referenced summary of litigation affirming the judgments and sentences of death imposed for first-degree murder, the record is legally sufficient to support the issuance of a death warrant.

Sincerely,



James Uthmeier
Attorney General

# DEATH WARRANT
## STATE OF FLORIDA

WHEREAS, EDWARD THOMAS JAMES, on or about the 19th day of September, 1993, murdered Toni Neuner and Betty Dick; and

WHEREAS, EDWARD THOMAS JAMES, on the 6th day of April, 1995, was convicted of two counts of first degree murder, aggravated child abuse, attempted sexual battery, kidnapping, grand theft, and grand theft auto; and on the 18th day of August, 1995, was sentenced to death for the murders of Toni Neuner and Betty Dick; and

WHEREAS, on the 24th day of April, 1997, the Supreme Court of Florida affirmed the convictions and death sentences of EDWARD THOMAS JAMES; and

WHEREAS, on the 24th day of January, 2008, the Supreme Court of Florida affirmed the trial court order denying EDWARD THOMAS JAMES's Motion for Reappointment of Capital Collateral Regional Counsel and Reinstatement of a Motion to Vacate a Sentence of Death after his voluntary dismissal of his Motion for Postconviction Relief; and

WHEREAS, on the 6th day of September, 2024, the United States District Court for the Middle District of Florida dismissed EDWARD THOMAS JAMES's federal Petition for Writ of Habeas Corpus; and

WHEREAS, on the 3rd day of February, 2025, the United States Court of Appeals for the Eleventh Circuit denied his Application for Certificate of Appealability; and

WHEREAS, further postconviction motions and petitions filed by EDWARD THOMAS JAMES have been denied and the denials affirmed on appeal; and

WHEREAS, executive clemency for EDWARD THOMAS JAMES, as authorized by Article IV, Section 8(a), of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate; and

WHEREAS, attached hereto is a certified copy of the record of the conviction and sentence pursuant to section 922.052, Florida Statutes.

NOW, THEREFORE, I, RON DESANTIS, as Governor of the State of Florida and

pursuant to the authority and responsibility vested in me by the Constitution and Laws of Florida, do hereby issue this warrant, directing the Warden of the Florida State Prison to cause the sentence of death to be executed upon EDWARD THOMAS JAMES, in accordance with the provisions of the Laws of the State of Florida.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, this 18th day of February, 2025.

GOVERNOR

ATTEST:

SECRETARY OF STATE

FILED
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DEPARTMENT OF STATE
TALLAHASSEE, FL