No. _____

In the Supreme Court of the United States

STACEY IAN HUMPHREYS,
PETITIONER,

v.

SHAWN EMMONS, WARDEN,
GEORGIA DIAGNOSTIC & CLASSIFICATION PRISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court must apply the deferential review provisions of AEDPA to the state court's adjudication of an ineffective assistance of counsel claim when deciding whether that claim constitutes cause and prejudice to overcome a procedural default.

PARTIES TO THE PROCEEDINGS

Stacey Ian Humphreys is the Petitioner here and was the Petitioner-Appellant below.

Shawn Emmons, in his official capacity as Warden of the Georgia Diagnostic & Classification Prison, is the Respondent here and was the Respondent-Appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Superior Court of Cobb County, Georgia:

The State of Georgia v. Stacey Ian Humphreys, No. 04-9-0673-05 (Sept. 30, 2007)

Superior Court of Butts County, Georgia:

Stacey Ian Humphreys v. Bruce Chatman, Warden, Georgia Diagnostic and Classification Prison, No. 2011-V-160 (Mar. 10, 2016)

Supreme Court of Georgia:

Humphreys v. The State, No. S09P1428 (Mar. 15, 2010)

Stacey Ian Humphreys v. Bruce Chatman, Warden, No. S16E1799 (Aug. 28, 2017)

United States District Court for the Northern District of Georgia:

Stacey Ian Humphreys v. Eric Sellers, No. 1:18-cv-02534-LMM (Sept. 16, 2020)

United States Court of Appeals for the Eleventh Circuit:

Stacey Ian Humphreys v. Warden, Georgia Diagnostic Prison, No. 21-10387 (June 11, 2024)

Supreme Court of the United States:

Stacey Ian Humphreys v. Georgia, No. 10-6322 (Nov. 15, 2010)

Stacey Ian Humphreys v. Eric Sellers, No. 17-7306 (Apr. 16, 2018)

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Before the start of Stacey Humphreys's Georgia capital trial, juror Linda Chancey revealed that she had been the victim of an attempted rape and robbery. *Humphreys v. Warden, Ga. Diagnostic Prison,* 2024 WL 2945070 (11th Cir. 2024) (unpublished) (Pet. App. 7a). "Chancey swore under oath during voir dire that her attacker"—"a convicted murderer who had escaped from a mental hospital"—"'didn't do [her] any physical bodily harm' because she 'escape[d] before he actually physically entered the dwelling.'" *Id.* at 71a (Rosenbaum, J., concurring) (alterations in original). But "[t]hat was false[.]" *Id.*

"In contrast to her answers during the voir dire process," Chancey told her fellow jurors that this intruder *did* attack her while she laid naked in bed. *Id.* at 7a. She reiterated this truth after trial, telling investigators that she was nearly sexually assaulted inside her home. *Id.* at 8a. "These were important facts, and had Humphreys's lawyers known of them, they could have exercised the remaining peremptory strike to remove Chancey from the jury. But they didn't know about them. And they didn't know because Chancey lied during voir dire." *Id.* at 71a (Rosenbaum, J., concurring).

Chancey secured a seat on Humphreys's jury, and her bias was decisive in his death sentence. When the other eleven jurors reached consensus on a life without parole sentence, Chancey "snapped." D.42-

7:443.[1] Juror Darrell Parker recalled: "it was as if an evil force took over[.]" D.33-12:13. Ms. Chancey began yelling and swearing, and she threw photos of the victims' bodies across the table demanding, "do you want this to happen to someone you know?" Pet. App. 9a. She deliberately misled the other jurors to believe that "they had to reach a unanimous decision or [Humphreys] would be paroled" and screamed that she intended to "stay here till forever if it takes it for him to get death." *Id.* (alteration in original); D.33-12:14, 18. Ms. Chancey deceived the trial court as well, editing a note to the court in order to conceal the intractability of the jury's deadlock and avoid a mistrial. Pet. App. 9a–10a.

For days, Ms. Chancey refused to engage in deliberations—she "put her feet up on the table and said that she [] would not change her vote," *id.* at 9a; D.33-12:18—until each of her fellow jurors was forced to surrender their honestly held convictions. As the jury foreperson later testified, giving up her life sentence vote "was one of the hardest things [she had] ever done because [she] was not true to [her] own

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[1] Unless otherwise noted, record citations in this petition refer to the district court record below in *Humphreys v. Sellers*, No. 1:18-cv-02534-LMM (N.D. Ga.), and are in the following form: District Court Docket Number - Attachment Number: page number range. For example, the citation "D.42-7:443" would refer to the Respondent's Notice of Filing at District Court Docket Entry 42, Attachment Number 7, page 443.

belief about what the proper sentence should be." Pet. App. 15a (alterations in original).

Humphreys's appellate counsel failed to raise a plainly meritorious juror misconduct claim at his Motion for New Trial proceedings or on direct appeal. As a consequence, Georgia law imposed a procedural bar to any future consideration of jury misconduct and the state postconviction courts could not review the claim. Pet. App. 210a, 224a–225a, 228a–229a.

Humphreys's federal habeas corpus petition raised both a claim that his appellate counsel provided ineffective representation in failing to litigate the juror misconduct claim, *and also* alleged that appellate counsel's ineffective representation provided the necessary cause and prejudice to overcome the default of his separate jury misconduct claim.

The deferential review provisions in subsection (d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, apply to claims that were rejected on the merits by a state court. A federal court evaluates procedural default questions *de novo*, including—crucially—whether there is cause for and sufficient prejudice to excuse a procedural bar imposed by the state court when a prisoner failed to timely present his claim. *Cone v. Bell*, 556 U.S. 449, 472 (2009).

The courts of appeal are divided, however, on how to review a Sixth Amendment claim, like Humphreys's, that sits in both roles: on one hand, adjudicated on the merits in state court, and on the other, separately pled to constitute the cause and prejudice necessary to excuse the procedural bar of another claim in federal court. The Third, Sixth, and Ninth Circuits have held that under such circumstances, the cause-and-prejudice question must be decided *de novo*. *See, e.g.*, *Fischetti v. Johnson,* 384 F.3d 140, 154–55 (3d Cir. 2004); *Hall v. Vasbinder*, 563 F.3d 222, 236–37 (6th Cir. 2009); *Visciotti v. Martel,* 862 F.3d 749, 769 (9th Cir. 2016). The Seventh Circuit, in contrast, evaluates cause and prejudice through the deferential lens of § 2254(d). *See Richardson v. Lemke,* 745 F.3d 258, 273 (7th Cir. 2014).

Here, the difference between *de novo* review and deference is a matter of life and death. The Supreme Court of Georgia ruled that Humphreys's appellate ineffectiveness claim failed on *Strickland*'s prejudice prong, holding that the majority of Humphreys's evidence in support of the omitted misconduct claim was inadmissible under Georgia's no-impeachment rule, which generally bars consideration of juror testimony regarding jury deliberations to undermine a verdict. According to the Georgia high court, the Constitution does not compel an exception in the circumstances here. And in the absence of admissible proof, the juror misconduct claim would have failed if counsel had raised it on direct appeal.

As Judge Rosenbaum wrote in the Eleventh Circuit below, there is no question that the manipulations of a biased juror were decisive in Mr. Humphreys's sentence. Pet. App. 72a–73a. But for that juror's actions, "Humphreys would have been sentenced to life imprisonment without the possibility of parole." *Id*. at 72a. But applying AEDPA deference to the Supreme Court of Georgia's resolution of the appellate ineffectiveness claim "cuts off" Humphreys's only avenue to relief from the ill-gotten death verdict: a constitutionally-mandated exception to the juror no-impeachment rule. *Id.* at 73a. While this Court's precedents establish that exceptions *are* warranted in rare cases, this Court has not clearly established that an exception is compelled in the face of deliberate, malicious juror misconduct in the penalty phase of a capital case. *See, e.g., Pena-Rodriguez v. Colorado,* 580 U.S. 206, 216 (2017) (noting that the Court has "reiterate[d] that the no-impeachment rule may admit exceptions," including in cases of "juror bias so extreme that, almost by definition, the jury trial right has been abridged"). *De novo* review offers the federal courts the only opportunity to confront the question squarely and redress the violation of Humphreys's jury trial right.

Thus the instant petition squarely presents the question of whether AEDPA deference applies to claims of appellate ineffective assistance of counsel that were adjudicated by the state court but are also "nested" within the cause-and-prejudice inquiry. It provides the Court with an opportunity to interpret

AEDPA consistent with its plain text and provide the lower federal courts with vital guidance on a recurring question of AEDPA's reach.

This Court should grant the Petition.

DECISIONS BELOW

The unpublished opinion of the Court of Appeals, entered June 11, 2024, affirming the denial of relief by the United States District Court for the Northern District of Georgia is Pet. App. 1a–74a. The October 3, 2024 order of the Court of Appeals denying a petition for panel rehearing and rehearing *en banc* is Pet. App. 332a–333a. The September 16, 2020 opinion of the district court denying Mr. Humphreys's petition for writ of habeas corpus is Pet. App. 75a–206a. The August 28, 2017 opinion of the Supreme Court of Georgia denying Mr. Humphreys a Certificate of Probable Cause to Appeal is Pet. App. 207a–211a. The March 10, 2016 opinion of the Superior Court of Butts County denying Mr. Humphreys a writ of habeas corpus is Pet. App. 212a–331a.

JURISDICTION

The Eleventh Circuit denied Humphreys's timely petition for panel rehearing and rehearing *en banc* on October 3, 2024. Pet. App. 332a–333a. On December 13, 2024, Justice Thomas granted an application to extend the time to file a Petition for Writ of Certiorari until January 31, 2025. *See* 28 U.S.C. § 2101 and

Supreme Court Rules 13.5 and 30.2. This Court has jurisdiction to review the Eleventh Circuit's judgment under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which state in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to…trial [] by an impartial jury…and to have the Assistance of Counsel for his defense." U.S. CONST. AMENDMENT VI.
>
> "…nor shall cruel and unusual punishments [be] inflicted." U.S. CONST. AMENDMENT VIII.
>
> "[N]o State shall…deprive any person of life, liberty or property…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMENDMENT XIV.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2254 provides, in relevant part:

> § 2254. State custody; remedies in Federal courts
>
> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

On the afternoon of November 3, 2003, Lori Brown and Cynthia Williams were shot, strangled, and robbed of their ATM and credit cards in the Cobb County, Georgia model home where they worked as real estate agents. Humphreys was convicted of the murders after a month-long trial in September 2007.

When the jurors—who were sequestered throughout—began their penalty phase deliberations on Friday, September 28, it became obvious they were deadlocked. Evidence later presented in state postconviction proceedings revealed that the deadlock was broken only through coercive misconduct committed by an unqualified juror who had deliberately concealed her bias in order to obtain a seat on Humphreys's jury.

A. Trial Proceedings

1. A biased and unqualified juror, Linda Chancey, was seated on Mr. Humphreys's jury.

On the eleventh day of *voir dire*, the parties questioned prospective juror L.A. Chancey. *See, e.g.*, D.35-7:54–67, 270–75, 289–90. On her juror questionnaire, Ms. Chancey indicated that she had been the victim of an armed robbery and attempted rape by an escaped convict. Pet. App. 7a; D.42-7:485. When asked about this experience, she responded that her attacker "actually didn't do [her] any physical bodily harm. [She] was able to escape *before he ever actually physically entered the dwelling*." Pet. App. 7a (alterations in original) (emphasis added); D.35-7:273. She also revealed that a close friend worked as a real estate agent—the same occupation as the victims in this case, who were killed at work. D.35-9:19–20; D.42-7:477; Pet. App. 3a. Nevertheless, she

professed no bias against Mr. Humphreys. These representations were false.

2. All eleven other jurors were willing to vote for a sentence of life without parole.

Ms. Chancey's fellow jurors testified in postconviction proceedings that she "had her mind made up" "from day one"; "early in trial – before the end of the [guilt] phase – she said something along the lines of he's guilty and he deserves to die." Pet. App. 8a; D.42-8:58–60. During posttrial interviews, Chancey herself admitted that she "would only vote for death." Pet. App. 8a; D.33-12:19.

But each of the eleven other jurors *was* willing to vote for a sentence of life without parole.

The penalty phase of Mr. Humphreys's trial ended on Friday, September 28, 2007 and the deliberations began at 4:18 that afternoon. D.36-10:17. At some point that evening, the jury took an initial vote. Three jurors voted for life imprisonment without parole, while the remaining nine jurors cast their votes for death. *See* D.42-8:60; Pet. App. 8a. Initially, the jurors told the court that they wished to deliberate until 11:00 p.m. D.36-10:118. Yet when deliberations grew hostile a short time later, they sent a note indicating that they wanted to "leave as soon as possible." D.36-10:119. "Several jurors were in tears." D.42-8:50.

Deliberations resumed the next morning at 8:24. D.36-10:120. Because three jurors felt strongly that the evidence warranted a life sentence, the entire group decided they would unanimously vote for life without parole and inform the court of their decision. D.42-8:60; Pet. App. 8a. "[B]ut when the jurors tallied their votes, Chancey voted for death. At that point, the vote was 11-1 in favor of life without parole." Pet. App. 8a.

The foreperson wrote a note to the court explaining that "[w]hile [they] agreed that life imprisonment with parole is not an option, [they] [we]re unable to come to a *unanimous* decision on either death or life imprisonment without parole as a sentence." Pet. App. 9a. Chancey "believed the manner in which the foreperson originally wrote the note could have resulted in a mistrial" which would have meant "do[ing] it over again" or that Humphreys "would get parole and hunt the jurors down." *Id.* at 10a. So Chancey "revised the note because she did not want to give the court the impression that the jury was at an impasse[,]" *id.*, adding the word "currently" to the note as drafted: "we are <u>*currently*</u> unable to reach a *unanimous* decision." *Id.* In response, the judge instructed the jurors to continue deliberating and "address the remaining issues." *Id.*

3. The jury's deadlock entitled Mr. Humphreys to a non-death sentence under Georgia law but Ms. Chancey coerced a death verdict.

Outraged that the other jurors were all voting for life without parole, Ms. Chancey "snapped." D.42-7:443. Chancey screamed that she would "stay here till forever if it takes it for him to get death." Pet. App. 9a. Another juror later testified that "it was as if an evil force took over[.]" D.33-12:13. Ms. Chancey began yelling and swearing, and she threw photos of the victims' bodies across the table demanding, "do you want this to happen to someone you know?" Pet. App. 9a. Chancey told the jurors "they had to reach a unanimous decision or [Humphreys] would be paroled." *Id.*

At a loss, the jurors sent a note asking to review a piece of the trial evidence. D.36-10:125. When the jury was brought out, counsel observed again that multiple jurors were crying. D.42-8:50.

At 6:34 Saturday night, the defense moved for a mistrial outside the presence of the jury. The defense noted that the jury had been deliberating for 10 hours. D.36-10:127. It was clear that deliberations had been fraught since they began and "[t]he same is true of today…several of them also were obviously…having a difficult time." D.36-10:127. The defense contended that the charge the court gave in response to the deadlock note was coercive, and pointed out that the

Georgia capital sentencing statute, O.C.G.A. § 17-10-31(c), required imposition of a non-death sentence if the jury deadlocked. Pet. App. 11a.

Meanwhile the jurors engaged in "angry debates about what would happen if [they] continued to be deadlocked." D.42-8:61. Some jurors erroneously believed that if they could not reach a unanimous verdict, Humphreys "would walk and the entire trial would have been in vain." D.42-8:61. Chancey later admitted that she was the source of this belief. D.33-12:19.

Chancey yelled at, harassed, and "ma[de] personal attacks on the other jurors." Pet. App. 11a. One juror "'took a swing' at Chancey and punched a hole in the wall." *Id.* at 9a. Chancey told the other jurors about her attack at the hands of an escaped murderer. She recounted how he had assaulted her while she slept naked in bed years earlier, contrary to what she told counsel during *voir dire*—that her attacker never made it inside the apartment. *Id.* at 7a.

The foreperson sent out a second note: "Due to the hostile nature of one of the jurors, I am asking to be removed from the jury." *Id.* at 12a. In response, the court gave an *Allen* charge,[2] instructing the jury, *inter alia*, that "[t]he case … has been submitted to you for

[2] *Allen v. United States*, 164 U.S. 492, 501 (1896) (approving the use of a "dynamite" charge in the face of a deadlock).

decision and verdict, if possible, and not for disagreement. *It is the law that a unanimous verdict is required. …*"[3] *Id.* at 12a–13a.

The jury resumed its deliberations at 8:40 p.m. Chancey "would not articulate her reasons for voting for death and would not engage in debate." D.42-8:62; D.39-26:172–73. She sat alone "in the back of the jury room, reading or doing yoga." D.33-12:28–29. "[S]creaming" could be overheard from the courtroom. Pet. App. 15a. The foreperson became "extremely distressed and locked [herself] in the bathroom and cried." *Id.* (alteration in original). The jury retired at 10:20 p.m.

After a final night sequestered, the jurors reconvened at 8:25 Sunday morning. The parties could again hear screaming. D.33-12:18. Two hours later, they sent a note to the judge informing her that they had reached a decision. D.36-10:139. The jury sentenced Humphreys to death. Pet. App. 15a–16a; D.36-10:139–43.

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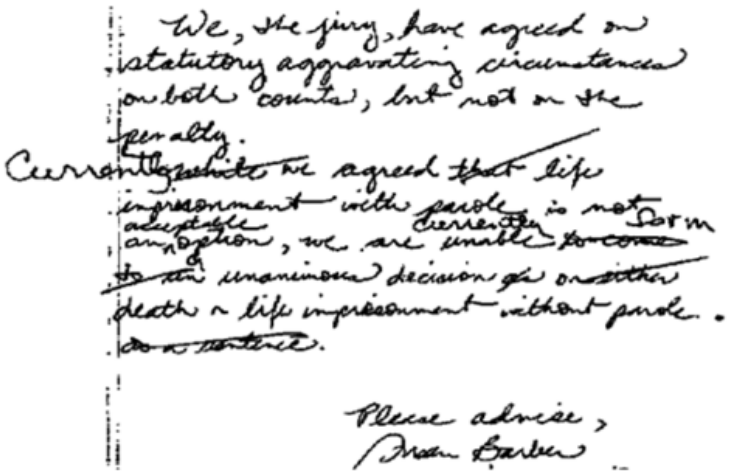
[3] To the contrary, Georgia law does not require jurors to come to a unanimous decision on the death penalty, and explicitly provides that "[i]f the jury is unable to reach a unanimous verdict as to sentence, the judge shall dismiss the jury and shall impose a sentence of either life imprisonment or imprisonment for life without parole." O.C.G.A. § 17-10-31(c).

B. Motion for New Trial and Appeal Proceedings

Although Humphreys's counsel were aware of the irregularities in the deliberations, they inexplicably failed to raise a claim of juror misconduct.

Counsel raised a claim that the trial court's *Allen* charge was improper. In support, counsel submitted affidavits from two defense investigators who interviewed Linda Chancey. The investigators detailed how Chancey invited them into her home and showed them the personal journal that she maintained on Humphreys's case. D.42-7:449. Chancey pulled the original jury deadlock note from the trial out of her journal:



We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty.

Currently we agreed that life imprisonment with parole is not acceptable and upon, we are unable to come to a unanimous decision on either death or life imprisonment without parole.

Please advise,
Brian Barber

D.42-8:137. She bragged that she had added the word "currently" because "the way the forewoman had written it they might have gotten a mistrial," and she "wasn't going to let that happen." D.42-7:451; Pet. App. 10a. She confirmed that she deliberately segregated herself from the other jurors. D.42-7:453. She informed the investigators that "[a]ll of the jurors thought that their sentencing vote had to be unanimous," D.42-7:451, and admitted that she bore responsibility for the misimpression. D.33-12:19. She prided herself on her ability to "control what went on in the jury room." D.42-7:450.

The trial court—upon Humphreys's Motion for New Trial—refused to consider the investigator affidavits, asserting that they were barred by O.C.G.A. § 17-9-41, and they did not fall within any exception. Pet. App. 16a; D.33-12:47–48. The court denied Humphreys's Motion for New Trial. *Id.* at 17a.

On appeal, Humphreys's counsel again inexplicably failed to raise a claim of juror misconduct. *Id.* The Supreme Court of Georgia affirmed his conviction and sentence of death on March 15, 2010. *Humphreys v. State*, 694 S.E.2d 316, 333 (Ga. 2010).

C. State Habeas Corpus Proceedings

1. The state habeas court found Humphreys's juror misconduct claim was procedurally defaulted.

On February 14, 2011, Humphreys filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, raising claims of, *inter alia*, juror misconduct and ineffective assistance of appellate counsel. At an evidentiary hearing on the petition, Mr. Humphreys presented both live and affidavit testimony from the jurors, as well as documentary evidence, detailing the course of the jury deliberations recounted above.

On March 10, 2016, the state habeas court issued an order denying relief on all claims. Pet. App. 212a–213a. The court found that the jury misconduct claim was defaulted and, consequently, the court was "barred from considering [it] on the[] merits due to the fact that Petitioner has failed to demonstrate cause and prejudice[.]" *Id.* at 224a.

With respect to the claim that appellate counsel performed deficiently in failing to raise and support a jury misconduct claim, the court held that "even if [it] were to find that appellate counsel were deficient…, this claim still fails as Petitioner has failed to show resulting prejudice." *Id.* at 328a. The court noted that

the affidavits of jurors[4] were "inadmissible as they did not fall within any exception to O.C.G.A. § 17-9-41 [the juror no-impeachment rule]" and "[t]herefore, trial [sic] counsel is not deficient for failing to present inadmissible evidence." *Id.* at 328a–329a.

2. The Supreme Court of Georgia held that Humphreys's juror misconduct claim was procedurally defaulted.

On July 8, 2016, Humphreys moved the Supreme Court of Georgia for a certificate of probable cause to appeal the denial of habeas corpus relief. In a short written opinion, the court denied the application and affirmed the state habeas court below. Pet. App. 207a–211a. The court ruled that Humphreys's juror misconduct claim was defaulted, and that the state habeas court had correctly found that there was no cause and prejudice to overcome that default. *Id.* at 208a–210a.

With respect to the ineffective assistance of appellate counsel claim, the court noted an analytical error in the state habeas court's characterization of some of the jury evidence, *id.* at 207a–208a, but nevertheless affirmed. *Id.* at 208a–209a. The court ruled that Humphreys's ineffective assistance of appellate counsel claim failed because, in the absence of admissible evidence of juror misconduct,

[4] The court did not mention the live testimony that jury foreperson Susan Barber provided at the evidentiary hearing.

Humphreys could not satisfy the prejudice prong of *Strickland,* i.e., he could not prove a reasonable probability of success on the omitted jury claim. *Id.* The Supreme Court of Georgia held that given Humphreys could not show prejudice from appellate counsel's conduct, "the habeas court did not commit reversible error by denying him relief on this claim." *Id.* at 209a.

This Court denied a timely-filed petition for writ of certiorari to review the Supreme Court of Georgia's ruling on April 16, 2018. *Humphreys v. Sellers*, 584 U.S. 935 (2018).

D. Federal Habeas Corpus Proceedings

1. The District Court denied relief.

On May 24, 2018, Mr. Humphreys timely filed his initial petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia. D.1. Following briefing by both parties, the district court denied the petition on September 16, 2020. Pet. App. 206a. The court issued a Certificate of Appealability on Humphreys's claim that his trial counsel provided prejudicially ineffective representation in failing to adequately prepare for the penalty phase of trial. *Id.*

2. The Eleventh Circuit applied AEDPA deference to the cause-and-prejudice question

The Eleventh Circuit expanded the Certificate of Appealability entered by the district court to include both Humphreys's jury misconduct claim and his ineffective assistance of appellate counsel claim. On June 11, 2024, the panel issued an unpublished per curiam opinion affirming the district court's denial of relief. Pet. App. 70a.

While the court acknowledged that "[t]he issue of whether a claim is subject to the doctrine of procedural default" is reviewed *de novo*, *id.* 30a (citing *Ward v. Hall,* 592 F.3d 1144, 1175 (11th Cir. 2010)), the panel also included a lengthy discussion of AEDPA. It first noted that the appellate ineffectiveness question was "embedded in Humphreys's juror-misconduct claim," *id.* at 32a, such that AEDPA deference must be applied "on top of *Strickland* deference[.]" *Id*. at 34a. This, the panel noted, requires a habeas petitioner to show both "that counsel acted in a professionally unreasonable manner (under *Strickland*) and that the state court's contrary determination was objectively unreasonable (under § 2254)." *Id*. (parentheticals in original). After noting that the state courts had found that Humphreys's appellate-ineffectiveness and juror misconduct claims failed because the supporting evidence was inadmissible, *id.* at 35a, the Eleventh Circuit considered that ruling in light of

"constitutional standards of fairness that require criminally accused defendants to enjoy a panel of fair and impartial jurors." *Id.* at 37a. Though "concerned by Chancey's conduct," *id.* at 43a, the court nevertheless affirmed the denial of habeas relief. *Id.* at 70a.

While the per curiam majority's discussion includes elements of both *de novo* and deferential review, Judge Rosenbaum's concurrence underlined that she believed the result was compelled by AEDPA's deference provisions. She noted that this Court has previously acknowledged an exception to the no-impeachment rule "in the gravest and most important cases," but "AEDPA's standard of review cuts off that avenue for granting the petition." Pet. App. 73a (Rosenbaum, J., concurring). Because this Court "has applied the exception [to the juror no-impeachment rule] in only a single case ever," *see Pena-Rodriguez*, 580 U.S. at 225, it cannot be said that the Georgia courts' failure to apply the exception here was unreasonable under AEDPA. Pet. App. 73a–74a (Rosembaum, J., concurring).

REASONS FOR GRANTING THE PETITION

This case squarely presents a question that has divided the circuits: Whether AEDPA deference applies to claims of ineffective assistance of counsel that were adjudicated by the state court but are also nested within the cause-and-prejudice inquiry. The Eleventh Circuit's opinion here highlights the vital

need for this Court to provide clarity on this question. And Mr. Humphreys's case—where the differing standards are the difference between life and death—is the ideal vehicle for this Court to do so.

When a habeas applicant alleges that his attorney's ineffective representation provides the necessary cause and prejudice to overcome a default, the cause and prejudice analysis mirrors the two-pronged test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel's unreasonably deficient performance provides the "objective factor external to the defense [that] impeded the effort to raise the claim properly in the state court," e.g., it constitutes "cause" for the default. Pet. App. 31a (citing *Henderson v. Campbell,* 353 F.3d 880, 892 (11th Cir. 2003)); *see also Coleman v. Thompson,* 501 U.S. 722, 754 (1991) (holding that a Sixth Amendment violation establishes "cause"). And to establish prejudice from the default, "a petitioner must show that 'there is at least a reasonable probability that the result of the proceeding would have been different.'" Pet. App. 32a (quoting *Henderson*, 353 F.3d at 892). In other words, the cause and prejudice analysis is coextensive with the *Strickland* analysis.

Every day, prisoners seeking redress of constitutional violations from the federal courts under 28 U.S.C. § 2254(d) allege that prior counsel's failure to provide adequate representation establishes the cause necessary to allow the federal courts to adjudicate a previously defaulted claim.

These "nested ineffective assistance issues" present in a considerable subset of petitions for federal habeas corpus relief by state prisoners. *See Richardson,* 745 F.3d at 273 (noting that the Seventh Circuit's treatment of "nested" claims differs from its sister circuits). Whether AEDPA mandates that they receive deferential review is a question of vital importance.

A. The Courts of Appeal Are Divided on Whether Cause and Prejudice Is Reviewed Under AEDPA.

1. The Third, Sixth, and Ninth Circuits review nested ineffective assistance claims in the cause-and-prejudice context *de novo.*

Three courts of appeal acknowledge that AEDPA's text does not extend its deferential review provisions to the question of cause-and-prejudice. The Sixth Circuit has stated plainly "that ineffective assistance of counsel [to] excuse a procedural default is treated differently than a free-standing claim of ineffective assistance of counsel. The latter must meet the higher AEDPA standard of review, while the former need not." *Hall*, 563 F.3d at 236–37 (internal quotations omitted); *see also Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006) ("Although Joseph must satisfy the AEDPA standard with respect to his independent IAC claim, he need not do so to claim ineffective assistance for the purpose of establishing

cause."); *Chase v. Macauley,* 971 F.3d 582, 592 (6th Cir. 2020) (same).

The Third Circuit, too, performs *de novo* review, and has acknowledged that this may lead to different outcomes for the same ineffectiveness claim:

> How can the denial of counsel suffice to establish cause to overcome a procedural default when we have already ruled that it is not sufficient as a stand-alone claim to warrant reversal of the underlying convictions? The answer lies in the differing standard for evaluating constitutional error as a substantive basis of relief and as a cause to avoid default of other claims…AEDPA authorizes the writ of habeas corpus to be granted only for clearly erroneous applications of Supreme Court case decisions. The constitutional error here does not meet this threshold. But AEDPA does not establish a statutory high hurdle for the issue of cause.

Fischetti, 384 F.3d at 154–55. The Ninth Circuit "agree[d] with its sister circuits that have reviewed IAC claims in the cause-and-prejudice context *de novo*." *Visciotti,* 862 F.3d at 769 (*quoting Fischetti*, 384 F.3d at 154). It too applies a "differing standard for evaluating constitutional error as a substantive basis of relief and as a cause to avoid default of other claims." *Id.* (*quoting Fischetti*, 384 F.3d at 154).

2. The Seventh Circuit reviews nested ineffectiveness claims in the cause-and-prejudice context by applying AEDPA deference.

In contrast, the Seventh Circuit applies AEDPA's limitations to the default inquiry: "In our circuit, when we review a state court's resolution of an ineffective assistance claim in the cause-and-prejudice context, we apply the same deferential standard as we would when reviewing the claim on its own merits." *Richardson,* 745 F.3d at 273; *see also Wrinkles v. Buss*, 537 F.3d 804, 813 (7th Cir. 2008) (applying § 2254(d) to cause); *Gray v. Hardy*, 598 F.3d 324, 330–31 (7th Cir. 2010) ("that [state] ruling [on ineffectiveness] would be entitled to our deference").

The Eleventh Circuit has not yet answered this question, avoiding the creation of binding precedent on this issue. *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1365 n.16 (11th Cir. 2020) ("[W]e needn't address the conflict here…"). And its obstruse, unpublished opinion in the instant case only highlights the pervasive confusion over the scope of proper review.

B. The Decisions of the Third, Sixth, and Ninth Circuits Are Consistent with the Text of 28 U.S.C. § 2254(d)

Humphreys's juror misconduct claim arrived before the federal courts having never been

adjudicated on the merits, and so § 2254(d) should play no part in its adjudication. The approach utilized by the majority of circuits that have addressed this question is the proper one.

The text of Subsection (d), which establishes AEDPA's deferential regime, is self-limiting:

> An application for a writ of habeas corpus…shall not be granted with respect to any *claim* that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law...; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented…

28 U.S.C. § 2254(d) (emphasis added). An allegation of cause-and-prejudice is not a "claim."

As the Ninth Circuit observed, nothing in Subsection (d) alters the long-established *Coleman* cause-and-prejudice standard. *Visciotti,* 862 F.3d at 769. *Coleman* resolved the cause question "based on a straightforward analysis of whether the denial of counsel was 'an independent constitutional vio-

lation.'" *Id.* (*quoting Fischetti,* 384 F.3d at 154–55, and *Coleman*, 501 U.S. at 755). "Absent any indication to the contrary in AEDPA, the *Coleman* independent constitutional analysis continues to apply, post-AEDPA, to a contention that trial counsel IAC constitutes cause to excuse a procedural default." *Id.* The Seventh Circuit, and the Eleventh Circuit here, should adjudicate the counsel question with a "straightforward analysis" of the "independent constitutional violation."

C. The Question Is of Exceptional Importance.

1. The lower federal courts frequently confront nested ineffectiveness claims in the cause-and-prejudice context.

Habeas corpus actions on behalf of state prisoners overwhelmingly present questions of the enforceability of a state court procedural default.[5] And when procedural default is at issue, consideration of counsel ineffectiveness is inextricable. 17B Wright & Miller, *Federal Practice & Procedure* § 4266.1 (3d ed.) ("Almost all procedural defaults are attributable to counsel."); 2 William J. Rich, *Modern Constitutional Law* § 31:38 (3d ed.) ("Unfortunately, the 'cause' of procedural defaults in

[5] *See* Nancy J. King *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts* 28 (Aug. 21, 2007), available at https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

all too many cases stems from failure on the part of defense counsel who handled the state trial or appeal.").

How to operationalize the inquiry is a matter of importance, both for the state prisoners seeking to vindicate constitutional trial rights and for States seeking to vindicate the validity and finality of their convictions. *See Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022). The lack of clarity on the proper standard has led a number of courts to avoid confronting the question where they were able to do so. *Janosky v. St. Amand*, 594 F.3d 39, 44–45 (1st Cir. 2010) (noting the court was "reluctant to address an important issue without adversarial briefing" and that the case could simply be resolved on *de novo* review); *Tavarez v. Larkin,* 814 F.3d 644, 650 (2d Cir. 2016) (finding that the court "need not decide which standard of review applies" because the underlying defaulted claims were without merit); *Powell v. Kelly,* 531 F.Supp.2d 695 (E.D.Va. 2008) ("whatever significance this dispute…may have in some close cases, it is academic here given that Powell's ineffectiveness claim asserted as cause for default fails under both [standards]").

2. The availability of habeas relief often turns on whether deference is owed, as it does here.

The question presented is decisive for many state prisoners seeking relief and States defending their

lawful judgments. As the Third Circuit observed, applying the differing standards often leads to differing outcomes. *Fischetti,* 384 F.3d at 154–55.

That could not be more clear than in the instant case. As Judge Rosenbaum observed, "faithful[] appl[ication of] AEDPA's standard of review," Pet. App. 74a, renders relief unavailable for Mr. Humphreys in spite of the blatant violation of his right to an impartial and reliable jury determination of his sentence:

> [T]wo things seem clear: (1) [juror] Chancey was dishonest during voir dire, and her undisclosed bias likely made her unable to consider any verdict other than death, and (2) had the jury not incorrectly believed, as a result of the trial court's instructions and Chancey's statements, that Humphreys would have been released or been sentenced to life with the possibility of parole if the jury couldn't return a verdict, the jury wouldn't have returned a verdict, and Humphreys would have been sentenced to life imprisonment without the possibility of parole.

Id. at 72a (Rosenbaum, J., concurring). Whether these errors find redress depends on the answer to the *de novo*-versus-deference question.

This Court's precedents strongly indicate that the no-impeachment rule must yield here. This Court has long recognized that in "the gravest and most important cases," it would be impossible to refuse juror testimony "without violating the plainest principals of justice." *McDonald v. Pless*, 238 U.S. 264, 268 (1915); *United States v. Reid*, 53 U.S. 361, 366 (1851); *see Pena-Rodriguez*, 580 U.S. at 225 (holding that the no-impeachment rule must give way when racial bias infected jury deliberations); Fed. R. Evid. 606(b) advisory committee's note (1972) ("The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification…simply putting verdicts beyond effective reach can only promote irregularity and injustice").

Moreover, capital cases, which are undoubtedly the "gravest and most important," demand heightened reliability under the Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality) ("the penalty of death is qualitatively different from a sentence of imprisonment, however long…Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Accordingly, capital juries are subject to heightened scrutiny as well. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 730 (1992) ("we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections"). It is axiomatic that the

Constitution requires impartiality from jurors in a capital sentencing proceeding. *Beck v. Alabama*, 447 U.S. 625, 637 (1980).

Mattox v. United States, the only capital case from this Court to confront the no-impeachment rule, further highlights these obligations. 146 U.S. 140 (1892). There, the Court held that a lower court's exclusion of juror affidavits detailing extraneous, prejudicial information constituted reversible error. *Id.* at 148–49. The Court's chief concern was the impropriety of the extrajudicial influences at issue—not internal juror bias or misconduct. *Id.* Nonetheless, in side-stepping the prevailing "public policy" of the rule, for "the interest of justice," the Court emphasized the broad necessity of juror impartiality in capital proceedings: "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can *any ground of suspicion that the administration of justice has been interfered* with be tolerated." *Id.* (emphasis added).

The intentionally underhanded nature of Linda Chancey's conduct here weighs heavily in favor of a constitutional imperative. Two cases are illustrative. In *Warger v. Shauers*, a civil damages case, a juror failed to disclose during *voir dire* that her daughter had been at fault in a prior motor vehicle accident. 574 U.S. 40, 42 (2014). During deliberations, she remarked that a lawsuit "would have ruined her [daughter's] life." *Id.* at 43. The only evidence

regarding the juror's statement was the affidavit of another juror. *Id.* at 43–44. This Court ruled the juror affidavit inadmissible, holding "that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*." *Id.* at 44.

In contrast, in *Pena-Rodriguez*, a juror repeatedly denied racial bias during *voir dire* and alleged there was nothing that would "make it difficult for [him] to be a fair juror." 580 U.S. at 211–12. These statements proved to be false, as he told his fellow jurors that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," and "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* The Court held that the no-impeachment rule must yield to guard against the insidious and corrupting effect of racial bias in our system of justice. *Id.*

Likewise, the Constitution cannot tolerate a juror *intentionally and repeatedly* misleading the parties and the trial court with the intention of producing a death sentence. During *voir dire*, Chancey lied about the circumstances of her assault at the hands of a violent escapee, concealing facts from which the parties could infer bias. Pet. App. 71a (Rosenbaum, J., concurring). When the other jurors sent a note to the trial judge to convey their deadlock, Chancey altered its meaning. *Id.* at 9a–10a. After the trial, she admitted that she had altered the note specifically to

mislead the trial court: she knew that the note would lead to a mistrial, and she "couldn't let that happen" because, if she did, "the defendant would get parole and hunt the jurors down." *Id.* at 10a; D.42-7:451. Unlike the information that the civil juror neglected to reveal in *Warger*, Chancey intentionally concealed evidence of her bias. And in *Warger*, the omitted information revealed itself during an isolated comment by the juror during deliberations. Here, Chancey manipulated the entire deliberations process end-to-end in order to secure a death verdict that other jurors did not believe was warranted.

Chancey's bias is far more akin to that this Court confronted in *Pena-Rodriguez*. True, her actions did not present as a boorish, derogatory statement concerning an immutable characteristic of Mr. Humphreys. But her misconduct was more pronounced and insidious, as she took calculated, manipulative steps to achieve her stated goal of securing a death sentence. Indeed, it was outcome determinative. Pet. App. 72a–74a (Rosenbaum, J., concurring) ("Put simply, I do not doubt that the errors here 'actually prejudice[d]' Humphreys." (quoting *Brecht v Abrahamson*, 507 U.S. 619, 637 (1993)). In the process, Chancey entirely eschewed her responsibilities as a juror and deprived the other jurors of an opportunity to vote their conscience. *See* D.33-12:28–29. Such intentional dishonesty is constitutionally intolerable. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984);

id. at 556 (Blackmun, J., concurring); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

On *de novo* review, the no impeachment rule would yield in the face of Chancey's conduct "so extreme that, ... by definition, the jury trial right has been abridged." *Warger*, 574 U.S. at 51; *see* Pet. App. 71a–74a (Rosenbaum, J., concurring). It is the application of AEDPA to the cause-and-prejudice inquiry that "cuts off that avenue." Pet. App. 73a (Rosenbaum, J., concurring). This Court should clarify the proper analysis of nested ineffective assistance of counsel claims and remand the case to the Eleventh Circuit for an adjudication of Humphreys's juror misconduct claim.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below summarily reversed, and the case remanded to the Eleventh Circuit for proper adjudication under *de novo* review. Alternatively, the writ should be granted and the case set for full briefing and argument.

Respectfully submitted,

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January 31, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 11, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 21-10387

STACEY IAN HUMPHREYS,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent-Appellee.

Filed June 11, 2024

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-02534-LMM

OPINION

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

PER CURIAM:

Petitioner Stacey Humphreys, a death-row inmate in Georgia, filed a petition for writ of habeas corpus pursuant

to 28 U.S.C. § 2254. Between the district court and this Court, Humphreys received a certificate of appealability ("COA") on four issues. First, Humphreys asserts that juror misconduct and bias plagued the proceedings and deprived him of his due-process rights. Second, Humphreys contends the trial court gave an improper *Allen* charge, which compounded the juror misconduct. And third and fourth, Humphreys asks us to find that his trial counsel was ineffective during the investigation and presentation of mitigating evidence and that his appellate counsel was ineffective for failing to raise the juror-misconduct claim sooner.

After careful consideration of the claims and with the benefit of oral argument, we affirm the district court's denial of the habeas petition.

I. BACKGROUND

A. Facts

Humphreys was arrested for the murders of Cynthia Williams and Lori Brown in November 2003. Jimmy Berry was appointed as trial counsel. After the state issued its notice of intent to seek the death penalty in February 2004, the Georgia Capital Defender's Office ("GCD") signed onto the case with its director, Chris Adams, joining Berry. The responsibility for Humphreys's case shifted over the course of four years, but Berry remained on the case the entire time. Teri Thompson from GCD replaced Adams and worked on the case from January 2006 until June 2007. At that time, Deborah Czuba (who

had also been working on the case during the same period as Thompson) became the second-chair attorney. Berry was first chair, presenting both the guilt and sentencing phases.

At trial, the evidence showed the following tragic facts relating to the murders of Williams and Brown:

> At approximately 12:40 p.m. on November 3, 2003, Humphreys, a convicted felon who was still on parole, entered a home construction company's sales office located in a model home for a new subdivision in Cobb County [Georgia]. Cindy Williams and Lori Brown were employed there as real estate agents. Finding Ms. Williams alone in the office, Humphreys used a stolen handgun to force her to undress and to reveal the personal identification number (PIN) for her automated teller machine (ATM) card. After calling Ms. Williams's bank to learn the amount of her current balance, Humphreys tied her underwear so tightly around her neck that, when her body was discovered, her neck bore a prominent ligature mark and her tongue was protruding from her mouth, which had turned purple. While choking Ms. Williams, Humphreys forced her to get down on her hands and knees and to move into Ms. Brown's office and behind Ms. Brown's desk. Humphreys placed his handgun at Ms. Williams['s] back and positioned a bag of balloons between the gun and her body to muffle the sound of gunshots.

He then fired a shot into her back that went through her lung and heart, fired a second shot through her head, and left her face-down on her hands and knees under the desk.

Ms. Brown entered the office during or shortly after Humphreys's attack on Ms. Williams, and he attacked her too. Ms. Brown suffered a hemorrhage in her throat that was consistent with her having been choked in a headlock-type grip or having been struck in the throat. Humphreys also forced Ms. Brown to undress and to reveal her PIN, called her bank to obtain her balance, and made her kneel with her head facing the floor. Then, while standing over Ms. Brown, Humphreys fired one gunshot through her head, this time using both a bag of balloons and Ms. Brown's folded blouse to muffle the sound. He dragged her body to her desk, took both victims' driver's licenses and ATM and credit cards, and left the scene at approximately 1:30 p.m. Neither victim sustained any defensive wounds.

When the builder, whose office was located in the model home's basement, heard the door chime of the security system indicating that someone had exited the sales office, he went to the sales office to meet with the [real-estate] agents. There he discovered Ms. Brown's body and called 911. The responding police officer discovered Ms. Williams's body.

After interviewing the builder and canvassing the neighborhood, the police released to the media descriptions of the suspect and a Dodge Durango truck seen at the sales office near the time of the crimes. In response, someone at the job site where Humphreys worked called to advise that Humphreys and his vehicle matched those descriptions and that Humphreys did not report to work on the day of the crimes. The police began to investigate Humphreys and made arrangements through his parole officer to meet with him on the morning of November 7, 2003. Humphreys skipped the meeting, however, and eluded police officers who had him under surveillance.

Humphreys was apprehended in Wisconsin the following day. Police there recovered from the console of his rental vehicle a Ruger 9-millimeter pistol, which was determined to be the murder weapon. Swabbings from that gun revealed blood containing Ms. Williams's DNA. A stain on the driver-side floormat of Humphreys's Durango was determined to be blood containing Ms. Brown's DNA.

After the murders, the victims' ATM cards were used to withdraw over $3,000 from their accounts. Two days after the murders, Humphreys deposited $1,000 into his account, and he had approximately $800 in cash in his possession when he was arrested. Humphreys

> claimed in a statement to the police that he did not remember his actions at the time of the crimes. However, when asked why he fled, he said: "I know I did it. I know it just as well as I know my own name." He also told the police that he had recently taken out some high-interest "payday" loans and that he "got [in] over [his] head with that stinking truck."

Humphreys v. State, 694 S.E.2d 316, 322-23 (Ga. 2010).

Humphreys was convicted on September 25, 2007, in the Superior Court of Cobb County, Georgia, of two counts each of malice murder, felony murder, aggravated assault, kidnapping, and armed robbery in connection with the murders of the two women at their workplace. Defense counsel then presented evidence of mitigation during the sentencing phase. Trial counsel's mitigation strategy was to show that Humphreys suffered severe and frequent physical abuse as a child and suffered from Asperger's Syndrome. On September 30, 2007, after a sentencing hearing, the same jury found the existence of several statutory aggravating circumstances and recommended a sentence of death. The trial court imposed death sentences for each murder.

B. Jury Selection and Deliberations

Much of Humphreys's petition centers on the selection of a particular individual as a juror, Linda Chancey, and her interaction with other jurors during the sentencing phase. To explain Humphreys's claim, we must first discuss

the jury-selection process and the jury's deliberations. We note from the outset, though, that most of this information comes from post-sentencing interviews of jurors that the trial court later found to be inadmissible and the Supreme Court of Georgia agreed.

During jury selection, prospective juror Linda Chancey stated on a questionnaire that she had been the victim of an armed robbery and attempted rape. Both the questionnaire and her voir dire testimony revealed that her assailant was a convicted murderer who had escaped from a mental hospital. When the prosecution asked her about the incident during voir dire, Chancey said that her assailant "actually didn't do [her] any physical bodily harm. [She] was able to escape before he ever actually physically entered the dwelling, so it was preempted." Chancey further attested that her prior experience would not prevent her from sitting as a fair juror and that she felt she could listen to the evidence and follow the law. Defense counsel did not ask any follow-up questions. Nor did he challenge Chancey for cause or bias, even though the defense had a preemptory strike remaining. Chancey was seated on the jury.

In contrast to her answers during the voir dire process, Chancey apparently told the other jurors during deliberations that her assailant actually breached her home and attacked her. In an unsworn statement, another juror stated that Chancey told the jurors she "had been attacked in her bed in her apartment. [She] was naked in her bed and a man broke in and attacked her. [She] ran into the halls of her apartment and finally someone opened the

door." When jurors asked Chancey if she told the attorneys this, she said she hadn't thought about it. After trial, investigators for Humphreys went to Chancey's home to conduct an interview. Chancey told them that "a strange man came in through the window of her apartment, robbed her, and tried to rape her." Based on these circumstances, Humphreys contends Chancey lied during voir dire.

Humphreys also asserts that Chancey bullied other jurors into voting for a death sentence. Deliberations were contentious and lengthy. According to Susan Barber, the jury foreperson, from "day one, [Chancey] had her mind made up: early in the trial—before the end of the first phase—she said something along the lines of he's guilty and he deserves to die." Chancey later stated that she "would only vote for death." Following the presentation of evidence during sentencing, initially, three jurors—Susan Barber, Alma Pogue, and Tara Newsome—believed that Humphreys should receive life without parole and indicated they wouldn't vote for death (resulting in a vote of 9-3 in favor of death). It became apparent that two of the jurors (Barber and Pogue) were set on a life sentence (resulting in a vote of 10-2), so two male jurors began trying to convince the other eight jurors to change their votes from death to life without parole. Later, the jurors agreed that they would unanimously vote for life without parole, but when the jurors tallied their votes, Chancey voted for death. At that point, the vote was 11-1 in favor of life without parole. The deliberations continued and became quite heated, eventually resulting in a verdict for death.

Appendix A

A post-trial investigation revealed some jurors claimed that Chancey yelled and cursed at others during deliberations. Chancey herself agreed that the deliberations in the penalty phase were "volatile" with screaming and raised voices, and at one point, another juror "took a swing" at Chancey and punched a hole in the wall. Chancey went through the crime-scene photos, threw them on the table and showed them to the other jurors and asked them, "[D]o you want this to happen to someone you know? And Chancey yelled at the other jurors that she intended to "stay here till forever if it takes it for [Humphreys] to get death." Chancey also "put her feet up on the table and said that she was digging in and she would not change her vote." She told the others that "they had to reach a unanimous decision or [Humphreys] would be paroled."

After deliberating for approximately eight hours over a period of two days, Jury Foreperson Barber, wrote a note to the court which stated as follows:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. While we agreed that life imprisonment with parole is not an option, we are unable to come to a *unanimous* decision on either death or life imprisonment without parole as a sentence. Please advise.

(emphasis added). Before Barber provided the note to the court, however, Chancey, added the word "currently." Barber re-wrote the note and the version sent to the court stated as follows:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. *Currently* we agreed life imprisonment with parole is not an acceptable option. We are *currently* unable to form a *unanimous* decision on death or on life imprisonment without parole. Please advise.

(emphasis added).

Chancey said she revised the note because she did not want to give the court the impression that the jury was at an impasse. She believed the manner in which Barber originally wrote the note could have resulted in a mistrial, which she said she "wasn't going to let [] happen."[1] The court placed the note in the record but did not read it aloud, instead summarizing its contents for the parties and letting them know that the court intended to instruct the jury to keep deliberating.[2] At that time, the trial court told the jury, "[Y]ou need to continue with your deliberations, and address the remaining issues."

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1. Chancey said that if a mistrial were declared, the jury would either have to "do it over again" or Humphreys "would get parole and hunt the jurors down."

2. The court summarized the contents of the note as follows:

> [The jurors have] indicated that they have reached a verdict in regard to some of the issues that have been submitted to them, but have not yet reached a decision on other issues that were submitted to them.

Humphreys, 694 S.E.2d at 331.

Humphreys points out that under controlling law at the time, if the jury failed to reach a unanimous decision on the death penalty, the court would have imposed a sentence of life without the possibility of parole. *See* O.C.G.A. § 17-10-31.1(c) (repealed by Ga. L. 2009 p.223, § 6, effective April 29, 2009).[3]

Rather than informing the jury about this statute, the trial court told the jury to continue deliberating after receiving its note. When the jury did so, the deliberations became quite heated with Chancey "yell[ing]" at and making personal attacks on the other jurors. Chancey also apparently used her prior experience as a victim of

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3. The then-relevant statutory section provided as follows:

> Where a jury has been impaneled to determine sentence and the jury has unanimously found the existence of at least one statutory aggravating circumstance *but is unable to reach a unanimous verdict as to sentence*, the judge shall dismiss the jury and *shall impose a sentence of either life imprisonment or imprisonment for life without parole.* In imposing sentence, the judge may sentence the defendant to imprisonment for life without parole only if the court finds beyond a reasonable doubt that the defendant committed at least one statutory aggravating circumstance and the trial court has been informed by the jury foreman that upon their last vote, a majority of the jurors cast their vote for a sentence of death or for a sentence of life imprisonment without parole; provided, however, that the trial judge may impose a sentence of life imprisonment as provided by law.

§ 17-10-31.1(c) (emphases added).

a crime to pressure the other jurors to impose the death penalty. As we've described, Chancey shared a version of her assault that included a much closer encounter with her attacker than she had shared during voir dire.

Following three more hours of deliberations, Foreperson Barber sent a second note to the court asking that the jurors be allowed to rehear a taped statement that Humphreys had given to law enforcement. *See Humphreys*, 694 S.E.2d at 32. After listening to the recording, the jury resumed deliberations for approximately two more hours, at which point, defense counsel moved for a mistrial. *Id.* The trial court denied the motion, finding that the jury had not indicated it was deadlocked. *Id.*

Another two hours of deliberations passed, and Barber sent yet another note to the court. This one read, "Due to the hostile nature of one of the jurors, I am asking to be removed from the jury." The trial court read the note to the parties and informed them that it intended to give the jury a modified *Allen*[4] charge. Defense counsel renewed its motion for a mistrial, but the trial court again denied the motion. The judge brought the jury into the courtroom and issued the following charge:

> The Court deems it advisable at this time to give you some instruction in regard to the manner in which you should be conducting your deliberations in the case. You've been deliberating upon this case for a period of time. The Court deems it proper to advise you further

4. *See Allen v. United States*, 164 U.S. 492 (1896).

in regard to the desirability of agreement, if possible.

The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict, if possible, and not for disagreement. *It is the law that a unanimous verdict is required.*

While this verdict must be the conclusion of each juror independently, and not a mere acquiescence of the jurors in order to reach an agreement, it is nevertheless necessary for all the jurors to examine the issues and the questions submitted to them with candor and with fairness and with a proper regard for in [sic] deference to the opinion of each other.

A proper regard for the judgment of others ill greatly aid us in forming our own judgment. Each juror should listen with courtesy to the arguments of the other jurors with the disposition to be convinced by them.

If the members of the jury differ in their view of the evidence, the difference of opinion should cause them all to scrutinize the evidence more carefully and closely and to reexamine the grounds of their own opinion.

Your duty is to decide the issues that have been submitted to you if you can consci[enti]ously

> do so. In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for hostility or taking up and maintaining in a spirit of controversy either side of the cause.
>
> You should bear in mind at all times that, as jurors, you should not be advocates for either side of the case. You should keep in mind the truth as it appears from the evidence, examined in the light of the instructions that the Court has given to you.
>
> You may, again, retire to the jury room for a reasonable time, examine your differences in a spirit of fairness and candor and courtesy, and try to arrive at a verdict if you can conscientiously do so. At this time, you may return to the jury room.

(emphases added).

Later interviews with the jurors revealed that Foreperson Barber and other jurors took from this instruction that the jury's decision on sentencing must be unanimous. And they believed if they were deadlocked, Humphreys would get life imprisonment with the possibility of parole or that he could "walk." After receiving the third note, the court did not ask why Barber wished to be removed from the jury. And Barber later explained that she did not believe it was an option to send another note to the court stating that the jury was deadlocked since "[t]he judge had made it clear that

it didn't matter: [the jury] didn't have a choice other than to be unanimous." That day, the jury deliberated for an additional two hours before retiring for the evening at 10:20 p.m.

The next day, when the jury resumed deliberations, Foreperson Barber decided to "fight for [a sentence of] life without parole." At that point in the deliberations, Foreperson Barber and Juror Pogue were the only two not voting for death. Despite Barber's intent to fight, Chancey would "not engage in debate at all." The parties could hear "screaming" coming from the jury room. Barber became "extremely distressed and locked [herself] in the bathroom and cried." She later expressed that she felt they had run out of options because she "thought that unanimity was our only choice." Pogue deferred to Barber as to whether to "stick it out" but the two finally relented, and after two hours of deliberations, the jury returned two death sentences because they "didn't want Mr. Humphreys to go free."

Barber expressed that she believed she "had absolutely no other option . . . [She] cried the entire time. [She said] [i]t was one of the hardest things [she had] ever done because [she] was not true to [her] own belief about what the proper sentence should be." Barber also said if she had known that "not being unanimous meant a sentence of life without parole in this case, it would have been easy to stand [her] ground as long as [she] needed to."

On September 30, 2007, the jury found the existence of several statutory aggravating factors and recommended

that Humphreys be executed.[5] The trial court ultimately imposed two death sentences for the murders of Williams and Brown.

C. Post-trial Proceedings

1. Motion for New Trial

After interviewing some jurors, who revealed the circumstances we've noted, Humphreys's trial counsel filed a motion for new trial. Although defense counsel raised various grounds in the motion, they did not raise a claim of juror misconduct. Instead, counsel challenged the trial court's *Allen* charge, claiming it led jurors to erroneously believe that they were required to reach a unanimous decision. In support of the claim, Humphreys submitted the affidavits of Juror Darrell Parker and two investigators. *See Humphreys*, 694 S.E.2d at 333.

The trial court denied the motion for new trial. Among other conclusions, the trial court determined that both the juror and investigator affidavits were inadmissible under O.C.G.A. § 17-9-41 and did not fall under any exception. That statutory section provided that the "[a]ffidavits of jurors may be taken to sustain but not to impeach their

5. One of the five aggravating factors found by the jury is set forth in O.C.G.A. § 17-10-30(b)(10), which provides that a jury may impose a death sentence when the "murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." The Supreme Court of Georgia later found that the jury's reliance on O.C.G.A. § 17-10-30(b)(10) as an aggravating factor was improper but still affirmed the death sentence.

verdict." The trial court explained that exceptions to the rule are allowed "where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." The trial court determined that the affidavits did not offer any evidence of extrajudicial prejudicial information improperly brought to the jury's attention or allege any non-juror interference had occurred. Accordingly, the court concluded that the affidavits did not fall into any exception to § 17-9-41 and could not be considered.

Regarding the *Allen* charge, the trial court looked to the decision in *Walker v. State*, 635 S.E.2d 740, 748 (Ga. 2006). There, the defendant made a similar claim of error because, during the sentencing phase, the jury was told, "[Y]our verdict as to penalty must be unanimous" and it was directed to continue deliberating after the jury told the trial court that it could not reach a unanimous verdict. *Id.* The trial court pointed out that in *Walker*, the Supreme Court of Georgia rejected the claim of error since Georgia law expects a jury to consider all the evidence and attempt to reach unanimity on the issue of sentence, and, if possible, unanimously recommend a sentence. Based on *Walker*, the trial court rejected Humphreys's *Allen*-charge claim and ultimately denied the motion for new trial.

2. Direct Appeal

In Humphreys's direct appeal, he again raised the issue of the *Allen* charge and again omitted any claim of juror misconduct. He argued that the portion of

the instruction that stated that "[i]t is the law that a unanimous verdict is required" was an incorrect statement of the law in the sentencing phase of a death-penalty case and misled the jurors. *Humphreys*, 694 S.E.2d at 332-33. The Supreme Court of Georgia disagreed, affirming Humphreys's convictions and sentences. *Id.* at 334-36.

The Supreme Court of Georgia also agreed with the trial court's ruling that the juror and investigator affidavits were inadmissible under O.C.G.A. § 17-9-41. *Id.* at 333. Thus, it upheld the trial court's decision to exclude the juror and investigator affidavits when analyzing the alleged coerciveness of the *Allen* charge. *Id.* (citing *Gardiner v. State*, 444 S.E.2d 300 (Ga. 1994) and noting that exceptions to § 17-9-41 exist but do not include juror's misapprehension regarding the law).

The Supreme Court of Georgia then turned to the issue of whether the *Allen* charge was "so coercive as to cause a juror to 'abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors.'" *Id.* at 333-34 (quoting *Mayfield v. State*, 578 S.E.2d 438, 443 (2003)). The Court concluded it was not. *Id.* at 334.

Still, the Court recognized that the charge could lead to claims of jury confusion that require an analysis of the circumstances of the jury instructions given. *Id.* It then analyzed the charge in Humphreys's case and found that the challenged "unanimity" language was just a "small portion of the extensive *Allen* charge given." *Id.* The court determined that the overall charge passed muster. It explained,

> [The overall *Allen* charge] [c]autioned the jurors that the verdict was not to be the . . . mere acquiescence [of the jurors] in order to reach an agreement, that any difference of opinion should cause the jurors to scrutinize the evidence more [carefully and] closely and that the aim was to keep the truth in view as it appeared from the evidence, considered in light of the court's instructions.

Id. (cleaned up).

The Court also noted that after the publication of the verdicts, the jury was polled. *Id.* At that time, each juror affirmed that the verdicts announced were the verdicts that they had reached and that each juror had reached the verdicts without pressure from anyone during deliberations. *Id.* Ultimately, the Court concluded the *Allen* charge did not unduly coerce the jury into rendering a death sentence because the "unanimous verdict" language was required and was "one small portion of an otherwise balanced and fair *Allen* charge." *Id.* But because potential problems existed with the *Allen* charge that could result in claims of jury confusion, the Court instructed future trial courts "to omit this language from *Allen* charges given during the sentencing phase of death penalty trials." *Id.*

The Supreme Court of the United States denied Humphreys's petition for writ of certiorari on November 15, 2010. *See Humphreys v. Georgia*, 562 U.S. 1046 (2010).

D. Habeas Proceedings

1. State Habeas Petition

Humphreys filed a petition for writ of habeas corpus in the Superior Court of Butts County on February 14, 2011. He later amended that petition to include twenty-one claims for relief. As relevant here, Humphreys contended that (1) trial counsel were ineffective in their mitigation investigation and presentation; (2) his constitutional rights were violated as a result of juror misconduct; (3) the manner in which the trial court handled the jury deadlock and *Allen* charge was erroneous; and (4) appellate counsel's failure to adequately litigate these claims during the motion for new trial and direct appeal also deprived him of due process.

The state habeas court held an evidentiary hearing in February 2013. At that hearing, Humphreys's new counsel presented both affidavits and live testimony of jurors, the substance of which we have already set forth. Humphreys also submitted evidence during the habeas proceedings that painted a somewhat different picture of his childhood than the one presented to the sentencing jury—including the fact that he had been sexually abused by his great grandmother.

When addressing the juror-misconduct claim, the state habeas court recognized the claim included assertions that Chancey (1) was not forthcoming during voir dire about her experience as a victim of violent crime and her willingness to consider a sentence other than

death; (2) pressured and bullied other jurors into voting for a death sentence, refused to deliberate, and used the *Allen* charge to convince other jurors that they had to reach a verdict; and (3) altered a note to the trial court to mislead it about the status of deliberations. In support of these claims, Humphreys offered the affidavits of three jurors—one of which was filed in support of the motion for new trial. Humphreys also offered the live testimony of Foreperson Barber.

In denying relief, the state habeas court first found the juror-misconduct claims to be procedurally defaulted under O.C.G.A. § 9-14-48(d) because Humphreys failed to raise them in the motion for new trial or on direct appeal. It also determined that Humphreys had not overcome the procedural default because he showed neither cause for failing to raise the issue nor actual prejudice as a result of appellate counsel's failure to raise these claims. In conducting this analysis, the state habeas court acknowledged that Humphreys sought to rely on juror affidavits and Foreperson Barber's testimony but found them to be inadmissible under O.C.G.A. § 17-9-41, O.C.G.A. § 9-10-9, and Georgia law.[6] Humphreys presented no other evidence of Chancey's alleged bias or misconduct, so in the absence of the jurors' affidavits and Barber's live testimony, nothing was left to support a valid challenge for cause by defense counsel. The state habeas court further determined that even if it considered the juror testimony, Humphreys still failed to show any resulting prejudice.

6. The state habeas court acknowledged both the juror affidavits and Barber's live testimony and grouped them together, referring to them as "testimony."

As for the ineffective-assistance-of-trial-counsel claim, the court began by thoroughly detailing trial counsel's qualifications, the mitigation investigation counsel conducted, and counsel's presentation of evidence and experts during the sentencing phase. The court concluded that trial counsel were not ineffective in their presentation of mitigation evidence, and it determined that, in particular, counsel were not ineffective for not presenting allegations that Humphreys's great grandmother had sexually abused him. In support of this conclusion, the court noted that the defense team had questioned Humphreys about sexual abuse, and Humphreys had failed to disclose any such abuse.

The state habeas court also determined that trial counsel's investigation and presentation of mental-health and other mitigating evidence were reasonable. The only "new" evidence Humphreys presented at the habeas hearing was of sexual abuse, but Humphreys did not disclose it to trial counsel or anyone else when asked, so, the court concluded, trial counsel could not be faulted for failing to discover it.

Not only that, but the court determined that Humphreys failed to show the requisite *Strickland* prejudice. As the court reasoned, the additional evidence presented to it during the habeas evidentiary hearing would not have created a reasonable probability of a different outcome had it been presented originally. That was so, the court reasoned, because the majority of the evidence presented in habeas proceedings (mostly having to do with physical abuse, poor living conditions, and

mental-health assessments) reiterated the testimony presented during sentencing. Indeed, the court concluded that much of the testimony from both lay witnesses and expert witnesses during the habeas proceedings was cumulative. In the end, the court weighed the totality of the aggravating evidence against the totality of the mitigating evidence and announced that "any additional mitigating testimony would not have created a reasonable probability of a different outcome."

Rounding out its decision, the state habeas court addressed Humphreys's claim that the trial court improperly instructed the jury on the principle of unanimity in capital sentencing—the *Allen* charge claim. Humphreys candidly acknowledged that the Supreme Court of Georgia had already reviewed and rejected the claim, but he asserted that the Court had erred in its legal conclusions. The state habeas court noted that it did not review in a habeas proceeding issues raised and litigated on direct appeal. And because Humphreys had failed to advise the state habeas court about any changes in the law, the court determined the claim was precluded from review under the doctrine of *res judicata.*

In sum, the state habeas court denied Humphreys's petition in its entirety.

2. Supreme Court of Georgia's Denial of Certificate of Probable Cause to Appeal

Humphreys filed an application for certificate of probable cause to appeal with the Supreme Court of

Georgia. That court denied the entirety of the application, finding that it lacked any arguable merit.

Humphreys filed a petition for writ of certiorari, which the Supreme Court of the United States denied on April 16, 2018.

3. Federal Habeas Petition (§ 2254 Petition)

Humphreys filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia. He later amended the petition.

On September 16, 2020, the district court issued a final order denying relief on all claims and dismissed the petition with prejudice, except as to a challenge not applicable here. The district court granted Humphreys a COA on the issue of whether his trial counsel was ineffective in investigating and presenting his case in mitigation during the penalty phase of his trial.

4. Notice of Appeal and Motion to Expand COA

Humphreys timely filed his notice of appeal with this Court and later sought an expansion of the COA to include six additional claims of constitutional error. We granted the motion in part and permitted Humphreys to appeal four claims as follows: (1) whether Humphreys is entitled to relief from the denial of his habeas petition on his claim that juror bias and misconduct deprived him

of his constitutional rights; (2) whether Humphreys is entitled to relief from the denial of his habeas petition on his claim that the trial judge gave inaccurate, misleading, or coercive instructions and inadequately responded to juror misconduct; (3) whether Humphreys is entitled to relief from the denial of his habeas petition on his claim that he was denied his Sixth Amendment right to effective assistance of counsel by appellate counsel; and (4) whether his trial counsel was ineffective in investigating and presenting his case in mitigation during the penalty phase of his trial.

The parties fully briefed these issues, and we heard oral argument.

II. STANDARD OF REVIEW

This Court reviews "de novo the denial of a petition for a writ of habeas corpus." *Morrow v. Warden*, 886 F.3d 1138, 1146 (11th Cir. 2018) (quotation omitted). But the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs our review of federal habeas petitions and prescribes a highly deferential framework for evaluating issues previously decided in state court. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (en banc); *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1354 (11th Cir. 2020). Under AEDPA, we may not grant habeas relief on claims that were "adjudicated on the merits in [s]tate court" unless the state court's decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *Sealey*, 954 F.3d at 1354 (quoting 28 U.S.C. § 2254(d)). These standards mean that we must give state-court decisions "the benefit of the doubt." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1325 (11th Cir. 2013) (citation and internal quotation marks omitted).

A state-court decision is not "contrary to" federal law under 2254(d)(1) "unless it contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." *Id.* (citation and internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 405 (2000).

And a state-court decision is not an "unreasonable application" of federal law under 2254(d)(1) "unless the state court identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case, unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply." *Evans*, 703 F.3d at 1325 (citation and internal quotation marks omitted); *see also Williams*, 529 U.S. at 407 (a state court decision is an "unreasonable application" of clearly established law if the state court identifies the correct governing legal rule from the Supreme Court's holdings but unreasonably applies it to the facts of the particular defendant's case).

Regarding AEDPA's unreasonable-application-of-federal-law provision under 2254(d)(1), "[t]he key word is 'unreasonable,' which is more than simply incorrect." *Sealey*, 954 F.3d at 1354. To meet this standard, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Pye*, 50 F.4th at 1034 (quoting *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quotation marks omitted)). "[A] state court's application of federal law is unreasonable only if no fairminded jurist could agree with the state court's determination or conclusion." *Raulerson v. Warden*, 928 F.3d 987, 995-96 (11th Cir. 2019) (citations and internal quotation marks omitted). This is "a difficult to meet and highly deferential standard . . . , which demands that state-court decisions be given the benefit of the doubt." *Id.* at 996 (citation and internal quotation marks omitted). Still, AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citations and internal quotation marks omitted).

For each claim presented, we review "the last state-court adjudication on the merits." *Greene v. Fisher*, 565 U.S. 34, 40 (2011). If the state court did not reach the merits of the claim, though, "federal habeas review is not subject to the deferential standard that applies under AEDPA[.]" *Cone v. Bell*, 556 U.S. 449, 472 (2009). Rather, in that case, we review the claim de novo. *Id.* The

Supreme Court has instructed us to presume "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011) (citation omitted). An indication to the contrary exists when, for example, the state court has denied the petitioner's claim on only one prong of the *Strickland* test. In that case, we review de novo the prong that the state court never reached. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 380, 390, (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

We also defer to a state court's determination of the facts under 2264(d)(2) unless the state-court decision "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). Section 2254(d)(2) is similar to § 2254(d)(1) in that it requires us to give state courts "substantial deference." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015). "We may not characterize . . . state-court factual determinations as unreasonable 'merely because we would have reached a different conclusion in the first instance.'" *Id.* at 313-14 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)) (alteration adopted). We also presume that the state court's factual determinations are correct, absent clear and convincing evidence to the contrary. *Pye*, 50 F.4th at 1035; 28 U.S.C. § 2254(e)(1).

If the petition satisfies § 2254(d)'s requirements, we then consider whether the state court's error was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In collateral-review cases, a federal constitutional error

is harmless unless it caused "actual prejudice." *Id.* at 637 (citation omitted). Put another way, we examine "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 623, 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *See also Brown v. Davenport*, 596 U.S. 118, 122 (2022) ("When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant relief without first applying both the test this Court outlined in *Brecht* and the one Congress prescribed in AEDPA.").

III. DISCUSSION

A. Juror Misconduct

Humphreys contends that juror misconduct infected the trial from voir dire all the way through jury deliberations, resulting in a violation of his due-process rights. He points to the following as evidence of Chancey's misconduct: (1) lying during voir dire about her experience as a victim of a crime and her unwillingness to consider a sentence other than death; (2) intimidating other jurors and refusing to deliberate; and (3) altering a note to the trial court to mislead it about the status of deliberations.

According to Humphreys, Chancey vacillated between refusing to deliberate and berating other jurors, and she admitted that she would vote for only a death sentence. Humphreys also emphasizes that during deliberations, Chancey revealed that she had been dishonest during voir dire about the home invasion and attempted rape. Had Chancey revealed that information during jury selection,

Humphreys asserts, the defense would have stricken her. Humphreys further takes issue with what he deems to be Chancey's "bullying" and coercion of the other jurors. He contends that, paired with the trial court's *Allen* charge, Chancey's conduct caused at least one juror—Barber—to surrender her honestly held beliefs about the appropriate sentence. Finally, Humphreys characterizes Chancey's alteration of the jury note by inserting the word "currently" as an attempt to mislead the trial court that the jury was not deadlocked.

The state habeas court concluded Humphreys procedurally defaulted these claims because he failed to raise them in his motion for new trial or on direct appeal. The Supreme Court of Georgia and the district court agreed.

The issue of whether a claim is subject to the doctrine of procedural default "is a mixed question of fact and law, which we review *de novo*." *Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010) (citation and internal quotation marks omitted).

The doctrine of procedural default bars a court from re-viewing a petitioner's claim when that claim has been or would be rejected in state court on a state procedural ground. *See Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). We have explained,

> Federal habeas review reduces the finality of litigation and frustrates states' sovereign power to punish offenders and states' good-

> faith attempts to honor constitutional rights. So, when a state prisoner fails to follow state procedural rules, thereby procedurally defaulting on the claim, our authority to review the prisoner's state court criminal conviction is severely restricted. Federal review of a petitioner's claim is barred by the procedural-default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and that bar provides an adequate and independent state ground for denying relief.

Atkins v. Singletary, 965 F.2d 952, 956 (11th Cir. 1992) (citations and internal quotation marks omitted). Because the state habeas court concluded that Humphreys procedurally defaulted his claims about Chancey, those claims are also likely barred from review in this proceeding.

Still, we have recognized that a petitioner may obtain federal review of a procedurally defaulted claim if he can show both "cause" for the default and actual "prejudice" resulting from the default. *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986), and *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). To establish "cause," a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Id.* (quoting *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir.1999)); *Mize v. Hall*, 532 F.3d 1184, 1190 (11th Cir. 2008) ("Cause exists if there was 'some

objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule.'" (quoting *Murray*, 477 U.S. at 488)). To establish prejudice, a petitioner must show that "there is at least a reasonable probability that the result of the proceeding would have been different." *Henderson*, 353 F.3d at 892 (citing *Wright*, 169 F.3d at 703, and *Crawford v. Head*, 311 F.3d 1288, 1327-28 (11th Cir. 2002)).

We have further explained that a federal court may also grant a habeas petition on a procedurally defaulted claim, without a showing of cause or prejudice, to "correct a fundamental miscarriage of justice." *Id.* (citing *Murray*, 477 U.S. at 495-96). A fundamental miscarriage of justice occurs only in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is actually innocent. *Id.* (citing *Murray*, 477 U.S. at 495-96).

Here, Humphreys does not claim actual innocence, so he must establish cause and prejudice to overcome the procedural bar to his juror-misconduct claim. He says he can demonstrate cause for the default because his appellate counsel was ineffective for failing to raise the claims about Chancey's conduct earlier. So embedded in Humphreys's juror-misconduct claim is his separate claim that his appellate counsel was ineffective.

For the reasons we explain below, we disagree with Humphreys that his appellate counsel was ineffective. We therefore deny that separate claim. And because Humphreys cannot show that his counsel was ineffective,

he also cannot show cause for the procedural default of the juror-misconduct claim, so we deny that claim, too.

1. *Strickland* Standard

When a federal habeas petitioner alleges ineffective assistance of counsel, as here, the relevant law "as determined by the Supreme Court" is *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an ineffective-assistance claim under *Strickland*, a petitioner must show that (1) his "counsel's representation fell below an objective standard of reasonableness" and (2) a reasonable probability "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88, 694. We can resolve an ineffectiveness claim on either ground if a petitioner cannot prove both. *Atkins*, 965 F.2d at 959; *see also Strickland*, 466 U.S. at 697. A reasonable probability of a different outcome is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is not enough for the defendant to show that the errors had "some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, defense counsel's errors must be "so serious" that they deprived the defendant of a "fair trial, a trial whose result is reliable." *Id.* at 687.

When we assess counsel's performance, we must avoid viewing their decisions through the "distorting effects of hind-sight." *Id.* at 689. We must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* The defendant bears the burden to show that counsel made

errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. He must show that the attorney's representation amounted to incompetence under prevailing professional norms. *Id.* at 690. As we have explained, "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (citation and internal quotation marks omitted). Instead, the inquiry is whether counsel's actions were "so patently unreasonable that no competent attorney would have chosen [them]." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) (per curiam) (citation and internal quotation marks omitted).

And when we apply AEDPA deference on top of *Strickland* deference, we may reject a state-court finding that trial counsel was adequate only upon the dual-determination that counsel acted in a professionally unreasonable manner (under *Strickland*) and that the state court's contrary determination was "objectively unreasonable" (under § 2254). It is a "rare" circumstance when a federal court finds in favor of a habeas petitioner on both accounts. *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 910-11 (11th Cir. 2011).

2. Admissibility of Juror Testimony

Because Humphreys's ineffective-assistance claim is premised on the evidence contained in the affidavits and testimony counsel obtained about juror deliberations, Humphreys can establish the necessary "cause" to avoid

procedural default of his juror-misconduct claims only if that evidence is admissible. The state habeas court refused to consider that evidence, finding it to be inadmissible. Previously, both the trial court and Supreme Court of Georgia had reached the same conclusion with respect to Humphreys's claim that the *Allen* charge was coercive.

Humphreys acknowledges that the lower courts, relying on Georgia law, refused to consider the juror statements. In Georgia, in general, jurors may not impeach their own verdict. *O'Donnell v. Smith*, 751 S.E.2d 324, 327 (Ga. 2013); *see also Henley v. State*, 678 S.E.2d 884, 887 (Ga. 2009) ("[A] jury verdict may not be challenged based on an affidavit from one or more jurors."). Indeed, former O.C.G.A. § 17-9-41 (repealed by Ga. L. 2011, Act 52, § 33, effective January 1, 2013), referred to as the "no-impeachment rule," provided that "[t]he affidavits of jurors may be taken to sustain but not impeach their verdict."[7] This rule applies equally to juror affidavits and live testimony by jurors, even in death-penalty cases. *See Roebuck v. State*, 586 S.E.2d 651, 658 (Ga. 2003); *Oliver v. State*, 461 S.E.2d 222 (Ga. 1995); *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990). That said, this general rule cannot override a defendant's right to a fair trial. *O'Donnell*, 751 S.E.2d at 327 (citing *Henley*, 678 S.E.2d at 888, and *Turpin v. Todd*, 493 S.E.2d 900 (Ga. 1997)).

Multiple exceptions to the general rule also exist: "when (1) prejudicial, extrajudicial information has

7. This statute was in place at the time of Humphreys's motion for new trial and direct appeal in 2008 and 2010, respectively.

been brought to the jury's attention; (2) nonjurors have interfered with deliberations; or (3) there has been irregular jury conduct so prejudicial that the verdict lacks due process." *Tate v. State*, 628 S.E.2d 730, 732-33 (Ga. Ct. App. 2006); *see also Crowe v. Hall*, 490 F.3d 840, 846 (11th Cir. 2007).

Analogously, Federal Rule of Evidence 606(b) also generally precludes courts from relying on post-trial juror testimony during an inquiry into the validity of a verdict. That rule provides, "During an inquiry into the validity of a verdict . . . , a *juror may not testify* about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1) (emphasis added). Because of this rule, a court may not consider a juror's affidavit or testimony on these matters. *Id.* As with the Georgia rule, the federal rule contains exceptions. Under Federal Rule of Evidence 606(b)(2), a jury may testify about its verdict when "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." Rule 606(b) reveals Congress's endorsement of a "broad no-impeachment rule, with only limited exceptions." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 217 (2017).

Rule 606(b) arose from the common-law rule against admitting jury testimony to impeach a verdict. In *Tanner v. United States*, the Supreme Court explained that "full

and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." 483 U.S. 107, 120-21 (1987). The Supreme Court has reasoned that Rule 606(b) "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts." *Pena-Rodriguez*, 580 U.S. at 218.

Here, Humphreys does not claim that the verdict came as a result of external influences or a mistake in the verdict form. And "juror misconduct" is not an exception to the no-impeachment rule, so post-trial testimony from jurors regarding alleged misconduct is not admissible under Federal Rule 606(b). *See Warger v. Shauers*, 574 U.S. 40 (2014); *Tanner*, 483 U.S. 107 (1987).

But Humphreys argues the state habeas court unreasonably refused to consider the juror testimony establishing Chancey's misconduct based on constitutional standards of fairness that require criminally accused defendants to enjoy a panel of fair and impartial jurors.

In Humphreys's view, the no-impeachment rule presupposes the existence of specific trial safeguards the Supreme Court recognized in *Tanner* that bring misconduct to light during the trial proceedings, eliminating the need for post-trial inquiries into

deliberations. Those safeguards include (1) "[t]he suitability of an individual for the responsibility of jury service . . . is examined during voir dire[,]" (2) "[t]he jury is observable by the court, by counsel, and by court personnel[,]" (3) "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict[,]" and] (4) "nonjuror evidence of misconduct." *Tanner*, 483 U.S. at 127; *See also Warger*, 574 U.S. at 51. But Humphreys contends the *Tanner* safeguards are not infallible and they sometimes fail to capture serious juror misconduct.

As Humphreys sees things, this is a "rare" case in which all four of the *Tanner* safeguards failed. And because the *Tanner* safe-guards failed, the no-impeachment rule should yield and the state habeas court should have considered the juror testimony. He emphasizes the Supreme Court's acknowledgment that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Warger*, 574 U.S. at 51 n.3. Humphreys argues this is such a case.

In short, Humphreys asserts Chancey's bias and misconduct implicate his Eighth Amendment right to a fair and reasonable sentencing determination and his due-process right to an impartial, unbiased jury. He says the no-impeachment rule should be "stripped away" to preserve his rights and we should find the state habeas court unreasonably refused to take that action. Still,

Humphreys acknowledges that the Supreme Court has considered the application of the no-impeachment rule in only a small number of cases. *See* Blue Brief at 69, n. 27 (citing *United States v. Reid*, 53 U.S. 361 (1851), *Mattox v. United States*, 146 U.S. 140 (1892), *McDonald v. Pless*, 238 U.S. 264 (1915), *Tanner v. United States*, 483 U.S. 107 (1987), *Warger v. Shauers*, 574 U.S. 40 (2014), and *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017)). But he asserts that *Pless, Tanner, Warger*, and *Pena-Rodriguez* establish the lower courts' authority to review and consider the juror testimony.

Humphreys's argument is somewhat novel. Indeed, the Supreme Court issued three of the cases he relies on—*Reid* (1851), *Mattox* (1892), and *Pless* (1915)—before Congress adopted Rule 606(b) in 1975, which endorsed a broad no-impeachment rule, with "limited exceptions." *See Pena-Rodriguez*, 580 U.S. at 215-218. And although both *Reid* and *Pless* noted the possibility of an exception to the no-impeachment rule in the "gravest and most important cases[,]" *Pless*, 238 U.S. at 269, the Supreme Court has addressed this circumstance in only three cases—*Tanner, Warger*, and *Pena-Rodriguez. See Reid*, 53 U.S. at 366. Yet in only one of those cases—*Pena-Rodriguez*—did the Court actually allow an exception to the no-impeachment rule.

In *Tanner*, the Court rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial. *Tanner*, 483 U.S. at 125. In reaching this conclusion, the Court noted the "long-recognized and very substantial concerns"

supporting "the protection of jury deliberations from intrusive inquiry." *Id.* at 127. In particular, the Court did not want attorneys to use juror testimony to attack verdicts because, the Court ruled, that would result in jurors being "harassed and beset by the defeated party," thus destroying "all frankness and freedom of discussion and conference." *Id.* at 120 (quoting *Pless*, 238 U.S. at 267-68). The Court also expressed concerns about attempts to impeach a verdict that would "disrupt the finality of the process" and undermine both "jurors' willingness to return an unpopular verdict" and "the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-21.

Besides identifying the problems with cracking open jury deliberations post-verdict, the Court emphasized the existing safe-guards that protect the defendant's right to an impartial and competent jury beyond post-trial juror testimony, which we noted earlier. *Id.* at 127. Balancing the concerns and safeguards against the defendant's Sixth Amendment interest, the Court affirmed the exclusion of affidavits about the jury's inebriated state.

Warger was a civil case. There, the Supreme Court again declined to recognize an exception to the no-impeachment rule. Af-ter the trial court entered the verdict, the losing party sought to proffer evidence that the jury forewoman failed to disclose pro-defendant bias during voir dire. *Warger*, 574 U.S. at 43. Like in *Tanner*, the Court relied substantially on existing safeguards for a fair trial. The Court stated, "Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is

adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* at 51.

Still, the *Warger* Court reiterated that the no-impeachment rule may have exceptions. As in *Reid* and *Pless*, the Court warned of "juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 51 n.3. The Court announced, "If and when such a case arises," it would "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.*

As it turned out, in *Pena-Rodriguez*, the Supreme Court encountered such a grave case. There, the Court held,

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Pena-Rodriguez, 580 U.S. at 225. Despite finding an exception, the Supreme Court once again emphasized that its recognition in *Warger*—that there may be extreme cases where the jury trial right requires an exception to the no-impeachment rule—"must be interpreted in

context as a guarded, cautious statement." *Id.* at 221. As the Court explained, such a begrudging exception was necessary "to avoid formulating an exception that might undermine the jury dynamics and finality interests the no-impeachment rule seeks to protect." *Id.* But given that "racial animus was a significant motivating factor in [the juror's] finding of guilt," the Court held that the Constitution required an exception to the no-impeachment rule. *Id.* at 221, 225. That was so, the Court explained, because such statements cast "serious doubt" on the fairness of the trial and resulting verdict. *Id.* at 225.

Against this legal landscape, we cannot say that Humphreys's appellate counsel acted unreasonably in refraining from raising the juror-misconduct claims in the motion for new trial or in the direct appeal. For starters, only *Pena-Rodriguez* has ever applied an exception to the no-impeachment rule. But that case involved prejudice based on a protected status. And that type of bias is in a category of its own. Plus, *Pena-Rodriguez* was not decided until well after the motion for new trial and direct appeal were filed. When counsel filed those documents, the Court had never recognized an exception to the no-impeachment rule. In fact, counsel didn't have the benefit of *Warger*, either, when moving for a new trial and filing the direct appeal.

That leaves *Reid, Pless*, and *Tanner*. To be sure, in *Reid* and *Pless*, the Supreme Court left the door open for a case in which juror bias was so severe that the right to a fair trial was abridged. But those cases did not give any concrete examples to guide counsel.

Here, Chancey allegedly revealed that she had lied during voir dire about the particulars of being a victim of a crime, bullied other jurors, was loud and unwilling to deliberate, and altered a note. The other jurors knew all these things during deliberations and could have brought them to the trial court's attention. They did not—even though Chancey was the only juror involved in the troubling conduct and even though Chancey's conduct did not involve racial bias. As the Supreme Court explained in *Pena-Rodriguez*, "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." 580 U.S. at 225. The same is not true here. So while we certainly understand and are concerned by Chancey's conduct, we cannot say that counsel unreasonably decided that it did not fall into a then-theoretical exception to the no-impeachment rule.

In short, appellate counsel's representation did not fall below an objective standard of reasonableness when counsel did not pursue the juror-misconduct claims in the motion for new trial or on direct appeal. Perhaps, some other lawyer may have pursued the claim. But the test is not what the best lawyer or even a good lawyer would have done. Not raising these claims was not "so patently unreasonable that no competent attorney would have chosen" counsel's actions.[8] *Kelly*, 820 F.2d at 1176.

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8. We recognize that appellate counsel submitted other affidavits in support of the *Allen* charge claim. But that claim is markedly different because the affidavits made up only a small portion of the evidence supporting the claim. The *Allen* charge claim was based on an amalgamation of the trial judge's own

Ultimately, because Humphreys has not shown that appellate counsel was ineffective for failing to pursue the juror-misconduct claims sooner, he cannot demonstrate the cause required to defeat the procedural default of those claims. For this reason, we are barred from examining the merits of the juror-misconduct claims. The claims are therefore denied.

B. Ineffective Assistance of Appellate Counsel

Humphreys's ineffective-assistance-of-appellate-counsel claim necessarily fails for the same reason that Humphreys cannot show cause for his procedural default: as we've explained, counsel did not act unreasonably when they did not pursue the juror-misconduct claims sooner. Consequently, we reject Humphreys's claim that his appellate counsel was ineffective under *Strickland*.

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words, the jury notes to the court, the amount of time it took the jurors to deliberate, the yelling coming from the jury room, and other evidence. In contrast, the juror-misconduct claims are based exclusively on the post-trial juror interviews, juror affidavits, and juror testimony. In short, the entirety of the juror-misconduct claim is premised upon juror testimony—evidence that is inadmissible under the no-impeachment rule. *See* Fed. R. Evid. 606(b) ("a juror may not testify about any statement made or incident that occurred during the jury's deliberations"); *see also Gavin v. Comm'r, Ala. Dep't of Corr.*, 40 F.4th 1247 (11th Cir. 2022); *Roebuck*, 586 S.E.2d at 658; *Oliver*, 461 S.E.2d at 223-24. It was not unreasonable for counsel to refrain from pursuing those claims under Humphreys's novel theory where it was nearly a foregone conclusion that the only piece of evidence—the juror testimony—would not be considered and the court would be left with nothing to support the juror-misconduct claims.

C. Allen Charge

Humphreys also argues that the trial court coerced a sentencing verdict by instructing the jurors that "[i]t is the law that a unanimous verdict is required," by repeatedly returning them to the jury deliberation room despite their declaration of a deadlock, and by ignoring Foreperson Barber's plea to be excused "due to the hostile nature" of one of her fellow jurors. On direct appeal, the Supreme Court of Georgia found the trial court's instructions did not constitute coercion and the trial court's unanimity instruction was correct. *Humphreys*, 694 S.E.2d at 332-34.

Because the Supreme Court of Georgia adjudicated the coercion claim on the merits, it is entitled to AEDPA deference.[9] We may grant relief on this claim only if the Supreme Court of Georgia's determination was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d).

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9. Although the state habeas court briefly addressed the *Allen*-charge claim, it determined that it was barred from adjudicating it because the claim had already been litigated on direct appeal and could not be reviewed absent a change in the law. We therefore look to the decision of the Supreme Court of Georgia on direct appeal since it is the "last state-court adjudication on the merits" with respect to the *Allen*-charge claim. *Greene*, 565 U.S. at 40.

Trial courts may not coerce juries into rendering verdicts. *See United States v. Davis*, 779 F.3d 1305, 1312 (11th Cir. 2015). And a defendant "being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). That said, the Supreme Court has held that a trial court may instruct a deadlocked jury to keep deliberating. *Id.* at 237 (citing *Allen v. United States*, 164 U.S. 492 (1896)). Therefore, "[i]n an *Allen* charge, the judge instructs a deadlocked jury to undertake further efforts to reach a verdict." *United States v. Chigbo*, 38 F.3d 543, 544 n.1 (11th Cir. 1994) (per curiam). Although we've acknowledged the potential for coercion in an *Allen* charge, we've also approved the use of the charge. *Rubinstein v. Yehuda*, 38 F.4th 982, 996-97 (11th Cir. 2022). Accordingly, district courts have broad discretion in issuing *Allen* charges but must take care to not "coerce any juror to give up an honest belief." *United States v. Anderson*, 1 F.4th 1244, 1269 (11th Cir. 2021) (quoting *Davis*, 779 F.3d at 1312).

We recently reiterated that "[c]oercion does not mean 'simple pressure to agree.'" *Sears v. Warden*, 73 F.4th 1269, 1301 (11th Cir. 2023) (per curiam) (quoting *Brewster v. Hetzel*, 913 F.3d 1042, 1053 (11th Cir. 2019)). "Pressure becomes coercive when the actions of the court result in 'a minority of the jurors sacrificing their conscientious scruples for the sake of reaching agreement.'" *Id.* (quoting *Brewster*, 913 F.3d at 1053)).

In our Circuit, whether a verdict was coerced presents a mixed question of law and fact. *Id.* We look at the language the trial court employed and "examine the

totality of the circumstances to see if the court's actions created a substantial risk that one or more jurors would be coerced into abandoning their honest convictions." *Brewster*, 913 F.3d at 1053 (citing *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008)). The relevant, but not exhaustive, circumstances we consider include the following:

> (1) the total length of deliberations; (2) the number of times the jury reported being deadlocked and was instructed to resume deliberations; (3) whether the judge knew of the jury's numerical split when he instructed the jury to continue deliberating; (4) whether any of the instructions implied that the jurors were violating their oaths or acting improperly by failing to reach a verdict; and (5) the time between the final supplemental instruction and the jury's verdict.

Id. (citations omitted).

Here, the Supreme Court of Georgia concluded that the *Allen* charge, considered as a whole, was not coercive. *Humphreys*, 694 S.E.2d at 334. The court noted that it had previously considered the same "a unanimous verdict is required" instruction given as part of an *Allen* charge in the sentencing phase of a death-penalty trial and found that it was technically a correct statement of the law. *Id.* (citing *Legare v. State*, 302 S.E.2d 351 (Ga. 1983)). Relying on *Legare*, the Supreme Court of Georgia explained that "it is true that any 'verdict' rendered [in the sentencing

phase] must be unanimous and thus also true, stated in isolation, that it is 'the law that a unanimous verdict is required.'" *Id.* (quoting *Legare*, 302 S.E.2d at 353).

The Supreme Court of Georgia further expounded, noting that Georgia requires a unanimous verdict even in the sentencing phase of a capital case because under its death-penalty law, "[w]here a jury is unable to agree on a verdict, that disagreement is not itself a verdict." *Id.* (quoting *Romine v. State*, 350 S.E.2d 446, 451 (Ga. 1986)). As the court explained Georgia law, "[t]he jury's dead-lock may lead to a sentence of life with or without parole imposed by the trial court, but it does not result either in a mistrial subject to retrial (as in other contexts where a jury deadlocks) or an automatic verdict (as occurs under the death penalty law of other states)." *Id.* (citing *Romine*, 350 S.E.2d at 451). Thus, the court em-phasized, it had "repeatedly held that a trial court is not required to instruct the jury in the sentencing phase of a death penalty trial about the consequences of a deadlock." *Id.* (citing *Jenkins v. State*, 498 S.E.2d 502 (Ga. 1998)).

Still, the Supreme Court of Georgia recognized that the charge could lead to claims of jury confusion, requiring an analysis of the "circumstances of the jury instructions given[.]" *Id.* The court then considered the circumstances here and determined that the unanimity language amounted to merely a small portion of the extensive *Allen* charge the trial court gave. In the court's view, several other aspects of the *Allen* charge minimized the unanimity language in these ways:

> [It] cautioned the jurors that the verdict was not to be the . . . mere acquiescence [of the jurors] in order to reach an agreement, that any difference of opinion should cause the jurors to scrutinize the evidence more [carefully and] closely and that the aim was to keep the truth in view as it appeared from the evidence, considered in light of the court's instructions.

Id. (citation and internal quotation marks omitted). Plus, the court observed, the trial court polled the jury, and each juror affirmed that the verdicts announced were the verdicts that they had reached. *Id.* Each juror also confirmed that they had rendered their verdicts without any pressure from anyone during their deliberations. *Id.*

In the end, the Supreme Court of Georgia concluded that the *Allen* charge did not unduly coerce the jury into rendering a death sentence because the unanimous-verdict language was required at the time and was "but one small portion of an otherwise balanced and fair *Allen* charge." *Id.* Still, the court recognized that the unanimity language may result in claims of "jury confusion." For this reason, the court instructed future trial courts to exclude this language from *Allen* charges given during the sentencing phase of death-penalty trials. *Id.*

Humphreys argues it was unreasonable for the Supreme Court of Georgia to find that the jury charge, which results in jury confusion, was constitutional. And he claims that when a trial court insists that the jury must reach a decision, even in the face of a deadlock,

that instruction is unconstitutionally coercive. We reject both claims. First, the Supreme Court of Georgia did not find that the "unanimous verdict language" in the jury charge *results in* jury confusion; rather, it found that it *could* result in jury confusion. Second, the court made an individualized determination of the circumstances in Humphreys's case to ascertain whether juror confusion occurred in Humphreys's trial and determined it did not.[10]

We must defer to the Supreme Court of Georgia's decision so long as it did not unreasonably determine the facts in light of the evidence presented and its decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Humphreys cannot meet the AEDPA standard on either ground.

With respect to its factual determinations, the Supreme Court of Georgia accurately recounted the circumstances leading to the jury's verdict. It correctly noted that, during the sentencing phase, the jury deliberated for approximately eight hours over a period of two days before Foreperson Barber sent the trial court a note that stated,

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. *Currently* we agreed

10. Importantly, the Supreme Court of Georgia found that the inclusion of the unanimity language in an *Allen* charge would require a detailed analysis of the full circumstances of the jury instructions given. Here, the court engaged in that analysis.

> life imprisonment with parole is not an acceptable option. We are *currently* unable to form a *unanimous* decision on death or on life imprisonment without parole. Please advise.

Humphreys, 694 S.E.2d at 331 (emphasis added).

The Supreme Court of Georgia recounted that the trial judge informed counsel of the note and summed up its details, advising counsel that the jury "indicated that they have reached a verdict in regard to some of the issues that have been submitted to them, but have not yet reached a decision on other issues that were submitted to them." *Id.* So the trial court declared its intention to call the jury in and instruct it to continue deliberating. *Id.* When the jurors were brought into the courtroom, the judge instructed them as follows:

> I guess you've been deliberating now about eight hours in the case. And the case was a lengthy trial, and there are a lot of issues. And you need to continue with your deliberations, and address the remaining issues.

The Supreme Court of Georgia next correctly noted that the jury returned to the jury room and continued deliberations for about three more hours before sending a second note to the court. *Id.* at 332. In that note, the jury asked to listen to Humphreys's taped statement to detectives. *Id.* The court allowed the jury to listen to the statement, and the jury returned to the jury room to continue deliberations. *Id.* After about two hours or so,

defense moved for a mistrial. *Id.* The trial court denied the motion, emphasizing that the jury had not indicated that it was dead-locked. *Id.*

Following that motion, the jury deliberated for another roughly two hours, when Foreperson Barber sent a note to the court. She asked to be removed from the jury "[d]ue to the hostile nature of one of the jurors." *Id.* In response to this note, the trial court announced that it intended to give the jury a modified *Allen* charge. *Id.* The Supreme Court of Georgia correctly set forth the verbatim *Allen* charge in its decision, acknowledging that Foreperson Barber's note and the trial court's intent to give an *Allen* charge prompted an objection from the defense and a renewal of the defense's motion for mistrial, which the trial court again denied. *Id.* at 332 & n.7

After reading the juror's note and without identifying from whom it came, the trial court gave the modified *Allen* charge. *Id.* at 332. The jury retired to the jury room at 8:40 p.m., where it deliberated until 10:20 p.m., and then went home for the evening. *Id.* at 333. The following morning, the jurors reconvened and deliberated for two more hours, and the jury returned a death sentence for the two murders. *Id.*

After reviewing the complete record, we cannot say that clear and convincing evidence exists that the Supreme Court of Georgia clearly erred in its factual determinations based on the evidence presented. The sequence of events and other facts set forth by the court were correct. Humphreys does not appear to dispute this.

Rather, he argues that the court's legal conclusion of no coercion was unreasonable.

But on this record, we cannot say that the Supreme Court of Georgia's decision was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. With respect to the trial court's first decision to send the jurors back for further deliberations, the court correctly observed that whether a jury is "hopelessly dead-locked" is a determination to be made by the trial court and will be reversed on appeal only for an abuse of discretion. *Humphreys*, 694 S.E.2d at 332. And here, the court emphasized, the trial was lengthy, the jury "had been deliberating for less than nine hours, and the language twice used in the note that the jurors 'currently' were not able to agree indicated that deliberations were ongoing." *Id.*

As for the two later notes, the Supreme Court of Georgia again pointed to the length of the trial in relation to the time the jury had been deliberating, and the court also noted that the jurors had recently requested to rehear evidence. *Id.* at 333. These facts, the court said, showed that the jurors were continuing to actively deliberate. *Id.* We can't say that the Supreme Court of Georgia's determinations in these regards were unreasonable.

With respect to the *Allen* charge, the Supreme Court of Georgia recognized the correct law in its analysis, considering whether, as a whole, the charge was "so coercive as to cause a juror to abandon an honest

conviction for reasons other than those based upon the trial or the arguments of other jurors." *Id.* (citation and internal quotation marks omitted). It concluded that it was not. Then, the court emphasized that the trial court polled the jurors, and each juror disavowed any coercion. *Id.* at 334. Again, these determinations are neither unreasonable nor contrary to law.

The Supreme Court's case law on what constitutes a coerced verdict is quite limited. When the Supreme Court of Georgia issued its decision here, the leading case on this topic was *Lowenfield.* There, the Supreme Court determined that a jury's penalty-phase verdict was not coerced after the trial court polled the jurors on whether further deliberations would be helpful and then instructed the jury to continue deliberating. 484 U.S. at 240-41.

In *Lowenfield*, the Supreme Court acknowledged that juror coercion can support a constitutional claim and that the relevant inquiry is the totality of the circumstances. *Id.* at 237-38. That said, the Supreme Court hasn't shed further light on what constitutes juror coercion that violates a defendant's constitutional rights. Given this fact and the Supreme Court of Georgia's analysis here, we cannot conclude that the Supreme Court of Georgia unreasonably applied existing federal law.

To the extent that Humphreys relies on *Jenkins* to support his argument that his conviction should be reversed, we disagree. In *Jenkins*, the Supreme Court reversed a conviction based on jury instructions given in a federal prosecution. But the Court has since

explained that it based its decision there on the Court's "supervisory power over the federal courts, and not on constitutional grounds." *Lowenfield*, 484 U.S. at 239 n.2 (citation omitted); *Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam). The same is true of the Court's decision in *United States v. Gypsum Co.*, 438 U.S. 422 (1978), another case upon which Humphreys relies. Consequently, both *Jenkins* and *Gypsum Co.* "are off the table as far as § 2254(d) is concerned." *Sears*, 73 F.4th at 1304 (quoting *Packer*, 537 U.S at 10).

In sum, the Supreme Court of Georgia accurately portrayed the facts and examined the *Allen* charge in its entirety, determining that the trial court did not coerce the jury to return a death sentence. Under AEDPA, we must defer to the Supreme Court of Georgia's decision because it did not unreasonably determine the facts in light of the evidence presented, and its finding of no coercion was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.

D. Ineffective Assistance of Trial Counsel

In his final claim, Humphreys challenges the state habeas court's finding that his trial counsel was not ineffective in investigating and presenting mitigation evidence. In Humphreys's view, trial counsel's failure to conduct a thorough and accurate mitigation case caused them not to learn about years of childhood sexual abuse that Humphreys endured from his great-grandmother, the full extent of his mother's neglect and abuse, or his

lengthy family history of mental illness, abuse, and drug dependency. Humphreys also complains that the defense did not accept the diagnoses of their own mental-health clinician because someone on the defense team had already "chosen" another diagnosis for Humphreys—Asperger's Syndrome. Based on these claims, Humphreys contends trial counsel's representation of him fell below the prevailing professional norms. Had a jury had heard the undiscovered, unpresented evidence, Humphreys contends, "there is clearly a reasonable probability that the . . . jury . . . 'would have struck a different balance.'"

As we've noted, the state habeas court denied Humphreys's claims after holding an evidentiary hearing during which new counsel presented evidence in support of Humphreys's claims. The Supreme Court of Georgia denied a certificate of probable cause to appeal, and the district court denied relief on the claim. We apply AEDPA deference to the state habeas court's opinion. That requires us to deny Humphreys's petition on this ground.

First, the state habeas court discussed at length the qualifications of the defense team and, based on these details, it determined that Humphreys's trial counsel were death-penalty qualified and their experience supported a finding of effective assistance of counsel.

Next, the state habeas court described the investigation the defense team conducted and found it to be reasonable. The court noted that counsel interviewed Humphreys's family members, friends, co-workers, and teacher, where available. The defense team also spoke

with Humphreys, his father, stepmother, brother-in-law, paternal grandmother, aunt, uncle, and stepfather about Humphreys's mental-health history and questioned them about any physical, mental, or sexual abuse Humphreys suffered. During this investigation, neither Humphreys nor any of his family members indicated that he had been sexually abused.

Besides these steps, defense counsel reviewed Humphreys's prison records, criminal records, employment records, family records, financial records, legal records, medical records, social-services records, psychological records, and school records. And to prepare for the sentencing phase, defense counsel hired a licensed clinical social worker (Marti Loring, who met with Humphreys and diagnosed him with post-traumatic stress disorder ("PTSD") and Asperger's Syndrome), a prison adaptability expert (James Aiken), a neuropsychologist (Robert Schaffer, who diagnosed Humphreys with PTSD, Dissociative Disorder, and Asperger's Syndrome), a psychiatrist (Bhushan Agharkar, to render an opinion as to trauma and abuse),[11] a victim outreach specialist, and a trauma expert.

As for the investigation of childhood sexual abuse, at the evidentiary hearing, mitigation specialist Laura Switzer testified that she suspected Humphreys had been sexually abused. But during the defense team's interviews of witnesses (including Humphreys), no one reported

11. Dr. Agharkar disagreed with the diagnosis of Asperger's Syndrome, and defense counsel decided he would not testify since his evaluation did not support their sentencing-phase theory.

that he had been sexually abused. In fact, the defense team asked Humphreys directly about sexual abuse, but Humphreys denied any recollection of such abuse.

The state habeas court summarized defense counsel's presentation during the guilt-innocence phase as follows: (1) Humphreys's childhood was characterized by violence, trauma, and instability and that he was raised by a dysfunctional, abusive family; (2) Humphreys's parents divorced when he was two years old, and he lived with his mother for a while, during which he received a head injury that resulted in a concussion; (3) when Humphreys's father gained custody of him, violence and disruption occurred in the home; and (4) Humphreys was placed in special education because of behavioral problems. The state habeas court also noted that trial counsel advised the jury about Humphreys's mental-health issues, including about dissociative episodes that started when he was a teenager, and about his obsessive-compulsive behavior ("OCD"). Finally, the state habeas court acknowledged that trial counsel presented evidence that Humphreys was non-violent and non-confrontational.

As for the state habeas court's findings about counsel's performance during the penalty phase of the trial, it determined that trial counsel "made a reasonable presentation during the sentencing phase based on their strategy and the information discovered during their investigation." It recognized the strategy was to present evidence of Asperger's Syndrome as well as Humphreys's traumatic childhood to allow the jurors to have some empathy for him. The state habeas court pointed out that

defense counsel used the testimony of six lay witnesses and three experts to present the information to the jury.

The state habeas court summarized the testimony of each witness. As relevant here, the court pointed out that trial counsel presented the testimony of Humphreys's stepmother, Janie Swick, who conveyed the dynamics in the home, including that Humphreys's father was verbally and physically abusive to him. Swick explained that Humphreys's father "bullied" him and caused him to run away in fear. She recalled an incident in which Humphreys's father struck him in the arm with a broom, requiring Humphreys to go to the hospital. Swick also informed the jury that Humphreys did not have many friends growing up and had mental problems, and she said she regretted not getting psychological help for Humphreys.

Next, Humphreys's half-sister Julia testified to the abuse their father inflicted on them. Although the father disciplined all the children, Julia characterized the abuse he inflicted upon Humphreys as "very bad." Julia explained that her father used switches and belts to discipline the children. And she recalled an incident where their father challenged Humphreys to a fight. During that fight, their father repeatedly punched Humphreys in the head before he finally escaped.

Later, the state habeas court turned to the testimony of Humphreys's sister Dayna, who gave examples of their "rather difficult" early childhood. According to Dayna, their father was an unhappy man who was hard on them

and showed very little affection. He did not handle stress well and often became angry and violent. Dayna testified that their father physically abused her and Humphreys throughout their childhood, imposing whippings with a large belt or stick. Their father beat Humphreys with his fist.

The state habeas court further recounted the testimony of the two expert witnesses trial counsel presented to the jury during the mitigation phase. Dr. Loring, who was qualified as an expert in social work and trauma, testified that she met with Humphreys on four occasions for approximately three hours each time. Dr. Loring also interviewed sixteen individuals to get their perceptions, experiences, and observations of Humphreys. To complete her analysis of Humphreys, Dr. Loring reviewed extensive records including police records, school records, jail records, divorce records, work records, and hospital records.

Dr. Loring testified to the jury that Humphreys's childhood was marked by abuse; he spent his early childhood living in a home where drugs were bought and sold. As evidence of the "extensive physical abuse," Dr. Loring testified that the Department of Family and Children Services discovered cigarette burns on Humphreys when he was a child. At age two, Humphreys's entire body was bruised following a beating by his father, who admitted that he had "lost it" and beaten him. At age three, he was taken to the hospital for a fractured skull. At age four, his shoulder was dislocated as the result of a violent shaking by his father. Dr. Loring also spoke of the

incident where Humphreys's father hit Humphreys with a broom handle. After the incident, his father threatened to kill his stepmother if she tried to take Humphreys to the hospital for treatment. Besides these incidents, Dr. Loring recounted that Humphreys's father had severely beaten by him because he got into a car accident and, on another occasion, his father sat on his private parts, holding Humphreys's hands above his head and continually beating him in the head and the chest.

And the state habeas court noted that Dr. Loring explained to the jury that Humphreys's father flew "into a rage as a matter of pattern, not just one time or two, and he would whip or beat [Humphreys]." Dr. Loring described the abuse as "not only explosive physically, where [Humphreys] would get slapped and punched, thrown across the room, indeed, but there was a very remarkable emotional component to the abuse that [his father] committed upon [Humphreys and his sister]." In Dr. Loring's view, this was "ritualistic emotional abuse," meaning a series of steps led up to the physical abuse.

The state habeas court also considered Dr. Loring's testimony that, growing up, Humphreys was in special education and exhibited "odd classroom behavior, inappropriate behavior, that was marked by a lack of focus, being hyper, [and] a lack of concentration." She said these symptoms were often seen in children who are traumatized and abused. Dr. Loring also told the jury that as a result of his abusive upbringing, Humphreys tended to wander off, even to different states, evidencing Humphreys's dissociation.

Dr. Loring advised the jury that she had diagnosed Humphreys with PTSD and Asperger's Syndrome. In Dr. Loring's view, Humphreys suffered from PTSD because of the trauma he experienced during his childhood and teenage years. Regarding her diagnosis of Asperger's Syndrome, Dr. Loring educated the jury that individuals with Asperger's Syndrome were "very impaired in their ability to be close or intimate with another person" and severely suffered from a "sustained impairment in social interaction." Dr. Loring provided several indicia to support her diagnosis of Humphreys. She opined that he had "a real impaired ability to relate to people and to empathize with them," and his life experiences caused him to be "much more involved with objects or cleaning or a kind of ritual of what you do at what moment in time."

When the state habeas court finished reviewing Dr. Loring's testimony to the jury, it then went through Dr. Robert Shaffer's testimony. Dr. Schaffer, a clinical psychologist, interviewed six individuals about their observations of Humphreys. Dr. Shaffer also spoke with Dr. Loring about the social history she prepared on Humphreys and reviewed police reports, hospital records, school records, and prison records. Based upon his evaluation, Dr. Shaffer opined that Humphreys suffered from PTSD, Dissociative Disorder, and Asperger's Syndrome.

In support of his diagnosis of Asperger's Syndrome, Dr. Shaffer testified that Humphreys had very unusual cleaning routines, and he explained that Humphreys became uncomfortable and agitated if his routine was

disturbed. Dr. Shaffer also testified that Humphreys met the criteria for Asperger's in that he had an "extreme interest" in reading science fiction and constantly talked about these books for hours with different people as if they really could be true. Additionally, Dr. Shaffer recounted Humphrey's lack of the normal emotional give and take.

As for Dissociative Disorder, Dr. Shaffer said that involved an individual who "split[s] off from their normal state of awareness" and experiences "periods of productive and active behaviors, and then later, ha[s] no recollection of that." Dr. Shaffer opined to the jury that Humphreys suffered from Dissociative Disorder as a result of the violence in his home, so Humphreys was unaware of the "normal judgment and thoughts and memories that he has to bring to bear on a situation."

Besides this testimony, Dr. Shaffer told the jury that Humphreys met all the diagnostic criteria for PTSD. In Dr. Shaffer's view, there was "pretty strong evidence that there was significant abuse before [Humphreys's] age of earliest memory." And he also said that the second category of diagnostics for PTSD—avoidance of the memories—also applied to Humphreys, as there was "clear evidence of a great deal of denial" by Humphreys. Finally, Dr. Shaffer testified that Humphreys's denial was his attempt to "avoid re-experiencing the problems and horrors" that occurred in his life.

The state habeas court then recounted the evidence presented during the habeas proceedings: (1) the testimony of Humphreys's step-siblings, who testified that

Humphreys's mother verbally and physically abused them, (2) Humphreys's ROTC teacher, who testified that he was in special education classes for a behavioral disorder, (3) Humphreys's childhood neighbor, who testified that Humphreys's father yelled at him often and spanked him in the yard after he soiled his underwear, and (4) two expert witnesses.

The most relevant testimony here was that of the two expert witnesses, Dr. Julie Rand Dorney and Dr. Victoria Reynolds. The state habeas court recounted that testimony.

It noted that Dr. Dorney, an expert in forensic psychiatry, testified she performed an examination of Humphreys over the course of two days, and diagnosed him with obsessive-compulsive disorder and depressive disorder, NOS. She also found that he had many symptoms of both PTSD and bipolar disorder, but she concluded he did not meet all the criteria for either diagnosis. Dr. Dorney testified that, in her second meeting with Humphreys, he told her that he had been sexually abused by his great-grandmother.

As for Dr. Reynolds, an expert in trauma and its impact on victims, she testified about much of the evidence presented in the sentencing proceedings. She acknowledged that when she spoke to Humphreys about his great-grandmother, he did not reveal the sexual abuse. Still, Dr. Reynolds suspected Humphreys had been sexually abused based on his level of dissociativeness, his level of compartmentalization, and his sexual activity.

Dr. Reynolds also spoke about the trauma Humphreys endured growing up, including a skull fracture, the instability in the home, and physical abuse.

After these detailed inventories of defense counsel's presentation of evidence at the mitigation stage and habeas counsel's presentation of evidence at the habeas hearing, the state habeas court concluded that trial counsel performed adequately. And "particularly in light of trial counsel's thorough investigation and strategic decisions[,]" the state habeas court determined that Humphreys was not prejudiced by counsel's failure to discover and present the additional mitigation evidence Humphreys said should have been presented. As the state habeas court emphasized, trial counsel was not required to present all mitigation evidence and "[c]onsidering the realities of the courtroom, more is not always better. . . . [G]ood advocacy requires 'winnowing out' some arguments, witnesses, evidence, and so on, to stress others."

Plus, the state habeas court observed that the evidence submitted during the habeas proceedings was largely cumulative of the evidence presented at trial. Indeed, the court concluded, the only truly "new evidence" concerned Humphreys's past sexual abuse, although neither Humphreys nor anyone else had disclosed the abuse prior to the habeas proceedings. Still, the state habeas court noted, Humphreys's defense team remained suspicious and investigated further. The court explained that it "weigh[ed] heavily the information provided by the defendant" in evaluating the reasonableness of counsel's investigation.

Here, Humphreys did not provide the court with any evidence of sexual abuse that would have been available to trial counsel. The only evidence was his self-report to Dr. Dorney, *after* the sentencing proceedings. Given these circumstances, the state habeas court explained that trial counsel "does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." Accordingly, the state habeas court concluded trial counsel's performance was not deficient "for not presenting evidence that [Humphreys] withheld from them."

And in any case, the state habeas court determined that Humphreys failed to show any prejudice since the additional evidence presented in the habeas proceedings would not have created a reasonable probability of a different outcome. As the court explained, a comparison of the trial record with the habeas record "shows the majority of the evidence presented in habeas reiterated the testimony presented at trial."

As for the expert testimony, the state habeas court recognized that the habeas experts diagnosed Humphreys with OCD, but the trial experts diagnosed him with PTSD, dissociative disorder, and Asperger's Syndrome. But the court reasoned that the diagnoses were based on the same behaviors and symptoms. And while OCD could be one possible diagnosis, it was not the only reasonable diagnosis that could be made from the information.

With respect to the new evidence of past sexual abuse, even assuming the investigation was deficient (as we've

noted, the court found it wasn't because the defense team expressly asked about sexual abuse and Humphreys and his relatives and friends did not disclose it), Humphreys still did not demonstrate a reasonable probability that the outcome would have been different if the evidence had been presented at trial, given the weight of the mitigation evidence that counsel did present.

In sum, the state habeas court found that Humphreys failed to show deficient performance *or* the required resulting prejudice. Consequently, the state habeas court denied the ineffective-assistance-of-trial-counsel claims.

As we have already noted, to succeed on an ineffective-assistance-of-counsel claim, the petitioner must show both that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. And because *Strickland*'s standard itself requires deference to counsel's performance, and AEDPA, by its terms, requires deference to state-court decisions, our review of state courts' resolution of the deficient-performance prong of *Strickland*'s ineffective-assistance standard requires double deference. *See Cullen v. Pinholster*, 563 U.S. 170, 202 (2011).

After careful consideration, and applying AEDPA deference, we conclude that the state habeas court reasonably determined that Humphreys failed to show unconstitutionally deficient performance on the part of his trial counsel. In answering this question, we reweigh the aggravating evidence against the totality of the available mitigating evidence. *See Ferrell v. Hall*, 640 F.3d

1199, 1234 (11th Cir. 2011). In doing so, we find nothing unreasonable about the state court's determination that counsel were not deficient in not uncovering Humphreys's sexual abuse. Here, members of the defense team interviewed Humphreys and others, asking specifically whether Humphreys had been sexually abused. No one responded that he had. Counsel also reviewed medical, school, and other records, but they, too, failed to reveal Humphreys's sexual abuse. A defense attorney preparing for sentencing in a capital trial is not required "to scour the globe on the off chance something will turn up." *Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1250 (11th Cir. 2015) (quoting *Rompilla*, 545 U.S. at 382-383).

As for the additional evidence of Humphreys's non-sexual abuse and his mental conditions, counsel presented substantial mitigation evidence, and the new habeas evidence was mostly cumulative of what was presented during the trial and sentencing proceedings. The jury learned of the severe and frequent physical and mental abuse, as well as neglect, that Humphreys suffered as a child. It also learned of Humphreys's mental-health issues—his dissociative episodes, his OCD behaviors, and his other odd behavior.

The state habeas court reasonably concluded that any additional evidence about these issues would be cumulative. The "mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." *Chandler v. United States*, 218 F.3d 1305, 1316 n.20 (11th Cir. 2000) (citation omitted).

Finally, as for Humphreys's suggestion that his trial counsel conducted a last-minute mental-health investigation and reached an unreasonable conclusion that he suffered from Asperger's Syndrome, we cannot conclude that the state habeas court unreasonably rejected that claim, either. Dr. Shaffer conducted his first evaluation of Humphreys in May 2005, but at that time, he was instructed not to prepare a written report. Dr. Shaffer later conducted a second evaluation of Humphreys in August of 2007 after reviewing additional records, reviewing case information, and interviewing witnesses. After the second evaluation, Dr. Shaffer diagnosed Humphreys with PTSD, Dissociative Disorder, and Asperger's Syndrome. This timeline refutes the idea that defense counsel waited until just prior to trial to develop a mitigation strategy and hire defense experts.

Humphreys focuses on the opinion of another doctor who agreed with Dr. Shaffer's findings that Humphreys exhibited symptoms of PTSD but disagreed with the Asperger's Syndrome diagnosis. The defense was not required to present the testimony of the second doctor; it made a strategic decision not to present it. And the state habeas court was not unreasonable in concluding that decision was within competent counsel's discretion. *See Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1302 (11th Cir. 2019) ("It is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence."). After all, other evidence supports defense counsel's strategy. Along with Dr. Shaffer, Dr. Loring opined that Humphreys suffered

from PTSD and Asperger's Syndrome. Consequently, two doctors' findings supported the defense team's decision. And both Dr. Loring and Dr. Shaffer testified as to how they came up with their diagnoses.

For these reasons, the state habeas court's determination that defense counsel was not ineffective is entitled to deference. We will not disturb that finding on the grounds advanced by Humphreys.

Though this conclusion requires us to deny Humphreys's petition even without considering the state habeas court's prejudice determination, we nonetheless find that the court's prejudice determination was likewise not unreasonable. As the state habeas court explained, with the exception of the sexual-assault evidence, the remainder of the evidence was largely cumulative of the hefty mitigation evidence trial counsel presented to the jury. And we cannot say the habeas court unreasonably concluded that the addition of the sexual-assault evidence would have made an overall difference in the impact of the mitigation case, given the strong evidence of abuse and mental-health issues counsel presented. So for this reason, too, we reject Humphreys's claim of ineffective assistance.

IV. CONCLUSION

Our review of the record compels the conclusion that Humphreys is not entitled to relief on any of the claims he presented in his petition for writ of habeas corpus. We therefore affirm the district court's denial of Humphreys's habeas petition.

AFFIRMED.

Appendix A

ROSENBAUM, Circuit Judge, Concurring:

I concur in the panel opinion because I think that a combination of the no-impeachment rule and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") require it. But I am deeply concerned about what transpired during jury deliberations here.

Linda Chancey swore under oath during voir dire that her attacker "actually didn't do [her] any physical bodily harm" because she "escape[d] before he actually physically entered the dwelling." That was false. Chancey told jurors that she "was naked in her bed and a man broke in and attacked her" in her bed. And after trial, Chancey told Humphreys's investigators that "a strange man came through the window of her apartment, robbed her, and tried to rape her." These were important facts, and had Humphreys's lawyers known of them, they could have exercised the remaining peremptory strike to remove Chancey from the jury. But they didn't know about them. And they didn't know because Chancey lied during voir dire.

Even worse, Susan Barber testified that on "day one, [Chancey] had her mind made up: early in the trial—before the end of the first phase—she said something along the lines of he's guilty and he deserves to die." Indeed, according to Barber, Chancey told the other jurors that she "would only vote for death."

So even when the other eleven jurors, after deliberating many hours, voted for life without parole, Chancey would

not even consider it. Of course, it was Chancey's right to vote for death if she thought the facts warranted it. But Humphreys had the right to expect that (a) Chancey had told the truth during voir dire, and (b) she would at least honestly consider imposing a sentence of life without parole.

Worse still, Chancey incorrectly told the other jurors that "they had to reach a unanimous decision or [Humphreys] would be paroled." That, of course, was wrong. In fact, had the jurors failed to reach a unanimous decision, Humphreys would have been sentenced to life without parole under Georgia law. But Chancey's incorrect statement, combined with the court's repeated instructions to the jury to continue deliberating, caused Barber to believe incorrectly that if the jury didn't return a death verdict, Humphreys would be sentenced to life imprisonment with the possibility of parole or that he could "walk."

Based on Barber's testimony about what occurred during jury deliberations, two things seem clear: (1) Chancey was dishonest during voir dire, and her undisclosed bias likely made her unable to consider any verdict other than death, and (2) had the jury not incorrectly believed, as a result of the trial court's instructions and Chancey's statements, that Humphreys would have been released or been sentenced to life with the possibility of parole if the jury couldn't return a verdict, the jury wouldn't have returned a verdict, and Humphreys would have been sentenced to life imprisonment without the possibility of parole. Put simply, I do not doubt that

the errors here "actually prejudice[d]" Humphreys. *See Brecht v Abrahamson*, 507 U.S. 619, 637 (1993). When an error "actually prejudices" a defendant and that error is the difference between life and death, in my view, we should be able to correct that error.

But we can't here. The problem is that proving prejudice requires us to consider the jurors' testimony about what occurred during deliberations. Yet Georgia law and the no-impeachment rule prohibit us from doing just that.

True, the Supreme Court has identified an exception to the no-impeachment rule. But the Court has never recognized an exception under the specific circumstances here (and when the state courts considered Humphreys's case, the Supreme Court had yet to apply the limited exception in any case).

And while the Court has limited any exception to the "gravest and most important of cases"—a category into which death-penalty cases would seem to fall—AEDPA's standard of review cuts off that avenue for granting the petition. As I've noted, the Supreme Court has applied the exception in only a single case ever—and the reason there was the juror's racial bias, which was not the case here. And though a Supreme Court case need not be directly on point to make it applicable, here, the Supreme Court has otherwise consistently refused to apply the exception and has cautioned time and again against construing the exception in any way but extremely narrowly.

Given this precedent, if we faithfully apply AEDPA's standard of review, we cannot find that the state court's decision was "contrary to" federal law. 28 U.S.C. § 2254(d)(1). That's so because the state court's decision does not "contradict[] the United States Supreme Court on a settled question of law or hold[] differently than did that Court on a set of materially indistinguishable facts." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1325 (11th Cir. 2013) (citation omitted).

So I must reluctantly concur in today's opinion. But I don't think that makes it right.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED SEPTEMBER 16, 2020

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

CIVIL ACTION NO. 1 :18-CV-2534-LMM

STACEY IAN HUMPHREYS,

Petitioner,

v.

ERIC SELLERS,

Respondent.

Filed September 16, 2020

DEATH PENALTY
HABEAS CORPUS
28 U.S.C. § 2254

ORDER

Petitioner Stacey Ian Humphreys, an inmate under a sentence of death at the Georgia Diagnostic and Classification Prison in Jackson, Georgia, has filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus. The parties have filed their final briefs, and the matter is now before the Court for a merits determination of Petitioner's claims for relief.

Appendix B

I. Background and Factual Summary

On September 25, 2006, a Cobb County Superior Court jury[1] found Petitioner guilty of two counts of malice murder, two counts of felony murder, two counts of aggravated assault, two counts of kidnapping with bodily injury, and two counts of armed robbery.[2] On September 30, 2006, after a sentencing hearing, the same jury found the existence of several statutory aggravating circumstances and recommended that Petitioner be executed. The trial court imposed death sentences for each murder along with sentences of incarceration for the remaining crimes.

After the trial court denied Petitioner's motion for a new trial on February 19, 2009, [Doc. 33-12 at 36-49], Petitioner appealed. The Georgia Supreme Court affirmed his convictions and sentences on March 15, 2010, and denied reconsideration on April 9, 2010. *Humphreys v. State*, 694 S.E.2d 316 (Ga. 2010).[3]

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1. Because of pretrial publicity, the trial was held in Brunswick, Georgia, and the jurors were from that area.

2. Petitioner pled guilty the next day to one count of possession of a firearm by a convicted felon. The felony murder convictions merged into the malice murder convictions by operation of law.

3. The Georgia Supreme Court did, however, conclude that the jury's finding of the O.C.G.A. § 17-10-35(c)(10) aggravated circumstance—that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another,"—was not supported by the evidence. *Humphreys*, 694 S.E.2d at 335.

Petitioner next filed a petition for a writ of habeas corpus in Butts County Superior Court. After holding an evidentiary hearing, the state court denied habeas corpus relief on March 10, 2016. [Doc. 46-29]. The Georgia Supreme Court denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief on August 28, 2017. The United States Supreme Court then denied Petitioner's petition for a writ of certiorari on April 16, 2018. *Humphreys v. Sellers*, 138 S. Ct. 1548 (2018). This action followed.

In affirming Petitioner's convictions and sentences, the Georgia Supreme Court described the evidence presented at Petitioner's trial as follows:

> The evidence, construed in the light most favorable to the jury's verdicts, showed the following. At approximately 12:40 p.m. on November 3, 2003, [Petitioner], a convicted felon who was still on parole, entered a home construction company's sales office located in a model home for a new subdivision in Cobb County. Cindy Williams and Lori Brown were employed there as real estate agents. Finding Ms. Williams alone in the office, [Petitioner] used a stolen handgun to force her to undress

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That did not require a reversal of the death sentences because the jury's findings with respect to the other statutory aggravating circumstances were supported by the evidence. *Id.* at 336; see *also infra* n.23 (noting that the Georgia Supreme Court has disapproved of the opinion in Petitioner's appeal on a basis that does not affect the outcome of the appeal).

and to reveal the personal identification number (PIN) for her automated teller machine (ATM) card. After calling Ms. Williams's bank to learn the amount of her current balance, [Petitioner] tied her underwear so tightly around her neck that, when her body was discovered, her neck bore a prominent ligature mark and her tongue was protruding from her mouth, which had turned purple. While choking Ms. Williams, [Petitioner] forced her to get down on her hands and knees and to move into Ms. Brown's office and behind Ms. Brown's desk. [Petitioner] placed his handgun at Ms. Williams back and positioned a bag of balloons between the gun and her body to muffle the sound of gunshots. He then fired a shot into her back that went through her lung and heart, fired a second shot through her head, and left her face-down on her hands and knees under the desk.

Ms. Brown entered the office during or shortly after [Petitioner]'s attack on Ms. Williams, and he attacked her, too. Ms. Brown suffered a hemorrhage in her throat that was consistent with her having been choked in a headlock-type grip or having been struck in the throat. [Petitioner] also forced Ms. Brown to undress and to reveal her PIN, called her bank to obtain her balance, and made her kneel with her head facing the floor. Then, while standing over Ms. Brown, [Petitioner] fired one gunshot through her head, this time using both a bag of balloons

and Ms. Brown's folded blouse to muffle the sound. He dragged her body to her desk, took both victims' driver's licenses and ATM and credit cards, and left the scene at approximately 1:30 p.m. Neither victim sustained any defensive wounds.

When the builder, whose office was located in the model home's basement, heard the door chime of the security system indicating that someone had exited the sales office, he went to the sales office to meet with the agents. There he discovered Ms. Brown's body and called 911. The responding police officer discovered Ms. Williams's body.

After interviewing the builder and canvassing the neighborhood, the police released to the media descriptions of the suspect and a Dodge Durango truck seen at the sales office near the time of the crimes. In response, someone at the job site where [Petitioner] worked called to advise that [Petitioner] and his vehicle matched those descriptions and that [Petitioner] did not report to work on the day of the crimes. The police began to investigate [Petitioner] and made arrangements through his parole officer to meet with him on the morning of November 7, 2003. [Petitioner] skipped the meeting, however, and eluded police officers who had him under surveillance.

> [Petitioner] was apprehended in Wisconsin the following day. Police there recovered from the console of his rental vehicle a Ruger 9—millimeter pistol, which was determined to be the murder weapon. Swabbings from that gun revealed blood containing Ms. Williams's DNA. A stain on the driver-side floormat of [Petitioner]'s Durango was determined to be blood containing Ms. Brown's DNA.
>
> After the murders, the victims' ATM cards were used to withdraw over $3,000 from their accounts. Two days after the murders, [Petitioner] deposited $1,000 into his account, and he had approximately $800 in cash in his possession when he was arrested. [Petitioner] claimed in a statement to the police that he did not remember his actions at the time of the crimes. However, when asked why he fled, he said: "I know I did it. I know it just as well as I know my own name." He also told the police that he had recently taken out some high-interest "payday" loans and that he "got over [his] head with that stinking truck."

Humphreys, 694 S.E.2d at 322-23.

II. Standard of Review Under 28 U.S.C. § 2254

A. Habeas Corpus Standard

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a person held

in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This authority is significantly restrained under § 2254(d). Under § 2254(d), a habeas corpus application

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

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

> that review under § 2254(d)(1) is limited to the record that was before the state court

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

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

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). To determine whether a particular state court decision is "contrary to" then-established law, this Court considers whether that decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Id.* at 405, 406. If the state court decision "identifies the correct governing legal principle" this Court determines whether the decision "unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *Id.* at 410. In other words, it matters not that the

state court's application of clearly established federal law was incorrect so long as that misapplication was objectively reasonable. *Id.* ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief contrary to a state court holding is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 102 (internal quotation marks omitted); see *Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1294 (11th Cir. 2015). Accordingly, Petitioner's burden in this matter is to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

B. Exhaustion and Procedural Default

The federal doctrine of procedural default bars a district court from reviewing a petitioner's claim when that claim has been or would be rejected in state court on a state procedural ground. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). Under § 2254, a procedural default can arise in two ways. Before a § 2254 habeas corpus petitioner may obtain federal review of his claims, he must first exhaust his federal claims by raising them in the appropriate state court, giving the state courts an opportunity to decide the merits of the constitutional issue raised. See 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). To exhaust a claim fully, a petitioner must "invok[e] one complete round of the State's established appellate review process." *O'Sullivan*

v. Boerckel, 526 U.S. 838, 845 (1999). In Georgia, a complete round of appellate review includes review of the claim by the Georgia Supreme Court. *Pope v. Rich*, 358 F.3d 852, 853 (11th Cir. 2004). This Court may not review an unexhausted claim and, if exhaustion is possible, must dismiss such claims without prejudice to allow the petitioner an opportunity to return to state court to fully exhaust his claims. *Rose v. Lundy*, 455 U.S. 509, 515 (1982).

However, where exhaustion is not possible—i.e., if presentation of the claims in state court would be barred by state procedural rules—such unexhausted claims are procedurally defaulted in a federal § 2254 proceeding. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). "[I]f the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred[,] . . . there is a procedural default for purposes of federal habeas." *Coleman*, 501 U.S. at 735 n.1 (citations omitted); see *Henderson v. Campbell*, 353 F.3d 880, 891 (11th Cir. 2003). Georgia law forbids successive state habeas petitions that raise claims that could have been raised in the first habeas petition. O.C.G.A. § 9-14-51. Accordingly, because Petitioner has already sought habeas corpus relief in state court, claims that Petitioner has failed to raise before the Georgia Supreme Court are unexhausted and procedurally defaulted in this proceeding. *Ogle v. Johnson*, 488 F.3d 1364, 1370 (11th Cir. 2007).

In addition, a § 2254 claim may be procedurally defaulted before this Court if a state court has rejected

the claim on state procedural grounds. *Coleman*, 501 U.S. at 729. "Federal review of a petitioner's claim is barred by the procedural-default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and that bar provides an adequate and independent state ground for denying relief." *Atkins v. Singletary*, 965 F.2d 952, 955 (11th Cir. 1992); see *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995).

A habeas petitioner can overcome a procedural default by showing cause for the default and resulting prejudice, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or establishing a "fundamental miscarriage of justice," which requires a colorable showing of actual innocence, *Schlup v. Delo*, 513 U.S. 298, 324-27 (1995).[4] "Cause" for a procedural default must ordinarily turn on whether the petitioner can show that some objective factor external to the defense impeded efforts to comply with the state's procedural rules. *Murray*, 477 U.S. at 488. In certain circumstances, for example, trial or appellate counsel's ineffectiveness in failing to preserve a claim in state court may constitute sufficient cause to overcome procedural default of a claim. *Murray*, 477 U.S. at 488-89. To establish "prejudice," a petitioner must show that the errors worked to his "actual and substantial disadvantage, infecting his entire [proceeding] with error of constitutional dimensions." *Murray*, 477 U.S. at 494 (internal quotations and emphasis omitted).

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4. Petitioner has not raised a claim of actual innocence to overcome the default of a claim.

Appendix B

III. Discussion of Petitioner's Claims for Relief

A. Ground I: Juror Misconduct

1. Background

Linda Chancey was a member of Petitioner's jury venire. On her juror questionnaire, Chancey stated that she had been the victim of an armed robbery and attempted rape by a convicted murderer and rapist who had escaped a mental hospital. [Doc. 42-7 at 13916]. During her voir dire testimony, the prosecutor questioned Chancey about the crime, and she testified that the perpetrator "actually didn't do me any physical harm. I was able to escape before he ever actually physically entered the dwelling, so it was preempted." [Doc. 35-7 at 273]. She further stated that her experience would not keep her from sitting as a fair juror and that she could listen to and follow the law. [Id. at 274].[5] Although Petitioner's trial counsel questioned her during voir dire, he did not ask Chancey any followup questions about the crime. Despite the fact that some members of Petitioner's defense team felt that Chancey would not be a good juror, trial counsel did not use a preemptive

5. Chancey also testified that she had not formed or expressed an opinion in regard to Petitioner's guilt or innocence, that her mind was perfectly impartial between the State and Petitioner, that she had no prejudice or bias either for or against Petitioner, [Doc. 35-7 at 49-50], and that she could equally consider all of the available sentencing options based on the law and the facts of the case, [id. at 53-54].

strike to remove her from the jury,[6] and she served on Petitioner's jury.

Petitioner argues that Chancey's statements and actions during sentencing phase deliberations amounted to misconduct and demonstrated her bias against Petitioner. According to the affidavits of other jurors, Chancey was steadfast in her opinion that Petitioner should be sentenced to death, she refused to participate in deliberations, and she became verbally abusive toward the jurors with whom she disagreed. At one point during the guilt phase of the trial, and before deliberations, a fellow juror claimed that Chancey said that Petitioner is "guilty and he deserves to die." [Doc. 42-8 at 58-59]. She further insisted that she would, under no circumstances, change her vote in favor of the death penalty and effectively used personal insults and shrill warnings about the dangers of not sentencing Petitioner to death to browbeat the holdout jurors into agreeing to a death sentence. According to Petitioner, as part of her verbal abuse, Chancey told the holdout jurors that, if they did not unanimously vote in favor of the death penalty, Petitioner would eventually be released on parole, and he would come to kill the holdouts.

Petitioner also alleges that Chancey lied during voir dire when she testified regarding the attempted robbery and rape that she suffered in that she was able to escape before the assailant entered her home. In later statements (that were not under oath), Petitioner claims

6. Petitioner's claim that trial counsel was ineffective for failing to strike Chancey is discussed below.

that Chancey changed her story. During deliberations, she purportedly told the other jurors that she was naked in her bed when her assailant broke into her apartment and attacked her. She was able to escape her apartment, and a neighbor assisted her. [Doc. 42-8 at 14030-31]. After the trial, investigators for Petitioner visited Chancey for an interview. The investigators assert that Chancey told them that "a strange man came in through the window of her apartment, robbed her, and tried to rape her." [Doc. 33-12 at 5520]. Petitioner claims that Chancey likewise lied during voir dire when she stated that she would consider the full range of sentencing options because it was clear that she was bent on sentencing Petitioner to death and would not consider a life sentence.

Petitioner also contends that Chancey altered a note sent to the trial judge by the jury foreperson and that Chancey's alterations were an attempt to mislead the trial court regarding the fact that the jury was deadlocked. According to Petitioner, Chancey's behavior deprived him of due process and a fair trial.

2. Discussion

a. Procedural Default

The state habeas corpus court concluded that Petitioner's claims regarding Chancey's actions were procedurally barred because Petitioner failed to raise them in his a motion for new trial or on direct appeal. [Doc. 46-29 at 7-8, 10]. As discussed above, because the state court concluded that the claim was procedurally defaulted

before that court, the claim is likewise procedurally defaulted in this proceeding.

Petitioner contends that he can demonstrate cause for the default because his motion for a new trial/appellate counsel was ineffective for failing to raise his claim regarding Chancey earlier. However, as is discussed below, Petitioner has failed to demonstrate that his counsel was ineffective, and he thus cannot demonstrate cause for his default. This Court thus agrees with Respondent that this claim is procedurally defaulted and must be denied.

b. Merits Discussion

This Court additionally concludes that Petitioner's claims regarding Chancey fail on their merits. In concluding that Petitioner was not entitled to relief with respect to his claim that appellate counsel was ineffective for failing to raise a claim regarding Chancey' s actions in Petitioner's motion for a new trial and on appeal, the state habeas corpus court, in the following discussion, concluded that Petitioner had failed to demonstrate prejudice by showing that the underlying claim regarding Chancey had no merit:

> Petitioner states that Ms. Chancey was "settled on a death sentence from the outset;" however, as discussed above, Ms. Chancey repeatedly affirmed that she was open to a life sentence. Petitioner argues that Ms. Chancey was not qualified to serve on Petitioner's jury because she: prejudged Petitioner's guilt and what the appropriate sentence should be; was only

willing to only consider a death sentence; and, failed to reveal relevant details about her own experience as a victim of a crime, which allegedly biased her against Petitioner. Petitioner claims that there is a reasonable probability that the jury would have returned a unanimous sentence of life without parole if "an unbiased, qualified juror" had been seated in Ms. Chancey's place.

In support of these allegations, Petitioner presented the testimony of two jurors from Petitioner's trial, Susan Barber and Tara Newsome. O.C.G.A. §§ 9-10-9 and 17-9-41 provide that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict." This statutory prohibition is deeply rooted in Georgia law and serves important public policy considerations. *See*, *e.g.*, *Oliver v.State*, 265 Ga. 653, 654(3) (1995); *Bowden v. State*, 126 Ga. 578 (1906) (holding "[a]s a matter of public policy, a juror cannot be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow-jurors, or by showing his own misconduct or disqualification from any cause"). Moreover, the Supreme Court of Georgia has explicitly applied this statutory prohibition against juror impeachment of the verdict to death penalty cases. *See*, *e.g.*, *Spencer v. State*, 260 Ga. 640, 643(3) (1990); *Hall v. State*, 259 Ga. 412, 414(3) (1989). Exceptions are made to this rule in cases where "extrajudicial and prejudicial

information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." *Spencer v. State*, 260 Ga. 640, 643 (1990) (citing *Hall v. State*, 259 Ga. 412(3) (1989)). However, the affidavits in this case do not fall within any exception to O.C.G.A. § 17-9-41 and are therefore, inadmissible.

Furthermore, even if this Court were to consider the juror testimony presented during these proceedings, Petitioner has still failed to show prejudice. Petitioner alleges that Ms. Chancey "harassed, intimidated, and bullied" other jurors who disagreed with her, which constituted misconduct. Petitioner argues that "[o]ver the course of three days of deliberations, [Ms. Chancey] adamantly voted for death, with her behavior becoming increasingly hostile. She segregated herself from the other jurors, called them names, and often refused to engage in the deliberations." Petitioner's allegations of pressuring behaviors indicate the "normal dynamic of jury deliberations, with the intense pressure often required to reach a unanimous decision." *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990). *See also Sears v. State*, 270 Ga. 834, 839 (1999) (Testimony by juror that the other jurors yelled at her, insulted her character, and made her change her mind because she was "ostracized" indicated that she finally voted in favor of the death penalty because she felt pressure "only as the result

of the normal dynamic of jury deliberations."). Furthermore, the jurors were polled after the verdict was read and all stated that they were not pressured during deliberations as to the penalty.

Petitioner also alleges that Ms. Chancey changed the wording of a note to the court "which had the effect of misleading the court into thinking that the jury was merely struggling as part of the normal course of deliberations, when in fact deliberations had devolved into a tension-filled impasse." Ms. Barber, who served as the foreperson of the jury in Petitioner's trial, testified that the jury collectively drafted a note to the judge asking for direction because they could not agree on a unanimous—decision for sentencing. The note that the court received read:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. *Currently*, we agreed that life imprisonment with parole is not an acceptable option, we are *currently* unable to form a unanimous decision on either death or life imprisonment without parole as a sentence. Please advise.[7]

7. ' Petitioner contends that it was Chancey who added "currently" in two places on the original note that Barber, the foreperson, had drafted.

In her affidavit, Ms. Barber stated that after drafting the note, "[o]ne of the other jurors added the word 'currently' and then [Ms. Barber] re-wrote the note and sent it to the judge." Additionally, Ms. Barber testified at the evidentiary hearing before this Court that the jury all agreed on the language used in the letter. Petitioner has failed to demonstrate any juror misconduct regarding the juror note.

Petitioner further argues that the use of the word "currently" was "decisive for both the trial court and the Supreme Court of Georgia on review, in determining that that [sic] it was not an abuse of discretion to instruct the jury to continue to deliberate." Although the Georgia Supreme Court did mention that "currently" was used twice in the note, the Court also noted that "after a lengthy trial, the jury had been deliberating for less than nine hours." *Humphreys*, 287 Ga. 63, 79. Furthermore, the Court noted that "[a]fter being instructed to continue, the jury deliberated for about three more hours. The jury foreperson then sent a note to the trial court requesting that the jurors be allowed to rehear Humphreys's taped statement to the detectives." *Id.* Therefore, the Court finds that Petitioner's claim fails.

Additionally, Petitioner's allegation that Ms. Chancey failed to reveal relevant details about her own experience as a victim of a crime is

> unpersuasive. The record reflects that Ms. Chancey, in fact, did reveal that she had been a victim of a crime. Furthermore, Ms. Chancey affirmed that she did not feel that this experience would keep her from sitting as a fair juror if she were chosen for the jury and that she would "absolutely" listen to and follow the law as given to her by the judge.

[Doc. 46-29 at 80-83 (citations to the internal record and footnotes omitted; alterations and emphasis in original)].

In denying Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief, the Georgia Supreme Court raised a rather fine distinction in the manner in which the lower court had analyzed Petitioner's claim of prejudice:

> We note that, in its analysis of [Petitioner] 's claim that appellate counsel were ineffective in omitting a juror misconduct claim in his motion for new trial and on direct appeal, the habeas court found [Petitioner]' s new juror affidavits and testimony, which he presented for the first time in the habeas court, inadmissible, and thereby disposed of both prongs of this claim by relying exclusively on the fact that on direct appeal this Court upheld the trial court's ruling that other juror affidavits that were submitted with [Petitioner]'s motion for new trial were inadmissible because they "d[id] not fall within any exception to [then controlling] O.C.G.A. § 17-9-41." *Humphreys v. State*, 287 Ga. 63, 81

(9) (b) (694 S.E.2d 316) (2010). However, because [Petitioner] submitted new and different juror affidavits and testimony in his habeas proceeding to support this claim, a proper analysis would address whether these new juror affidavits and testimony fell within any of the exceptions to former O.C.G.A. § 17-9-41, which was the law at the time of [Petitioner]'s motion for new trial and direct appeal. See *Williams v. Rudolph*, 298 Ga. 86, 89 (777 S.E.2d 472) (2015) (holding that a habeas court properly addresses a petitioner's ineffective assistance of appellate counsel claim "from a perspective and state of the law" at the time of the petitioner's direct appeal); *Butler v. State*, 270 Ga. 441, 444 (2) (511 S.E.2d 180) (1999) (stating that whether an affidavit falls within an exception to former O.C.G.A. § 17-9-41 must be determined by the circumstances of the case).

Nevertheless, in its evaluation of the prejudice prong of [Petitioner]' s claim that trial counsel were ineffective in not removing Juror Chancey from the jury, the habeas court carefully considered the new juror affidavits and testimony presented in the habeas proceeding before correctly determining that the juror affidavits and testimony "in this case" did not fall within any exception to former O.C.G.A. § 17-9-41. *See Glover v. State*, 274 Ga. 213, 215 (3) (552 S.E.2d 804) (2001). Our independent review of the habeas court's factual findings regarding the new juror affidavits and testimony that were

made in relation to [Petitioner]'s allegations of juror misconduct shows that those findings are supported by the record. Applying the law to those same factual findings leads us to conclude that [Petitioner] also failed to establish the prejudice prong of his claim that appellate counsel were ineffective, because, even had appellate counsel raised a juror misconduct claim in [Petitioner]'s motion for new trial and on direct appeal based on the new juror affidavits and testimony that he submitted in the habeas court, there is no reasonable probability that the outcome of those proceedings would have been different. *See Humphrey v. Morrow*, 289 Ga. 864, 866 (II) (717 S.E.2d 168) (2011) (explaining that this Court adopts the habeas court's findings of fact unless they are clearly erroneous but applies the facts to the law de novo in determining whether counsel performed deficiently and whether any deficiency was prejudicial). Because [Petitioner] failed to establish the prejudice prong of his claim that appellate counsel were ineffective by omitting a juror misconduct claim, the habeas court did not commit reversible error by denying him relief on this claim. *See Hall v. Lewis*, 286 Ga.767, 769-70 (II) (692 S.E.2d 580) (2010); *Lafara v. State*, 263 Ga. 438, 440 (3) (435 S.E.2d 600) (1993). Accordingly, we conclude that this issue is without arguable merit. *See* Supreme Court Rule 36.

[Doc. 47-8 at 1-2 (citations to the internal record omitted)].

In the passage above, the Georgia Supreme Court concluded that the habeas corpus court erred in determining that the juror affidavits were inadmissible before that court based on the Georgia Supreme Court's ruling in Petitioner's direct appeal that other, similar affidavits were inadmissible in relation to his claim regarding the trial court's *Allen* charge.[8] However, the Georgia Supreme Court concluded that in a different discussion, the state habeas corpus court properly analyzed the admissibility of the affidavits and further concluded that the habeas corpus court's prejudice analysis was sound and agreed that, if appellate counsel had raised his juror misconduct claims in Petitioner's motion for a new trial or on appeal, there is no reasonable probability that he would have prevailed with the claims. As the discussion below demonstrates, this Court has carefully reviewed Petitioner's jury misconduct claims as well as his arguments and concludes that the state court's determination that the claims are unavailing are entitled to deference under § 2254(d).

In this discussion of Petitioner's Ground I, this Court, unlike the Georgia court opinions quoted above, is not ruling on an ineffective assistance claim but is determining whether the substantive claims regarding Juror Chancey's purported misconduct entitle Petitioner to relief, and a component of that analysis is determining whether the evidence that Petitioner relies on in support of that claim is admissible for consideration by this Court.

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8. *See Allen v. United States*, 164 U.S. 492 (1896).

Appendix B

Pursuant to Rule 606(b) of the Federal Rules of Evidence:

> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> > (A) extraneous prejudicial information was improperly brought to the jury's attention;
> >
> > (B) an outside influence was improperly brought to bear on any juror; or
> >
> > (C) a mistake was made in entering the verdict on the verdict form.

Rule 606(b) clearly applies to § 2254 proceedings. Fed. R. Evid. 1101(e); *e.g.*, *Fields v. Brown*, 431 F.3d 1186, 1207 (9th Cir. 2005); *Williams v. Price*, 343 F.3d 223, 230 n.3 (3d Cir. 2003); *Gosier v. Welborn*, 175 F.3d 504, 511 (7th

Cir. 1999).[9] It is equally clear that Rule 606(b) would apply to prevent this Court's consideration of affidavits and/or testimony by individual jurors regarding discussion and actions that occurred during deliberations. *See United States v. Stansfield*, 101 F.3 d 909, 914 (3d Cir. 1996) ("Testimony concerning intimidation or harassment of one juror by another falls squarely within the core prohibition of the Rule.").

Under § 2254, the avenues of inquiry in determining whether jury misconduct occurred such that the petitioner is entitled to relief are limited to determining if either (1) prejudicial external information (e.g., from outside the courtroom and jury room) was improperly supplied to the jury, (2) prejudicial external influence or coercion was improperly brought to bear upon any juror, *Fullwood v. Lee*, 290 F.3d 663, 680 (4th Cir. 2002), or (3) where a juror makes a clear statement that indicates he or she relied on racial stereotypes or racial animus to convict. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). The exceptions to Rule 606(b) which appear in the text of the rule itself are designed to permit testimony regarding external information or influences, and in *Pena-Rodriguez*, the United States Supreme Court carved out an additional

9. This Court is mindful that some federal circuit courts have suggested that state evidentiary rules, rather than federal rules, are relevant when a habeas petitioner first introduced such evidence in state court. *See Loliscio v. Goord*, 263 F.3d 178, 185-88 (2d Cir. 2001); *Doan v. Brigano*, 237 F.3d 722, 735 n.8 (6th Cir. 2001) *abrogated on other grounds Wiggins v. Smith*, 539 U.S. 510 (2003). However, as described by the state habeas corpus court, the Georgia statute is materially the same as the federal rule.

exception for "statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 869. Otherwise, testimony regarding what happened during jury deliberations cannot serve as a basis to abrogate the jury's verdict. "[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987).

Petitioner cites to *Tate v. State*, 628 S.E.2d 730, 733 (Ga. Ct. App. 2006), in support of his contention that under Georgia law, there is a yet another exception to the rule prohibiting jurors from impeaching their verdict: when "there has been irregular jury conduct so prejudicial that the verdict lacks due process." As discussed above, this Court has determined that federal, not state, evidentiary rules apply to its review of a § 2254 petition. Moreover, a review of Georgia case law reveals that the additional exception mentioned in *Tate* is merely an extension of the rule regarding external prejudicial information. The court in *Tate* did not conclude that the jurors in that case, who allegedly pressured a juror into returning a guilty verdict, engaged in prejudicial misconduct and, in mentioning the additional "exception," cited to a line of cases that began with *Bobo v. State*, 327 S.E.2d 208, 210 (Ga. 1985). In *Bobo*, the Georgia Supreme Court reversed a criminal conviction because, during the trial, two jurors visited the crime scene and provided information to fellow jurors in an effort to sway them regarding unreliability of a witness' testimony. The *Bobo* jurors brought external prejudicial information to the jury room based on their

improper research. *Id.* at 210 (referring to "the improper evidence collected by jurors"). None of the other eleven Georgia cases that have recited the *Bobo* exception that this Court could locate concluded that prejudicial juror misconduct occurred. *See*, *e.g.*, *Sims v. State*, 467 S.E.2d 574 (Ga. 1996); *Holcomb v. State*, 485 S.E.2d 192 (Ga. 1997); *Butler v. State*, 511 S.E.2d 180, 184 (Ga. 1999); *Dixon v. State*, 808 S.E.2d 696 (Ga. 2017). The court in *Bobo* adopted its exception from language in *Williams v. State*, 310 S.E.2d 528, 530 (Ga. 1984), which concerned "extra-record" statements by jurors during deliberations and also found no error. Put simply, this Court's review indicates that no Georgia case has applied the *Bobo* "exception" to circumstances that did not include the introduction of prejudicial external information, and it is clear that it would not apply to these facts.

Rule 606(b) bars consideration of statements made by other jurors that Chancey pressured or coerced other jurors, that she refused to participate in deliberations, that she altered the note that the foreperson sent to the judge,[10] or that she was biased in favor of the death penalty.

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10. In any event, despite Petitioner's extensive argument to the contrary, the Court finds the altered note to the judge a non-issue. As the state habeas corpus court found, the jury foreperson rewrote the note, including Chancey's changes, and signed it before sending the note to the trial judge, and the "jury all agreed on the language used in the" note. [Doc. 46-29 at 83]. This Court thus concludes that Chancey's suggestion that the note be changed does not constitute misconduct when the rest of the jury acquiesced to and adopted her changes. Moreover, the fact that the Georgia Supreme Court relied, in part, on Chancey's

See *United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989) (noting that "alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the guilty verdict"); *see also United States v. Lakhani*, 480 F.3d 171, 184-85 (3d Cir. 2007) (discussing the rationale for the rule and noting that "[t]estimony concerning intimidation or harassment of one juror by another falls squarely within the core prohibition of the Rule") (citation and quotation omitted); *United States v. Decoud*, 456 F.3d 996, 1019 n.11 (9th Cir. 2006); *United States v. Briggs*, 291 F.3d 958, 961 (7th Cir. 2002) (barring evidence of one juror being "'intimidated' by other jurors into finding [the defendant] guilty"); *United States v. Brito*, 136 F.3d 397, 414 (5th Cir. 1998) (deeming evidence of internal coercion inadmissible per Rule 606(b)); *United States v. Tallman*, 952 F.2d 164, 167 (8th Cir. 1991) ("To admit proof of contentiousness and conflict to impeach a verdict under Rule 606(b) would be to eviscerate the rule.").

In *Jacobson v. Henderson*, 765 F.2d 12, 13 (2d Cir. 1985), the Second Circuit concluded that there was no basis to impeach the verdict even in the event of "screaming, hysterical crying, fist banging, name calling . . . the use of obscene language, by other jurors" and a thrown chair in the jury room. *See also United States v. Barber*, 668 F.2d 778, 786 (4th Cir. 1982) (no basis to impeach verdict where juror claimed that foreman "scared [her] to death"); *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir.

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suggested wording of the note in determining that the trial court's *Allen* charge, discussed below, was not coercive, and does not call the state court's conclusion into question.

1981) ("intimidation and harassment among jurors" not competent to impeach verdict). This prohibition likewise applies to juror testimony regarding statements made during deliberations that demonstrates another juror's lack of objectivity. *United States v. Foster*, 878 F.3 d 1297, 1310 (11th Cir. 2018).

With respect to Petitioner's claim that Chancey testified falsely during voir dire regarding the incident in which a convicted murderer entered her apartment, this Court first notes that the evidentiary basis for this claim is a statement of a juror regarding what Chancey said during deliberations and Chancey's statement to Petitioner's investigators. In *Warger v. Shauers*, 574 U.S. 40, 44 (2014), the Supreme Court held that "Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire." In other words, under *Warger*, Chancey's and another jurors' statements are not admissible before this Court to establish that Chancey answered a voir dire question falsely, and there is thus no evidence in the record to support Petitioner's claim.

Even if this Court were to consider that evidence, this Court concludes that Petitioner has failed to establish that Chancey lied during voir dire. To the degree that the statements that Chancey made to other jurors and the statements that she made to Petitioner's investigators after trial differed from the statement she made during voir dire, there is nothing in the record that demonstrates which of the statements is true. Petitioner seemingly wants this Court to look at Chancey's different accounts

of the crime she suffered and presume that she was lying during voir dire, but her voir dire description of the crime was the only time that she was under oath. As a result, the presumption is that she was being truthful while testifying under oath during voir dire, and Petitioner has presented no evidence or argument that would overcome that presumption.

The same analysis applies to Petitioner's claim that Chancey lied during voir dire when she stated that should would consider all sentencing options. As discussed, Petitioner contends that Chancey was fully committed to death as the only sentencing option. However, as already determined, the various statements of Chancey's fellow jurors that recount her statements and actions are not admissible.[11] Moreover, the fact that Chancey was unwilling to consider a life sentence after she learned the facts of Petitioner's crime does not demonstrate that Chancey was lying during voir dire.

In arguing that Chancey engaged in misconduct when she erroneously told the other jurors that if they did not unanimously vote in favor of the death penalty, Petitioner would ultimately be released on parole, Petitioner cites to *Chambers v. State*, 739 S.E.2d 513, 518 (Ga. App. 2013). In that case the Georgia Court of Appeals stated that

11. Petitioner argues that Chancey's statement that Petitioner was guilty and deserves to die is admissible because it was made during the guilt phase of the trial and not during deliberations. However, this argument is foreclosed by *Tanner* in which the Supreme Court held that the trial court properly declined to consider juror statements that other jurors used drugs and alcohol during the trial. 483 U.S. at 116.

[a]llowing jurors to decide a case based on 'law' provided by a juror during deliberations patently violates a defendant's Sixth Amendment rights not only to be present at all critical stages of his trial, but also to be tried by a fair and impartial jury." However, *Chambers*, a criminal case, is materially different from this case because the errant juror in that case had done some "research" on the Internet and had somehow located an incorrect statement of the law related to one of the criminal defendant's affirmative defenses and shared that information with other jurors. *Id.* at 517. The Georgia Court of Appeals held that the juror had brought prejudicial outside information into juror deliberations, and the prosecution had failed to establish that no harm occurred. *Id.* "Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation." *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980). As the Supreme Court noted in *Warger*, the information is "extraneous" if it derives from a source "external" to the jury. *Warger*, 135 S. Ct. at 529. "'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Id.* Petitioner has not alleged that Chancey brought prejudicial external information or materials into the jury room, and he has thus failed to demonstrate that he is entitled to relief.

In response to Petitioner's contention that Chancey violated her oath by refusing to deliberate with other

jurors, this Court concludes that the claim, even if true, would not entitle Petitioner to relief. According to the statements of other jurors as well as Chancey's own statements, she was set on the death penalty from the start of deliberations and would not participate in deliberations. Instead, she sat by herself and did yoga in a corner of the jury room and at one point proclaimed her intent to "stay here forever if it takes it for him to get death." [Doc. 59 at 72-73].

Petitioner cites to cases that voice the general proposition that jurors have a duty to participate in deliberations and base their verdict on the evidence presented during the trial. *E.g.*, *United States v. Boone*, 458 F.3d 321, 329 (3d Cir. 2006); *United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001).[12] However, those cases concern the question of when it is acceptable for a trial judge to dismiss a juror during the trial who is refusing to deliberate or is engaging in impermissible jury nullification. Petitioner did not cite to, and this Court could not independently locate, a case in which a court granted relief under § 2254 based on a juror's refusal to deliberate. Conversely, in *Tanner*, mentioned above, the Supreme Court held that under Rule 606(b) a district court properly refused to hold an evidentiary hearing at which jurors would testify concerning other jurors' drug and alcohol use during the trial. 483 U.S. at 116. In so holding, the Court noted that:

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12. Petitioner also cites to two Supreme Court cases, *Lowenfield v. Phelps*, 484 U.S. 231, 235, 241 (1988), and *Allen v. United States*, 164 U.S. 492, 501 (1896), that he claims also hold that jurors have a duty to deliberate. However, in both cases, the Court was merely quoting the jury instructions given at trial.

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21 (internal citations omitted). Post-verdict inquiry into allegations of jury misconduct, aside from external influences or clear racial animus as discussed above, must be avoided to protect the jury system. As the Eleventh Circuit has recognized:

> Permission to attack jury verdicts by postverdict interrogations of jurors would allow defendants to launch inquiries into jury conduct in the hope of discovering something that might invalidate the verdicts against them. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. Such events would result in

> the destruction of all frankness and freedom of discussion in the jury room. . . . In a justice system that depends upon public confidence in the jury's verdict, such events are unacceptable.

United States v. Siegelman, 640 F.3d 1159, 1185-86 (11th Cir. 2011) (quotations and citations omitted). Accordingly, "[w]hether a juror would have been struck from the jury because of incompetence or bias, the mere fact that a juror would have been struck does not make admissible evidence regarding that juror's conduct and statements during deliberations." *Warger*, 574 U.S. at 53 (2014).

Finally, in a footnote in *Warger*, the Supreme Court stated that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* at 51. In response to Petitioner's contention that Chancey's actions represent such an extreme, this Court notes that, to date, the only instance where the Supreme Court has found that juror bias was so extreme as to necessitate violating the no-impeachment rule was the juror's reliance on racial stereotypes in *Pena-Rodriguez*, 137 S. Ct. at 869. As the above discussion indicates, courts have repeatedly evaluated instances of juror behavior similar to Chancey' s and have determined that the no-impeachment rule applies. It is thus clear that the facts of this case do not reach the extreme contemplated in *Warger*.

In summary, this Court concludes that Petitioner is not entitled to relief with respect to his Ground I because

the claim is procedurally defaulted before this Court and because the claim fails on its merits.

B. Ground II: Ineffective Assistance of Counsel

1. Legal Standard

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

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range ofprofessionally competent assistance." *Strickland*, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Given the strong presumption in favor of competence, the petitioner's burden of persuasion—though the presumption is not insurmountable—is a heavy one." *Fugate v. Head*, 261 F.3d 1206, 1217 (11th Cir. 2001) (citation omitted). As the Eleventh Circuit has stated, "[t]he test has nothing to do

with what the best lawyers would have done. Nor is the test even what most good lawyers would have done." *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc). Rather, the inquiry is whether counsel's actions were "so patently unreasonable that no competent attorney would have chosen them." *Kelly v. United States*, 820 F.2d 1173, 1176 (1 lth Cir. 1987). Moreover, under *Strickland*, reviewing courts must "allow lawyers broad discretion to represent their clients by pursuing their own strategy," *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992), and must give "great deference" to reasonable strategic decisions, *Dingle v. Sec'y for Dep't of Corr.*, 480 F.3d 1092, 1099 (11th Cir. 2007).

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

As will be discussed in more detail below, the state habeas corpus court rejected Petitioner's claims of ineffective assistance. As such, this Court's review of those claims are "doubly deferential" wherein this Court takes a "highly deferential look at counsel's performance [under] *Strickland* . . . through the deferential lens of § 2254(d)." *Id.* (quotation and citation omitted).

2. Background

After Petitioner's arrest, his sister hired Jimmy Berry, a highly experienced criminal attorney, to represent him. After the state noticed its intent to pursue the death penalty, the Georgia Capital Defender (GCD), a fairly new entity at the time, became involved. Chris Adams, the GCD director, entered an appearance as Petitioner's counsel, and requested that Berry, who had extensive death penalty experience, remain in the case, and Berry agreed. Berry and Adams agreed that Berry would focus on preparing for the guilt phase of the trial while GCD would prepare for the penalty phase.

Adams remained the GCD lawyer on the case from April, 2004, until he withdrew in January, 2006, and another GCD attorney, Teri Thompson, replaced him. Ms. Thompson remained on the case until she resigned from the GCD and withdrew in June, 2007, and was replaced by Deborah Czuba. Czuba had already been involved in Petitioner's case, had filed an entry of appearance on January 31, 2006, and had been helping develop Petitioner's case in mitigation.

It is clear that Jimmy Berry had significant death penalty experience and is an experienced, well-qualified attorney. It is further clear that Adams, Thompson, and Czuba were also well-qualified attorneys with significant death penalty experience.

3. Petitioner's Claims of Ineffective Assistance

a. Penalty Phase Investigation and Presentation of Evidence

In his first assertion of ineffective assistance, Petitioner contends that his trial counsel failed to properly investigate and present mitigation evidence during the penalty phase of Petitioner's trial. "In death penalty cases, trial counsel is obliged to investigate and prepare mitigation evidence for his client." *Krawczuk v. Sec'y, Fla. Dep't of Corr.*, 873 F.3d 1273, 1293 (11th Cir. 2017).

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (citation omitted).

Appendix B

Petitioner's and Respondent's briefs are difficult to reconcile. Indeed, it almost appears that the parties are describing different cases. Petitioner dedicates significant discussion to his assertion that (1) Berry had a heavy case-load at the time, (2) the GCD was underfunded and understaffed and its lawyers were overwhelmed, and (3) because of staff shortages and turnover, the GCD attorney representing Petitioner changed twice. In his brief, Petitioner portrays the GCD as a hive of dysfunction as a result of its heavy caseload and argues that the general disarray at the GCD negatively affected Petitioner's representation. According to Petitioner, GCD attorneys, who were supposed to investigate and put together a case in mitigation for the penalty phase of Petitioner's trial, accomplished very little in investigating and planning the mitigation case during the years leading up to the trial. Once they finally focused on Petitioner's case, it was too late to accomplish much of anything, and as a result, Petitioner's trial counsel failed to uncover significant mitigation evidence and overlooked other evidence that they had in their files. Petitioner also faults trial counsel for presenting testimony from a prison adaptability expert and from a mental health expert that Petitioner suffers from Asperger's Syndrome.

Conversely, according, to Respondent—as well as the state habeas corpus court—the GCD attorneys and their investigators and experts engaged in significant investigation and preparation for the penalty phase. Trial counsel interviewed or attempted to locate Petitioner's family members, friends, co-workers, and teachers. The defense team interviewed multiple members of Petitioner's

family, including his father, stepmother, sisters, brother-in-law, paternal grandmother, aunt, uncle, and stepfather. Trial counsel questioned the family about Petitioner's mental health history, and whether he had been subject to physical, mental, or sexual abuse.[13] A GCD mitigation specialist was assigned to Petitioner's case beginning in 2004. As detailed by the state habeas corpus court, trial counsel also obtained and reviewed Petitioner's prison records, Cobb County Adult Detention Center records, criminal records, employment records, family records, financial records, legal records, medical records, social services records, psychological records, and school records. [Doc. 4629 at 21]. Also, "[c]ounsel compiled all of the information they received during the investigation and prepared Petitioner's family tree, social history, prison disciplinary timeline, 'attorney mitigation witness strategy,' and 'aggravation and bad mitigation.'" [Id. at 23]. To prepare for the penalty phase, trial counsel hired a licensed clinical social worker, a prison adaptability expert, a neuropsychologist, a psychiatrist, a victim outreach specialist, and a trauma expert.

This Court need not resolve the question of whether trial counsel's investigation and preparation for the penalty phase was constitutionally adequate, however, because it is clear that Petitioner has failed to demonstrate that the state habeas corpus court's prejudice determination regarding the mitigation evidence is unreasonable and not entitled to deference under § 2254(d). See *Strickland*,

13. Significant to the discussion below, there is no evidence that Petitioner or his family members ever informed trial counsel that Petitioner had ever been sexually abused.

466 U.S. at 697 (court need not consider both prongs of the ineffective assistance test if Petitioner makes an insufficient showing on one). The state habeas corpus court extensively discussed trial counsel's mitigation case. That effort began during the guilt phase of the trial:

> [T]rial counsel's guilt-innocence phase theory involved the presentation of mitigation as the evidence of Petitioner's guilt was overwhelming. In their guilt innocence phase opening statements, trial counsel informed the jury that Petitioner's childhood was characterized by "violence, trauma and instability" and that Petitioner was raised by a dysfunctional, abusive family. Trial counsel went on to explain that Petitioner's parents divorced when he was two years old and Petitioner lived with his mother for a period of time. While living with his mother, Petitioner received a head injury that resulted in a concussion. Thereafter, Petitioner's father gained custody of Petitioner. About one year later, Petitioner and his sister were kidnapped by their mother. They were subsequently located and sent back to Cobb County.
>
> Following the divorce from Petitioner's mother, Petitioner's father had three failed marriages and there was "violence and disruption" in the home. In school, Petitioner was placed in special education due to behavioral problems. At age sixteen, Petitioner left home and moved in with a friend.

Trial counsel then provided the jury with information regarding Petitioner's criminal history. Trial counsel informed the jury that during his incarcerations, Petitioner obtained his GED, tutored other students who were trying to obtain their GED, received one thousand hours of training as an electrician, successfully completed a program called Think Smart where he tutored younger people, and was involved in outreach ministries where he spoke with troubled youth.

Trial counsel then spoke about mental health symptoms that were present in Petitioner. Specifically, Petitioner experienced dissociative episodes which started when he was a teenager. Additionally, Petitioner exhibited obsessive-compulsive behavior and his coworkers described "very bizarre and odd things." For example, Petitioner cleaned his truck all of the time and he would not wear a dirty t-shirt or shoes in his truck.

Trial counsel also informed the jury that there was evidence of Petitioner being nonviolent and non-confrontational. At the time of his arrest, Petitioner was "very polite and very cooperative, was very concerned over the fact that no one was hurt in this chase." Petitioner told the officer that he did not want anyone to be hurt in the police chase. The following day, Petitioner told Detective Herman that "he did

> not want to have to face the families of these two young women, that he just wanted to plead guilty." Trial counsel also told the jury that although he claimed he lacked memory of the crime, Petitioner believed that he committed the crime. Petitioner tried to recall the crime but "every time he tries to think about it, his mind shoots off to something else and he can't concentrate and he can't think about it." During his police interview, Petitioner spoke with the detective about "episodes of memory loss, about dissociative times when he would leave, not know where he was, not know how he got there."
>
> Although trial counsel did not call any witnesses during the guilt-innocence phase of Petitioner's trial, they were able to verify many of the claims asserted in opening statements through cross-examination of State witnesses. Trial counsel elicited testimony that Petitioner kept his vehicle clean and that he changed shoes before entering the vehicle. Trial counsel also brought out that Petitioner was cooperative at the time of his arrest and that he repeatedly stated that he hoped he did not hurt anyone.

[Doc. 46-29 at 45-47 (citations to the internal record and footnotes omitted)].

The state habeas corpus court next described the evidence trial counsel presented during the penalty phase of the trial:

This Court finds that trial counsel made a reasonable presentation during the sentencing phase based on their strategy and the information discovered during their investigation. As previously discussed, trial counsel's theory for the sentencing phase of Petitioner's trial was to present evidence of Asperger's Syndrome and Petitioner's traumatic childhood. Regarding the selection of the sentencing phase witnesses, Ms. Czuba stated:

> I think there was (sic) two considerations. The first was telling [Petitioner]'s kind of story, his childhood developmental story, in a meaningful kind of narrative manner, and then the other being—allowing the jury to have some empathy with some of the family members who cared about him, to perhaps, you know, spare [Petitioner]'s life based on not wanting to cause more pain to some of his family members.

Trial counsel utilized six lay witnesses and three experts to present this information to the jury. The record reflects that trial counsel also met with the witnesses prior to trial and prepared them for their testimony.

With regard to the mitigation evidence, trial counsel told the jury they would present

evidence showing that Petitioner had Asperger's Syndrome. In their sentencing phase opening argument, trial counsel explained that evidence of this disorder would be presented to show that Petitioner might react differently to certain situations and was not being presented as an excuse for the crimes committed by Petitioner.

The first witness presented by trial counsel was James Aiken. Mr. Aiken, who was qualified as an expert in classification, corrections, and penology, testified that he viewed numerous institutional records regarding Petitioner's incarceration within the Georgia Department of Corrections. Mr. Aiken informed the jury that the performance evaluations contained in those records showed that Petitioner "adjusted very well to a confinement setting." Specifically, Petitioner complied with the prison rules and participated in "programmatic activities." Additionally, Petitioner received certificates of completion from the Georgia Department of Corrections for the following programs: victim impact; vocational assessment; substance abuse; electrician; repairman; confronting self concepts; heating and air conditioning; family violence; and, corrective thinking.

Mr. Aiken also testified regarding Petitioner's disciplinary violations. Mr. Aiken explained that it was not unusual for an inmate to receive disciplinary reports during incarceration

and that Petitioner did not have "chronic continuous dangerous violation of rules and regulations within the facility." Mr. Aiken testified regarding an incident in December of 1995 where Petitioner was charged with escape after failing to return to prison following his release on a holiday furlough." Mr. Aiken stated that Petitioner's escape was "at the lowest common denominator as it relates to the security of an institution and endangerment of the public."

In regards to future dangerousness, Mr. Aiken opined that Petitioner did not fall into the "predator category" and would not "present an unusual risk of harm to staff, inmates, as well as the general community as long as he is confined within a high security status." Mr. Aiken explained that an individual convicted of murder would be placed in a maximum security prison where there would "always be a gun between that individual and the public." He further stated that Petitioner would be incarcerated for the remainder of his life as a result of his behavior in the community.

The next witness that trial counsel called was Robert Rader, who was employed at the Cobb County Adult Detention Center. Mr. Rader, who had frequent interactions with Petitioner for three and one-half years, described Petitioner as a respectful, cooperative, and non-violent

inmate. Mr. Rader also testified that aside from one altercation with another innate, Petitioner did not cause any problems at the jail. Additionally, Mr. Rader told the jury he had only testified on behalf of an inmate one other time, in the seven years he had worked at the Cobb County Jail.

Trial counsel also called John Mowens, who was involved in the homeless and jail ministries at Glynn Haven Baptist Church. Mr. Mowens testified that Petitioner participated in both the homeless ministry and the jail ministry working with juveniles. As part of the jail ministry, Petitioner spoke with juvenile inmates about his experience in the penal system. Mr. Mowens opined that Petitioner's presentation to the troubled juveniles had an impact on their lives. Additionally, Mr. Mowens informed the jury that Petitioner was always "very respectful" towards him and his family.(ST,Vol.1:132).

Trial counsel then presented Petitioner's stepmother, Janie Swick. Ms. Swick testified that she married Petitioner's father in 1978, after three or four months of dating. Petitioner was five years old when Ms. Swick married his father. Ms. Swick and Petitioner's father had two children together, Julia and Kristin.

During their marriage, Petitioner's father was responsible for taking care of the children. Ms.

Swick explained that she worked during the day, and Petitioner's father worked at night as a park ranger. Petitioner's father did not want anyone else taking care of the children and he did not allow family or friends to visit the house. Although Petitioner's father was responsible for taking care of the children, Ms. Swick testified that she went to all of the children's school conferences and took them to church.

Ms. Swick also told the jury that Petitioner's father was verbally and physically abusive towards her. Ms. Swick discussed an incident that occurred when she and Petitioner's father told the children about their plans to get divorced. During this conversation with the children, Petitioner's father pinned Ms. Swick in a chair and head butted her in the face, which resulted in a black eye. Petitioner pulled his father off Ms. Swick. Ms. Swick also told the jury that Petitioner's father followed her from work and ran her off the road on the day that their divorce was final.

Additionally, Ms. Swick described physical abuse that Petitioner was subjected to by his father. Ms. Swick explained that Petitioner was bullied by his father, which caused Petitioner to run away in fear. Ms. Swick recalled one incident wherein Petitioner's father struck him in the arm with a broom. During this incident, Ms. Swick tried to get between Petitioner and

his father; however, Petitioner's father was in a rage and tossed Ms. Swick out of the way. Afterwards, Ms. Swick took Petitioner to the hospital as she was concerned his arm was broken.

Ms. Swick also told the jury that Petitioner's father treated him differently than his sister. She explained that when they got into trouble, Petitioner's sister would receive a verbal reprimand whereas Petitioner would get whipped. Ms. Swick stated that Petitioner's father was "very rough" on Petitioner.

In addition to testimony regarding Petitioner's father, Ms. Swick informed the jury that Petitioner did not have many friends growing up and was in special education for a behavior disorder. Ms. Swick stated Petitioner was hyper and could not sit still. In high school, Petitioner was involved in the ROTC program. Ms. Swick testified that Petitioner was "very prideful" of his involvement with ROTC, and he took "great pride in keeping his brass polished and his shoes polished and his appearance and his clothes."

In concluding her testimony, Ms. Swick asked the jury to spare Petitioner from the death penalty as he did not receive a "fair shake growing up" and had "mental problems." Ms. Swick expressed regret for failing to

get Petitioner psychological help. She also regretted leaving Petitioner with his father following the divorce. Ms. Swick explained that she took Petitioner's sister following the divorce as she thought the girls should be with her, and that Petitioner should remain with his father.

Trial counsel also presented the testimony of Petitioner's half-sister, Julia Humphreys, who testified to the abuse inflicted upon them by Petitioner's father. Ms. Humphreys stated that all of the children were disciplined by their father; however, the abuse inflicted upon Petitioner was "very bad." Ms. Humphreys explained that they were disciplined with switches and belts. Regarding Petitioner, Ms. Humphreys recalled an incident wherein their father challenged Petitioner to a fight. During this incident, Petitioner was repeatedly punched in the head before he escaped through a sliding glass door in the den.

Ms. Humphreys then asked the jury to consider mercy for Petitioner as he had a difficult life and "had to deal with a lot of things that children shouldn't have to deal with." Ms. Humphreys also asked the jury to spare Petitioner's life as his execution would deprive her of the opportunity to "fill that piece of my life that's been missing."

Trial counsel then presented the testimony of Jeffrey Knowles, Petitioner's brother-in-law.

Mr. Knowles testified that he and Petitioner had a good relationship and described Petitioner as "very witty," "knowledgeable in a lot of subjects," and a "voracious reader." Mr. Knowles also told the jury that his relationship with Petitioner changed his previously held beliefs that all incarcerated individuals were bad.

Mr. Knowles testified about the family dynamic and stated there was very little interaction between the family members during gatherings. The family gatherings usually involved them having a meal and watching television, and there were limited discussions about things happening in each other's lives. Mr. Knowles informed the jury that Petitioner's father had a temper and he described an incident in which Petitioner's father was told he was not allowed to park in a certain area. In response, Petitioner's father became very angry and wanted to fight the parking attendant. For about one hour after the incident, Petitioner's father was "beet red and sweating and still thinking of it."

Additionally, Mr. Knowles testified that Petitioner was a "very, very meticulous and neat" person and his truck and clothing were always immaculate. On occasion, Petitioner would house sit for his sister and brother-in-law. Upon returning home, they found their home to be "immaculate" and looked as though "30

maids went through the house and scrubbed it from top to bottom." Mr. Knowles also testified that Petitioner read books on a variety of subjects and explained that when Petitioner liked an author, he would read every single book in that particular series prior to moving on to another subject. Additionally, Mr. Knowles told the jury that Petitioner suffered from insomnia, migraines, and memory lapses.

In asking the jury to spare Petitioner's life, Mr. Knowles testified that he would be devastated if Petitioner were sentenced to death as they had a very close relationship. Mr. Knowles acknowledged that Petitioner committed a horrible crime and deserved to be in prison; however, he stated that Petitioner had a lot to offer the world even behind bars. Mr. Knowles explained "I know his kindness. I know what a sweet person he is . . . how intelligent he is."

Trial counsel then presented Dr. Marti Loring. Dr. Loring, who was qualified as an expert in social work and trauma, testified that she was retained by trial counsel to perform a social history. Dr. Loring met with Petitioner on four occasions to gather information and each session lasted approximately three hours. Dr. Loring testified that, during her interviews with Petitioner, she had a difficult time "getting the kind of information that [she] needed from [Petitioner]." Dr. Loring explained that

Petitioner reported he was unable to remember information in certain areas.

Dr. Loring also interviewed sixteen individuals "to get their perceptions, their experiences, [and] their observations." In interviewing these other individuals, Dr. Loring was seeking information that she was unable to obtain from Petitioner. In addition to conducting interviews, Dr. Loring reviewed extensive records including police records, school records, jail records, divorce records, work records, and hospital records.

The social history compiled by Dr. Loring, and to which she testified about at trial, revealed that Petitioner's childhood was marked by abuse. Petitioner and his sister spent their early childhood living with their mother in a home where drugs were bought and sold. During this time period, it was reported that Petitioner's mother would leave Petitioner and his sister at daycare and would not return for periods of time. Dr. Loring also testified regarding an instance wherein Petitioner and his sister were left at DFCS by their mother. Dr. Loring also testified that Petitioner was subjected to extensive physical abuse. Specifically, cigarette burns were discovered on Petitioner's body by DFCS. At age two, Petitioner's entire body was bruised following a beating by his father, who admitted that he had "lost it and beaten

[him]." At age three, Petitioner was taken to the hospital for a fractured skull. Petitioner's mother initially told the emergency room staff that Petitioner had fallen off the counter; however, she later told the treating physician that Petitioner had fallen out of a chair. Prior to the completion of treatment for the skull fracture, Petitioner's mother took him home against medical advice. At age four, Petitioner's shoulder was dislocated as the result of a violent shaking by his father. Petitioner was also hit on the arm with a broom handle by his father when he was thirteen years old. Following the incident, Petitioner's father threatened to kill his stepmother if she tried to take Petitioner to the hospital for treatment. Petitioner was also severely beaten by his father at age sixteen because he had gotten into a car accident. Additionally, Dr. Loring testified regarding an incident wherein Petitioner's father sat on his "private parts, holding [Petitioner's] hands above [Petitioner's] head and continually beating him in the head and the chest."

Dr. Loring explained to the jury that Petitioner's father would "fly into a rage as a matter of pattern, not just one time or two, and he would whip or beat [Petitioner]." In an attempt to protect his sister from the abuse by their father, Petitioner would take the blame for incidents so that he would receive the beating instead of his sister. The abuse by Petitioner's father was

"not only explosive physically, where they would get slapped and punched, thrown across the room, indeed, but there was a very remarkable emotional component to the abuse that Walter committed upon [Petitioner and his sister]." Dr. Loring told the jury that this was "ritualistic emotional abuse," meaning there were a series of steps leading up to the physical abuse. Dr. Loring stated "the children's hair might be grabbed, they maybe—they were pulled across the room, they were pushed into a corner, and then pulled into a bedroom and the door shut when the beatings could be heard. That would be one example of steps one through five before the physical abuse actually took place." Dr. Loring explained that "the nature of that ritualistic kind of emotional abuse is that the children feel terrified the minute step one starts because they know, you know, what the other steps are going to be that are going to be followed."

Dr. Loring also testified that, growing up, Petitioner was in special education and was described as having "odd classroom behavior, inappropriate behavior, that was marked by a lack of focus, being hyper, [and] a lack of concentration." Dr. Loring explained that these symptoms were often seen in children who are traumatized and abused. Additionally, while living with his father, Petitioner was not allowed to leave the house for social gatherings

and would "stare blankly ahead as if he was checked out."

Dr. Loring also told the jury that as a result of his abusive upbringing, Petitioner had a tendency to wander off. Dr. Loring described an occasion where Petitioner, who was sixteen years old, walked from Kennesaw to Dunwoody, Georgia and hid under his grandmother's bed all night. In addition, Dr. Loring testified that there was evidence of dissociation. Specifically, she testified that there were two incidents where Petitioner traveled to different states and could not recall these trips until he discovered evidence of it such as a newspaper from that particular state.

Dr. Loring diagnosed Petitioner with [post-traumatic stress disorder (]PTSD[)] and Asperger's Syndrome. Regarding the PTSD diagnosis, Dr. Loring testified that Petitioner suffered from PTSD due to the trauma he experienced during his childhood and teenage years. Petitioner suffered from "incredible amounts of trauma during his childhood, more than he can manage." As a result, there was evidence of memory loss associated with his PTSD. Dr. Loring explained that this memory loss, or disassociation, was part of the reason she struggled to get information from Petitioner. Petitioner did not remember significant times and behavior in his life and did not recall much

of the abuse he endured. In contrast to the reports from other individuals of an abusive upbringing, Petitioner told Dr. Loring that he had a great childhood. Dr. Loring explained to the jury that this was not uncommon in that an abused person tends to dissociate from the abuse and deny it so that they can continue to move forward in their life. Dr. Loring also testified that it was not unusual for someone to have interaction with a person who traumatized them. Dr. Loring explained that this "traumatic bonding" is where kids, and even teenagers and adults, continue trying to create a relationship with an abuser.

Regarding her diagnosis of Asperger's Syndrome, Dr. Loring told the jury that a person with Asperger' s Syndrome was "very impaired in their ability to be close or intimate with another person" and severely suffered from a "sustained impairment in social interaction." A person with Asperger's might exhibit aggression or violence. In support of her diagnosis of Petitioner, Dr. Loring testified that there were reports that Petitioner quickly ate meals and had no interaction with his family. Dr. Loring also stated that Petitioner was a "very lowly man" who was unable to have a "fulfilling sexual loving relationship with a girlfriend, can't connect up warmly with anybody, including the people at work who see him in his stories as unbelievable, do

not see themselves as his friend." Additionally, Dr. Loring testified that Petitioner did not have any friends, and his "reactions, partly because of the Aspergers [sic], may be way out of what one would normally expect in the way of normal reactions to abnormal events in his life." Petitioner's reactions to his life experiences resulted in him "having a real impaired ability to relate to people and to empathize with them" and caused him to be "much more involved with objects or cleaning or a kind of ritual of what you do at what moment in time." These rituals became very important to Petitioner. Dr. Loring concluded by telling the jury that despite the awareness of a number of family members that Petitioner was "very disturbed," Petitioner never received treatment for these disorders.

Trial counsel then presented testimony from Dr. Robert Shaffer, a clinical psychologist. Dr. Shaffer explained that he performed a psychological evaluation of Petitioner. As part of his evaluation, Dr. Shaffer interviewed approximately six individuals regarding their observations of Petitioner. Dr. Shaffer also spoke with Dr. Marti Loring regarding the social history she prepared on Petitioner and reviewed police reports, hospital records, school records, and prison records. Based upon his evaluation, Dr. Shaffer opined that Petitioner suffered from PTSD, Dissociative Disorder, and Asperger's Syndrome.

Dr. Shaffer explained to the jury that Asperger's Syndrome is a disturbance "manifested by odd and repetitive stereotyped patterns of behavior and interests" and "impairment in social functioning" and "social relationships." A person with Asperger's might also have "very unusual patterns of cleanliness and compulsive behavioral routines." Notably, Asperger's Syndrome included a high number of individuals who functioned in the superior range of intelligence. Depending on their history, a person with Asperger's might suffer from dissociation.

In support of his diagnosis of Asperger's Syndrome, Dr. Shaffer testified that Petitioner had very unusual cleaning routines. For example, Petitioner cleaned his floor several times a day and made his bed "compulsively with tight corners." Petitioner would become very upset if the mattress was not exactly centered. When vacuuming the floor, Petitioner would arrange the "pile of carpet all in one direction." After vacuuming, Petitioner would become very agitated when someone walked on the floor. If there was a rug with tassels, Petitioner would comb out the tassels in a specific direction. Petitioner also cleaned his car on a daily basis, folded his clothing in a particular manner, and lined up Coca-Cola cans with the labels facing the same direction. Dr. Shaffer explained that Petitioner would become

uncomfortable and agitated if his routine was disturbed.

Petitioner also met the criteria, for Asperger's in that he had an "extreme interest" in reading science fiction and would constantly talk about these books for hours with different people. Family members reported Petitioner would "relate these stories of science fiction as if they really could be true." This behavior was considered "odd and peculiar" as the books were clearly fiction, yet there was a "juvenile or boyish excitement about the possible reality of these things." Dr. Shaffer testified that Petitioner was also "intensely and extremely involved" in reading about martial arts experts. In studying these experts, Petitioner would become excited in a "childlike way." Dr. Shaffer explained that this "type of fascination with one narrow interest" was one of the diagnostic criteria for Asperger's.

Additionally, Petitioner demonstrated evidence of social impairment. Dr. Shaffer explained that there was a lack of the "emotional give and take that you normally see in a young person and a child, or in his adult life as well." Petitioner fantasized about being connected with interesting and popular people in school; however, his sister reported that she never knew Petitioner to be involved with these individuals. In addition, it was reported that

Petitioner exhibited "odd and embarrassing" behavior in public. Dr. Shaffer testified that individuals with Asperger's "tend not to know how to talk socially" and might "get all excited and worked up and talk loudly and embarrass people in public."

Regarding his diagnosis of Dissociative Disorder, Dr. Shaffer testified that Dissociative Disorder involved an individual who "will split off from their normal state of awareness" and experience "periods of productive and active behaviors, and then later, have no recollection of that." An individual with memory lapses usually had a "traumatic situation at the root of that, usually early in childhood." Dr. Shaffer explained to the jury that Petitioner suffered from Dissociative Disorder as a result of the "violence in his home and battering on his person, causing him at certain times to relate out of maybe one pocket of his personality." In that state, Petitioner would be unaware of the "normal judgment and thoughts and memories that he has to bring to bear to a situation."

Dr. Shaffer stated that Petitioner's background was marked by physical abuse inflicted by his father and explained that Petitioner had no memory of this abuse, which was not unusual in situations of abuse. Dr. Shaffer further explained that Petitioner's report of having a good family and childhood was not

uncommon and was consistent with families where abuse was present. Dr. Shaffer stated that Petitioner exhibited a "pattern of behavior that is somewhat idealistic in the sense that he wants to see only the best and he has some very compulsive behaviors about maintaining neatness and cleanliness that are consistent with this."

Dr. Shaffer also told the jury that Petitioner met all of the diagnostic criteria for PTSD. There was not a significant amount of evidence in the first category, reexperiencing the traumatic stress; however, Dr. Shaffer explained that this lack of evidence was partially due to the fact that some of the trauma occurred prior to Petitioner's "earliest age of memory." Dr. Shaffer then explained to the jury that there was "pretty strong evidence that there was significant abuse before his age of earliest memory." Specifically, there was information about cigarette burns on Petitioner's body and a skull fracture. Dr. Shaffer testified that Petitioner did experience "intrusions" in the form of disassociation and provided the jury with several examples of Petitioner lacking any memory of wandering off and traveling to other states. There was also evidence that Petitioner scratched his face during the night, which suggested that he was having disturbing nightmares.

Dr. Shaffer then explained that the second category of diagnostics for PTSD is avoidance of the memories. Dr. Shaffer testified that there was "clear evidence of a great deal of denial." Petitioner was an "individual for whom the world is always just right, it's always rosy." Petitioner maintained a neat and clean environment, and he viewed himself as "flawless and without problems to an extreme degree." Dr. Shaffer explained that this denial was Petitioner's attempt to "avoid re-experiencing the problems and horrors" that occurred in his life.

The final witness presented by trial counsel was Petitioner's sister, Dayna Knowles. Ms. Knowles testified that she and Petitioner had a "rather difficult" early childhood. As a young child, Ms. Knowles and Petitioner were taken to daycare by their biological mother and were left there for an extended period of time. After the daycare closed, Ms. Knowles and Petitioner would frequently go home with a woman who watched them until their mother arrived.

Ms. Knowles described their father as an unhappy man who was hard on them and showed very little affection. Their father did not handle stress well and would become angry and violent. Ms. Knowles told the jury that she and Petitioner were physically abused by their father through out their childhood. Ms. Knowles stated that they would both receive a whipping

from their father with a large belt or stick when he was upset; however, the whippings received by Petitioner were worse. Ms. Knowles explained that their father would use his fist to whip Petitioner.

In addition to the physical abuse, Ms. Knowles testified that she was sexually abused by her father. Ms. Knowles explained that her father used drugs and described an incident in which he called her into the bathroom. Ms. Knowles recalled entering the bathroom and finding her father sitting naked on the toilet. Ms. Knowles complied with her father's request and sat on his lap, and her father then pulled down her shorts. During this testimony, Ms. Knowles became emotional and no further testimony was elicited regarding the sexual abuse.

Additionally, Ms. Knowles told the jury that growing up, she and Petitioner were not allowed to have friends over, leave the yard, or go to a friend's house. Ms. Knowles testified that Petitioner talked about having friends, but she never saw any of them. Petitioner also frequently talked about several families with whom he seemed very attached. Ms. Knowles explained that Petitioner would refer to these friends' parents as "mom and dad," which she found to be bizarre. Ms. Knowles stated that she always wondered if the people that Petitioner talked about were really his friends.

Appendix B

Following the divorce of her father and stepmother, Ms. Knowles went to live with her stepmother and Petitioner stayed with their father. At some point, Petitioner moved out of their father's house. Ms. Knowles then decided to move back in with her father as he was alone and was "having a complete breakdown," which she acknowledged was a poor decision. During her senior year of high school, Ms. Knowles decided to join the Navy. Ms. Knowles testified that the Navy was the most positive experience for her as it was the first time in her life that she had self-confidence.

Trial counsel also elicited testimony from Ms. Knowles that Petitioner tried to reconnect with his father. Specifically, Ms. Knowles testified that Petitioner tried to reconnect with his father after he got out of prison in 2002. Petitioner's father, however, did not show any excitement about Petitioner getting out of prison.

In concluding her testimony, Ms. Knowles expressed sadness over the crime and "unbelievable sadness for the families involved." In asking the jury to spare Petitioner's life, Ms. Knowles explained that she and Petitioner had "come through sort of a battle," and they "always made it to the other side," albeit in different ways. Ms. Knowles testified that she loved Petitioner and that he was her "connection to what was real in [her] life, as horrible as it

> was." Ms. Knowles stated that Petitioner had a good heart, and she could not imagine being deprived of the ability to communicate with Petitioner given everything that they had been through in their life.

[Doc. 46-29 at 48-65 (citations to the internal record and footnotes omitted)].

The state habeas corpus court concluded that trial counsel's presentation of evidence in mitigation was reasonable, "particularly in light of trial counsel's thorough investigation." [Id. at 65]. The state habeas corpus court next described the mitigation evidence presented at the evidentiary hearing before that court:

> During the proceedings before this Court, Petitioner introduced the testimony of seven lay witnesses and three expert witnesses in an attempt to demonstrate deficient performance' of Petitioner's trial counsel. Petitioner introduced the testimony of Kelly Gosselin and her brother, Michael Boudreau. Ms. Gosselin testified that her father, Dennis Boudreau, was married to Petitioner's mother, Becky, from around September of 1977 through the beginning of 1980. During that time, Petitioner's mother verbally and physically abused Ms. Gosselin and Mr. Boudreau, as well as their younger sister.
>
> For a period of approximately two weeks, Petitioner and his sister, Dayna, lived in

the apartment with Ms. Gosselin and Mr. Bourdreau. Regarding that two week period, Mr. Boudreau recalled one incident in which he and his two sisters fought each other in front of Petitioner and his sister, Dayna. Additionally, Mr. Boudreau testified that one night Petitioner punched him in the face and gave him a black eye "for no reason." Ms. Gosselin, however, did not remember any details from that period of time.

Petitioner also presented testimony from Roger Jones, who was Petitioner's ROTC teacher for two years in high school, and his son, Thomas Jones. Roger Jones testified that Petitioner was in special education for a behavioral disorder and was an average student. Petitioner followed the rules in his class and was "always respectful." Roger Jones also testified that he never met Petitioner's parents and opined that Petitioner would have done well in the military. Thomas Jones testified that he met Petitioner "briefly" in the early 90s when Petitioner was in his father's ROTC class. Thomas Jones worked for the Cobb County Sheriff 's department and, at the request of his father, visited Petitioner "a few times" while Petitioner was incarcerated in the Cobb County Detention Center.

Kelly Kory Nagel, who was Petitioner's friend from fifth to ninth grade, also testified during the evidentiary hearing before this Court. Ms.

Nagel testified that Petitioner was a "wonderful friend, a great listener," and "her protector." Ms. Nagel never visited Petitioner's house and never met Petitioner's family. Ms. Nagel also described an incident in which Petitioner told her he was going to commit suicide. Trial counsel contacted Ms. Nagel in the spring of 2006; however, Ms. Nagel was living in California and unable to travel at the time. Although Ms. Nagel moved back to Georgia in October of 2006, she never contacted anyone from Petitioner's defense team to inform them of her move to Georgia.

Additionally, Petitioner presented testimony from Brenda Dragoone, who lived across the street from Petitioner and his family for approximately one to three years. Ms. Dragoone did not have a relationship with Petitioner's family aside from conversing with his stepmother, Janie, while walking their children to and from the bus stop. However, Ms. Dragoone testified that Petitioner and his sister were not allowed out of the yard to play and that their father yelled at them often. Ms. Dragoone also described an incident in which Petitioner's father spanked him in the yard because he "soiled his underwear" and "flushed it down the toilet and backed up the plumbing." Ms. Dragoone opined that Janie was afraid of Petitioner's father and when questioned as to why she believed this she stated "I'm a woman

and I would know—you know, you can tell when women are intimidated by men."

Petitioner presented the testimony of his sister, Dayna Lee, who also testified during the sentencing phase of Petitioner's trial. The record shows that Ms. Lee's testimony at the evidentiary hearing before this Court was largely cumulative of her testimony at trial. During habeas proceedings, Ms. Lee opined that trial counsel could have asked her more questions on the stand at Petitioner's trial and explained "I feel like maybe everybody felt sorry for me and so they stopped asking me questions, and I—I just feel like they could have asked more." However, the record reflects that Ms. Lee became emotional while giving testimony regarding sexual abuse she endured by her father and no further testimony regarding the sexual abuse was elicited.

Additionally, Petitioner introduced the testimony of two expert witnesses, Dr. Julie Rand Dorney and Dr. Victoria Reynolds. Dr. Domey, an expert in forensic psychiatry, performed a psychiatric examination of Petitioner at the request of Petitioner's habeas counsel. In conducting her examination, Dr. Dorney met with Petitioner on two occasions for a total of approximately seven hours. In addition, Dr. Domey reviewed the trial transcript, Dr. Shaffer's testing materials,

Petitioner's school records, and Petitioner's prison records. Following her examination of Petitioner, Dr. Dorney spoke with Dr. Reynolds and Petitioner's sister, Dayna.

Dr. Dorney diagnosed Petitioner with obsessive-compulsive disorder [(OCD)] and depressive disorder NOS. Additionally, Dr. Dorney found that Petitioner has many symptoms of both PTSD and bipolar disorder; however, Petitioner did not meet all of the criteria for a diagnosis. Regarding PTSD, Dr. Dorney explained:

> [Petitioner] is almost 40 years old and he doesn't reenact the trauma anymore in his mind, which means that—you know, typically if someone is traumatized they may have flash backs from an event or nightmares or they may have intrusive thoughts about it. But if you've been many years away from it and you have learned other ways to cope with it, you may not show that reenactment as much. So because he didn't meet that criteria, I couldn't make the diagnosis. He met all the other—other criteria, except for that.

Additionally, Dr. Domey testified that in her second meeting with Petitioner he told her that he was sexually abused by his great-

grandmother, Jewel, from the age of five or six until age fourteen. Dr. Domey also connected Petitioner's OCD to the sexual abuse and explained:

> [W]hen you pull together all the sexual trauma, it makes sense as to why psychologically he does what he does, because oftentimes with sexual abuse, with sexual trauma, patients tend to become obsessive; they tend to basically—you know, it's a way to stay cleari, it's a way to stay in control, it's a way to control your environment.

When asked why a sexual abuse victim would not report it, Dr. Domey explained "[mien have a harder time disclosing situations that are vulnerable. And I think, too he was—he's ashamed; he's humiliated; he, you know, feels very conflicted about it, you know, embarrassed about it."

Petitioner also presented the testimony of Dr. Reynolds, an expert in trauma and its impact on trauma victims. The majority of Dr. Reynolds's testimony reiterated the testimony that was presented at trial; however, Dr. Reynolds also testified regarding the sexual abuse Petitioner reported to Dr. Domey during habeas proceedings. Dr. Reynolds stated "[w]hen I—when I talked to him about Jewel, he did

not reveal the sexual abuse. I suspected it, but he did not—he just wasn't going to say it or it wasn't there and available to him; I'm not sure which."

Although Petitioner did not tell her about the sexual abuse, Dr. Reynolds stated that she suspected Petitioner had been sexually abused based on his level of dissociativeness, his level of compartmentalization, and his sexual activity. Regarding Petitioner's sexual activity, Dr. Reynolds explained that Petitioner and his sister, Dayna were found "kissing and touching" when they lived with their father and Janie. Additionally, Petitioner told Dr. Reynolds that he had "sexual relations with little girls" in his neighborhood and had sexual relations with two women in "semi-parental roles."

In fact, Petitioner never told anyone about the sexual abuse, which Dr. Reynolds explained is called dissociation. Dr. Reynolds further explained that this is a "compartmentalization where they—the experience gets put in—out of awareness, but it is still there and available to them." When questioned as to why Petitioner never told anyone about the sexual abuse, Dr. Reynolds stated that sexual abuse is "very stigmatizing for a boy" and that "it's double jeopardy for a child to report on the people he needs to depend on." Dr. Reynolds explained that sexual abuse is almost always a very severe trauma for a child or adult.

> Dr. Reynolds described the trauma Petitioner endured growing up including a skull fracture, instability, and physical abuse. Dr. Reynolds also discussed the incident in which Petitioner got into a car accident at age 16 and was beaten by his father after getting home from the hospital. Dr. Reynolds explained the effects of this abuse at different times in Petitioner's life. Dr. Reynolds stated that this trauma caused Petitioner to become dysregulated and explained that he went back and forth between mood and behavioral states. Dr. Reynolds also discussed the trauma in Petitioner's parental history, including Becky Humphreys' psychiatric and medical problems, and stated that both Petitioner's mother and father had been sexually abused.
>
> Dr. Reynolds also discussed Petitioner's OCD and how his trauma history and adaptations impacted him around the time of the crimes. Dr. Reynolds explained that he was living with his grandmother, on parole, he had lost his money, and his truck had been hit and when the "finishing line for paying off that money got farther and farther away, well, that—that kicks up more anxiety for him."

[Doc. 46-29 at 66-71 (citations to the internal record and footnotes omitted)].

Having reviewed Petitioner's presentation of evidence before that court in comparison to the evidence presented

at Petitioner's trial, the state habeas corpus court concluded that Petitioner cannot demonstrate prejudice regarding the evidence he now claims that trial counsel should have introduced during the penalty phase of his trial.

> [T]his Court finds that Petitioner has failed to show prejudice as the additional evidence presented in habeas would not have created a reasonable probability of a different outcome. A comparison of the trial record and the habeas record shows the majority of the evidence presented in habeas reiterated the testimony presented at trial. The testimony of Roger Jones regarding Petitioner's behavioral disorder and participation in ROTC is cumulative of evidence presented at trial and trial counsel is not ineffective for not introducing cumulative evidence. *See Holsey v.Warden, Ga. Diagnostic Prison, 694* F.3d 1230, 1260-62 (11th Cir. 2012); *see also Sochor v. Sec'y Dep't of Corr.*, 685 F.3d 1016, 1032 (11th Cir. 2012); *Rose v. McNeil*, 634 F.3d 1224, 1243(11th Cir. 2011). . . . Similarly, the majority of Ms. Dragoone's testimony is cumulative as numerous witnesses at trial testified that Petitioner's father was abusive. Further, Ms. Dragoone' s opinion regarding the relationship between Petitioner's father and stepmother is unpersuasive as she gave no factual basis for her beliefs.
>
> The testimony of Ms. Gosselin and Mr. Boudreau regarding the abuse they endured

by Petitioner's mother is also unpersuasive as Petitioner only lived within the same household for two weeks. Furthermore, the record shows that testimony was presented to the jury regarding the abuse and neglect Petitioner endured while in his mother's care. Similarly, the testimony of Thomas Jones that he met Petitioner "briefly" when Petitioner was in high school and visited Petitioner a few times while he was incarcerated is unpersuasive and weak. The testimony of Ms. Nagel describing Petitioner as being protective is also cumulative of the testimony elicited from numerous witnesses at Petitioner's trial. Although the testimony of Ms. Nagel regarding Petitioner's suicide attempt is new, the Court finds that this testimony is weak.

Additionally, the majority of the expert testimony presented during habeas proceedings is also cumulative and trial counsel is not ineffective for not introducing cumulative evidence.[14] . . . Furthermore, the only potentially

14. In a footnote, the state habeas corpus court stated:

The Court notes that Petitioner's habeas experts diagnosed Petitioner with OCD whereas trial counsel's experts diagnosed Petitioner with PTSD, Dissociative Disorder, and Asperger's Syndrome. However, the habeas experts and trial counsel's experts based their diagnosis on the same behaviors and "symptoms" exhibited by Petitioner. While OCD might be one possible diagnosis, "it is not the only reasonable diagnosis that could be made from the information contained in the materials."

mitigating "new evidence" presented during habeas proceedings concerns Petitioner's past sexual abuse, of which Petitioner did not disclose to trial counsel, or anyone else, prior to habeas proceedings. As discussed above, trial counsel cannot be found ineffective for failing to discover and present evidence of abuse that their client does not mention to them. *DeYoung v. Schofield*, 609 F.3d 1260, 1288 (11th Cir. 2010); *Newland v. Hall*, 527 F.3d 1162, 1202 (1 lth Cir. 2008). Furthermore, even if this Court were to find trial counsel's investigation and presentation of Petitioner's sexual abuse deficient, which the Court does not, Petitioner has still failed to demonstrate a reasonable probability in the outcome [sic] of the proceedings if this evidence had been presented at trial. This evidence would have had little, if any, mitigating weight at Petitioner's trial. *See Callahan v. Campbell*, 427 F.3d 897, 937, (11th Cir. 2005) and *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001) (finding the fact that none of defendant's siblings had committed violent crimes reduced the value of abuse as mitigating evidence).

Card v. Duaner, 911 F.2d 1494,1513 (11th Cir. 1990). Furthermore, trial counsel are "not required to 'shop' for a mental health expert "who will testify in a particular way." *Id.* Therefore, to the extent Petitioner alleges trial counsel were ineffective in failing to present a diagnosis of OCD to the jury, this claim fails.

[Doc. 46-29 at 73 n.71].

> This Court finds that there is no reasonable probability that the outcome of the proceedings would have been different based on the additional evidence Petitioner presented during habeas proceedings. The United States Supreme Court has held that a proper prejudice analysis under *Strickland* requires a court "to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Williams v.Taylor*, 529 U.S. 362, 397-98 (2000); *Strickland*, 466 U.S. at 694. . . .
>
> At the evidentiary hearing before this Court, the mitigating evidence presented by Petitioner was largely cumulative of the evidence of presented at trial. The additional evidence presented by Petitioner was weak and unpersuasive. Weighing the totality of the aggravating evidence against the totality of the mitigating evidence, this Court finds that any additional mitigating testimony would not have created a reasonable probability of a different outcome.

[Doc. 46-29 at 72-75].

Petitioner argues that the state habeas corpus court's conclusion that he failed to establish prejudice is not entitled to deference under § 2254(d). In order obtain relief on this claim, Petitioner must show that "the evidence on the prejudice question is so one-sided in his favor that the

answer is, as the Supreme Court has phrased it, 'beyond any possibility for fairminded disagreement'" or that the state court's "determination of the prejudice issue was so unjustified that it 'was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3 d 1230, 1258 (11th Cir. 2012) (quoting *Richter*, 562 U.S. at 103). Petitioner has failed to meet that burden.

As recited above, the state habeas corpus court found that most of the evidence that Petitioner presented at the hearing before that court was cumulative to evidence presented at Petitioner's trial. Petitioner contends that the state court erred because the testimony he presented from Brenda Dragoone (the neighbor who witnessed the abusive acts of Petitioner's father), Kelly Nagel (the childhood friend who stated that Petitioner was her protector), and Roger Jones (the high school ROTC instructor), could have corroborated and reenforced the testimony of Petitioner's family members, making that testimony more believable, given that the jury might view Petitioner's family as biased. Petitioner also points to testimony that Pamela Jahns, Petitioner's second grade teacher, could have given about the fact that Petitioner seemed troubled and her suspicion that "something was going on at home." [Doc. 40-18 at 117 (Bates 4697)].

However, both the United States Supreme Court and the Eleventh Circuit have held that "evidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial

when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." *Holsey*, 694 F.3d 1230, 1260-61; see *Pinholster,* 563 U.S. at 200-01 ("The 'new' evidence largely duplicated the mitigation evidence at trial. School and medical records basically substantiate the testimony of [the petitioner]'s mother and brother. Declarations from [the petitioner]'s siblings support his mother's testimony that his stepfather was abusive and explain that [the petitioner] was beaten with fists, belts, and even wooden boards."). Given that standard, this Court agrees with the state habeas corpus court that the mitigation evidence that Petitioner presented to the state habeas corpus court was largely cumulative of the evidence that trial counsel presented during the penalty phase of Petitioner's trial. In any event, "fairminded jurists could disagree on the correctness of the state court's" conclusion that the evidence was cumulative. *Richter*, 562 U.S. at 102. As a result, under § 2254(d), Petitioner cannot establish that he was prejudiced by trial counsel's failure to present evidence that the state habeas corpus concluded was cumulative of evidence presented at trial.

Petitioner also points out that testimony regarding Petitioner's fecal incontinence, "childhood suicidality," and his mother's mental illness, is new evidence that the jury did not hear.[15] However, this Court agrees with the state

15. Petitioner contends that evidence of his mother's drug use was also new, noncumulative evidence. However, in her testimony at Petitioner's trial, Dr. Loring stated that, when he was very young, Petitioner lived with his mother in a "drug house." [Doc. 36-9 at 56-57].

habeas corpus court that the fact that Petitioner soiled himself one time and the fact that Petitioner, as a child, once told a friend that he was contemplating suicide does not undermine this Court's confidence in the outcome of the sentencing phase of Petitioner's trial. In any event, as the state habeas corpus court noted, trial counsel was aware of the witness who would have testified regarding Petitioner's contemplation of suicide, and as far as counsel knew, she was unavailable to testify.

As to Petitioner's mother's mental issues and drug use, most of that testimony related to periods after Petitioner had been removed from his mother's care, a point that the prosecution almost certainly would have raised, and the jury did hear compelling testimony regarding the abuse that Petitioner suffered while he was in his mother's care. The fact that mental illness may have driven Petitioner's mother to abuse her children does not make that abuse worse or more mitigating.[16]

This Court strongly disagrees with Petitioner's contention that this case is comparable to the circumstances presented in *Johnson v. Sec'y, Dept. Corr.*, 643 F.3d 907 (11th Cir. 2011), or *Cooper v. Sec'y, Dept. Corr.*, 646 F.3d 1328 (11th Cir. 2011), where both petitioners' trial counsel did virtually no investigation into mitigating evidence prior to the trial and missed highly compelling mitigating

16. This same analysis applies to Petitioner's contention that his trial counsel should have presented evidence of his father's criminality and "the generations of dysfunction, mental illness, and sexual abuse that plagued [Petitioner]'s paternal family history." [Doc. 59 at 210].

evidence. *Cooper*, 646 F.3 d 1354 ("The description, details, and depth of abuse in Cooper's background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told.") (quotation, alteration, and citation omitted); *Johnson*, 643 F.3 d at 936 (same). Here, as found by the state habeas corpus court, trial counsel's investigation into mitigating evidence was substantial, and new evidence that Petitioner presented at the state habeas corpus hearing does not undermine this Court's confidence in the outcome of Petitioner's trial.

The one example of more possibly compelling evidence—that Petitioner's great-grandmother engaged in continuing, ritual sexual abuse of Petitioner—cannot be considered because trial counsel cannot be faulted for failing to present that evidence. It is undisputed that trial counsel (and their investigators or experts) asked Petitioner whether he had been sexually abused as a child, and Petitioner told them that he had not. No one else interviewed by trial counsel's team, including all members of Petitioner's family, indicated that Petitioner had been sexually abused. Accordingly, as determined by the state habeas corpus court, trial counsel "does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). In response, Petitioner argues: "Of course, Dr. Agharkar[17] advised counsel that he needed

17. Dr. Bhushan Agharkar, a psychiatrist, was hired as an expert by Petitioner's defense team, but he did not testify because, according to Petitioner, he would not diagnose Petitioner with Asperger's.

to meet with Mr. Humphreys multiple times in order to build enough of a rapport to enable disclosure of sensitive and traumatic information, but counsel ignored him." [Doc. 59 at 194]. Petitioner continues: "Overcoming those barriers and accessing Mr. Humphreys's memory of the abuse required arming a properly qualified expert with the time necessary to obtain an accurate picture of his functioning." [Id. at 195]. According to Petitioner, his OCD rituals and his fecal incontinence are indicators of sexual abuse, and trial counsel should have allowed the expert the time needed to uncover the abuse. This Court first points out that *Strickland* does not require prescience or expert psychological knowledge on the part of counsel. As discussed above, the test is not what the best—or even a good—lawyer would do, *Waters*, 46 F.3d at 1512, and the standard that Petitioner would have this Court use to evaluate his trial counsel is simply inconsistent with Supreme Court law.

More important, Petitioner's contention that he would have revealed his prior sexual abuse if trial counsel had arranged for him to spend more time with a mental health professional is purely speculative. Dr. Reynolds, the psychologist who provided expert testimony during the penalty phase of Petitioner's trial, testified at the state habeas corpus hearing that, prior to the trial, she had a "strong suspicion" that Petitioner had been sexually abused as a child. [Doc. 39-28 at 67]. Based on that suspicion, she asked Petitioner a series of questions that she posed "in a particular way"—she termed it a "behaviorally specific way"—in an attempt to get Petitioner to confirm her suspicion, and Petitioner denied that sexual abuse occurred. [Id. at 9394]. As noted above,

Petitioner admitted his sexual abuse to Dr. Dorney, and Dr. Reynolds speculated that Petitioner was able to make that admission at that time because "outside influences were distressing him enough that he . . . could maybe access . . . more in that moment." [Id. at 95]. Dr. Dorney testified that the day that Petitioner admitted the sexual abuse to her, he had just learned that we would have to change cells, which caused him a significantly high level of stress because of his obsessive compulsive disorder, and he had not slept for days. [Id. at 183, 190 ("The whole idea of being moved out of his cell really kept him just in a frenzy. . . . [H]e was very depressed and hopeless.")]. Dr. Dorney speculated that it was "that vulnerability . . . that . . . allowed [her] the opportunity to get through into what was going on sexually with him." [Id. at 190-91]. In other words, according to Petitioner's experts, if not for the fact that prison officials ordered Petitioner to change cells just prior to his meeting with Dr. Dorney, we may have never learned of the sexual abuse, and trial counsel cannot be faulted for not benefitting from fortuity.[18]

This Court is further unconvinced by Petitioner's arguments regarding the shifting expert mental health diagnoses presented at Petitioner's trial and at the state

18. Petitioner points out that Dr. Dorney also said that this was not "the first day [Petitioner]'s been vulnerable over the last several years," and he asserts that "[a] similar opportunity would have presented itself to Dr. Agharkar." [Doc. 59 at 196 n.51 (quoting Doc. 39-28 at 191)]. This Court responds that the proper statement is that a similar opportunity *might* have presented itself, just as it could have presented itself when Dr. Reynolds was questioning Petitioner about sexual abuse. That it did not happen is unfortunate, but it was not the fault of trial counsel.

habeas corpus hearing. Petitioner contends that the Asperger's Syndrome diagnosis was incorrect and was arrived at by trial counsel "in a last-minute panic." [Doc. 59 at 222]. According to Petitioner, "[t]he presentation of an unsupported diagnosis needlessly sacrificed their experts' credibility with jurors and portrayed [Petitioner] in an even more aggravating light. It fueled the state's arguments and prejudiced the outcome of his trial." [Id.]. This assertion is not supported by the record. The state did not present expert mental health testimony during the penalty phase of Petitioner's trial and the prosecutor made no mention of Petitioner's Asperger's diagnoses during his closing argument during the penalty phase of the trial. It also would have been difficult for the jury to know if the Asperger' s diagnosis was incorrect when there was no apparent reason to question Petitioner's experts' credibility.

Petitioner also argues that Petitioner's trial experts mislabeled his OCD as Asperger's, and that, if the jury had heard about Petitioner's OCD, they would have learned about the "tormenting" symptoms that he suffered. [Doc. 59 at 213]. As a general matter, *post hoc* mental diagnoses in death penalty habeas corpus cases are common and rarely demonstrate that the petitioner is entitled to relief. *See Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[W]e have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). The Asperger's diagnosis was not the only diagnosis made by experts at

Petitioner's trial. Those experts also diagnosed PTSD and dissociative disorder. While Petitioner contends that his post-conviction diagnosis of OCD is more mitigating than the diagnoses presented at his trial, this Court is willing to acknowledge only that Petitioner may possibly be correct, which falls far short of the requirement, discussed above, of demonstrating that "the evidence on the prejudice question is so one-sided in his favor that the answer is . . . beyond any possibility for fairminded disagreement." *Holsey*, 694 F.3d at 1258 (quotation and citation omitted). Indeed, this Court is not convinced that, given the horrific nature of Petitioner's crimes and the aggravating evidence against him, the jury would have have altered their sentencing decision, even if his OCD was as debilitating as Petitioner now describes it.

Having carefully reviewed the record, this Court now concludes that Petitioner has failed to demonstrate that the state habeas corpus court's conclusion that Petitioner did not establish his claim of ineffective assistance regarding counsel's actions during the penalty phase of his trial is not entitled to deference under § 2254(d), and Petitioner is thus not entitled to relief on the claim in this Court.

b. Petitioner's Claim that Trial Counsel was Ineffective for Failing to Question, Challenge, or Strike Linda Chancey During Voir Dire

Petitioner next contends that his trial counsel was ineffective in failing to properly question, challenge, and strike Juror Chancey during voir dire. Petitioner raised

this claim in his state habeas petition, and the state habeas court denied the claim on its merits. [Doc. 46-29 at 75-84]. The state court made the following findings of fact regarding Ms. Chancey:

> Ms. Chancey affirmed that she had not formed or expressed an opinion in regard to the guilt or innocence of the defendant regarding the charges. Ms. Chancey also affirmed that she was not related to the defendant, that her mind was perfectly impartial between the State and the accused, and that she had no prejudice or bias either for or against the defendant. Ms. Chancey denied that she was conscientiously opposed to the death penalty, and when asked whether she would always vote to impose the death penalty where a defendant was found guilty of murder, Ms. Chancey replied [n]ot at all." Asked whether she would be able to consider and vote for the imposition of life with the possibility of parole, Ms. Chancey responded "[d]epending upon the evidence, I would be." She also indicated that she would be able to consider voting to impose a sentence of life without parole. Ms. Chancey denied that she would always vote for the sentences of life or life without parole regardless of the evidence, and indicated that she would be able to vote for any of the three sentencing options, depending upon the evidence.
>
> When questioned by the State, Ms. Chancey indicated that she knew nothing about the case

and had not overheard any information about the case while at the courthouse. Ms. Chancey reaffirmed that she would be able to consider all three sentencing options if the defendant was found guilty of murder, and would regard the verdict and mitigating circumstances as two separate matters. Ms. Chancey indicated that if the instructions were to fairly consider all three sentencing options "that is precisely what [she] would do." Ms. Chancey denied that she had leanings towards any particular sentence and stated that "we all err and there is a sanctity of life and only God gives that life" and that "contemplation for remorse is appropriate." Ms. Chancey stated she "absolutely" could consider the defense evidence in mitigation and would vote for whichever sentence she felt was right. She indicated that she understood her responsibility as a juror to hear and consider the views of the other jurors regarding guilt-innocence and sentencing. Finally, Ms. Chancey indicated that she would vote the way she felt after considering the other jurors' views.

When questioned by [Petitioner's trial counsel] Mr. Berry regarding her views on the death penalty, Ms. Chancey stated "[t]here is a certain finality with it. I think we are rather predisposed to give a defendant a fair sentence." Ms. Chancey further stated that there was a "certain sanctity of life," and she thought that "every human being has the right to that

sanctity." She stated that one must "make sure that justice is dealt and in such a manner that would be applicable to the situation and the crimes or the mitigating circumstances." Ms. Chancey stated that her views on the death penalty were "flexible," and that there was "no retribution once the lives of others that are innocent have been taken." Ms. Chancey also stated that whether she could consider a life sentence for someone she had found guilty of malice or felony murder was a matter of hearing the mitigating circumstances. Ms. Chancey indicated that if she were in the minority, she would be able to stand up for what she thought was the right thing to do. She affirmed that she would give the defendant the benefit of the doubt, and stated that she was more of a fact-based than emotion based person. Ms. Chancey also affirmed that if she had a loved one on trial for his or her life, she would be satisfied with a juror of like attitudes as herself on the jury. Mr. Berry ended his questioning at that point, and after Ms. Chancey left the courtroom, the trial court ruled that she was eligible to be considered for further questioning.

After discussing her employment history, Ms. Chancey freely admitted that she had been the victim of a crime that had happened some time ago in her home in Washington, D.C. Ms. Chancey stated that she did not know the attacker, a convicted murderer who escaped

from a mental hospital in Washington, D.C. Ms. Chancey stated that the man had been recaptured and "actually didn't do [her] any physical bodily harm. [She] was able to escape before he ever actually physically entered the dwelling, so it was preempted . . . they were able to capture him and to place him where he should be." Ms. Chancey affirmed that she did not feel that this experience would keep her from sitting as a fair juror if she were chosen for the jury, and that she would "absolutely" listen to and follow the law as given to her by the judge.

Mr. Berry asked Ms. Chancey whether she had been employed as law enforcement, and Ms. Chancey stated she had been a research analyst, and that she never had police powers. Mr. Berry stated that from his review of her juror questionnaire, he noticed that Ms. Chancey was friends with a real estate agent and he asked whether that would cause her any problems sitting on Petitioner's case. Ms. Chancey explained that she had known the woman for twenty years and that she had been a realtor for the last two years, but that it would not cause Ms. Chancey any problems hearing the case.

On Monday, September 17, the jury was struck and Ms. Chancey was selected. On Tuesday, September 18, 2007, before the trial began, the

> court questioned jurors to determine whether they had heard any information about the case since the time that they received their jury summons. Ms. Chancey indicated that she had not heard any information since receiving her jury summons and had not read anything on the Internet. Although Ms. Chancey had taken a trip to Las Vegas with a friend who was a realtor and had spoken to her that Saturday night to confirm each other' s safe return from Las Vegas, Ms. Chancey stated that they had not spoken about the case.

[Doc. 46-29 at 76-79].

Based on those findings, the state court concluded that Petitioner had failed to demonstrate that trial counsel had been deficient in their handling of Juror Chancey. After noting that trial counsel had extensive experience in choosing juries in death penalty cases and that the defense team kept detailed notes regarding voir dire and met following voir dire to compare notes and discuss the panel members, the court concluded that

> trial counsel is not deficient for not challenging Ms. Chancey as there were no grounds to warrant such a challenge. The standard for determining when a prospective juror maybe excluded for cause because of his or her views on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in

> accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas.*, 448 U.S. 38, 45 (1980)). The record shows that Ms. Chancey's views on capital punishment did not meet the standard to be excluded for cause.
>
> Petitioner has failed to show that trial counsel's decisions regarding the extent of voir dire, as well as whether to challenge Ms. Chancey, were not reasonable and strategic. Therefore, Petitioner has not carried his burden of showing that trial counsel's performance during voir dire fell outside the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Williams v. State*, 258 Ga. 281, 289 (7) (1988).

[Id. at 80].

This Court agrees with the state court that, given her testimony during voir dire, there certainly was not a valid reason to challenge Ms. Chancey for cause because she repeatedly stated that she was not biased and that she would consider all sentencing options. Her testimony certainly gave no indication that she would be willing to consider only the death penalty.

While Ms. Chancey's experience as a victim of a crime might indicate that she might not be the ideal juror, a reasonable attorney could decide not to use a preemptive strike to remove her from the jury. Petitioner points to

trial counsel Mr. Berry's testimony that he was tired, as a result of having to conduct all of the voir dire questioning by himself, and that he should not have left Chancey on the jury. Looking back, Berry considered that Chancey "was just crazy. And I think I made a mistake, obviously, in putting her on. If I had it to do over again, I would not have put her on there." [Doc. 42-3 at 42]. Petitioner argues in conclusory fashion that no reasonable attorney would have failed to strike Juror Chancey and contends that the state habeas corpus court erred in concluding that Berry made a tactical decision to keep Chancey on the jury because, according to Petitioner, Berry left Chancey on the jury by mistake, not by design. However, a more complete review of Mr. Berry's testimony reveals that he did have a strategic basis for leaving Ms. Chancey on the jury. Before admitting that it was a mistake to leave her on the jury, Berry said of Chancey: "This woman gave all the appropriate answers, but she was a little crazy. But I kind of felt like she would be crazy for us rather than crazy for them. . . . I took a chance and put her on there." [Id.].

Given trial counsel's reasons for not striking Chancey, Petitioner simply cannot demonstrate, based on Ms. Chancey's voir dire testimony, that she should have been struck or that trial counsel's failure to strike her was "so patently unreasonable that no competent attorney would have" done so. *Kelly*, 820 F.2d at 1176. She testified that she was not biased against Petitioner, that she was willing to consider all sentencing options, that she had not prejudged the case, and that she had not heard about the crimes, and her experience as a victim of a crime did not legally disqualify her. While trial counsel may

now regret his decision in keeping her on the jury, he did have a reasonable strategic reason for doing so. That having Chancey on the jury later proved to be problematic cannot be the basis of relief as this Court may not use 'the distorting effects of hindsight' and must evaluate the reasonableness of counsel's performance 'from counsel's perspective at the time.'" *Chandler v. United States*, 218 F.3 d 1305, 1316 (11th Cir. 2000) (quoting *Strickland*, 104 S. Ct. at 2065). This Court thus concludes that the state habeas corpus court's conclusion that trial counsel was not deficient in failing to remove Chancey from the jury is entitled to § 2254(d) deference, and Petitioner is not entitled to relief with respect to this claim.

C. Ground III: Withdrawn

D. Ground IV: Ineffective Assistance of New Trial and Appellate Counsel

Petitioner's Ground IV raises claims of ineffective assistance of his new trial and appellate counsel. Such claims are evaluated under the same two-prong standard applied to claims of ineffective assistance of trial counsel under *Strickland. Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). In addition, the Supreme Court has held a criminal defendant's appellate counsel need not raise all possible non-frivolous issues on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). Rather, the Court noted, "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-52. Therefore, it is

difficult for a defendant to show his counsel was ineffective for failing to raise certain issues on appeal, particularly if counsel did present other strong issues. *Robbins*, 528 U.S. at 287-88.

1. Juror Misconduct

Petitioner first contends that new trial and appellate counsel were deficient for failing to raise juror misconduct claims regarding Juror Chancey. As noted above, this Court has already held that the Georgia Supreme Court's conclusion that his appellate counsel was not ineffective for failing to raise the claims regarding Juror Chancey on appeal is entitled to § 2254(d) deference.[19] Petitioner has failed to effectively argue that the affidavits and testimony of other jurors regarding Chancey would have been admissible in his motion for a new trial or on appeal. As a result, there is no evidence to demonstrate that Chancey engaged in misconduct, and as the Georgia Supreme Court held, Petitioner "failed to establish the prejudice prong of his claim that appellate counsel were ineffective." [Doc. 47-8 at 2]. Moreover, this Court has further analyzed the merits of Petitioner's juror misconduct claim, see *supra* discussion at § III.A.2.b, and determined that Petitioner is not entitled to relief under that claim. Accordingly, Petitioner cannot demonstrate that he was prejudiced by appellate counsel's failure to raise the claim.

19. Petitioner's contention that the state courts' conclusion is not entitled to deference is entirely conclusory.

2. Other Claims of Ineffective Assistance of Appellate Counsel

Petitioner also raises claims of ineffective assistance of appellate counsel, contending (1) that appellate counsel failed to properly argue the coercive effect of the trial court's actions in response to the jury's purported deadlock, and (2) that appellate counsel failed to present competent evidence of the coercive impact of the trial court's *Allen* charge. Respondent argues that these claims are unexhausted and procedurally defaulted because Petitioner did not properly raise them before the state habeas corpus court. Petitioner argues in response that he did mention the claims in his brief before the state habeas corpus court, and that court failed to rule on them.

However, even if this Court were to accept Petitioner's argument that he properly raised the claims before the state court, both claims, as raised by Petitioner here, are entirely conclusory. In Petitioner's appeal, appellate counsel did, in fact, raise claims asserting that the trial court's *Allen* charge was coercive and that the trial court should have granted a mistrial, and in response, the Georgia Supreme Court concluded that the claims were unavailing. Before this Court, Petitioner has failed to identify the arguments or evidence he believes that appellate counsel should have (but failed to) presented in his motion for a new trial or on appeal, and he has not explained how those arguments and/or evidence would have likely led to a different result. Petitioner mentions the fact that appellate counsel submitted affidavits from some of the jurors in support of these claims and contends

that the affidavits were insufficient in comparison to the affidavits and testimony that habeas corpus counsel secured.[20] However, Petitioner has not provided any arguments or examples of why the latter affidavits/testimony would have been more effective in convincing the trial court or the appellate court to grant relief. Most significantly, the state habeas corpus court, the Georgia Supreme Court, and this Court have all concluded that the juror affidavits and testimony that Petitioner sought to introduce at the state habeas corpus proceeding are inadmissible, and Petitioner has not shown that the affidavits/testimony would be admissible in support of these claims.

Finally, the Georgia Supreme Court's discussion of these claims was comprehensive, and Petitioner has not demonstrated that the state court's reasoning would not apply to whatever arguments and evidence that Petitioner

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20. In his Ground V, discussed below, Petitioner raises the underlying substantive claim that the trial court's *Allen* charge was coercive, and he likely raises his ineffective assistance claim in order to counter a procedural default of any arguments regarding that claim that were not presented to the Georgia Supreme Court. To the degree that Petitioner assumes that this Court will read his arguments in his discussion of the underlying claims and compare that with the arguments that appellate counsel raised to determine what Petitioner believes appellate counsel should have argued, it is not this Court's role to mine the record and fashion Petitioner's arguments for him. *Chavez v. Sec. Fla. Dept. of Corrections*, 647 F.3d 1057, 1061 n.6 (11th Cir. 2011). In any event, this Court determines below that Petitioner is not entitled to relief with respect to the underlying claim, and he thus cannot demonstrate prejudice to establish his ineffective assistance claim.

thinks appellate counsel should have presented. Put simply, Petitioner has failed to show that he is entitled to relief with respect to his claim that his appellate counsel was ineffective in arguing that the trial court's *Allen* charge and its reaction to the deadlock was coercive.

E. Ground V: The Trial Court's *Allen* Charge was Coercive, the Trial Court Improperly Failed to Declare Mistrial, and the Trial Court did not Properly Respond to Juror Misconduct

As already stated, in his Ground V, Petitioner raises the substantive claim that the trial court's *Allen* charge was unduly coercive. Petitioner also adds claims regarding the fact that the trial court should have declared a mistrial in light of the fact that the jury was deadlocked and that the trial court failed to properly deal with Juror Chancey's misconduct. The result is that Petitioner's Ground V is rather like a claim of cumulative error where Petitioner claims that the combined elements of Chancey's antics, the animosity evident among the jurors, and the trial judge's reaction to the jury's notes by instructing the jurors to continue deliberating combined to deprive Petitioner of a fair trial.

According to Petitioner, the jurors reached a point where one or two jurors insisted that they should impose a life-without-parole sentence, other jurors were apparently willing to impose either a life-without-parole sentence or a death sentence, and Chancey insisted on a death sentence. As described above, Chancey withdrew from the discussions and said, in effect, that she would sit there

until the other jurors agreed to a death sentence. The foreperson wrote a note to the judge suggesting that the jury was at an impasse (and Chancey insisted that they add the word "currently" in two places in the note). The judge summoned the jury into the courtroom and urged them to keep deliberating. After further deliberations (and apparent histrionics by Chancey) the foreperson wrote another note asking to be relieved because of "the hostile nature of one of the jurors."[21]

The judge again summoned the jurors into the courtroom and gave the following *Allen* charge:

> The Court deems it advisable at this time to give you some instruction in regard to the manner in which you should be conducting your deliberations in the case. You've been deliberating upon this case for a period of time. The Court deems it proper to advise you further in regard to the desirability of agreement, if possible.
>
> The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision and verdict, if possible, and not for disagreement. It is the law that a unanimous verdict is required.
>
> While this verdict must be the conclusion of each juror independently, and not a mere

21. Petitioner's trial counsel also twice moved for a mistrial during the penalty phase deliberations.

acquiescence of the jurors in order to reach an agreement, it is nevertheless necessary for all the jurors to examine the issues and the questions submitted to them with candor and with fairness and with a proper regard for in deference [sic] to the opinion of each other.

A proper regard for the judgment of others will greatly aid us in forming our own judgment. Each juror should listen with courtesy to the arguments of the other jurors with the disposition to be convinced by them.

If the members of the jury differ in their view of the evidence, the difference of opinion should cause them all to scrutinize the evidence more carefully and closely and to reexamine the grounds of their own opinion.

Your duty is to decide the issues that have been submitted to you if you can consciously do so. In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for hostility or taking up and maintaining in the spirit of controversy either side of the cause.

You should bear in mind at all times that, as jurors, you should not be advocates for either side of the case. You should keep in mind the truth as it appears from the evidence, examined in the light of the instructions that the Court has given to you.

> You may, again, retire to the jury room for a reasonable time, examine your differences in a spirit of fairness and candor and courtesy, and try to arrive at a verdict if you can conscientiously do so. At this time, you may return to the jury room.

[Doc. 36-10 at 136-38].

Petitioner asserts that several members of the jury erroneously believed that they had to reach a unanimous verdict or that something untoward would happen: that Petitioner would receive a life-with-parole sentence, that Petitioner would be released, that the whole case would have to be retried, or that the judge would not let them leave until they reached a unanimous verdict. Chancey encouraged these erroneous beliefs. Eventually, the holdouts for a life-without-parole gave in and agreed to a death sentence. After the trial, one of those holdouts felt cheated, misled, and coerced by the trial court's instructions.

The Georgia Supreme Court, in determining that the trial court did not err in failing to declare a mistrial and that the *Allen* charge was not coercive discussed the issues and held as follows:

> We also find no merit to [Petitioner]'s contention that, after receiving [a] note [from the jury indicating that the jurors might be deadlocked], the trial court erred in failing to discharge the jury and sentence him to life without the

possibility of parole. *See* O.C.G.A. § 17-10-31.1(c) (requiring the trial court to impose either a sentence of life or life without parole where a death penalty sentencing jury has unanimously agreed on at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence) (repealed by Ga. L. 2009, p. 223, § 6, effective April 29, 2009); *Hill v. State*, 301 S.E.2d 269 (1983). Whether a jury is hopelessly deadlocked is a sensitive determination best made by the trial court that has observed the trial and the jury. It will be reversed on appeal only for an abuse of that discretion. *Romine v. State*, 350 S.E.2d 446 (Ga. 1986). Here, after a lengthy trial, the jury had been deliberating for less than nine hours, and the language twice used in the note that the jurors "currently" were not able to agree indicated that deliberations were ongoing. Under the circumstances, we cannot say that the trial court abused its discretion in requiring further deliberations.

After being instructed to continue, the jury deliberated for about three more hours. The jury foreperson then sent a note to the trial court requesting that the jurors be allowed to rehear [Petitioner]'s taped statement to the detectives. After listening to the statement, the jurors resumed their deliberations. About two hours later, [Petitioner] moved for a mistrial. The trial court denied the motion, noting that

there had been no indication from the jury that it was deadlocked.

After approximately two more hours, the trial court received a note from a juror asking to be removed from the jury "[d]ue to the hostile nature of one of the jurors." After reading the note to the parties, the trial court informed counsel that it intended to give the jury a modified *Allen* charge. *See Allen v. United States*, 164 U.S. 492, 501 (1896). Based on this last juror communication, [Petitioner] renewed his motion for mistrial, which again was denied.

After reading the juror's note to the jury without identifying from whom it came, the trial court gave a modified *Allen* charge. The jury resumed its deliberations at 8:40 p.m. and retired for the evening at 10:20 p.m. After deliberating for two hours the following morning, the jury returned death sentences for the two murders.

. . . .

While the trial court made a few inconsequential slips of the tongue and harmless additions, the *Allen* charge given in this case substantially followed the pattern charge. [Petitioner] nevertheless contends that two portions of the trial court's *Allen* charge rendered it unduly coercive. There is no merit to [Petitioner]'s

argument that the trial court coerced the jury to reach a verdict by injecting its personal feelings into the deliberations, in charging that "[a] proper regard for the judgment of others will greatly aid *us* in forming *our* own judgment" (emphasis supplied). While unfortunately colloquial for such an important and often-used instruction, this passage, when read in context, clearly refers to the judgment of the jurors, not the trial court, and in any event it does not suggest what judgment, if any, the court had at the time. *Compare McMillan v. State*, 322 S.E.2d 278 (Ga. 1984) (requiring reversal where, after its *Allen* charge, the trial court stated, "I feel like there is enough evidence in this case for you to reach a verdict one way or the other").

[Petitioner] also maintains that the instruction, "[i]t is the law that a unanimous verdict is required," is an incorrect statement of the law in the sentencing phase of a death penalty case, because Georgia's death penalty statute provides that, if the jury considering the death penalty cannot reach unanimity as to which of the three sentencing options to recommend, the trial court is required to dismiss the jury and to sentence the defendant to either life or life without parole. *See* O.C.G.A. § 17-10- 31.1(c) (repealed by Ga. L. 2009, p. 223, § 6, effective April 29, 2009).

With regard to this issue, [Petitioner] submitted with his motion for new trial the affidavits of one juror and of two investigators who interviewed a second juror, which allege that the jury misunderstood the law. However, because the proposed affidavit of the juror does not fall within any exception to O.C.G.A. § 17-9-41 (providing that jurors' affidavits "may be taken to sustain but not to impeach their verdict"), the trial court correctly declined to consider it. *See Gardiner v. State*, 444 S.E.2d 300 (Ga. 1994) (holding that the limited exceptions to O.C.G.A. § 17-9-41 do not include jurors' misapprehension regarding the law). Likewise, the trial court did not err in disregarding the two investigators' affidavits, because "'if a verdict may not be impeached by an affidavit of one or more of the jurors who found it, certainly it cannot be impeached by affidavits from third persons, establishing the utterance by a juror of remarks tending to impeach his verdict.'" *Washington v. State*, 678 S.E.2d 900 n.11 (Ga. 2009) (citation omitted).

Our task is to determine whether the *Allen* charge in [Petitioner]' s case, considered as a whole, was "so coercive as to cause a juror to 'abandon an honest conviction for reasons other than those based upon the trial or the arguments of other jurors.'" *Mayfield v. State*, 578 S.E.2d 438 (Ga. 2003) (citation omitted). [Petitioner] maintains that the instruction misled the jurors

into believing that, if they were unable to reach a unanimous verdict, [Petitioner] would receive a life sentence or could even be released and that such a misunderstanding of the law coerced one or more jurors into abandoning their honest convictions in order to reach a unanimous verdict of death.

This Court has previously considered the same "a unanimous verdict is required" instruction given as part of an *Allen* charge in the sentencing phase of a death penalty trial. In *Legare v. State*, 302 S.E.2d 351 (Ga. 1983), we stated that "it is true that any 'verdict' rendered [in the sentencing phase] must be unanimous and thus also true, stated in isolation, that it is 'the law that a unanimous verdict is required.'" *Id.*

As we later explained in a related context, in Georgia a unanimous verdict is required even in the sentencing phase of a capital case because under our death penalty law, "[w]here a jury is unable to agree on a verdict, that disagreement is not itself a verdict." *Romine*, 350 S.E.2d 446(b). The jury's deadlock may lead to a sentence of life with or without parole imposed by the trial court, but it does not result either in a mistrial subject to retrial (as in other contexts where a jury deadlocks) or an automatic verdict (as occurs under the death penalty law of other states). Moreover, we have repeatedly held that

a trial court is not required to instruct the jury in the sentencing phase of a death penalty trial about the consequences of a deadlock. See *Jenkins v. State*, 498 S.E.2d 502 (Ga. 1998).

For these reasons, the "a unanimous verdict is required" instruction is technically a correct statement of the law even in the context of the sentencing phase of a death penalty trial. Nevertheless, because this charge may lead to claims of jury confusion that require detailed analysis of the full circumstances of the jury instructions given, the better practice is to omit this language from *Allen* charges given during the sentencing phase of death penalty trials. To the extent that *Legare*, 302 S.E.2d 351, suggests that this instruction will always survive such review, it is overruled.

Turning to that broader review, we note that the complained-of charge was a small portion of the extensive *Allen* charge given. As we have emphasized before, that charge also

> cautioned the jurors that the verdict was not to be the . . . "mere acquiescence [of the jurors] in order to reach an agreement," that any difference of opinion should cause the jurors to "scrutinize the evidence more [carefully and] closely" and that the aim was to keep the truth in view

> as it appeared from the evidence, considered in light of the court's instructions.
>
> *Mayfield*, 578 S.E.2d 438(b) (citation and punctuation omitted). In addition, following the publication of the verdicts, the jury was polled, and each of the jurors affirmed that the verdicts announced were the verdicts that he or she had reached and that each juror had reached those verdicts without any pressure from anyone during his or her deliberations. Id. In light of these circumstances and the full course of the jury's deliberations in this case, "[w]e conclude that, because the [a unanimous verdict is required] language constituted but one small portion of an otherwise balanced and fair *Allen* charge, it did not render the charge impermissibly coercive," *Burchette v. State*, 596 S.E.2d 162 (Ga. 2004), and it does not require reversal of [Petitioner]' s death sentences.

Humphreys, 694 S.E.2d at 332-34.

Petitioner argues that the Georgia Supreme Court's conclusions are not entitled to § 2254(d) deference because the court did not have before it the ample evidence presented at the state habeas corpus proceeding and because the court unreasonably erred in concluding that the instruction was not coercive on its face. With respect to the first argument, this Court again concludes that, for the same reasons discussed above, that the affidavits and

testimony of the jurors is clearly not admissible to impeach their verdict under Fed. R. Evid. 606(b). As a result, there is no evidence to support Petitioner's claims about what Chancey did, about what occurred during deliberations, or about what the jurors understood as a result of the trial court's instructions. This Court also again concludes that Chancey's actions were not juror misconduct in the legal sense. *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990).

In response to Petitioner's claim that certain jurors misunderstood the consequences of a deadlock, and that the holdout juror seeking a life-without-parole sentence gave in to avoid a deadlock, this Court points to the following holding by the Supreme Court:

> even assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence. Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights.

Jones v. United States, 527 U.S. 373, 394-95 (1999). In other words, in the case of a juror (or jurors) during a death penalty sentencing phase mistakenly believing that unanimity was an absolute requirement in order to

avoid the defendant walking free or even for the jury to be allowed to go home, the result could have gone the other way with the holdout jurors in favor of the death penalty caving and voting for a life sentence. As a result, Petitioner cannot establish that he was harmed by whatever supposed error caused the confusion because the error "would have had such an indeterminate effect on the outcome of the proceeding." *Id.* at 395. The confusion was just as likely to help Petitioner as harm him.

Having removed Chancey's behavior and juror confusion from the calculus, we are left with the question of whether the trial court's *Allen* charge was unduly coercive on its face, and this Court agrees with the Georgia Supreme Court that it was not. Petitioner focuses on specific passages in that charge that he contends rendered it improper, focusing in particular on the judge's statement that "[i]t is the law that a unanimous verdict is required." However, it is clear that this Court must weigh the propriety of the charge through a thorough examination of the course of the jury's deliberations, as well as the content of the instructions as a whole. *United States v. Alonso*, 740 F.2d 862, 878 (11th Cir. 1984). In addition to announcing that a unanimous verdict is required—which the Georgia Supreme Court concluded was an accurate statement of Georgia law—the trial court also said (1) that the case has been "submitted to [the jury] for decision and verdict, *if possible,*" (2) that "the verdict must be the conclusion of each juror independently, and *not a mere acquiescence of the jurors in order to reach an agreement,*" (3) that the juror's "duty is to decide the issues that have been submitted to you *if you can consciously do*

so," and (4) that the jury should "retire to the jury room *for a reasonable time* . . . try to arrive at a verdict *if you can conscientiously do so.*" [Doc. 36-10 at 136-38 (emphasis supplied)]. Viewing the instruction in its entirety, it is plainly evident that the instruction was not coercive and that jurors could not have reasonably come away with the belief that they must reach a unanimous verdict.

Moreover, nothing regarding the circumstances of the deliberations indicates that the *Allen* charge was coercive. As found by the Georgia Supreme Court, the jury had been deliberating for less than nine hours when they sent the first note stating that they "currently"[22] were not able to agree. After being instructed to continue, the jury deliberated for about three more hours when the foreperson sent a note requesting to rehear [Petitioner]'s taped statement to the detectives. Four hours after that, the trial court received the note from the foreperson asking to be relieved, and the trial court gave the *Allen* charge. After just under four more hours of deliberations, the jury returned death sentences for the two murders.

Nothing in that sequence indicates that the *Allen* charge was inappropriate at the time it was given. While there is certainly evidence in the admissible record indicating that there was dissension among the jurors—when jurors entered the courtroom for the *Allen* charge it appeared that some of them had been (or were) crying, and shouting was heard from outside the jury room during deliberations—it was the sentencing phase of a

22. See *supra* n.10.

death penalty trial where raw emotion is unsurprising if not expected.

Accordingly, this Court concludes that the Georgia Supreme Court's conclusion that the trial court's *Allen* charge was not coercive was clearly reasonable, and Petitioner is not entitled to relief with respect to his Ground V.

F. Ground VI: The Prosecution Introduced Prejudicial and Inflammatory Evidence at Trial

Petitioner next complains that the prosecution introduced "gruesome" photographs of the victim and a prejudicial crime scene videotape during his trial. As Respondent points out, this claim is clearly procedurally defaulted as he failed to raise it in his appeal, and Petitioner's attempt to overcome the default by arguing that appellate counsel was ineffective for failing to raise the claim, to which argument he dedicates one sentence, is entirely conclusory.

This Court further points out that even Petitioner concedes that the evidence of his guilt was overwhelming. As such, the photographs and video could not have prejudiced him during the guilt phase of the trial. As to sentencing, evidence that demonstrates the wantonly vile, horrible, or inhuman nature of his crimes is certainly fair game. As a result, this Court concludes that Petitioner is not entitled to relief with respect to his Ground VI.

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G. Ground VII: Trial Court Excluded Jurors Based on Their Views of the Death Penalty in Violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968)

In his Ground VII, Petitioner contends that the trial court improperly excluded jurors based on their negative views of the death penalty. In *Witherspoon*, the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), the Court held that under *Witherspoon*, a prospective juror may not be excused for cause "based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (reaffirming the standard announced in *Adams).* "[A] juror may be excused for cause 'where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.'" *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (quoting *Witt*, 469 U.S., at 425-26).

Petitioner contends that three members of his jury panel were stricken by the trial court for cause because of their view of the death penalty, but their opinions were not strong enough to disqualify them under the standard announced in *Witherspoon.*

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The first panel member, Linda Weaver, made several equivocal statements during voir dire regarding the death penalty. She first stated that she was conscientiously opposed to the death penalty but then stated that she could vote for the death penalty for "something terribly, terribly outrageous." [Doc. 34-19 at 150]. She then stated twice that she would not be able to impose a sentence of life with the possibility of parole. [Id. at 151]. She then said that she would always vote for a sentence of life without parole, and that she would be unable to vote for the death penalty regardless of the evidence. [Id. at 152-53]. Then she swung back and said that she would be able to vote in favor of the death penalty for "something outrageous" and that she could consider the death penalty but would not consider a life-with-parole sentence. [Id. at 153]. She then said that after she heard the evidence, she could consider all three sentencing options. [Id. at 156]. After a two or three more inconsistent answers to artfully worded questions, the judge asked Weaver whether she would be inclined to always vote for a sentence of life without parole, and she responded that she would. [Id. at 160]. After hearing from the parties, the judge excused Weaver, concluding that "life without parole is exactly where she is going. And when I asked her the question if that would always be her vote, she said yes." [Id. at 162].

The next panel member, Glenna O'Quinn, was asked repeatedly whether she could consider voting in favor of a death sentence. She responded with ambiguous statements such as, "it would be difficult," "I guess," "I'm not sure," and "I don't know." [Doc. 35-6 at 203]. At one point she stated that she could consider all three sentencing options,

and that she would not have hesitation in considering all three options. [Id. at 211-12]. Moments later, however, she said that she did not know whether she could impose a death sentence and that she "just struggle[s] with having to think about putting a person to death." [Id. at 212]. She then stated that she honestly did not know what she would do. [Id.].

The court excused O'Quinn, concluding that she

> could not state that she could vote for the death penalty. She continually said I guess. And I believe that a panel member has to be able to say that it might be difficult, but I could vote for it under the circumstances. But even when asked about circumstances, she said, I guess. And that is not the same as saying, I could go for it if I found that way. And the fact she also stated that her religious principles were such, that you should not play God, God decides whether a person should live or not. So I'm going to excuse her at this time. I believe she would be substantially impaired based upon her body language and her consistent statement of she guesses she could do something, but she could never say definitely she could.

[Id. at 214].

The final panel member was Claudette Hudson. She initially stated that she was not conscientiously opposed to the death penalty and that she could consider all three

sentencing options. [Doc. 35-1 at 172-73]. However, when the prosecutor asked Hudson why she hesitated when answering whether she opposed the death penalty, she responded, "I just don't believe in the death penalty," and she agreed that it would be "really hard for [her] to give fair consideration to the death penalty." [Id. at 175]. When Petitioner's trial counsel asked her if she thought she could vote for a death sentence if she "thought it was bad enough," she said no. [Id. at 177]. She also testified that, while she could consider all three sentencing options, she did not "know about imposing the death penalty on somebody"—that she could consider the death penalty, but she was not sure she could impose it. [Id. at 179].

The trial court concluded that

> Ms. Hudson initially in answer to the Court's questions answered that she could consider all three, and she could vote for them. Later on she, during questioning, indicated that she basically was against the death penalty and that she could not impose the death penalty. When asked straight out whether or not she could impose a sentence and there was some confusion on her part about what the question was. And I said it would be voting to put the person to death. She said she couldn't do that. And then she later said, well, when [trial counsel] was questioning her that, well, she thinks maybe she could do that or not do that.
>
> I think she is trying to be nice in her answers is the impression I get, and yet she is very

> nervous. But I believe that overall she is opposed to the death penalty and would not be able to impose it, so I'm going to excuse her.

[Id. at 181-82].

Petitioner raised his claims regarding Weaver, O'Quinn, and Hudson in his appeal. In affirming the trial court, the Georgia Supreme Court identified the correct standard announced by the United States Supreme Court and held as follows:

> A review of the record shows that the responses of prospective jurors Weaver, Hudson, and O'Quinn regarding their ability to impose a death sentence were equivocal and contradictory. The trial court was authorized to find from the totality of their responses that they could not meaningfully consider all three sentencing options and, accordingly, that they would be substantially impaired in the performance of their duties as jurors in a capital case.

Humphreys, 694 S.E.2d at 328. Having reviewed the record, this Court concludes that the state court's determinations regarding Weaver, O'Quinn, and Hudson are correct. All three women indicated that they would have difficulty imposing the death penalty, and Weaver also indicated that she would not impose a life-with-the-possibility-ofparole sentence. Given their responses, the judge was reasonably left with the definite impression that the prospective jurors would be unable to faithfully and impartially apply the law.

Petitioner contends that the Georgia Supreme Court unreasonably determined the facts, but Petitioner's version of the facts, as detailed in his brief, is incomplete and omits some of Weaver's, 0' Quinn's, and Hudson's answers that indicate that they would not be able to follow the judge's instructions. A review of each panel member's entire testimony demonstrates that the trial judge's and the Georgia Supreme Court's opinion that Weaver's, O'Quinn's, and Hudson's views would prevent or substantially impair the performance of their duties as a juror in accordance with their instructions and their oath was reasonable. As such, this Court must defer to those opinions under § 2254(d), and Petitioner is not entitled to relief with respect to his claims in Ground VI.

H. Ground VIII: Trial Court Failed to Excuse Jurors Who Were Incapable of Giving Proper Consideration to a Sentence Other than Death and/or to Mitigating Evidence

Petitioner next contends that the trial court failed to excuse certain jury panel members who indicated that they would not give proper consideration to a sentence other than death and/or mitigating evidence. Petitioner lists six such panel members. Three of those six, McCollum, Beckham, and Burkey, did not serve on Petitioner's jury. Under Georgia law in effect at the time of Petitioner's trial and appeal, death penalty defendants are entitled to 42 qualified jurors, and the erroneous qualifying of a single juror for the panel from which the jury was struck requires reversal. *Lively v. State*, (Ga. 1992) *overruled by Willis v. State*, 820 S.E.2d 640 (Ga.

2018).[23] Conversely, under federal constitutional law, if a biased panel member does not serve on the jury, Petitioner cannot have been prejudiced by the trial court's refusal to strike that individual for cause even if Petitioner was required to use a peremptory strike to avoid having that panel member serve. "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," the Supreme Court has held that the criminal defendant "has not been deprived of any . . . constitutional right." *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" demonstrates "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." *Id.* at 316; *see also Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (rejecting "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury"). Accordingly, Petitioner has failed to state a claim regarding jury panel members McCollum, Beckham, and Burkey.

As to the remaining three, Kenneth Goodbread, Darell Parker,[24] and Kim Buckley,[25] this Court concludes that

23. In *Willis*, 820 S.E.2d at 658 n.3, the Georgia Supreme Court also disapproved of the opinion in Petitioner's direct appeal to the extent that it relied on *Lively* or *Harris v. State*, 339 S.E.2d 712 (1986).

24. Parker's first name is spelled three different ways in the transcript. [Doc. 35-5 at 3, 55], and the parties use different spellings. This Court is unclear as to which one is correct.

25. It appears that Kim Buckley was the first alternate juror, and neither party has stated in their briefs' hether she took part

Petitioner has not demonstrated that he is entitled to relief. The standard announced in *Adams, supra*, for analyzing *Witherspoon* claims also applies to "reverse *Witherspoon*" claims: "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. . . . [A] juror who would automatically vote for the death penalty in every case should be stricken for cause." *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992).

In her voir dire testimony, Dare11 Parker stated in response to the judge's questions that she would be able to vote for all three sentencing options depending on the evidence. [Doc. 35-5 at 59]. She also stated that she would reserve judgment on the appropriate sentence until she heard all of the evidence in aggravation and in mitigation, [id. at 60-61], and affirmed that she could "consider all [three sentencing options] and engage in a discussion with 11 other jurors, hear what they think and then make up [her] own mind, and it might be any of those three sentences," [id. at 64]. Then in response to a question from Petitioner's trial counsel, she testified to her belief that "when one is found guilty beyond a reasonable doubt, that they have . . . taken someone's life, that they deserve the death penalty." [Id. at 65]. However, it seems from a review of her entire answer to that question that she was

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in deliberations. This Court has chosen to analyze Petitioner's claim regarding Buckley in an abundance of caution.

confused about the different phases of a death penalty trial, and she might have been talking about the process of finding a defendant guilty of murder. When trial counsel tried to clarify, Parker's answers got a bit more confused, until she seemed to understand and again said that she would be able to consider all three sentencing options, [id. at 73], that she was willing to listen to the evidence in mitigation, [id. at 73-74], and that she had an open mind, [id. at 76]. After hearing this testimony, the judge refused trial counsel's request to excuse Parker, stating that while Parker testified "that she would start with the death penalty and then consider the other possibilities, . . . she later in the questioning became much more convinced that she would be open to all possible sentences before making that decision." [Id. at 80-81].

Kenneth Goodbread similarly began his questioning by telling the judge that he would be willing to consider all three sentencing options depending on the evidence. [Doc. 35-4 at 58]. He also testified that he believed he could keep an open mind and listen to the evidence in aggravation and mitigation. [Id. at 59]. In responding to a question from Petitioner's trial counsel, Goodbread indicated that he may or may not be able to consider a life-with-parole sentence. [Id. at 64]. Then he testified that he probably could not consider a life-with-parole sentence. [Id.]. After further questioning and discussion, he moderated his stance and said that he believed he could consider a life-with-parole sentence, [id. at 68], and that he would be able to vote for any of the three possible sentences, [id. at 69]. The judge refused to excuse Goodbread based on his testimony that he could consider all three possible sentences. [Id. at 73].

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Kim Buckley also answered the trial judge's questions by stating that she would consider all three possible sentences. [Doc. 35-5 at 132]. She further testified that she was willing to withhold her judgment on sentencing until she has heard the evidence in aggravation and in mitigation, [id. at 133], that after she found someone guilty of murder, she would not have made up her mind about punishment until she heard the evidence from the penalty phase, [id. at 140]. Then, in response to a question from Petitioner's trial counsel, she stated that she would not consider a life-with-parole sentence and that she had a strong opinion about that. [Id. at 141-43]. Then in response to questions from the prosecutor, Buckley said that, during deliberations, she could listen to and consider the views of other jurors, [id. at 144], and that those opinions could possibly convince her to vote for a life-with-parole sentence, [id. at 145-46]. When Petitioner's trial counsel again questioned her about the inconsistency of her answers, Buckley said, "I will change my answer. I guess I'd [consider a lifewith-parole sentence]." [Id. at 147]. She further explained that she could not "make an intelligent answer unless I know what the circumstance are for that particular case . . . I'm willing to listen to everything and to look at all of the evidence and the other jurors." [Id.]. But she then said that, after finding a defendant guilty of murder, she would have a predisposition against voting for a life-with-parole sentence. [Id. at, 149]. Finally, in responding to the judge's questions, Buckley said that she would be open to all three sentencing options. [Id. at 153]. The trial judge then concluded that she was qualified to serve. [Id. at 154].

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Petitioner raised his reverse *Witherspoon* claims in his direct appeal, and in affirming his convictions and sentences, the Georgia Supreme Court stated that

> while each of these jurors expressed a leaning toward the death penalty, they all stated that they would listen to and consider mitigating evidence and that they could give fair consideration to and vote for each of the three sentencing options. We therefore conclude that the trial court did not abuse its discretion by denying [Petitioner]' s motions to disqualify these . . . prospective jurors.

Humphreys, 694 S.E.2d at 328.

Petitioner contends in conclusory fashion that the state court's findings and conclusions regarding these jurors was unreasonable. This Court disagrees. While each of these jurors indicated at some point during voir dire that they may not be able to consider all three sentencing options, they all ultimately testified that they would be willing to consider the evidence in mitigation and in aggravation before weighing which of the three possible sentences would be appropriate. Given the jurors' testimony, the trial judge, who had the opportunity to observe the demeanor of the jurors while they testified, see *Uttecht v. Brown*, 551 U.S. 1, 17 (2007), certainly acted within her discretion in determining that the jurors' responses made them qualified to serve on the jury, as the Georgia Supreme Court reasonably concluded. This Court thus holds that Petitioner is not entitled to relief with respect to his Ground VIII.

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I. Ground IX: Petitioner's Death Sentence Was Sought and Imposed in an Arbitrary, Discriminatory, and Disproportionate Manner

Petitioner's Ground IX is a general attack on Georgia's standards and procedures for imposing the death penalty. He first contends that the Georgia Supreme Court has abdicated its responsibility in applying the proportionality review required under O.C.G.A. § 17-10-35. In affirming Petitioner's sentences and convictions, the Georgia Supreme Court held that

> In reviewing the proportionality of the death sentences in [Petitioner]'s case as required by O.C.G.A. § 17-10-35(c)(3), we have considered "whether the death penalty is 'excessive per se' or if the death penalty is `only rarely imposed . . . or substantially out of line' for the type of crime involved and not whether there *ever* have been sentences less than death imposed for similar crimes." *Gissendaner v. State*, 532 S.E.2d 677 (Ga. 2000) (citations omitted; emphasis in original). The cases in the appendix support the imposition of the death penalty in this case in that all involved a deliberate murder committed for the purpose of receiving money or any other thing of monetary value or involved an armed robbery, kidnapping with bodily injury, the (b)(7) statutory aggravating circumstance, and/or evidence that the defendant murdered multiple persons. *See* O.C.G.A. § 17-10-35(e). Thus, the cases in the appendix show the

> willingness of juries in Georgia to impose the death penalty under such circumstances. We find that, considering the crimes and the defendant, the sentences of death in this case are not disproportionate punishment.

Humphreys, 694 S.E.2d at 336 (listing cases that were comparable to Petitioner's). The court cited to O.C.G.A. § 17-10-35(c)(3) which requires the court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In approving Georgia's death penalty scheme, the United States Supreme Court cited favorably to the proportionality review requirement as a "provision to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," *Gregg v. Georgia*, 428 U.S. 153, 204 (1976), and noted that "[i]t is apparent that the Supreme Court of Georgia has taken its [proportionality] review responsibilities seriously," *id.* at 205. The Court also noted that

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind

> of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id. at 206.

This Court stresses, however, that the Supreme Court has concluded that proportionality review is not required by the Constitution "where the statutory procedures adequately channel the sentencer's discretion," *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984)), and Georgia's statutory procedures are adequate. *Collins v. Francis*, 728 F.2d 1322, 1343 (11th Cir. 1984) ("[I]t appears clear that the Georgia [death penalty] system contains adequate checks on arbitrariness to pass muster without proportionality review.") (internal quotations and citations omitted). As the proportionality review is not required by the Constitution, Petitioner cannot claim relief under § 2254 for the Georgia Supreme Court's purported failure to properly carry out its statutory mandate. *See Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons.").

Petitioner next complains that Georgia's statutory aggravating circumstances are unconstitutionally broad. O. C. G.A. § 17-10-30(b) sets out 12 aggravating factors, one of which must be unanimously found by a jury before the death penalty can be imposed. Petitioner contends

that some of the factors are so broad that they apply to virtually any murder. He points to O.C.G.A. § 17-10-30(b)(2), which permits a death sentence when the murder is committed in the commission of another capital felony, aggravated battery, burglary, or arson in the first degree, as well as O.C.G.A. § 17-10-30(b)(4) (murder committed for the "purpose of receiving money or any other thing of monetary value") and O.C.G.A. § 17-10-30(b)(7) (murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim").

The Eighth and Fourteenth Amendments prohibit the "standardless" imposition of the death penalty. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Capital sentencing statutes must "provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not. *Id.* at 427 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)); *see also Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). The Supreme Court, however, has concluded that Georgia's statutory aggravating factors, as interpreted by the Georgia Supreme Court, are not vague or overly broad. *Gregg*, 428 U.S. at 202-03.

In *Godfrey*, the Supreme Court overturned a Georgia death sentence that was premised on the (b)(7) aggravating factor ("outrageously or wantonly vile,

horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"), because the evidence did not support a finding of torture or an aggravated battery.[26] 446 U.S. at 426. Petitioner could feasibly claim that this aggravating factor should not apply to him based on the *Godfrey* opinion.[27] However, as the Georgia Supreme Court held, the evidence of Petitioner's crimes "was clearly sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of the remaining statutory aggravating circumstances as to each victim in this case." *Humphreys*, 694 S.E.2d at 336. Notably, the evidence clearly supports the jury's finding that "[t]he offense of murder . . . was committed while the offender was engaged in the commission of another capital felony," i.e., kidnapping. O.C.G.A. § 17-10-30(b)(2). The (b)(2) aggravating factor, as part of Georgia's death penalty scheme, sufficiently narrows the jury's discretion to impose the death penalty and "meets the requirements of *Zant*." *Sealey v. Chatman*, 1:14-CV-0285 -WBH, 2017 WL 11477455 at *35 (N.D. Ga. Nov. 9, 2017). Because at least one valid statutory aggravating factor as found by

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26. The Georgia Supreme Court had, by then, essentially erased "depravity of mind" from the statute by holding that "the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim." *Blake v. State*, 236 S.E.2d 637, 643 (Ga. 1977).

27. It is doubtful, however, that he would succeed with the argument because of the evidence that Petitioner choked Ms. Williams by tying her underwear tightly around her neck before he shot and killed her and the evidence that Petitioner choked Ms. Brown in a headlock-type grip or struck her in the neck before he shot and killed her.

the jury supports Petitioner's death sentences, he cannot obtain § 2254 relief based on the purported vagueness or broadness of other factors. *Zant*, 462 U.S. 862, 881 (1983) (holding that under Georgia's death penalty scheme, if one of the statutory aggravating factors supporting a defendant's death penalty is invalidated, the death sentence stands if supported by a finding of another, valid aggravating factor).

J. Ground X: The Trial Court's Improper Rulings and Other Errors

Petitioner's Ground X is simply a list of twenty-two errors purportedly committed by the trial court. Petitioner offers no argument to support why these claims warrant habeas relief. Indeed, he fails to cite to the record to demonstrate that the errors actually occurred, he provides no factual description of how the supposed errors happened, and he fails to discuss how the supposed errors prejudiced him. This Court agrees with Respondent that these conclusory allegations are insufficiently pled, unexhausted and thus procedurally defaulted, and they do not entitle Petitioner to relief.

K. Grounds Withdrawn

L. Grounds XIV and XV: The Statutory Aggravating Circumstances, as Defined in O.C.G.A. § 17-10-30(b)(2) and (B)(7) are Unconstitutionally Vague and Arbitrary

For the reasons discussed above in relation to Petitioner's Ground IX, this Court concludes that

Petitioner is not entitled to relief with respect to his Grounds XIV and XV in which he claims that the statutory aggravating factors found by the jury are vague and arbitrary, they were not supported by the evidence, or they did not properly narrow the class of death eligible offenders.

M. Ground XVI: Cumulative Error

In his Ground XVI, Petitioner raises a rather amorphous claim that could best be described as a claim of cumulative error or that cumulative effect of the unconstitutional incidents at Petitioner's capital trial served to deprive him of his right to a fundamentally fair trial. Cumulative error analysis addresses the possibility that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rosario Fuentez*, 231 F.3d 700, 709 (10th Cir. 2000). However, in order for a court to perform a cumulative error analysis, there first must be multiple errors to analyze, and this Court has not identified such error. Accordingly, Petitioner is not entitled to relief with respect to this claim.

N. Ground XVII: Georgia's Lethal Injection Protocols Violate the Eighth Amendment

Finally, in his Ground XVII, Petitioner contends that Georgia's use of lethal injection to execute him under the State's current protocols would constitute cruel and unusual punishment, violating his rights under the

Eighth Amendment. However, claims raising challenges to lethal injection procedures should be brought under 42 U.S.C. § 1983 rather than in a habeas corpus proceeding. *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1261 (11th Cir. 2009) ("A § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures.").

This is especially relevant in light of the well-documented problems that states, including Georgia, have encountered obtaining the drugs necessary for lethal injections and the changes that Georgia has made in its lethal injection protocol. *See generally*, Bill Rankin, et al., *Death Penalty*, Atl. J. Const., Feb. 17, 2014 at Al (discussing the increasing reluctance of drug manufacturers and compounding pharmacies to supply drugs for executions); *DeYoung v. Owens*, 646 F.3 d 1319, 1323 (11th Cir. 2011). It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court. This Court also points out that bringing this claim under § 1983 would likely work to Petitioner's substantial advantage because he may be able to conduct discovery without leave of court, and he will be more likely to have a hearing. Accordingly, Petitioner's challenge to Georgia's lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

IV. Certificate of Appealability

Under Rule 22(b)(1) ofthe Federal Rules of Appellate Procedure, "the applicant cannot take an appeal unless

a circuit justice or a circuit or district judge issues a certificate of appealability (COA) under 28 U.S.C. § 2253(c)." Pursuant to Rule 11 of the Rules Governing Section 2254 Cases "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotation marks omitted). Where a habeas petition is denied on procedural grounds without reaching the prisoner's underlying constitutional claim, "a certificate of appealability should issue only when the prisoner shows both 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." *Jimenez v. Quarterman*, 555 U.S. 113, 118 n.3 (2009) (internal quotations marks omitted) (citing *Slack*, 529 U.S. at 484).

Having now reviewed the petition and the parties' briefs, this Court concludes that Petitioner has made a substantial showing of the denial of a constitutional right only with respect to the portion of his Ground II in which he claims that his trial counsel was ineffective in investigating mitigating evidence and presenting his case in mitigation during the penalty phase of his trial.

V. Conclusion

Having carefully reviewed the parties' briefs, this Court concludes that Petitioner has failed to demonstrate that he is entitled to relief under 28 U. S. C. § 2254. Accordingly, the petition for a writ of habeas corpus is **DENIED** with prejudice except that Petitioner's Ground XVII, in which he raises a challenge to Georgia's lethal injections protocols, is **DENIED** without prejudice to his raising the claim in a 42 U.S.C. § 1983 civil rights action. A certificate of appealability is **GRANTED** with respect to Petitioner's claim that his trial counsel was ineffective in investigating and presenting his case in mitigation during the penalty phase of his trial and is **DENIED** with respect to his other claims for relief.

The Clerk is **DIRECTED** to **CLOSE** this action.

IT IS SO ORDERED, this 15th day of September, 2020.

/s/ Leigh Martin May
LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

APPENDIX C — OPINION OF THE SUPREME COURT OF GEORGIA, DATED AUGUST 28, 2017

SUPREME COURT OF GEORGIA

Case No. S16E1799

STACEY IAN HUMPHREYS

v.

BRUCE CHATMAN, WARDEN

Dated Atlanta, August 28, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

This Court has thoroughly reviewed Humphreys's application for a certificate of probable cause to appeal the denial of his petition for habeas corpus, the Warden's response, the habeas court's order, and the entire trial and habeas records. In doing so, we note that, in its analysis of Humphreys's claim that appellate counsel were ineffective in omitting a juror misconduct claim in his motion for new trial and on direct appeal, the habeas court found Humphreys's new juror affidavits and testimony, which he presented for the first time in the habeas court, inadmissible, and thereby disposed of both prongs of this claim, by relying exclusively on the fact that on direct appeal this Court upheld the trial court's

ruling that other juror affidavits that were submitted with Humphreys's motion for new trial were inadmissible because they "d[id] not fall within any exception to [then controlling] OCGA § 17-9-41." *Humphreys v. State*, 287 Ga. 63, 81 (9) (b) (694 SE2d 316) (2010). See Order, p. 84 (HR, p. 2,167). However, because Humphreys submitted new and different juror affidavits and testimony in his habeas proceeding to support this claim, a proper analysis would address whether these new juror affidavits and testimony fell within any of the exceptions to former OCGA §17-9-41, which was the law at the time of Humphreys's motion for new trial and direct appeal. See *Williams v. Rudolph*, 298 Ga. 86, 89 (777 SE2d 472) (2015) (holding that a habeas court properly addresses a petitioner's ineffective assistance of appellate counsel claim "from a perspective and state of the law" at the time of the petitioner's direct appeal); *Butler v. State*, 270 Ga. 441, 444 (2) (511 SE2d 180) (1999) (stating that whether an affidavit falls within an exception to former OCGA § 17-9-41 must be determined by the circumstances of the case).

Nevertheless, in its evaluation of the prejudice prong of Humphreys's claim that trial counsel were ineffective in not removing Juror Chancey from the jury, the habeas court carefully considered the new juror affidavits and testimony presented in the habeas proceeding before correctly determining that the juror affidavits and testimony "in this case" did not fall within any exception to former OCGA § 17-9-41. Order, pp. 81-84 (HR, pp. 2,164-2,167). See *Glover v. State*, 274 Ga. 213, 215 (3) (552 SE2d 804) (2001). Our independent review of the habeas court's factual findings regarding the new juror affidavits

and testimony that were made in relation to Humphreys's allegations of juror misconduct shows that those findings are supported by the record. Applying the law to those same factual findings leads us to conclude that Humphreys also failed to establish the prejudice prong of his claim that appellate counsel were ineffective, because, even had appellate counsel raised a juror misconduct claim in Humphreys's motion for new trial and on direct appeal based on the new juror affidavits and testimony that he submitted in the habeas court, there is no reasonable probability that the outcome of those proceedings would have been different. See *Humphrey v. Morrow*, 289 Ga. 864, 866 (II) (717 SE2d 168) (2011) (explaining that this Court adopts the habeas court's findings of fact unless they are clearly erroneous but applies the facts to the law de novo in determining whether counsel performed deficiently and whether any deficiency was prejudicial). Because Humphreys failed to establish the prejudice prong of his claim that appellate counsel were ineffective by omitting a juror misconduct claim, the habeas court did not commit reversible error by denying him relief on this claim. See *Hall v. Lewis*, 286 Ga. 767, 769-770 (II) (692 SE2d 580) (2010); *Lajara v. State*, 263 Ga. 438, 440 (3) (435 SE2d 600) (1993). Accordingly, we conclude that this issue is without arguable merit. See Supreme Court Rule 36.

Because Humphreys's claim that appellate counsel were ineffective by omitting a claim of juror misconduct in his motion for new trial and on direct appeal lacks merit, he also fails in his claim that appellate counsel's ineffectiveness in this regard satisfies the cause and

prejudice test to overcome the bar to his independent juror misconduct claim arising out of procedural default. See OCGA § 9-14-48 (d); *Lewis*, 286 Ga. at 769 (II). Therefore, the habeas court did not commit reversible error by concluding that Humphreys "failed to demonstrate cause and prejudice, or a fundamental miscarriage of justice sufficient to excuse his failure to raise" his juror misconduct claim in his motion for new trial and on direct appeal and that the claim therefore remains procedurally defaulted. Order, pp. 8, 10 (HR, pp. 2,091, 2,093). See *Head v. Ferrell*, 274 Ga. 399, 402 (II) (554 SE2d 155) (2001) ("The only circumstance where the 'cause and prejudice' test is not applied is where granting habeas corpus relief is necessary to avoid a 'miscarriage of justice,' and an extremely high standard applies in such cases."). Accordingly, we conclude that this issue is without arguable merit. See Supreme Court Rule 36.

While we do not find a need to discuss our reasoning in detail, our review of the record similarly reveals that the other claims *properly* raised and argued by Humphreys are without arguable merit. See Supreme Court Rule 36.

We treat as abandoned Humphreys's unsupported claims, which he presented to this Court by mere reference to all of the other claims that he raised in the habeas court. See Supreme Court Rule 22 ("Any enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned."); *Perkins v. Hall*, 288 Ga. 810, 831 (708 SE2d 335) (2011) (deeming claims raised "in summary fashion" in a granted application for a certificate of probable cause to appeal abandoned under

Supreme Court Rule 22); *Whatley v. Terry*, 284 Ga. 555, 573 (VI) (668 SE2d 651) (2008) (same regarding claims "incorporate[d] by reference"). Accordingly, Humphreys's renewed motion for consideration of all claims for relief raised in the habeas court but not briefed and supported by argument and citation of authority in his application for a certificate of probable cause to appeal is denied. Furthermore, to the extent that that motion requested, in the alternative, a 270-page expansion of this Court's 30-page limit for applications for certificates of probable cause to appeal, that request is denied. In this regard, we note that this Court granted a 45-page expansion of the 30-page limit on April 5, 2016, and then, on March 20, 2017, denied Humphreys's previous request for a 270-page expansion but authorized him to file a substitute application of 75 pages and explained that "any claims not supported by argument and citation of authority w[ould] be deemed abandoned." Nevertheless, Humphreys chose to ignore this opportunity and warning and simply renewed his motion, attaching his original application.

In light of the foregoing and upon consideration of the entirety of the application for a certificate of probable cause to appeal the denial of habeas corpus, it is hereby denied as lacking arguable merit. See Supreme Court Rule 36.

All the Justices concur, except Hines, C. J., not participating.

APPENDIX D — FINAL ORDER OF THE SUPERIOR COURT OF BUTTS COUNTY, STATE OF GEORGIA, FILED MARCH 10, 2016

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

CIVIL ACTION NO. 2011-V-160

HABEAS CORPUS

STACEY IAN HUMPHREYS,

Petitioner,

v.

BRUCE CHATMAN, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

Filed March 10, 2016

FINAL ORDER

COMES NOW before the Court Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Cobb County. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (hereinafter "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on February 25-28, 2013[1] the

1. The Court notes that Petitioner waived his right to be present at the evidentiary hearing on this matter. (HT, Vol. 1:27-38). After conducting an inquiry into Petitioner's understanding

arguments of counsel and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49.[2] As explained in detail in this Order, this Court DENIES the writ of habeas corpus as to Petitioner's conviction and sentence.

I. PROCEDURAL HISTORY

Petitioner, Stacey Ian Humphreys, was indicted by a Cobb County grand jury on February 12, 2004, on two counts each of malice murder, felony murder, aggravated assault, kidnapping with bodily injury, and armed robbery, and one count of possession of a firearm by a convicted felon. The State filed its notice of intent to seek the death penalty on February 12, 2004. Jury selection in Petitioner's trial began on September 4, 2007. On September 25, 2007, Petitioner was found guilty of malice murder, felony murder, aggravated assault, kidnapping with bodily injury and armed robbery. Petitioner pled guilty to possession

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of the nature and consequences of his waiver, the Court found that Petitioner's decision was made knowingly, intelligently, and voluntarily. (HT, Vol. 1:37-38). *See Brooks v. State*, 271 Ga. 456, 519 S.E.2d 907 (2)(1999)(finding a defendant's right to be present May be personally waived by the defendant).

2. The following abbreviations are used in citations throughout this order:

"R"-Record on appeal

"TT"-Trial transcript (followed by volume number)

"ST"-Sentencing transcript (followed by volume number)

"HT"-Habeas transcript (followed by volume number)

of a firearm by a convicted felon on September 26, 2007. On September 30, 2007, Petitioner was sentenced to death for the murders, and the felony murder convictions were vacated by operation of law. *Malcolm v. State*, 263 Ga. 369, 371-372, 434 S.E.2d 479 (4) (1993). Petitioner was further sentenced to a consecutive life sentence for each count of kidnapping with bodily injury and armed robbery, concurrent twenty year sentences for each count of aggravated assault, and a concurrent five year sentence for possession of a firearm by a convicted felon.

Petitioner's motion for new trial, as amended, was denied on February 19, 2009. The Georgia Supreme Court affirmed Petitioner's convictions and death sentences on March 15, 2010. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316 (2010). Petitioner's motion for reconsideration was denied April 9, 2010. Petitioner filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 15, 2010. *Humphreys v. Georgia,* 562 U.S. 1046, 131 S.Ct. 599, 178 L. Ed. 2d 438 (2010). Petitioner filed a petition for writ of habeas corpus on February 14, 2011, and an amendment on September 26, 2012. An evidentiary hearing was held on February 25-28, 2013 wherein Petitioner tendered 134 exhibits and Respondent tendered 119 exhibits.

II. STATEMENT OF FACTS

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

> The evidence, construed in the light most favorable to the jury's verdicts, showed the

following. At approximately 12:40 p.m. on November 3, 2003, Humphreys, a convicted felon who was still on parole, entered a home construction company's sales office located in a model home for a new subdivision in Cobb County. Cindy Williams and Lori Brown were employed there as real estate agents. Finding Ms. Williams alone in the office, Humphreys used a stolen handgun to force her to undress and to reveal the personal identification number (PIN) for her automated teller machine (ATM) card. After calling Ms. Williams's bank to learn the amount of her current balance, Humphreys tied her underwear so tightly around her neck that, when her body was discovered, her neck bore a prominent ligature mark and her tongue was protruding from her mouth, which had turned purple. While choking Ms. Williams, Humphreys forced her to get down on her hands and knees and to move into Ms. Brown's office and behind Ms. Brown's desk. Humphreys placed his handgun at Ms. Williams [sic] back and positioned a bag of balloons between the gun and her body to muffle the sound of gunshots. He then fired a shot into her back that went through her lung and heart, fired a second shot through her head, and left her face-down on her hands and knees under the desk.

Ms. Brown entered the office during or shortly after Humphreys's attack on Ms. Williams, and he attacked her too. Ms. Brown suffered a

hemorrhage in her throat that was consistent with her having been choked in a headlock-type grip or having been struck in the throat. Humphreys also forced Ms. Brown to undress and to reveal her PIN, called her bank to obtain her balance, and made her kneel with her head facing the floor. Then, while standing over Ms. Brown, Humphreys fired one gunshot through her head, this time using both a bag of balloons and Ms. Brown's folded blouse to muffle the sound. He dragged her body to her desk, took both victims' driver's licenses and ATM and credit cards, and left the scene at approximately 1:30 p.m. Neither victim sustained any defensive wounds.

When the builder, whose office was located in the model home's basement, heard the door chime of the security system indicating that someone had exited the sales office, he went to the sales office to meet with the agents. There he discovered Ms. Brown's body and called 911. The responding police officer discovered Ms. Williams' body.

After interviewing the builder and canvassing the neighborhood, the police released to the media descriptions of the suspect and a Dodge Durango truck seen at the sales office near the time of the crimes. In response, someone at the job site where Humphreys worked called to advise that Humphreys and his vehicle matched

those descriptions and that Humphreys did not report to work on the day of the crimes. The police began to investigate Humphreys and made arrangements through his parole officer to meet with him on the morning of November 7, 2003. Humphreys skipped the meeting, however, and eluded police officers who had him under surveillance.

Humphreys was apprehended in Wisconsin the following day. Police there recovered from the console of his rental vehicle a Ruger 9-millimeter pistol, which was determined to be the murder weapon. Swabbings from that gun revealed blood containing Ms. Williams's DNA. A stain on the driver-side floormat of Humphreys's Durango was determined to be blood containing Ms. Brown's DNA. After the murders, the victims' ATM cards were used to withdraw over $3,000 from their accounts. Two days after the murders, Humphreys deposited $1,000 into his account, and he had approximately $800 in cash in his possession when he was arrested. Humphreys claimed in a statement to the police that he did not remember his actions at the time of the crimes. However, when asked why he fled, he said: "I know I did it. I know it just as well as I know my own name." He also told the police that he had recently taken out some high-interest "payday" loans and that he "got over [his] head with that stinking truck."

Humphreys, 287 Ga. at 63-65.

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III. SUMMARY OF RULINGS

Petitioner's Amended Petition enumerates twenty one (21) claims for relief. As stated in further detail below, this Court finds: (1) some claims asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some claims are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some claims are non-cognizable; and, (4) some claims are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review. To the extent Petitioner failed to brief his claims for relief, the Court deems those claims abandoned. Any claims made by Petitioner that are not specifically addressed by this Court are **DENIED**.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CLAIMS THAT ARE RES JUDICATA

Many of Petitioner's grounds for relief in the instant action were rejected by the Georgia Supreme Court on direct appeal. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. *See Elrod v. Ault*, 231 Ga. 750, 204 S.E.2d 176 (1974); *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986); *Hance v. Kemp*, 258 Ga. 649(6), 373 S.E.2d 184 (1988); *Roulain v. Martin*, 266 Ga. 353, 466 S.E.2d 837 (1996). This Court finds that the following claims are not reviewable based on the doctrine of *res judicata* as the claims were raised and litigated adversely to Petitioner on his direct appeal in *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316 (2010).

That **portion of Claim I,** wherein Petitioner alleges that his death sentence was sought and imposed in arbitrary, disparate and discriminatory manner. *Humphreys*, 287 Ga. at 85 (11);

That **portion of Claim I,** wherein Petitioner alleges that his death sentence is disproportionate. *Humphreys*, 287 Ga. at 85 (12);

That **portion of Claim III,** wherein Petitioner alleges that the pool from which his grand jury was drawn was unconstitutionally composed and discriminatorily selected in violation of his constitutional rights. *Humphreys*, 287 Ga. at 65-69 (2) and (3);

Claim IV, wherein Petitioner alleges that the trial court erred in not excusing for cause unspecified potential jurors who were biased against Petitioner and/or whose views regarding the death penalty would have substantially impaired their ability to fairly consider a sentence less than death and to fairly consider and give weight and meaning to all proffered mitigating evidence. *Humphreys*, 287 Ga. at 71-72 (5);[3]

3. To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

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Claim V, wherein Petitioner alleges that the trial court erred in excusing for cause unspecified jurors whose views on the death penalty were not extreme enough to warrant exclusion. *Humphreys*, 287 Ga. at 71-72 (5);[4]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in denying several defense pretrial motions, including the motion to suppress Petitioner's post-arrest statement and the motions to suppress evidence obtained during allegedly illegal searches and seizures. *Humphreys*, 287 Ga. at 72-77 (6) and (7);[5]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in failing to strike for cause several unspecified venire persons whose attitudes towards the death penalty would have prevented or substantially

4. To the extent that this claim refers to jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

5. To the extent that this claim was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

impaired their performance as jurors. *Humphreys*, 287 Ga. at 71-72 (5);[6]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in its rulings on motions to challenge prospective jurors for cause based on their attitudes about the death penalty and stated biases. *Humphreys*, 287 Ga. at 71-72 (5);[7]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in allowing fair and impartial jurors to be struck for cause. *Humphreys*, 287 Ga. at 71-72 (5);[8]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in improperly

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6. To the extent that this claim refers to jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

7. To the extent that this claim refers to any jurors who were not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

8. To the extent that this claim refers to any jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

removing a juror on the grounds that she was a convicted felon. *Humphreys*, 287 Ga. at 69-71 (4);

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in admitting various items of prejudicial, unreliable, unsubstantiated and irrelevant evidence tendered by the State at either phase of trial. *Humphreys*, 287 Ga. at 72-77 (6) and (7);[9]

That **portion of Claim XII,** wherein Petitioner alleges that the trial court erred in failing to declare a mistrial and impose a sentence less than death after multiple, unambiguous declarations of deadlock by the jury in the sentencing phase. *Humphreys*, 287 Ga. at 77-82 (8) and (9);

Claim XIV, wherein sentence, and actively misled jurors regarding the consequences of a deadlock as to Petitioner alleges that the trial court erred in its modified Allen instruction by failing to instruct the jury that unanimity was not required to impose a life sentence. *Humphreys*, 287 Ga. at 80-82 (9) (b);[10]

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9. To the extent that this claim refers to evidence which was not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

10. Petitioner's allegations of trial court error during the sentencing phase charge to the jury are addressed below on page 84.

Claim XV, wherein Petitioner alleges that the trial court's *Allen* charge was unduly coercive and misleading under the facts and circumstances of Petitioner's case and denied him due process of law and a reliable determination of punishment. *Humphreys*, 287 Ga. at 77-82 (8) and (9);[11]

Claim XVII, wherein Petitioner alleges that the statutory aggravating circumstances as defined in O.C.G.A. § 17-10-30(b)(2) and (b)(7), and as applied in this case, are unconstitutionally vague and arbitrary. *Humphreys*, 287 Ga. at 83-85 (10);[12] and

Claim XIX, wherein Petitioner alleges that his death sentence is disproportionate. *Humphreys*, 287 Ga. at 85 (12).

As these claims were raised and rejected by the Georgia Supreme Court on direct appeal, they are barred under the well-established doctrine of *res judicata* and are not properly before this Court for review.

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11. Petitioner's allegations of trial court error during the sentencing phase charge to the jury are addressed below on page 84.

12. To the extent that this claim refers to jurors not addressed by the Georgia Supreme Court on direct appeal, this claim is procedurally defaulted and Petitioner has failed to show cause and prejudice or a miscarriage of justice to overcome the procedural default.

B. CLAIMS THAT ARE PROCEDURALLY DEFAULTED

Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985); *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48(d); *Hance v. Kemp*, 258 Ga. 649(4), 373 S.E.2d 184 (1988); *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. *See Earp v. Angel*, 257 Ga. 333, 357 S.E.2d 596 (1987). *See also Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997)(a procedural bar to habeas corpus review May be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors. A habeas petitioner who meets both prongs of the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

This Court concludes that the following grounds for habeas relief, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted. This Court is barred from considering any of these claims on their merits due to the fact that Petitioner has failed to demonstrate cause and prejudice, or a fundamental

miscarriage of justice sufficient to excuse his failure to raise these grounds:

> That **portion of Claim I,** wherein Petitioner alleges that Georgia's death penalty process provides no uniform standard for seeking and imposing the death penalty;
>
> **Claim II,** wherein Petitioner alleges that the Unified Appeal Procedure is unconstitutional;
>
> That **portion of Claim III,** wherein Petitioner alleges that the pool from which his traverse jury was drawn was unconstitutionally composed and discriminatorily selected in violation of his constitutional rights;
>
> **Claim VI,** wherein Petitioner alleges that death qualification process is unconstitutional;
>
> **Claim VII,** wherein Petitioner alleges that the State impermissibly struck a disproportionate number of jurors based on racial and/or gender bias;
>
> **Claim IX,** wherein Petitioner alleges prosecutorial misconduct in that:[13]

13. To the extent Petitioner relies on his ineffectiveness claim to establish cause to overcome the procedural default, this claim fails. As explained below, Petitioner's ineffective assistance of counsel claims are denied in their entirety. Further, Petitioner has also failed to show prejudice to overcome his procedural default. *See Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

a) the State made allegedly improper and prejudicial remarks during its argument at the guilt and sentencing phases of the trial;

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

c) the State suppressed unspecified information allegedly favorable to the defense at both phases of the trial;

d) the State took advantage of Petitioner's ignorance of the allegedly undisclosed favorable information by arguments it knew or should have known were false and/or misleading;

e) the State allowed its witnesses to convey a false impression to the jury; and

f) the State knowingly or negligently presented allegedly false testimony in pretrial and trial proceedings;

Claim X, wherein Petitioner alleges that the trial court erred in admitting gruesome and prejudicial photographs of the crime scene and victims, a prejudicial crime scene video and other unreliable and prejudicial evidence;[14]

14. To the extent Petitioner alleges that the trial court erred in admitting Petitioner's police statement and the evidence seized

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Claim XI, wherein Petitioner alleges that the trial court erred in permitting the prosecution to introduce inflammatory and prejudicial victim impact testimony;

That **portion of Claim XII,** wherein Petitioner alleges trial court error in that:

a) the trial court erred by phrasing her voir dire questions in a manner which suggested to jurors who gave neutral responses that they were or should be in favor of the death penalty;

b) the trial court engaged in improper voir dire;

c) the trial court erred in excusing unspecified potential jurors or moving them to the back of the venire for improper reasons under the rubric of "hardship;"

d) the trial court erred in allowing the prosecution to introduce improper, unreliable and irrelevant evidence in aggravation at sentencing, as well as evidence of which the defense had not been provided adequate notice and which had been concealed from the defense;

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from Petitioner's vehicle following his arrest, this claim was addressed and decided adversely to Petitioner on direct appeal. *Humphreys*, 287 Ga. at 72-77 (6) and (7).

e) the trial court erred in failing to require the State to disclose certain items of evidence of an exculpatory or impeaching nature to the defense; and

f) the trial court erred in denying Petitioner's motion for a new trial;

That **portion of Claim XIII,** wherein Petitioner alleges that the trial court's guilt phase instructions to the jury were erroneous, insufficient and confusing. Specifically, Petitioner alleges the trial court's instruction regarding intent allowed the jurors to resolve facts through presumptions and inferences;

Claim XVI, wherein Petitioner alleges juror misconduct, including:

a) improper consideration of matters extraneous to the trial;

b) false, misleading and/or incomplete responses on voir dire;

c) improper biases which were not revealed on voir dire and which infected the deliberations;

d) false and misleading extra-judicial information provided to other jurors during deliberations in an effort to obtain a death verdict;

e) direct undue coercion, harassment, pressure and threats at the other individual jurors in order to obtain a death verdict;

f) consideration of the prejudicial opinions of third parties;

g) lack of candor with the trial judge in each of the notes which announced a deadlock and sought guidance from the court;

h) improper communications with third parties and improper communications with jury bailiffs;

i) improper deliberation without all twelve jurors present;

j) improper deliberation before the close of the evidence;

k) prejudgment in the sentencing phase of Petitioner's trial; and

l) exposure to improper and prejudicial outside influences and bias, which included bias and prejudice against Petitioner created by the extensive media attention, by the actions of a juror who was excused for misconduct prior to deliberations, and by the actions of their fellow juror(s); and

Claim XX, wherein Petitioner alleges that capital punishment is cruel and unusual punishment.

C. CLAIMS THAT ARE NON-COGNIZABLE

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

Claim XVIII, wherein Petitioner alleges that lethal injection is cruel and unusual punishment; and

Claim XXI, wherein Petitioner alleges cumulative error.[15]

D. CLAIMS THAT ARE PROPERLY BEFORE THIS COURT FOR REVIEW

1. Ineffective Assistance of Counsel

Petitioner alleges in **Claim VIII,** various other claims and in various footnotes to claims, that he received

15. Alternatively, this claim is without merit as there is no cumulative error rule in Georgia. *Head v. Taylor*, 273 Ga. 69, 70, 538 S.E.2d 416 (2000). However, the Court has considered the combined effects of trial counsel's alleged errors in evaluating Petitioner's claims of ineffective assistance of counsel. *Schofield v. Holsey*, 281 Ga. 809, 812, 642 S.E.2d 56 (2007).

ineffective assistance of counsel at the guilt/innocence and sentencing phases of his trial as well as on his motion for new trial and direct appeal.[16] Petitioner was represented at trial by Jimmy Berry and Deborah Czuba.[17] Mr. Berry represented Petitioner on direct appeal as well. Petitioner's allegations of ineffective assistance of trial counsel, which were neither raised nor litigated adversely to Petitioner on direct appeal, nor procedurally defaulted, are properly before this Court for review on their merits. Additionally, Petitioner's allegations of ineffective assistance of appellate counsel are properly before this Court for review on their merits.

Standard of Review

In *Strickland v. Washington*, the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, [the petitioner] must show that the deficient performance prejudiced the defense.

16. Petitioner's claims of ineffective assistance of appellate counsel are addressed on page 84 below.

17. As discussed in detail below, multiple attorneys with the Georgia Capital Defender's Office worked on Petitioner's case.

> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The *Strickland* standard, which requires that a petitioner satisfy both the performance and prejudice prongs to demonstrate ineffectiveness, was adopted by the Georgia Supreme Court in *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362 (1985). *See also Jones v. State*, 279 Ga. 854, 622 S.E.2d 1 (2005); *Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005); *Hayes v. State*, 263 Ga. 15, 426 S.E.2d 557 (1993). Therefore, the *Strickland* standard governs this Court's review of Petitioner's ineffective assistance of counsel claims.

As to the first prong, Petitioner must show that counsel's representation "fell below an objective standard of reasonableness," which is defined in terms of "prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citing *Strickland*, 466 U.S. at 688). In *Strickland*, the Court established a deferential standard of review forjudging ineffective assistance claims by directing that "judicial scrutiny of counsel's performance must be highly deferential . . . [a] fair assessment of attorney performance requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The prejudice prong requires that Petitioner establish that the outcome of the proceedings would have been different, but for counsel's errors. *Smith v. Francis*, 253 Ga. at 783. The Georgia Supreme Court has relied on the *Strickland* test for establishing actual prejudice which requires Petitioner to "demonstrate that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional, errors, the result of the proceeding would have been different. *Smith*, 253 Ga. at 783. *See also Head v. Carr*, 273 Ga. 613, 616, 544 S.E.2d 409 (2001).

As explained in detail below, this Court has applied the guiding principles set forth in *Strickland* and its progeny, as adopted by the Georgia Supreme Court, and finds that Petitioner failed to establish that trial counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This Court also finds that Petitioner failed to establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Appendix D

Qualifications of Defense Team

In reviewing claims of ineffective assistance of counsel, the United States Supreme Court has held that "[a]mong the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." *Strickland*, 466 U.S. at 681. The presumption that trial counsel rendered adequate assistance is therefore, "even greater" when trial counsel are experienced criminal defense attorneys. *Williams v. Head*, 185 F.3d 1223, 1228-1229 (11th Cir. 1999) (*citing Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998)). This Court finds trial counsel were experienced criminal defense attorneys and has given their investigation and presentation the appropriate deference.

1. Jimmy Berry

Petitioner was represented at trial by Jimmy Berry and various attorneys from the Georgia Capital Defender's office. Mr. Berry had previously represented Petitioner on unrelated charges and following Petitioner's arrest in 2003, Petitioner's family retained Mr. Berry again. (HT, Vol. 1:45). Mr. Berry filed an entry of appearance of counsel in Petitioner's case on November 24, 2003, three weeks after Petitioner's arrest. (R. 33; HT, Vol. 1:45; HT, Vol. 38:14099, 14102-14103, 14109; HT, Vol. 40:14690). Petitioner's family paid Mr. Berry $1,500 to handle the probable cause hearing. (HT, Vol. 40:14690). Following

the probable cause hearing, Petitioner's family lacked the funds to continue paying Mr. Berry; however, he continued as retained counsel. (HT, Vol. 40:14690-14691). Mr. Berry was subsequently appointed by the court and served as lead counsel on Petitioner's case. (HT, Vol. 40:14696).

Mr. Berry became a member of the State Bar of Georgia in 1971. (HT, Vol. 1:40). Following law school, Mr. Berry spent five years practicing real estate law. (HT, Vol. 38:14096). Afterwards, his practice focused exclusively on criminal defense. (HT, Vol. 1:40; Vol. 38:14096). At Petitioner's March 26, 2004 pretrial hearing, Mr. Berry told the court that he had been practicing law for 32 years, had handled over 40 death penalty cases, and had attended and taught at a number of death penalty seminars. (3/26/04 PT, 3; *see also* HT, Vol. 42:118; Vol. 38:14097-14098). A significant number of Mr. Berry's death penalty cases went through both guilt-innocence and sentencing phases, and in those cases Mr. Berry performed the mitigation investigation. (HT, Vol. 1:41, 47; Vol. 38:14097).

2. Multi-County Public Defender: Mike Mears and Chris Adams

On February 12, 2004, the State filed its notice of intent to seek the death penalty. (R. 27-28). Mr. Berry then spoke with the Director of the Multi-County Public Defender[18], Mike Mears, who agreed to join Mr. Berry

18. The Court notes that Multi-County Public Defender and Georgia Capital Defender are both used on documents within the record. Legislation created the Office of the Capital Defender which "took over and expanded" the obligation of the Multi-County

on Petitioner's case. (HT, Vol. 40:14690). Subsequently, Mr. Mears left the Multi-County Public Defender and on April 23, 2004, Chris Adams filed an entry of appearance in Petitioner's case. (R. 43-44; HT, Vol. 32:11800-11801; Vol. 40:14844-14845). Mr. Adams served as co-counsel with Mr. Berry for the next 21 months.

Chris Adams graduated from Georgetown University Law School in 1992 and started out as a public defender in South Carolina. (HT, Vol. 32:11800). In 2000, Mr. Adams accepted a job in Atlanta with the Southern Center for Human Rights, where he focused on capital litigation. (HT, Vol. 32:11800). Prior to his representation of Petitioner, Mr. Adams served as lead or co-counsel in numerous death penalty trials. (6/1/04 PT, 19-20). Specifically, Mr. Adams handled three capital cases to verdict and over 30 capital felony trials to verdict. (6/1/04 PT, 20).

In 2004, Mr. Adams was appointed to serve as the first director of the Georgia Capital Defender (hereinafter "GCD"), officially starting his new role on January 1, 2005. (HT, Vol. 32:11800, 11803). While at GCD, Mr. Adams taught at death penalty seminars, including defender trainings sponsored by state defender agencies. (HT, Vol. 32:11803; Vol. 40:1485114855). On January 25, 2006, Mr. Adams formally withdrew from Petitioner's case, as he felt he needed to focus on his responsibilities as Director of GCD. (R. 2588-2589; HT, Vol. 32:11801). Mr. Adams testified that Petitioner's case was "one of the easier cases

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Public Defender. (HT, Vol. 40:14692). (*See also* HT, Vol. 1:49-50; Vol. 32:11800-11801).

to transition off of given [Berry's] prior and continuing role as lead counsel." (HT, Vol. 32:11801). Mr. Adams filed a substitution of counsel on January 25, 2006, replacing himself with GCD attorney Teri Thompson.[19] (R. 2588-2589; HT, Vol. 32:11801).

3. Teri Thompson

Teri Thompson graduated from John Marshall Law School in 1991 and became a member of the Georgia State Bar in 1992. (HT, Vol. 4:862; Vol. 38:14162-14163). After graduating law school, Ms. Thompson worked as a sole practitioner focusing primarily on criminal defense work. (HT, Vol. 4:862-863; Vol. 38:14162-14163). As a sole practitioner, Ms. Thompson handled between eight and ten murder cases, although none of them were death penalty cases. (HT, Vol. 4:863-864; Vol. 38:14163).

In 2005, Ms. Thompson joined GCD as a trial attorney. (HT, Vol. 4:864). Ms. Thompson was death penalty qualified and assigned to represent capital defendants while a GCD staff attorney.[20] (HT, Vol. 4:864-865; Vol. 38:14164-14165).

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19. However, the record shows that Ms. Thompson was actively involved in Petitioner's case as early as May 4, 2005, when she arranged a neurological examination of Petitioner at the Cobb County jail by Dr. Shaffer. (HT, Vol. 36:13535-13540). Additionally, the Cobb County jail records reflect that Ms. Thompson had her first meeting with Petitioner on January 14, 2005. (HT, Vol. 11:2668-2672).

20. During the evidentiary hearing before this Court, Ms. Thompson testified that she was certain that she was second-chair qualified and believed that she was first-chair qualified as well. (HT, Vol. 4:865).

By May 11, 2005, Ms. Thompson had reached the position of Senior Staff Attorney at GCD. (HT, Vol. 18:5479). From 2005 to 2007, Ms. Thompson worked on 14 or 15 capital cases, none of which resulted in a death sentence. (HT, Vol. 38:14166-14168). Ms. Thompson also attended death penalty seminars prior to, and during her employment at GCD. (HT, Vol. 1:868; Vol. 4:868; Vol. 38:14165). These seminars covered information on mental health, mental health experts, and trends in death penalty cases. *Id.*

On August 20, 2007, Ms. Thompson withdrew from Petitioner's case. (R. 2787). In her motion to withdraw, Ms. Thompson stated that on June 2, 2007, she personally informed Petitioner of her resignation from GCD, and that Petitioner had no objection to her withdrawal. (R. 2787). Although Ms. Thompson informed Petitioner of her withdrawal from the case on June 2, neither Ms. Thompson nor any other member of Petitioner's defense team informed the trial court, which signed an order on June 6, 2007, setting Petitioner's trial for September 4, 2007. (R. 2750). This order listed Mr. Berry, Ms. Czuba and Ms. Thompson as Petitioner's counsel. (R. 2751). Additionally, Ms. Thompson's name appears on several subsequent orders regarding trial matters which were issued by the court in July and August of 2007.[21] (R. 2753, 2760, 2771, 2774).

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21. Ms. Thompson testified during the evidentiary hearing before this Court that she left GCD in June of 2007 to return to private practice. (HT, Vol. 4:866). Ms. Thompson explained that at that time, she had two young children and her cases were scattered around Georgia, requiring extensive travel. *Id.* After leaving GCD, Ms. Thompson stayed connected to GCD and continued to assist with the Moody case. (HT, Vol. 4:866-867). In 2009, Ms. Thompson returned to GCD where she worked until November 2012. *Id.*

4. Deborah Anne Czuba

On January 31, 2006, less than one week after Teri Thompson became an official member of Petitioner's trial team, GCD attorney Deborah Anne Czuba also filed an entry of appearance in the trial court as Petitioner's counsel. (R. 2590-2591; HT, Vol. 40:14848-14849). Ms. Czuba graduated from Cornell University Law School in 1995 and became a member of the New York State Bar in January of 1996. (HT, Vol. 2:234, 297; Vol. 38:14213). Initially, Ms. Czuba worked for the New York Capital Defender as a mitigation specialist and staff attorney.[22] (HT, Vol. 2:234, 297, 408-409; Vol. 38:14213). In 1999, Ms. Czuba became a Deputy Capital Defender and was responsible for her own cases as a "full member of the trial team." (HT, Vol. 2:297; Vol. 38:14213), During her time at the New York Capital Defender, Ms. Czuba worked on approximately 35 capital cases. (HT, Vol. 2:406-407; Vol. 38:14214). In those cases, Ms. Czuba conducted investigation for both guilt-innocence and sentencing phases of trial, and handled motions and preliminary hearings. (HT, Vol. 2:243, 407, 409; Vol. 38:14226). Ms. Czuba also served as co-counsel on a murder case that went to verdict. (HT, Vol. 2:242-243, 409). Ms. Czuba explained that this case was originally a death penalty trial, but was subsequently de-capitalized when New York abolished the death penalty. (HT, Vol. 2:242-243). Ms. Czuba conducted voir dire and witness examination in this case. *Id.*

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22. The New York Capital Defender was responsible for handling capital cases at the trial level. (HT, Vol. 38:14214).

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In June or July of 2005, Ms. Czuba began working at the Georgia Capital Defender. (HT, Vol. 2:234; Vol. 38:14213, 14219). Initially, Ms. Czuba was not allowed to work as an attorney as she was not a member of the Georgia Bar. (HT, Vol. 2:298; Vol. 38:14213). However, while waiting to be admitted to the Georgia Bar, Ms. Czuba reviewed mitigation in Petitioner's case and provided ideas to the defense team, including Mr. Berry, Mr. Adams, Ms. Thompson and GCD investigator Alysa Wall. (HT, Vol. 2:241, 298-299; Vol. 38:14219, 14221-14222). After waiving into the Georgia Bar that summer, Ms. Czuba worked as a GCD staff attorney and handled capital cases at the trial level. (HT, Vol. 2:235-236, 297; Vol. 38:14213-14215). Ms. Czuba worked on approximately ten cases as a staff attorney and conducted mitigation investigation. (HT, Vol. 38:14215-14216, 14226).

Around September of 2005, Ms. Czuba became GCD's Deputy Director of Mitigation and Investigation, replacing Pamela Blume Leonard. (HT, Vol. 2:236; Vol. 38:14214). As Deputy Director of Mitigation and Investigation, Ms. Czuba was responsible for the supervision of GCD's entire mitigation and investigative staff, which included 17 mitigation experts and investigators. (HT, Vol. 2:236-237; Vol. 38:14215, 14221). This required Ms. Czuba's regular contact with the staff, and her assistance and consultation with their cases. (HT, Vol. 2:236-237). Ms. Czuba also handled budgetary and personnel matters, kept track of the office's case statistics, planned annual GCD conferences, and ensured that the attorneys and mitigation staff met their CLE requirements. (HT, Vol. 2:237; Vol. 38:14215). During her representation of

Petitioner, Ms. Czuba also attended and instructed at death penalty seminars in Georgia, Washington D.C., New York, South Carolina, and California. (HT, Vol. 38:14218; Vol. 40:14857-14862). In return for her performance of administrative duties at the GCD, Ms. Czuba was assigned a smaller case load.[23] (HT, Vol. 40:14860-14862).

5. Christopher Murell

On August 15, 2007, GCD attorney Christopher Murell filed an entry of appearance as counsel for Petitioner. (R. 2784-2785). Mr. Murell, a graduate of the New York University School of Law, worked as a fellowship attorney with GCD, and Ms. Czuba indicated that his role was primarily to conduct legal research for the trial team. (HT, Vol. 2:370-371).

The record reflects that Petitioner's trial counsel were death penalty qualified and Petitioner's case was handled according to the Unified Appeal Procedure.[24] This Court

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23. Ms. Czuba's notice of leave to courts and opposing counsel that she filed on January 26, 2006 in order to teach and attend death penalty seminars, indicates that Ms. Czuba was involved in three capital cases, including Petitioner's. (HT, Vol. 40:14860-14862).

24. During the proceedings before this Court, Mr. Berry testified that Petitioner's case was handled according to the Unified Appeal Procedure, which requires that two attorneys are provided each defendant in a capital case; among other requirements, co-counsel must have previously served as either lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials. (HT, Vol. 1:42-43; Unified Appeal Procedure (II)(b)(2)).

finds Petitioner's trial counsel were experienced criminal defense attorneys, whose experience supports a finding of effective assistance of counsel. *See Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) and *Fugate v. Head*, 261 F.3d 1206, 1216 (11th Cir. 2001) (finding presumption in favor of effective assistance is greater when trial counsel is experienced).

Reasonable Investigation

In Claim VIII of his Amended Petition, Petitioner alleges that his attorneys were ineffective in the pre-trial investigation conducted by his defense team. An attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and what investigations are reasonable "May be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. *See also Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) (finding defendant's demand that counsel undertake or refrain from a particular investigation bears upon the reasonableness of the investigation). As explained in detail below, this Court finds that trial counsel conducted a reasonable and competent investigation of Petitioner's case.

Following their appointment to Petitioner's case, Mr. Berry and Mr. Adams agreed that Mr. Berry would handle voir dire and the guilt-innocence phase and Mr. Adams would handle the sentencing phase. (HT, Vol. 1:51). Mr. Berry explained that Mr. Adams' office had "the

mitigation people" and "had the ability to be able to get the experts." *Id.* In addition to trial counsel, Petitioner had investigators and other staff from GCD working on his case. GCD interns also assisted in the mitigation investigation by organizing Petitioner's GCD file, locating and interviewing witnesses, and obtaining records. (HT, Vol. 4:807; Vol. 92:27761, 27766, 27768).

A. GCD Investigators

Alysa Wall was the initial mitigation investigator assigned to Petitioner's case in 2004 at the Multi-County Public Defender and she continued to work on Petitioner's case through much of 2005 at GCD. (HT, Vol. 86:26076). As early as August 11, 2004, Ms. Wall requested Petitioner's employment records from Cleveland Electric, where Petitioner worked as an apprentice at the time of the crimes. (HT, Vol. 52:17892). On January 21, 2005, Ms. Wall accompanied Mr. Berry and Mr. Adams to a deposition of Detective Eddie Herman, the lead detective on Petitioner's case, who interviewed Petitioner shortly after his arrest in Wisconsin. (1/21/05 PT, R. 5566-5609). On May 23, 2005, Ms. Wall sent Petitioner a copy of his "entire prison file" and asked him to read through it and highlight or note any sections that he thought "could be helpful . . . i.e. good work evaluations, positive guard notes, etc." (HT, Vol. 86:26076). Additionally, Ms. Wall's thorough interview notes, timelines and memos show that she was coordinating with Mr. Adams, Ms. Thompson, and Pamela Blume Leonard, and worked extensively on Petitioner's case. (HT, Vol. 91:27537).

After Alysa Wall, Laura Switzer took over as the GCD mitigation investigator for Petitioner's case. (HT, Vol. 1:67; Vol. 4:786, 831; Vol. 38:14172-14173). Ms. Switzer was employed as a mitigation specialist at GCD starting in 2005.[25] (HT, Vol. 4:782, 784-785). Previously, Ms. Switzer interned at the Southern Center for Human Rights, where she also investigated mitigation. (HT, Vol. 4:782-784). At the time of Petitioner's case, Ms. Switzer had both Bachelor's and Master's degrees in Social Work, and was working towards certification as a Licensed Clinical Social Worker (LCSW).[26] (HT, Vol. 4:780-782). Ms. Switzer worked on the mitigation investigation by gathering records and interviewing witnesses. (HT, Vol. 2:248; Vol. 38:14129). Additionally, Ms. Switzer acted as a liaison between trial counsel and the mental health experts. *Id.*

B. Document Requests

During their investigation, counsel requested numerous records pertaining to Petitioner and his family. (HT, Vol. 71:22477-22721). As early as May 2004, counsel had begun requesting Petitioner's records, including his family records, financial records, legal records, medical records, social services records, psychological records, school records, employment records, and prison records. *Id.* On May 27, 2004, Mr. Adams obtained Petitioner's authorization for release of all records regarding

25. Ms. Switzer testified that Alysa Wall was no longer working at the Georgia Capital Defender when Ms. Switzer's employment began in 2005. (HT, Vol. 4:785-787).

26. Ms. Switzer received her LCSW in 2010. (HT, Vol. 4:781)

adoption, correctional, educational, employment, foster care, medical, law enforcement criminal history (including GCIC and NCIC), psychological, psychiatric, rehabilitation, and all records maintained by federal, state, or local governments or subdivisions, to Mr. Adams, Mr. Berry, mitigation specialist Pamela Leonard, and investigator Wall. (HT, Vol. 52:17894). Counsel received extensive records relevant to Petitioner's background in response to their requests. (HT, Vol. 72-84; Vol. 86:26077-26108; Vol. 88:26675-26687).

After Mr. Adams, Mr. Berry, Ms. Leonard, and Ms. Wall requested declassification of Petitioner's entire institutional and central administrative records and probation records on file with the Georgia Department of Corrections, Mr. Adams secured a declassification order from the Commissioner's Office of the Department of Corrections on June 9, 2004. (HT, Vol. 15:4333). On March 11, 2005, Mr. Adams sent a subpoena for the production of evidence to Petitioner's former employer, Cleveland Electric, requesting all records of Petitioner's "hiring, employment, and termination, including his application, dates of employment, positions held, employment locations, time sheets, payroll records, tax records, salary, supervisor notes and evaluations, probation or disciplinary reports, and all other written or recorded records." (HT, Vol. 52:17878-17879).

At the February 12, 2007 ex parte hearing, Ms. Czuba told the trial court that the sentencing phase investigation "had been ongoing since the day the case started. That is the process of working and working and working to

gather this information." (HT, Vol. 40:14734). Ms. Czuba stated that counsel were still in the process of obtaining Petitioner's records that they had been requesting for the past three years, including Petitioner's North Carolina prison records, his juvenile incarceration records, and school records, and she explained the difficulty in obtaining some records that were "old and archived." (HT, Vol. 40:14733-14734). Regarding the older records, Ms. Czuba stated, "[w]e have requested them a dozen times, Your Honor. It is a process of working with the agencies to get these records. It is not you send a request to an agency and three weeks later they give you a record. It is a dynamic, difficult process." (HT, Vol. 40:14734).

On June 1, 2007, Ms. Czuba sent an authorization for release of confidential records to Merit Construction Company, where Petitioner worked between November 4, 2002 and February 9, 2003. (R. 2871; HT, Vol. 53:18038, 18039). The release authorized Mr. Berry, Ms. Thompson, Ms. Czuba, and Ms. Switzer to receive the information. (HT, Vol. 53:18039). Counsel compiled all of the information they received during the investigation and prepared Petitioner's family tree, social history, prison disciplinary timeline, "attorney mitigation witness strategy," and "aggravation and bad mitigation." (HT, Vol. 86:26069-26075, 26110-26112, 26118-26127; Vol. 87:26489-26523).[27]

27. The Court notes that the indexes to the information that counsel compiled alone are 53 pages long. (HT, Vol. 41:14865-14918).

C. Communication with Petitioner

The record shows that all members of the defense team visited Petitioner at the Cobb County Jail. After being retained by Petitioner's family, Mr. Berry visited Petitioner for purposes of introduction. (HT, Vol. 1:45; Vol. 38:14110). At that time, Mr. Berry explained the procedure to Petitioner and told Petitioner not to talk to anyone at the jail about his case. (HT, Vol. 1:46; Vol. 38:14110). Regarding his relationship with Petitioner, Mr. Berry stated:

> I felt like I had a good relationship with him, but [Petitioner] would never open up. He was not one to converse with you. He didn't want to talk about it, he didn't want to deal with it. He was just very difficult to shake anything out of. So pretty much from the beginning to end, he was not helpful to himself or to us.

(HT, Vol. 38:14111). Mr. Berry also thought that it was "fairly obvious" Petitioner had psychological issues:

> Well, he was very withdrawn. Just in talking with him, you could tell that he, you know, he just was—really didn't want to talk about it too much. He really didn't want to get his family involved, he really didn't want, you know, it was like I just want to be off in a cell by myself reading. I don't want to have any interaction with anybody else. And he just was kind of aloof about the whole matter. And it's not typically some—typically in these people that commit

> these crimes. He acted a little differently than I've normally seen with a lot of people.

(HT, Vol. 38:14122).

The attorneys and mitigation specialists from GCD also met with Petitioner in the jail. (HT, Vol. 1:65; Vol. 2:388, 397; Vol. 4:788, 895; Vol. 36:13562-13574; Vol. 38:14111, 14177, 14230-14232; Vol. 91:27549; Vol. 92:27762). Describing her relationship with Petitioner, Ms. Thompson stated that it was a "very pleasant" relationship. (HT, Vol. 4:895; Vol. 38:14177). Ms. Czuba also testified that she had a "very cordial, pleasant" relationship with Petitioner. (HT, Vol. 38:14231).

Additionally, Ms. Thompson and Ms. Czuba both questioned Petitioner about his social history. (HT, Vol. 4:895; Vol. 38:14232). During meetings with counsel, Petitioner was cooperative and forthcoming with information; however, trial counsel claim that Petitioner's mental health issues prevented them from getting necessary information. (HT, Vol. 2:396-397; Vol. 38:14232-14233). Ms. Czuba explained that there were "a lot of places that I'm not sure he was capable of going with me, just because we didn't have a trust relationship. Not that he was trying to be uncooperative. It's just that he wasn't able to go there." (HT, Vol. 38:14233). Additionally, Ms. Czuba stated that Petitioner had "a lot of deep kind of mental impairments and trauma that inhibit him from really forming a good trust relationship with anyone." (HT, Vol. 38:14231). Ms. Thompson also stated that she recognized Petitioner's mental health issues during their initial interview. (HT, Vol. 4:900; Vol. 38:14177).

Ms. Switzer testified that she and Petitioner developed a good rapport; however, there were always "walls" when dealing with Petitioner. (HT, Vol. 4:789). Ms. Switzer explained that during conversation, Petitioner "would share information up to a point and then that-that was sort of that's where the wall was." (HT, Vol. 4:789-790). Ms. Switzer asked Petitioner about the crime, Petitioner's life, and his criminal history. (HT, Vol. 4:791, 849-851; Vol. 86:26111). In speaking with Ms. Switzer, Petitioner claimed that he was unable to remember some periods of his life. (HT, Vol. 4:791). Ms. Switzer also spoke with Petitioner about his family and asked if he was physically abused; however, Petitioner had no recollection of abuse. (HT, Vol. 4:792). Ms. Switzer attempted to jog Petitioner's memory about any alleged physical abuse by giving him information that she had heard from others, but Petitioner still did not remember any alleged abuse. *Id.* Additionally, Ms. Switzer questioned Petitioner about sexual abuse; however, Petitioner had no recollection of being sexually abused. (HT, Vol. 4:792-793).

Ms. Switzer testified during the habeas proceedings that when she attempted to obtain the names of potential witnesses, Petitioner told her, "I don't want you going to talk to these people, it's not safe, and so I'm not telling you." (HT, Vol. 4:791). Ms. Switzer explained to Petitioner that she needed the information regarding the identity of certain individuals; however, Petitioner refused to provide her with that information. *Id.* Regarding Petitioner's lack of cooperation, Ms. Switzer testified:

> I would try and pull whatever I could pull. If he — if I had a first name, I would try and look

> through records and see if I can — and this is what I would do on any case, try and look and see if I could find any other information that would get me there. But I — he — it was just too vague; 1 could never get to — there were certain areas I just couldn't get to.

(HT, Vol. 4:792).

The record also shows that Ms. Wall met with Petitioner numerous times in 2004 and 2005 and obtained information from Petitioner including: Petitioner's family history, employment history, school history, special education, and medical history; and information regarding his prior incarcerations, his alcohol and drug use, alleged physical abuse, and his estrangement from his mother. (HT, Vol. 86:26065-26068; Vol. 87:26524-26533, 25636-26538, 26544-26545, 26551-26553, 26557, 26560, 26562-26572).

D. Discovery Provided by the State

During their investigation, counsel received extensive discovery from the State. (HT, Vol. 1:55, 59; Vol. 2:306-307; Vol. 41-57:14919-19014). Trial counsel testified during habeas proceedings that the State turned over discovery "fairly quickly," and neither Mr. Berry nor Ms. Czuba had concerns that the State withheld discovery. (HT, Vol. 1:59; Vol. 2:306-307; Vol. 38:14114). Upon receipt of the State's discovery, Mr. Berry testified that he provided copies to GCD. (HT, Vol. 1:55).[28]

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28. Additionally, the certificates of service indicate that the Cobb County District Attorney served copies of the discovery to

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E. Investigation of Potential Mitigation Witnesses

The record shows that the defense team also attempted to locate and interview Petitioner's family members, friends, co-workers, and teachers. The defense team interviewed multiple members of Petitioner's family, including his father, stepmother, sister, brother-in-law, paternal grandmother, aunt, uncle, and stepfather. (HT, Vol. 1:133-134; Vol. 2:322-324; Vol. 4:793-795, 877-879; Vol. 38:14174, 14180, 14238-14241; Vol. 87:26541-26543, 26546-26550, 26554-26556, 26558-26559, 26561; Vol. 93:27882). Ms. Czuba described everyone in Petitioner's family as having "mental health issues" and stated that they were a "family that needed time." (HT, Vol. 38:14241-14242). Ms. Czuba questioned Petitioner's family about Petitioner's mental health history and received information regarding "very odd behaviors."[29] *Id.*

Approximately one month after Petitioner's arrest, Petitioner's father, Walter Humphreys, provided background information to Mr. Berry. (HT, Vol. 1:132-133; Vol. 67:21649-21652; Vol. 91:27403-27410). Trial counsel also interviewed Petitioner's father; however, Ms. Czuba testified that she only had superficial discussions with Petitioner's father because he was uncooperative. (HT, Vol. 38:14239). Additionally, Ms. Thompson's notebook

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both Mr. Berry and Mr. Adams. (HT, Vol. 45:16023-16024, 16026; Vol. 48:16683, 16747, 16865).

29. After hearing the behaviors described by Petitioner's family, Ms. Czuba believed "the thing that fit the best was Asperger's." (HT, Vol. 38:14242).

indicates that she met with Walter Humphreys on September 12, 2006. (HT, Vol. 93:27882).

Trial counsel also spoke with Petitioner's stepmother, Janie Swick. Ms. Czuba testified in her deposition that Ms. Swick was "as responsive as she could be," but she had "her own mental health issues going on." (HT, Vol. 38:14238). Ms. Czuba explained that there was significant domestic violence between Petitioner's father and stepmother, which was difficult for Ms. Swick to discuss. *Id.*

Members of Petitioner's defense team also met with Petitioner's sister, Dayna Knowles,[30] who was "very cooperative." (HT, Vol. 4:793-794; Vol. 38:14240). Ms. Switzer testified during habeas proceedings that she met with Petitioner's sister at least four or five times, including one occasion in which Ms. Switzer traveled to Texas. (HT, Vol. 4:793-794). Ms. Switzer questioned Ms. Knowles regarding both physical and sexual abuse. (HT, Vol. 4:794-795). Ms. Knowles reported that she witnessed a significant amount of physical abuse, and that she had been sexually abused. (HT, Vol. 4:795). However, Ms. Knowles never reported that Petitioner had been sexually abused. (HT, Vol. 4:794-795; Vol. 38:14302). In speaking with Petitioner's sister, trial counsel felt that she was "very profoundly traumatized by her childhood." *Id.*

Additionally, the defense team utilized Accurint and Lexis to locate potential witnesses. (HT, Vol. 4:804-807;

30. The Court notes that Petitioner's sister went by her married name of Knowles at the time of Petitioner's trial. However, her last name has since been changed to Lee. (HT, Vol. 3:627-628).

Vol. 66:21265-21434; Vol. 67:21437-21684; Vol. 68:21687-21934; Vol. 69:21937-22184; Vol. 70:22187-22466). The record shows that Petitioner provided the name of Roger Jones to his defense team, who was one of his former teachers. (HT, Vol. 66:21204). Counsel ran an Accurint search on Mr. Jones in January and June 2006 in an attempt to locate him. (HT, Vol. 70:22265-22289). Despite their efforts, trial counsel could not locate Mr. Jones. (HT, Vol. 70:22261). On June 29, 2006, Ms. Czuba also submitted a request to the Cobb County School District for assistance locating Petitioner's former teachers. (HT, Vol. 71:22472).

Trial counsel's files also contain witness folders and other evidence of the interviews conducted by the defense team. (HT, Vol. 66:21265-21434; Vol. 67:21437-21684; Vol. 68:21687-21934; Vol. 69:21937-22184; Vol. 70:22187-22466). The defense team prepared a witness grid, which included the names of potential witnesses for both the guilt-innocence and sentencing phase. (HT, Vol. 66:21187-21264). The initial version of the witness grid was prepared on December 20, 2004; it was subsequently revised on August 15, 2005, January 9, 2006, and June 8, 2006. *Id.* Additionally, one of the revised witness grids contains notes on attempted and completed witness interviews. (HT, Vol. 66:21221-21245). During their investigation, the defense team also spoke with individuals who were in contact with Petitioner during the weekend before the crime. (HT, Vol. 38:14128). Mr. Berry testified that they "contacted whoever [they] could that might have any involvement with him that might be able to say, you know, give any indication as to what was going on with him at the time." (HT, Vol. 38:14128).

Ms. Switzer also interviewed Kelly Korey Nagle, a middle school friend of Petitioner's, for approximately one hour in the spring of 2006. (HT, Vol. 2:438-439, 443; Vol. 68:21725-21727). At that time, Ms. Nagle lived in California and was pregnant with her second child. (HT, Vol. 2:438, 443). In speaking with Ms. Nagle, Ms. Switzer learned that Ms. Nagle was Petitioner's best friend in middle school and that she had talked Petitioner out of suicide in the eighth grade. (HT, Vol. 2:439; Vol. 68:21726-21727). Ms. Switzer asked Ms. Nagle if she would testify at Petitioner's trial; however, Ms. Nagle was unable to travel.[31] (HT, Vol. 2:439).

F. Guilt-Innocence Phase Experts

i. Jeffrey Martin

In an ex parte motion dated March 21, 2005, counsel requested $3,000 for the expert assistance of Jeffrey Martin to investigate the grand and petit jury venires of Cobb County. (HT, Vol. 40:14631-14649). Counsel stated Mr. Martin's assistance was needed to "analyze, compile and present [] data on underrepresentation." (HT, Vol. 40:14646). The court granted the motion in an order signed on March 23, 2005. (HT, Vol. 40:14628-14629).

On August 22, 2007, counsel filed another ex parte motion for funds for expert assistance to investigate the Glynn County petit jury venires. (HT, Vol. 39:14429-14438). Counsel requested $3,000 from county funds for the services of Jeffrey Martin, once again, for what

31. Ms. Nagle offered to provide a statement to counsel. (HT, Vol. 2:439).

counsel estimated would be thirty hours for Mr. Martin's review and analysis. *Id.* The trial court granted the motion the same day. (HT, Vol. 39:1443).

ii. Teresa Ward, Ph.D

At the June 7, 2005 hearing in which Mr. Berry and Mr. Adams challenged the composition of the grand and traverse juries of Cobb County, counsel informed the court that they would need to present the testimony of an additional witness in support of their motions. (6/7/05 PT, 315-331). Trial counsel then presented Dr. Teresa Ward as an expert in anthropology to testify regarding the cognizability of Hispanics in Cobb County at the hearing held on September 14, 2005. (9/14/05 PT, 11-12). Dr. Ward, who had received her Ph.D in anthropology from Georgia State University, worked as a research associate at Georgia State University and taught anthropology classes at Kennesaw State University. (9/14/05 PT, 11-12). The court signed counsel's proposed order paying Dr. Ward $1,200 for her testimony on August 25, 2006. (R. 2594-2595). However, despite Dr. Ward's testimony, the court denied counsel's motions in an order filed on November 21, 2006. (R. 2608-2617).

iii. Robert Tressel

Counsel also received $2500 for an investigator, Robert Tressel, to assist in the crime scene evaluation and to analyze blood spatter. (HT, Vol. 1:55; Vol. 38:14230; Vol. 40:14707-14708). At the March 23, 2005 ex parte hearing, Mr. Berry stated that Mr. Tressel "is an expert in crime

scene evaluation, blood spatter expert, expert in a number of areas that would be important in this crime scene." (HT, Vol. 40:14707). Mr. Berry had used Mr. Tressel before in five or six murder cases, and testified that he was the "best investigator that [he had] dealt with over the years that [he had] practiced." (HT, Vol. 1:55; Vol. 40:14708-14709). Trial counsel provided Mr. Tressel with the entire box of the State's discovery and Mr. Tressel prepared a "crime scene work up."[32] (HT, Vol. 32:11808; Vol. 38:14115).

iv. Kelly Fite

In an ex parte motion dated March 21, 2005, trial counsel requested funds to hire Kelly Fite, an independent ballistics and firearms expert, to properly evaluate all aspects of the weapon used in the murders.[33] (HT, Vol. 39: 14592-14611). Trial counsel argued that Mr. Fite would provide assistance to counsel regarding "firearms identification (fired bullets, expended shells or cartridges matched to specific weapons), distance or range determinations (from gunshot residue on clothing or skin); firearms design, operability, defects, accidental

32. Mr. Tressel's billing records show that he charged $3,500 for "Case Review, Evaluation, Trial Prep." (HT, Vol. 100:29623).

33. The Court notes that this motion is labeled "Defense Ex Parte Motion #2"; however, there is another Motion For Funds to Hire an Independent Ballistics and/or Firearm Expert dated January 19, 2005 and stamp filed on March 23, 2005, which is labeled "Ex Parte Pleading Number 5." (HT, Vol. 40:14618-14627). During the March 23, 2005 ex parte hearing, Mr. Berry testified "[t]he newly filed Motion Number 2 is the same as our previously filed Motion Number 5." (HT, Vol. 40:14699).

discharge, modifications, conversions, etc." (HT, Vol. 40:14620). During the March 23, 2005 ex parte hearing, Mr. Berry told the court that counsel had reviewed the reports provided by the State, including ballistics reports, and the only weapon used in the crimes was the pistol recovered in Wisconsin. (HT, Vol. 40:14699-14700). The court granted counsel's motion on March 23, 2005. (HT, Vol. 39: 14588-14590).

G. Sentencing Phase Experts

At the February 12, 2007 ex parte hearing, trial counsel requested fluids for a psychiatrist, a trauma expert, a prison adaptability expert, and a victim outreach specialist. (HT, Vol. 40:14730-14736). During the hearing Ms. Czuba explained to the court that although counsel had previously submitted a "neuropsych request," that request and a request for a psychiatrist were "vastly different things." (HT, Vol. 40:14732). Trial counsel indicated that there could be a mental health issue, but at that point they were unsure, stating: "[o]bviously, we haven't completely determined whether that will be presented at trial." (HT, Vol. 40:14732-14733). When questioned by the trial court as to why a mental health expert had not been sought earlier, Ms. Czuba stated:

> Well, there is a great deal of mitigation work that needs to go on before you're even in the position to get a mental health person involved. It is the same way with any other science such as fingerprinting or DNA, you need to have all the relevant documents, you need to have all

> the relevant interviews before you can even remotely start identifying, narrowing what experts you're going to use.

(HT, Vol. 40:14733). Trial counsel were hesitant to lay out their penalty phase for the court; however, Ms. Czuba stated it would involve trauma and PTSD before the court stopped her. (HT, Vol. 40:14735).

i. Dr. Robert Shaffer

Two years prior to the February 2007 ex parte hearing, in an ex parte motion dated March 21, 2005, trial counsel requested funds to retain Dr. Robert Shaffer, a neuropsychologist, to aid in the preparation of Petitioner's defense. (HT, Vol. 39:14549-14575). In support of their motion, counsel stated "[t]here is a history of psychological or mental impairment in Mr. Humphreys' family. The mental health community now knows that significant evidence suggests a strong genetic component or predisposition to certain types of psychological illnesses or disorders." (HT, Vol. 39:14566). Trial counsel explained that an expert in psychology was needed "to interview [Petitioner] and his family, to review records and data regarding the existence and history of any present or past illnesses, general medical history, history of substance use, psychosocial and developmental history, social history, occupational history, and family history, to perform or order a review of systems, physical examination, mental status examination, functional assessment, appropriate diagnostic tests, and to review all other relevant information derived from medical and

social records, and to order appropriate diagnostic tests." (HT, Vol. 39:14566). Trial counsel indicated that Dr. Shaffer would: review medical, school, and institutional records; interview Petitioner's family members; conduct an evaluation and a physical and neurological examination of Petitioner; prescribe the appropriate psychological testing to determine the existence of any disabilities and, if they exist, to document them; express an opinion with a reasonable degree of medical certainty as to any causal connection between Petitioner's impairments, or environmental or genetic predispositions, and the antisocial behavior of the crimes charged; assist counsel in understanding and presenting evidence of Petitioner's mental impairments to the jury; and, testify regarding his findings and conclusions. (HT, Vol. 39:14566-14567).

During the March 23, 2005 ex parte hearing, the court questioned trial counsel regarding their knowledge of Petitioner's mental health history and the following colloquy ensued:

> Mr. Berry: Next is Motion Number 3. We're asking for clinical psychologist Robert Shaffer. We attached also his CV to the back of our motion. This, Judge, basically is more for mitigation than anything else. I think this is one of the more important ex parte motions that we have.
>
> The court: Is there any history, to your knowledge, of prior problems in that area in regard to the Defendant?

Mr. Berry: Yes, there is, Judge. In the past the family has indicated to us and so has Mr. Humphreys, there have been occasions where he had blackouts. There was one occasion he didn't know how he ended up in another state. He just came to the realization he was somewhere he didn't know how he got there and when he got there. So certainly I think those things are very important to follow up on and see if we can get to the root of that problem.

The court: Was he ever cared for by a psychiatrist or a psychologist? Those records would be important it would appear.

Mr. Adams: He has not been, your Honor. There are a number of mental health records from his earlier incarceration. He always has something that frankly we don't really know what it means. He was given some IQ scores in school and we've gotten those records. With most of us our performance and verbal are pretty close together on those type tests, and his are, one is much greater than the other. There is a big spread. And we're not sure exactly what that means. And we were hoping a neuropsychologist can do testing to help us identify what the cause, if the brain is malfunctioning in any sort of way, what that might mean, and we might be able to present that to the jurors in a compelling way.

The court: In regards to what type of condition you're bringing to the attention of the Court

> in regard to blackouts, are we talking about something involving drugs or alcohol?
>
> Mr. Berry: No, your Honor.
>
> The court: Consumption?
>
> Mr. Berry: No. In other words, this was not a drug-induced blackout or alcohol-induced blackout.

(HT, Vol. 40:14701-14702). The court granted counsel's motion in an order filed on March 24, 2005. (HT, Vol. 39:14546-14548).

Subsequently, Dr. Shaffer was retained to conduct a neuropsychological evaluation of Petitioner. (HT, Vol. 1:56, 100; Vol. 4:892-894; Vol. 38:14120-14121, 14133-14134, 14178; Vol. 39:14567). Prior to evaluating Petitioner, Dr. Shaffer consulted with counsel and reviewed records[34] (HT, Vol. 36:13542; Vol. 89:26835; Vol. 93:27862; Vol. 100:29624). Trial counsel provided Dr. Shaffer with Petitioner's family tree, social history chronology, birth records, medical records, correctional records, school records, the birth and death certificates of Petitioner's mother, and marriage and divorce records of Petitioner's parents. (HT, Vol. 38:14247; Vol. 89:26924-27032).

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34. In his notes from his consultation with trial counsel, Dr. Shaffer indicates that he was specifically instructed to evaluate "Neuro Only Not Personality." (HT, Vol. 89:26898).

Appendix D

On May 20, 2005, Dr. Shaffer conducted a neuropsychological evaluation of Petitioner, which he scored on May 25, 2005. (HT, Vol. 36:13542; Vol. 89:26835; Vol. 100:29624). The record is unclear as to Dr. Shaffer's findings from the neuropsychological evaluation of Petitioner and the record indicates he was instructed by counsel to "no written report."[35] (HT, Vol. 93:27863). However, on July 6, 2006, Dr. Shaffer sent Ms. Switzer a copy of his file on Petitioner. (HT, Vol. 36:13551).

On July 16, 2007, trial counsel again consulted with Dr. Shaffer and requested that he conduct another evaluation of Petitioner.[36] (HT, Vol. 2:271-272; Vol. 36:13547; Vol. 100:29624). The record shows that between July and September, 2007, Dr. Shaffer met with trial counsel

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35. Ms. Czuba testified during the evidentiary hearing in this case that it was common in death penalty cases not to receive a written report from an expert. (HT, Vol. 2:400). She explained, "[i]f you – you know, you don't know what's going to go on or how a case is going to morph or how an expert's, you know, earlier statement, then he does more work and changes his mind, then that can be exploited. So, in general, until you're positive where you're going, you don't have a written report, -per se written." *Id.* Additionally, the record reflects that on January 18, 2005, Petitioner's trial counsel filed notice that they had elected to apply reciprocal discovery rules, and requested timely disclosure of any results or reports of physical or mental examinations. (R, 2115-2118).

36. The record shows that on August 29, 2007, the court granted trial counsel's ex parte motion authorizing up to $8,000 for Dr. Shaffer's additional expenses to complete his evaluation and testimony, pending the court's review of his itemized billing at the conclusion of the case. (HT, Vol. 39:14428).

numerous times, reviewed records, interviewed multiple witnesses, attended meetings at the jail, reviewed case information, and on August 23, 2007, conducted a psychological evaluation of Petitioner. (HT, Vol. 36:13547-13548). Following his evaluation, Dr. Shaffer diagnosed Petitioner with Posttraumatic Stress Disorder (hereinafter PTSD), Dissociative Disorder, and Asperger's Syndrome. (HT, Vol. 90:27070-27071).

ii. Dr. Bhushan Agharkar

Additionally, trial counsel requested fonds to hire Dr. Bhushan Agharkar, a psychiatrist, to aid in the preparation of Petitioner's defense. (HT, Vol. 39:14448-14461). In their motion, counsel argued they needed the assistance of Dr. Agharkar to "render an opinion as to the trauma and abuse which has presented as a theme throughout [Petitioner's] developmental history." (HT, Vol. 39:14453). Counsel stated that Petitioner's educational records revealed a history of special education and psychological evaluations while in the Cobb County school system, and Petitioner's "cumulative social history [] revealed instances of dissociation, which is an indicator of trauma." (HT, Vol. 39:14453). As explained by counsel:

> Among others, some of the predictors of trauma and post traumatic stress disorder are early separation from a parent, history of child abuse, parental separation prior to age ten, and witnessing violence between parents – these indicators have surfaced during the mitigation investigation in Mr. Humphreys'

> case. The responses of the individual to trauma and post traumatic stress disorder can include defensiveness, aggressiveness (against self or others), hyperalertness, hypervigilance, and uncontrolled rage – it is clear that these factors would be critical to convey to any jury deciding whether there is any basis to give Mr. Humphreys a sentence less than death.

Id. Counsel stated Dr. Agharkar would: conduct a psychiatric evaluation of Petitioner so that any evidence of trauma could be related to the jury; express an opinion with a reasonable degree of medical certainty regarding the connection between the trauma and the crimes; assist counsel in understanding and presenting evidence of trauma as a mitigating factor to the jury; and testify regarding his findings and conclusions. *Id.* On February 21, 2007, the trial court granted counsel's motion and ordered the county to disburse $6,000 for these expenses. (HT, Vol. 39:14446).

According to Dr. Aghakar's billing statements, he met with trial counsel on March 2, 2007, June 8, 2007, June 19, 2007, and July 13, 2007. (HT, Vol. 36:13544-13545). Dr. Aghakar also had several consultations either in person or over telephone with defense team members, including Ms. Switzer and Ms. Loring. *Id.* Additionally, Dr. Aghakar spent a significant amount of time reviewing Petitioner's records. *Id.*

On June 28, 2007, Dr. Aghakar conducted a psychiatric examination of Petitioner. (HT, Vol. 36:13545; Vol.

100:29622). Following his evaluation, Dr. Aghakar informed trial counsel that he disagreed with a diagnosis of Asperger's Syndrome. (HT, Vol. 2:267-269). Trial counsel subsequently decided that Dr. Aghakar would not testify at Petitioner's trial as his evaluation did not support their sentencing phase theory. (HT, Vol. 2:266-267; Vol. 4:840-841; Vol. 38:14251-14252).

iii. Marti Loring

On February 21, 2007, the court granted trial counsel's motion for funds to retain Dr. Marti Loring, a Licensed Certified Social Worker. (HT, Vol. 39:14501-14502). Ms. Thompson and Mr. Berry had previously used Ms. Loring in a number of death penalty cases as she had "substantial experience as an expert in trauma issues in capital cases." (HT, Vol. 39:14509; Vol. 40:14757). In their motion, counsel stated that they had "conducted interviews with numerous members of [Petitioner's] family and gathered voluminous records regarding [Petitioner's] social history" and it had "become clear that there are underlying issues regarding trauma that permeate [Petitioner's] family history and social development." (HT, Vol. 39:14507). Counsel argued that a Licensed Certified Social Worker was needed to "further document and explore the trauma and abuse which ha[d] presented as a theme throughout [Petitioner's] developmental history." (HT, Vol. 39:14508-14509).

Counsel stated Dr. Loring would: review medical, school, and institutional records; interview members of Petitioner's family with regards to trauma or post-traumatic stress disorder; interview Petitioner to develop

additional evidence of trauma or post-traumatic stress disorder which could be related to the jury; express an opinion to the connection between Petitioner's trauma history and his crimes; assist counsel in understanding and presenting evidence of trauma as mitigation to the jury; and testify regarding her findings and conclusions. (HT, Vol. 39:14508). Ms. Thompson explained: Dr. Loring "specifically knows what questions to ask when interviewing people, interviewing teachers, former school teachers. Mr. Humphreys was incarcerated before. She knows exactly what types of questions to ask that a lay person, an attorney, an investigator from my office simply could not do because we are not trained in that particular area." (HT, Vol. 40:14757-14759).

As part of her work on the case, Dr. Loring interviewed sixteen individuals and reviewed records relating to Petitioner including medical, school, jail, police, divorce, and work records. (HT, Vol. 87:26457). Additionally, Dr. Loring met with Petitioner numerous times. (HT, Vol. 4:856; ST, Vol. 2:209). Dr. Loring also met with Ms. Czuba and Ms. Switzer during the investigation to discuss Petitioner's family history and mental health diagnosis. (HT, Vol. 4:798, 827-828; Vol. 38:14245). Following her evaluation, Dr. Loring diagnosed Petitioner with PTSD and Asperger's Syndrome. (ST, Vol. 2:229-230).

iv. James Aiken

In an ex parte motion dated February 21, 2007, trial counsel requested funds to hire James Aiken, a prison adaptability expert with experience in various

Departments of Corrections across the United States. (HT, Vol. 39:14464-14477). In their motion, counsel asserted it was important to present a prison adaptability expert to the jury to provide an opinion as to the prison's ability to safely confine Petitioner. (HT, Vol. 39:14469). Additionally, counsel argued that expert testimony on this matter was required "[a]s a result of the complicated nature of prisons, the way in which certain inmates react to conditions of confinement, and many other considerations outside the scope of a layperson's knowledge." (HT, Vol. 39:14469). The court granted counsel's motion on February 21, 2007 and ordered the county to disburse $6,000 for these expenses. (HT, Vol. 39:14463).

The record reflects that Mr. Aiken spent an extensive amount of time reviewing "documents and materials" provided to him by counsel, including "various materials pertaining to [Petitioner's] incarceration history and criminal activity." (HT, Vol. 36:13549-13550; Vol. 100:29626-29627). Additionally, Mr. Aiken met with trial counsel on September 26, 2007, prior to his testimony at Petitioner's trial the following day. *Id.* As explained in detail below, Mr. Aiken concluded that Petitioner could be safely confined in prison and would not be considered a risk in terms of future dangerousness. (ST, Vol. 1:92-93, 101).

v. Teaching Expert on Asperger's Syndrome

In July of 2007, Petitioner's defense team contacted Dr. Donna Schwartz-Watts, a leading expert on Asperger's Syndrome. (HT, Vol. 2:272; Vol. 36:13584). Trial counsel was looking to obtain a "teaching expert" on Asperger's

Syndrome and Dr. Schwartz-Watts was recommended by several people. (HT, Vol. 2:273; Vol. 38:14253). In a letter to Dr. Schwartz-Watts, Ms. Switzer states that she has enclosed relevant information from Petitioner's records as well as "historical information from witnesses regarding [Petitioner] and observations from members of the defense team and experts." (HT, Vol. 36:13584). Dr. Schwartz-Watts; however, never performed any work on Petitioner's case. At the evidentiary hearing before this Court, Ms. Czuba explained:

> My recollection at this point is that we tried to get her involved and that she kind of sort of led us on a little bit, like, oh, for sure, I'm going to be able to help you with this, I'm going to do this. And then – and this was all happening pretty rapidly, but we weren't able to get in touch with her, and then we finally got – heard from her assistant or secretary or someone that worked in her office that she simply was not going to have time to do the case and couldn't do it.

(HT, Vol. 2:273).

Around September 6, 2007, Ms. Switzer contacted Diane Wilkes regarding her willingness to testify at Petitioner's trial as a "teaching witness" on Asperger's Syndrome. (HT, Vol. 4:846; Vol. 90:27072). Initially, Ms. Wilkes agreed to testify on Petitioner's behalf. *Id.* Several days after their initial contact, the defense team met with Ms. Wilkes to discuss Petitioner's case. *Id.* During

this meeting, Ms. Wilkes reiterated that she would be happy to testify for the defense. (HT, Vol. 90:27073). Shortly thereafter, Ms. Wilkes contacted Ms. Switzer and stated that she no longer wanted to testify for the defense. *Id.* Ms. Wilkes explained that she changed her mind after receiving information about the case that was not public knowledge, from a family member who was in law enforcement.[37] *Id.*

vi. Defense Initiated Victim Outreach Specialist

In a motion dated February 21, 2007, trial counsel requested funds for $1200 to retain a defense initiated victim outreach specialist. (HT, Vol. 39:14481-14498). Counsel argued that a victim outreach specialist, "who by training and experience knows how to approach and develop a relationship with survivors with appropriate respect for their plight, their suffering, and their fears," was necessary to enable trial counsel to reach out to victims' families. (HT, Vol. 39:14485). According to counsel, a victim outreach specialist would contact the victims' families in an attempt to "diffuse a lot of anger they are feeling and hopefully make the courtroom a more neutral, accessible place for all and educating them better about the court system and what the prosecutor's office might be doing." (HT, Vol. 40:14731, 14751). Additionally,

37. In her memorandum, Ms. Switzer noted that Ms. Wilkes was initially more than happy to act as a teaching expert and "did not appear uncomfortable with the facts and details of the case and at no time did she question that [Petitioner] had Asperger's Syndrome." (HT, Vol. 90:27073).

a victim outreach specialist would inquire as to whether the family was agreeable to a life without parole sentence as opposed to the death penalty.[38] (HT, Vol. 2:319-321).

In their motion, counsel argued that survivors have a need to know why their loved one was murdered, what their loved one experienced during their murder, and what their loved one said and did before death came. (HT, Vol, 39:14483). Ms. Czuba explained "[i]f [the victims' families] want more information, often we as defense attorneys have information to give that the State doesn't, and if we are in a position that we can give that information without breaching confidentiality, we can." (HT, Vol. 38:14254-14255).

Counsel attached to the motion three pages of a blog written by victim Lori Brown's mother in which Ms. Brown expressed her grief and frustration with the pace of the trial. (HT, Vol. 39:14495-14497). According to Ms. Czuba, it was the fault of the District Attorney, and not Petitioner, that the victims' families had been "incredibly polarized" and the defense team had no assurances that Petitioner's written plea offer had been "appropriately and properly conveyed" to the victims' families by the District Attorney. (HT, Vol. 39:14486). Counsel also attached the CV of Cynthia East, a "defense initiated victim outreach specialist" to the motion. (HT, Vol. 39:14487, 14489-14492).

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38. Ms. Czuba testified in the proceedings before this Court that she had utilized a victim outreach specialist in the past with success. (HT, Vol. 2:319-321).

The court granted counsel's request for $1200 to hire a victim outreach specialist on February 21, 2007. (HT, Vol. 39:14480). However, Ms. Czuba testified in the proceedings before this Court that Ms. Brown's family was not interested in engaging in a "dialogue with the defense about anything….[t]hey didn't want anything to do with it." (HT, Vol. 2:320-321; Vol. 38:14255). Additionally, Ms. Williams' family was supportive of the death penalty and did not want any information from trial counsel. *Id.*

H. Investigation of Childhood Sexual Abuse

The record before this Court establishes that trial counsel investigated the possibility that Petitioner was sexually abused as a child. At the evidentiary hearing before this Court, Ms. Switzer testified that she suspected Petitioner was sexually abused and searched for collateral information. (HT, Vol. 4:792-793). However, during counsel's numerous interviews with witnesses, including Petitioner and his family members, no one reported that Petitioner had been sexually abused. (HT, Vol. 2:362; Vol. 4:794-795). Further, counsel asked Petitioner specifically about sexual abuse, but he reported no recollection of any sexual abuse. (HT, Vol. 1:148; Vol. 4:792-793).

Nevertheless, Ms. Thompson's notes indicate that the defense team discussed presenting the testimony of Dr. Beggs, an expert on male sexual abuse and dissociative states.[39] (HT, Vol. 36:13557). Additionally, the

39. The Court notes that the month and date of this discussion is identified as January 9; however, there is no year listed. (HT, Vol. 36:13557).

notes discussed how much Dr. Beggs' testimony would cost, how the defense team would secure money for his testimony, and what documentation Dr. Beggs would need regarding dissociative disorder. *Id.* Ms. Thompson's notes also indicate that the defense team knew Dr. Beggs had significant experience with grief and trauma, including trauma as a result of sexual abuse. (HT, Vol. 36:13557). Additionally, these notes suggest that the defense team considered using Dr. Beggs with regard to false memories and dissociative identity disorder.[40] *Id.* Ultimately, Dr. Beggs did not testify.[41]

Reasonable Attempt to Negotiate a Plea

This Court finds that trial counsel engaged in reasonable attempts to negotiate a plea in Petitioner's case. As evidenced by a letter written to the District Attorney, trial counsel informed the State orally of Petitioner's willingness to plead guilty to the entire indictment in exchange for a sentence of life without parole. (HT, Vol. 36:13559-13560). In addition to this conversation, trial counsel provided District Attorney Head with a written plea offer. *Id.* In the proceedings before this Court, Mr.

40. Counsel's notes also indicate that on March 2, 2006, the defense team held a meeting with Ms. Czuba, Ms. Switzer, and Ms. Thompson; and at that meeting, they discussed Dissociative Identity Disorder (hereinafter DID). (HT, Vol. 93:27854). The note indicates that as of this date, Jeffrey Klopper is the proposed expert on DID. *Id.*

41. Ms. Thompson's notes indicate that the defense team questioned whether the testimony of Dr. Beggs would fit in with their mitigation strategy. (HT, Vol. 36:13557).

Berry testified that he wanted to negotiate a life without parole plea as early on in the case as possible and had discussed a plea with Mr. Head prior to sending the letter.[42] (HT, Vol. 1:62-63). However, trial counsel's offer was rejected by the State in a letter dated June 6, 2006. (HT, Vol. 36:13561).

The Georgia Supreme Court has held that a trial attorney who pursues a plea negotiation, but is unsuccessful because the State will not agree to a deal, is not deficient. *Franks v. State*, 278 Ga. 246, 258-259, 599 S.E.2d 134 (2004). This Court finds Petitioner has failed to show trial counsel were deficient in attempting to negotiate a plea with the State.

Pre-Trial Motions

Initially, Mr. Berry and Mr. Adams "sat down and agreed on what . . . each one of us was going to do" and decided that Mr. Berry would be responsible for the majority of the pre-trial motions. (HT, Vol. 1:51). The record shows that on September 28, 2004, Mr. Berry and Mr. Adams filed 116 motions and four ex-parte pleadings. (R. 104-936). A review of the list of motions demonstrates that many of the motions addressed issues pertaining to both the guilt-innocence and sentencing phases of trial,

42. In a letter to District Attorney Head, dated May 23, 2006, trial counsel stated "[a]lthough defense counsel in this case has verbally communicated these wishes to your office, out of an abundance of caution that we have not communicated Mr. Humphreys' wishes clearly enough we now do so again in writing." (HT, Vol. 36:13559).

including motions that attempted to limit aggravating evidence; such as similar transaction evidence, autopsy photos, courtroom displays of emotion by the victims' families, and victim impact testimony. (R. 929-936).

In an ex parte motion filed on March 23, 2005, trial counsel requested funds to hire TrackNews, a media research specialist, so that Petitioner could effectively raise and litigate the issue of a venue change. (HT, Vol. 39:14521-14543). Counsel argued that the amount and frequency of media coverage was an issue in the case and that extensive media coverage could affect their decision to change venue. (HT, Vol. 39:14540). Counsel included correspondence between GCD investigator Alyssa Wall and the president of TrackTv. Inc., which discussed the cost of retrieving a written media report outlining the television broadcast materials pertaining to the case, including information from local newscasts between November 3, 2003 and January 19, 2005. Counsel stated that TrackNews would document television coverage from certain stations and provide information such as the airdate and airtime of the local broadcast, approximate length of the broadcast on Petitioner, and text of the actual broadcast when available by the station. (HT, Vol. 39:14540-14541).

At the March 23, 2005 ex parte hearing, counsel argued that this specialist was needed because of the time that had elapsed between the incident and initial flurry of media coverage. (HT, Vol. 40:14704-14707). Counsel explained that if they simply sent subpoenas to the stations, the only information they would learn would

be the dates of the coverage, and not the actual content of the coverage. *Id.* On March 24, 2005, the trial court filed an order granting counsel's motion for a media research specialist. (HT, Vol. 39:14518-14520).

Additionally, the record shows that, prior to trial, trial counsel filed a motion seeking to close the courtroom to the press during the testimony of Petitioner's stepmother. (R. 5262-5276). In this motion, trial counsel represented that Petitioner's stepmother's testimony would cover "sensitive and traumatic subject matter" and she was afraid to testify in front of the media due to her "previous personal violent experiences" with Petitioner's father. (R. 5263). Petitioner's stepmother feared retaliation by Petitioner's father for her testimony. (R. 5263-5265). Trial counsel argued that Petitioner's stepmother would not be an effective witness if forced to testify in front of the media in that she May "struggle to tell certain stories or be hesitant to reveal certain details." (R. 5265).

Trial counsel also filed a motion to close the courtroom to the media during the testimony of Petitioner's sister. (R. 5277-5292). In this motion, trial counsel asserted that Petitioner's sister would testify as to "sensitive and traumatic subject matter." (R. 5278-5279). Petitioner's sister consulted with a doctor who opined that she might be harmed by testifying about those subject matters in front of the media, *id.* Trial counsel argued that Petitioner's sister would not be an effective witness if forced to testify in front of the media and might "struggle to tell certain

stories or be hesitant to reveal certain details."[43] (R. 5279-5280). The trial court denied both of these motions; however, they instructed the media that they were not allowed to photograph the faces of Petitioner's stepmother and sister. (ST, Vol. 1:68).

Reasonable Strategy

Mr. Berry testified at the proceedings before this Court that counsel's strategy for the guilt-innocence phase was tethered to their sentencing phase strategy: "a lot of times in the guilt-innocence phase what you want to try to do is set up your mitigation. You want to also kind of condition the jury." (HT, Vol. 1:126-127). Mr. Berry explained:

> It's been asked why sometimes you don't just plead guilty and have the penalty phase. But the reality is you want to try to get the jury to know the worst part of the case in the guilt-innocence, and then when they get to the penalty phase it's not so much of a shock . . . you want to try to deal with as many of those kinds of factors in the guilt-innocence phase as you can.

(HT, Vol. 1:127). Mr. Berry felt the case came down to the mitigation and stated "[i]f you know you're going to—pretty much assured that you're going to lose the

43. Trial counsel attached a copy of the doctor's letter confirming the traumatic impact Petitioner's sister might have if forced to testify in an open courtroom to the motion. (R. 5290).

guilt/innocence, you want to try to bring out a few things that will be helpful in the second phase of the trial, and I think we tried to do that as much as we could." (HT, Vol. 1:46; Vol. 38:14113). Regarding counsel's sentencing phase strategy, Ms. Czuba explained as follows:

> [Petitioner] was an individual suffering from Asperger's syndrome, and to show how he and his sister had been subject to the same trauma growing up, and then with proper intervention his sister was able to diverge from the course she was on, whereas [Petitioner] never had that and stayed on this path, and the combination of what he had gone through as a child and his Asperger's syndrome leading to this event, the event.

(HT, Vol. 38:14236). This Court finds that trial counsel formulated a reasonable strategy after completing their investigation and, as explained in detail below, presented evidence consistent with this theory at Petitioner's trial.

Guilt-Innocence Phase Presentation

As discussed above, trial counsel's guilt-innocence phase theory involved the presentation of mitigation as the evidence of Petitioner's guilt was overwhelming. In their guilt-innocence phase opening statements, trial counsel informed the jury that Petitioner's childhood was characterized by "violence, trauma and instability" and that Petitioner was raised by a dysfunctional,

abusive family. (TT, Vol. 13:66). Trial counsel went on to explain that Petitioner's parents divorced when he was two years old and Petitioner lived with his mother for a period of time. (TT, Vol. 13:66-67). While living with his mother, Petitioner received a head injury that resulted in a concussion. (TT, Vol. 13:67). Thereafter, Petitioner's father gained custody of Petitioner. *Id.* About one year later, Petitioner and his sister were kidnapped by their mother. *Id.* They were subsequently located and sent back to Cobb County. *Id.*

Following the divorce from Petitioner's mother, Petitioner's father had three failed marriages and there was "violence and disruption" in the home. (TT, Vol. 13:67). In school, Petitioner was placed in special education due to behavioral problems. *Id.* At age sixteen, Petitioner left home and moved in with a friend. *Id.*

Trial counsel then provided the jury with information regarding Petitioner's criminal history[44] (TT, Vol. 13:68). Trial counsel informed the jury that during his incarcerations, Petitioner obtained his GED, tutored other students who were trying to obtain their GED, received one thousand hours of training as an electrician, successfully completed a program called Think Smart where he tutored younger people, and was involved in outreach ministries where he spoke with troubled youth. (TT, Vol. 13:68-69).

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44. According to handwritten notes contained in trial counsel's files, Mr. Berry provided information regarding Petitioner's criminal history as "the jurors will hear it anyway—and the more they hear it the less impact it has." (HT, Vol. 94:28115).

Trial counsel then spoke about mental health symptoms that were present in Petitioner. Specifically, Petitioner experienced dissociative episodes which started when he was a teenager. (TT, Vol. 13:69). Additionally, Petitioner exhibited obsessive/compulsive behavior and his coworkers described "very bizarre and odd things." *Id.* For example, Petitioner cleaned his truck all of the time and he would not wear a dirty t-shirt or shoes in his truck. *Id.*

Trial counsel also informed the jury that there was evidence of Petitioner being nonviolent and non-confrontational. At the time of his arrest, Petitioner was "very polite and very cooperative, was very concerned over the fact that no one was hurt in this chase." (TT, Vol. 13:70). Petitioner told the officer that he did not want anyone to be hurt in the police chase. (TT, Vol. 13:70-71). The following day, Petitioner told Detective Herman that "he did not want to have to face the families of these two young women, that he just wanted to plead guilty." (TT, Vol. 13:71).

Trial counsel also told the jury that although he claimed he lacked memory of the crime, Petitioner believed that he committed the crime. (TT, Vol. 13:71). Petitioner tried to recall the crime but "every time he tries to think about it, his mind shoots off to something else and he can't concentrate and he can't think about it." (TT, Vol. 13:72). During his police interview, Petitioner spoke with the detective about "episodes of memory loss, about dissociative times when he would leave, not know where he was, not know how he got there." (TT, Vol. 13:71).

Appendix D

Although trial counsel did not call any witnesses during the guilt-innocence phase of Petitioner's trial, they were able to verify many of the claims asserted in opening statements through cross-examination of State witnesses. Trial counsel elicited testimony that Petitioner kept his vehicle clean and that he changed shoes before entering the vehicle. (TT, Vol. 13:177178; Vol. 14:167-168, 192-193, 218; Vol. 15:95). Trial counsel also brought out that Petitioner was cooperative at the time of his arrest and that he repeatedly stated that he hoped he did not hurt anyone. (TT, Vol. 16:215-218, 227-229, 243-245, 254-255).

During their guilt-innocence phase closing arguments, trial counsel told the jury that there were a number of facts in the case that were not in controversy; however, there were some unanswered questions. (TT, Vol. 19:29-30). Trial counsel then pointed out several areas where the State's case was lacking. Trial counsel argued that the State only presented evidence regarding two spent projectiles despite the fact that there were three wounds. (TT, Vol. 19:30). There was no testimony offered regarding the whereabouts of the third projectile, whether it was fired from the same type gun or whether there was a ballistics match. *Id.* As to the phone calls made to the banks during the crime, trial counsel asserted that the State failed to present any evidence regarding who made those phone calls or what happened during those phone calls. (TT, Vol. 19:31). In addition, the State did not present any evidence regarding the movement of the people inside the model home or the time of death of each victim. (TT, Vol. 19:32-33). Trial counsel also asserted there was no evidence of sexual assault and there were questionable

identifications of Petitioner through photo line-ups. (TT, Vol. 19:34-37).

After reviewing the record as a whole, this Court finds that trial counsel were neither deficient nor was Petitioner prejudiced by their reasonable guilt/innocence phase investigation and presentation. Accordingly, this portion of Petitioner's claim of ineffective assistance of counsel is DENIED.

Sentencing Phase Presentation

This Court finds that trial counsel made a reasonable presentation during the sentencing phase based on their strategy and the information discovered during their investigation. As previously discussed, trial counsel's theory for the sentencing phase of Petitioner's trial was to present evidence of Asperger's Syndrome and Petitioner's traumatic childhood. Regarding the selection of the sentencing phase witnesses, Ms. Czuba stated:

> I think there was (sic) two considerations. The first was telling Stacey's kind of story, his childhood developmental story, in a meaningful kind of narrative manner, and then the other being - - allowing the jury to have some empathy with some of the family members who cared about him, to perhaps, you know, spare Stacey's life based on not wanting to cause more pain to some of his family members.

(HT, Vol. 38:14248). Trial counsel utilized six lay witnesses and three experts to present this information to the

jury. The record reflects that trial counsel also met with the witnesses prior to trial and prepared them for their testimony.[45] (HT, Vol. 1:98-101; Vol. 2:287-288; Vol. 4:821; Vol. 38:14126, 14132; Vol. 100:29625).

With regard to the mitigation evidence, trial counsel told the jury they would present evidence showing that Petitioner had Asperger's Syndrome. (TT, Vol. 20, T. 94-95). In their sentencing phase opening argument, trial counsel explained that evidence of this disorder would be presented to show that Petitioner might react differently to certain situations and was not being presented as an excuse for the crimes committed by Petitioner. *Id.*

The first witness presented by trial counsel was James Aiken. Mr. Aiken, who was qualified as an expert in classification, corrections, and penology, testified that he reviewed numerous institutional records regarding Petitioner's incarceration within the Georgia Department of Corrections. (ST, Vol. 1:91). Mr. Aiken informed the jury that the performance evaluations contained in those records showed that Petitioner "adjusted very well to a confinement setting." (ST, Vol. 1:92). Specifically, Petitioner complied with the prison rules and participated in "programmatic activities." *Id.* Additionally, Petitioner received certificates of completion from the Georgia Department of Corrections for the following programs: victim impact; vocational assessment; substance abuse; electrician; repairman; confronting self concepts; heating

45. Additionally, Ms. Czuba provided Mr. Berry with the notes that she had taken during the witness interviews. (HT, Vol. 1:100).

and air conditioning; family violence; and, corrective thinking. (ST, Vol. 1:112-113).

Mr. Aiken also testified regarding Petitioner's disciplinary violations. Mr. Aiken explained that it was not unusual for an inmate to receive disciplinary reports during incarceration and that Petitioner did not have "chronic continuous dangerous violation of rules and regulations within the facility." (ST, Vol. 1:97-98). Mr. Aiken testified regarding an incident in December of 1995 where Petitioner was charged with escape after failing to return to prison following his release on a holiday furlough.[46] (ST, Vol. 1:94-95). Mr. Aiken stated that Petitioner's escape was "at the lowest common denominator as it relates to the security of an institution and endangerment of the public." (ST, Vol. 1:97).

In regards to future dangerousness, Mr. Aiken opined that Petitioner did not fall into the "predator category" and would not "present an unusual risk of harm to staff, inmates, as well as the general community as long as he is confined within a high security status." (ST, Vol. 1:93, 101). Mr. Aiken explained that an individual convicted of murder would be placed in a maximum security prison where there would "always be a gun between that individual and the public." (ST, Vol. 1:100). He further stated that Petitioner would be incarcerated for the remainder of his life as a result of his behavior in the community. (ST, Vol. 1:93-94).[47]

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46. Mr. Aiken also informed the jury that Petitioner's escape charge was dismissed on November 15, 1996. (ST, Vol. 1:95).

47. Petitioner now claims that the testimony of Mr. Aiken should not have been presented at trial as the State used that testimony to argue that imposing a sentence of life without parole

The next witness that trial counsel called was Robert Rader, who was employed at the Cobb County Adult Detention Center. (ST, Vol. 1:116). Mr. Rader, who had frequent interactions with Petitioner for three and one-half years, described Petitioner as a respectful, cooperative, and non-violent inmate. (ST, Vol. 1:117-119). Mr. Rader also testified that aside from one altercation with another inmate, Petitioner did not cause any problems at the jail. (ST, Vol. 1:118-119). Additionally, Mr. Rader told the jury he had only testified on behalf of an inmate one other time, in the seven years he had worked at the Cobb County Jail. (ST, Vol. 1:119).

Trial counsel also called John Mowens, who was involved in the homeless and jail ministries at Glynn Haven Baptist Church. (ST, Vol. 1:124-125). Mr. Mowens testified that Petitioner participated in both the homeless ministry and the jail ministry working with juveniles. (ST, Vol. 1:127). As part of the jail ministry, Petitioner spoke with juvenile inmates about his experience in the penal system. (ST, Vol. 1:127-128, 136). Mr. Mowens opined that Petitioner's presentation to the troubled juveniles had an impact on their lives. (ST, Vol. 1:129). Additionally, Mr. Mowens informed the jury that Petitioner was always "very respectful" towards him and his family. (ST, Vol. 1:132).

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would be "the equivalent of sending [Petitioner] to his room." Petitioner's claim fails as Mr. Aiken's testimony was presented as part of trial counsel's reasonable strategy and the Supreme Court has found evidence of adaptability to prison life relevant and mitigating in a capital sentencing hearing. (*See Skipper v. South Carolina*, 476 U.S. 1 (1986)).

Trial counsel then presented Petitioner's stepmother, Janie Swick. Ms. Swick testified that she married Petitioner's father in 1978, after three or four months of dating. (ST, Vol. 1:140, 157). Petitioner was five years old when Ms. Swick married his father. (ST, Vol. 1:142). Ms. Swick and Petitioner's father had two children together, Julia and Kristin. (ST, Vol. 1:139).

During their marriage, Petitioner's father was responsible for taking care of the children. (ST, Vol. 1:143). Ms. Swick explained that she worked during the day, and Petitioner's father worked at night as a park ranger.[48] *Id.* Petitioner's father did not want anyone else taking care of the children and he did not allow family or friends to visit the house. *Id.* Although Petitioner's father was responsible for taking care of the children, Ms. Swick testified that she went to all of the children's school conferences and took them to church. (ST, Vol. 1:144, 149-150).

Ms. Swick also told the jury that Petitioner's father was verbally and physically abusive towards her. (ST, Vol. 1:144-145). Ms. Swick discussed an incident that occurred when she and Petitioner's father told the children about their plans to get divorced. (ST, Vol. 1:145). During this conversation with the children, Petitioner's father pinned Ms. Swick in a chair and headbutted her in the face,

48. Ms. Swick also testified that in 1982, Petitioner's father lost his job as a park ranger. (ST, Vol. 1:144, 147). Ms. Swick explained that Petitioner's father was asked to resign after it was discovered that he was returning home at night to sleep. (ST, Vol. 1:144). Following his resignation, Petitioner's father was unemployed for nine months. (ST, Vol. 1:147). Ms. Swick testified that during this time, Petitioner's father refused to look for a job and was a "maniac." *Id.*

which resulted in a black eye[49] *Id.* Petitioner pulled his father off Ms. Swick. *Id.* Ms. Swick also told the jury that Petitioner's father followed her from work and ran her off the road on the day that their divorce was final. (ST, Vol. 1:152-153).

Additionally, Ms. Swick described physical abuse that Petitioner was subjected to by his father. (ST, Vol. 1:145). Ms. Swick explained that Petitioner was bullied by his father, which caused Petitioner to run away in fear. (ST, Vol. 1:145-146). Ms. Swick recalled one incident wherein Petitioner's father struck him in the arm with a broom. (ST, Vol. 1:146). During this incident, Ms. Swick tried to get between Petitioner and his father; however, Petitioner's father was in a rage and tossed Ms. Swick out of the way.[50] *Id.* Afterwards, Ms. Swick took Petitioner to the hospital as she was concerned his arm was broken.[51] (ST, Vol. 1:146-147).

Ms. Swick also told the jury that Petitioner's father treated him differently than his sister. (ST, Vol. 1:148-149). She explained that when they got into trouble, Petitioner's

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49. The record reflects that Petitioner's half-sister, Julia Humphreys, also provided testimony regarding this incident. (ST, Vol. 2:168). Additionally, Dr. Loring testified regarding the incident and told the jury that Petitioner was struck by his father because he tried to pull his father off his stepmother. (ST, Vol. 2:224-225)

50. Ms. Swick also told the jury that following the incident, when she told Petitioner's father that she was taking Petitioner to the hospital, Petitioner's father grabbed her by the hair on her head and pulled her head back. (ST, Vol. 1:146).

51. At the hospital, Ms. Swick reported that Petitioner had fallen down. (ST, Vol. 1:147).

sister would receive a verbal reprimand whereas Petitioner would get whipped. (ST, Vol. 1:149). Ms. Swick stated that Petitioner's father was "very rough" on Petitioner. *Id.*

In addition to testimony regarding Petitioner's father, Ms. Swick informed the jury that Petitioner did not have many friends growing up and was in special education for a behavior disorder. (ST, Vol. 1:149-150). Ms. Swick stated Petitioner was hyper and could not sit still. (ST, Vol. 1:149). In high school, Petitioner was involved in the ROTC program. (ST, Vol. 1:150). Ms. Swick testified that Petitioner was "very prideful" of his involvement with ROTC, and he took "great pride in keeping his brass polished and his shoes polished and his appearance and his clothes." *Id.*

In concluding her testimony, Ms. Swick asked the jury to spare Petitioner from the death penalty as he did not receive a "fair shake growing up" and had "mental problems." (ST, Vol. 1:154-155). Ms. Swick expressed regret for failing to get Petitioner psychological help. (ST, Vol. 1:155). She also regretted leaving Petitioner with his father following the divorce. (ST, Vol. 2:164). Ms. Swick explained that she took Petitioner's sister following the divorce as she thought the girls should be with her, and that Petitioner should remain with his father.[52] *Id.*

Trial counsel also presented the testimony of Petitioner's half-sister, Julia Humphreys, who testified to

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52. Trial counsel also tendered into evidence a letter written by Petitioner to Ms. Swick wherein he expressed his love for her and thanked her for being his mother. (ST, Vol. 1:151).

the abuse inflicted upon them by Petitioner's father. Ms. Humphreys stated that all of the children were disciplined by their father; however, the abuse inflicted upon Petitioner was "very bad." (ST, Vol. 2:166). Ms. Humphreys explained that they were disciplined with switches and belts. *Id.* Regarding Petitioner, Ms. Humphreys recalled an incident wherein their father challenged Petitioner to a fight. (ST, Vol. 2:167). During this incident, Petitioner was repeatedly punched in the head before he escaped through a sliding glass door in the den. *Id.*

Ms. Humphreys then asked the jury to consider mercy for Petitioner as he had a difficult life and "had to deal with a lot of things that children shouldn't have to deal with." (ST, Vol. 2:171). Ms. Humphreys also asked the jury to spare Petitioner's life as his execution would deprive her of the opportunity to "fill that piece of my life that's been missing." (ST, Vol. 2:170-171).

Trial counsel then presented the testimony of Jeffrey Knowles, Petitioner's brother-in-law. (ST, Vol. 2:174-175). Mr. Knowles testified that he and Petitioner had a good relationship and described Petitioner as "very witty," "knowledgeable in a lot of subjects," and a "voracious reader." (ST, Vol. 2:177-178, 186). Mr. Knowles also told the jury that his relationship with Petitioner changed his previously held beliefs that all incarcerated individuals were bad. (ST, Vol. 2:176-177).

Mr. Knowles testified about the family dynamic and stated there was very little interaction between the family members during gatherings. (ST, Vol. 2:179-180). The

family gatherings usually involved them having a meal and watching television, and there were limited discussions about things happening in each other's lives. *Id.* Mr. Knowles informed the jury that Petitioner's father had a temper and he described an incident in which Petitioner's father was told he was not allowed to park in a certain area. (ST, Vol. 2:180-181). In response, Petitioner's father became very angry and wanted to fight the parking attendant. (ST, Vol. 2:181-182). For about one hour after the incident, Petitioner's father was "beet red and sweating and still thinking of it." (ST, Vol. 2:182).

Additionally, Mr. Knowles testified that Petitioner was a "very, very meticulous and neat" person and his truck and clothing were always immaculate. (ST, Vol. 2:183-184). On occasion, Petitioner would housesit for his sister and brother-in-law. (ST, Vol. 2:182). Upon returning home, they found their home to be "immaculate" and looked as though "30 maids went through the house and scrubbed it from top to bottom." (ST, Vol. 2:183). Mr. Knowles also testified that Petitioner read books on a variety of subjects and explained that when Petitioner liked an author, he would read every single book in that particular series prior to moving on to another subject. (ST, Vol. 2:186-187). Additionally, Mr. Knowles told the jury that Petitioner suffered from insomnia, migraines, and memory lapses. (ST, Vol. 2:185-186, 189).

In asking the jury to spare Petitioner's life, Mr. Knowles testified that he would be devastated if Petitioner were sentenced to death as they had a very close relationship. (ST, Vol. 2:190). Mr. Knowles acknowledged

that Petitioner committed a horrible crime and deserved to be in prison; however, he stated that Petitioner had a lot to offer the world even behind bars. (ST, Vol. 2:190-191). Mr. Knowles explained "I know his kindness. I know what a sweet person he is . . . how intelligent he is." (ST, Vol. 2:190).

Trial counsel then presented Dr. Marti Loring.[53] Dr. Loring, who was qualified as an expert in social work and trauma, testified that she was retained by trial counsel to perform a social history. (ST, Vol. 2:208-209, 217). Dr. Loring met with Petitioner on four occasions to gather information and each session lasted approximately three hours. (ST, Vol. 2:209). Dr. Loring testified that, during her interviews with Petitioner, she had a difficult time "getting the kind of information that [she] needed from [Petitioner]." (ST, Vol. 2:210). Dr. Loring explained that Petitioner reported he was unable to remember information in certain areas. (ST, Vol. 2:210-211).

Dr. Loring also interviewed sixteen individuals "to get their perceptions, their experiences, [and] their observations."[54] (ST, Vol. 2:209-210, 215-216). In

53. Trial counsel testified in the proceedings before this Court, that the purpose of Dr. Loring's testimony was to "set up the social history and to provide a duplicative diagnosis." (HT, Vol. 38:14246). Ms. Czuba stated "[s]o Dr. Shaffer was going to testify this was what [Petitioner] was suffering from, then Loring – Marti Loring would provide a complimentary, that's – correct kind of moment." *Id.*

54. The individuals Dr. Loring interviewed included: Kathy Kitner, Dayna's therapist; Vic Humphreys, Petitioner's uncle;

interviewing these other individuals, Dr. Loring was seeking information that she was unable to obtain from Petitioner. (ST, Vol. 2:211). In addition to conducting interviews, Dr. Loring reviewed extensive records including police records, school records, jail records, divorce records, work records, and hospital records. (ST, Vol. 2:213-214, 217).

The social history compiled by Dr. Loring, and to which she testified about at trial, revealed that Petitioner's childhood was marked by abuse. Petitioner and his sister spent their early childhood living with their mother in a home where drugs were bought and sold. (ST, Vol. 2:217, 219). During this time period, it was reported that Petitioner's mother would leave Petitioner and his sister at daycare and would not return for periods of time. (ST, Vol. 2:219). Dr. Loring also testified regarding an instance wherein Petitioner and his sister were left at DFCS by their mother. (ST, Vol. 2:220).

Dr. Loring also testified that Petitioner was subjected to extensive physical abuse. Specifically, cigarette bums were discovered on Petitioner's body by DFCS. (ST, Vol. 2:220). At age two, Petitioner's entire body was bruised

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Janie Swick, Petitioner's stepmother; Dayna Knowles, Petitioner's sister; Martha Gravitt, a former wife of Petitioner's father; Steven Olds, Petitioner's mother's former husband; Petitioner's Grandma Jordan; Phillip Strath, Petitioner's supervisor at his most recent job; Paige Durham, Petitioner's friend; Julia Humphreys, Petitioner's stepsister; Walter Humphreys, Petitioner's father; Tim Melon; Darlene Smith, Petitioner's aunt; Nylene Brewster; and, Kelly Nagel. (ST, Vol. 2:216).

following a beating by his father, who admitted that he had "lost it and beaten [him]." (ST, Vol. 2:221). At age three, Petitioner was taken to the hospital for a fractured skull. (ST, Vol. 2:220). Petitioner's mother initially told the emergency room staff that Petitioner had fallen off the counter; however, she later told the treating physician that Petitioner had fallen out of a chair. (ST, Vol. 2:220-221). Prior to the completion of treatment for the skull fracture, Petitioner's mother took him home against medical advice. (ST, Vol. 2:221). At age four, Petitioner's shoulder was dislocated as the result of a violent shaking by his father. (ST, Vol. 2:222). Petitioner was also hit on the arm with a broom handle by his father when he was thirteen years old. (ST, Vol. 2:223). Following the incident, Petitioner's father threatened to kill his stepmother if she tried to take Petitioner to the hospital for treatment. *Id.* Petitioner was also severely beaten by his father at age sixteen because he had gotten into a car accident. (ST, Vol. 2:225). Additionally, Dr. Loring testified regarding an incident wherein Petitioner's father sat on his "private parts, holding [Petitioner's] hands above [Petitioner's] head and continually beating him in the head and the chest."[55] (ST, Vol. 2:224).

Dr. Loring explained to the jury that Petitioner's father would "fly into a rage as a matter of pattern, not just one time or two, and he would whip or beat [Petitioner]." (ST, Vol. 2:224). In an attempt to protect his sister from the

55. In addition to the physical abuse, Dr. Loring testified that there were several occasions where Department of Family and Children Services gave Petitioner and his sister back to their father. (ST, Vol. 2:222).

abuse by their father, Petitioner would take the blame for incidents so that he would receive the beating instead of his sister. (ST, Vol. 2:228). The abuse by Petitioner's father was "not only explosive physically, where they would get slapped and punched, thrown across the room, indeed, but there was a very remarkable emotional component to the abuse that Walter committed upon [Petitioner and his sister]." (ST, Vol. 2:228). Dr. Loring told the jury that this was "ritualistic emotional abuse," meaning there were a series of steps leading up to the physical abuse. (ST, Vol. 2:228-229). Dr. Loring stated "the children's hair might be grabbed, they May be – they were pulled across the room, they were pushed into a comer, and then pulled into a bedroom and the door shut when the beatings could be heard. That would be one example of steps one through five before the physical abuse actually took place." *Id.* Dr. Loring explained that "the nature of that ritualistic kind of emotional abuse is that the children feel terrified the minute step one starts because they know, you know, what the other steps are going to be that are going to be followed."[56] (ST, Vol. 2:229).

Dr. Loring also testified that, growing up, Petitioner was in special education and was described as having "odd classroom behavior, inappropriate behavior, that was marked by a lack of focus, being hyper, [and] a lack of concentration." (ST, Vol. 2:223). Dr. Loring explained

56. In addition to the testimony regarding physical abuse by Petitioner's father, Dr. Loring also testified that there were numerous occasions where Petitioner's mother took him and his sister away to other states, and Petitioner's father had to search for her to get Petitioner and his sister back. (ST, Vol. 2:222).

that these symptoms were often seen in children who are traumatized and abused. *Id.* Additionally, while living with his father, Petitioner was not allowed to leave the house for social gatherings and would "stare blankly ahead as if he was checked out." *Id.*

Dr. Loring also told the jury that as a result of his abusive upbringing, Petitioner had a tendency to wander off. (ST, Vol. 2:225). Dr. Loring described an occasion where Petitioner, who was sixteen years old, walked from Kennesaw to Dunwoody, Georgia and hid under his grandmother's bed all night. *Id.* In addition, Dr. Loring testified that there was evidence of dissociation. Specifically, she testified that there were two incidents where Petitioner traveled to different states and could not recall these trips until he discovered evidence of it such as a newspaper from that particular state. (ST, Vol. 2:225-226).

Dr. Loring diagnosed Petitioner with PTSD and Asperger's Syndrome. (ST, Vol. 2:229230). Regarding the PTSD diagnosis, Dr. Loring testified that Petitioner suffered from PTSD due to the trauma he experienced during his childhood and teenage years. (ST, Vol. 2:229). Petitioner suffered from "incredible amounts of trauma during his childhood, more than he can manage." (ST, Vol. 2:234). As a result, there was evidence of memory loss associated with his PTSD. (ST, Vol. 2:229-230, 234). Dr. Loring explained that this memory loss, or disassociation, was part of the reason she struggled to get information from Petitioner. (ST, Vol. 2:229-230). Petitioner did not remember significant times and behavior in his life and did

not recall much of the abuse he endured. (ST, Vol. 2:229-230). In contrast to the reports from other individuals of an abusive upbringing, Petitioner told Dr. Loring that he had a great childhood. (ST, Vol. 2:232). Dr. Loring explained to the jury that this was not uncommon in that an abused person tends to dissociate from the abuse and deny it so that they can continue to move forward in their life. *Id.* Dr. Loring also testified that it was not unusual for someone to have interaction with a person who traumatized them. (ST, Vol. 2:233). Dr. Loring explained that this "traumatic bonding" is where kids, and even teenagers and adults, continue trying to create a relationship with an abuser. *Id.*

Regarding her diagnosis of Asperger's Syndrome, Dr. Loring told the jury that a person with Asperger's Syndrome was "very impaired in their ability to be close or intimate with another person" and severely suffered from a "sustained impairment in social interaction." (ST, Vol. 2:230). A person with Asperger's might exhibit aggression or violence. *Id.* In support of her diagnosis of Petitioner, Dr. Loring testified that there were reports that Petitioner quickly ate meals and had no interaction with his family. (ST, Vol. 2:230). Dr. Loring also stated that Petitioner was a "very lowly man" who was unable to have a "fulfilling sexual loving relationship with a girlfriend, can't connect up warmly with anybody, including the people at work who see him in his stories as unbelievable, do not see themselves as his friend." (ST, Vol. 2:234-235). Additionally, Dr. Loring testified that Petitioner did not have any friends, and his "reactions, partly because of the Aspergers [sic], May be way out of what one would normally expect in the way of normal

reactions to abnormal events in his life." (ST, Vol. 2:235). Petitioner's reactions to his life experiences resulted in him "having a real impaired ability to relate to people and to empathize with them" and caused him to be "much more involved with objects or cleaning or a kind of ritual of what you do at what moment in time." (ST, Vol. 2:226). These rituals became very important to Petitioner. *Id.* Dr. Loring concluded by telling the jury that despite the awareness of a number of family members that Petitioner was "very disturbed," Petitioner never received treatment for these disorders. (ST, Vol. 2:234).

Trial counsel then presented testimony from Dr. Robert Shaffer, a clinical psychologist. (ST, Vol. 2:266). Dr. Shaffer explained that he performed a psychological evaluation of Petitioner. (ST, Vol. 2:273). As part of his evaluation, Dr. Shaffer interviewed approximately six individuals regarding their observations of Petitioner. (ST, Vol. 2:275). Dr. Shaffer also spoke with Dr. Marti Loring regarding the social history she prepared on Petitioner and reviewed police reports, hospital records, school records, and prison records. *Id.* Based upon his evaluation, Dr. Shaffer opined that Petitioner suffered from PTSD, Dissociative Disorder, and Asperger's Syndrome. *Id.*

Dr. Shaffer explained to the jury that Asperger's Syndrome is a disturbance "manifested by odd and repetitive stereotyped patterns of behavior and interests" and "impairment in social functioning" and "social relationships." (ST, Vol. 2:276). A person with Asperger's might also have "very unusual patterns of cleanliness and compulsive behavioral routines." (ST, Vol. 2:280).

Notably, Asperger's Syndrome included a high number of individuals who functioned in the superior range of intelligence.[57] (ST, Vol. 2:277). Depending on their history, a person with Asperger's might suffer from dissociation. *Id.*

In support of his diagnosis of Asperger's Syndrome, Dr. Shaffer testified that Petitioner had very unusual cleaning routines. (ST, Vol. 2:280). For example, Petitioner cleaned his floor several times a day and made his bed "compulsively with tight corners." (ST, Vol. 2:280-281). Petitioner would become very upset if the mattress was not exactly centered. (ST, Vol. 2:281). When vacuuming the floor, Petitioner would arrange the "pile of carpet all in one direction." *Id.* After vacuuming, Petitioner would become very agitated when someone walked on the floor. *Id.* If there was a rug with tassels, Petitioner would comb out the tassels in a specific direction. *Id.* Petitioner also cleaned his car on a daily basis, folded his clothing in a particular manner, and lined up Coca-Cola cans with the labels facing the same direction. (ST, Vol. 2:281-282). Dr. Shaffer explained that Petitioner would become uncomfortable and agitated if his routine was disturbed. *Id.*

Petitioner also met the criteria for Asperger's in that he had an "extreme interest" in reading science fiction and would constantly talk about these books for hours with different people. (ST, Vol. 2:282). Family members reported Petitioner would "relate these stories of science

57. Dr. Shaffer also testified that Petitioner was in the "very superior range of intellectual functioning." (ST, Vol. 2:274).

fiction as if they really could be true." (ST, Vol. 2:283). This behavior was considered "odd and peculiar" as the books were clearly fiction, yet there was a "juvenile or boyish excitement about the possible reality of these things." *Id.* Dr. Shaffer testified that Petitioner was also "intensely and extremely involved" in reading about martial arts experts. *Id.* In studying these experts, Petitioner would become excited in a "childlike way." *Id.* Dr. Shaffer explained that this "type of fascination with one narrow interest" was one of the diagnostic criteria for Asperger's. *Id.*

Additionally, Petitioner demonstrated evidence of social impairment. (ST, Vol. 2:283-284). Dr. Shaffer explained that there was a lack of the "emotional give and take that you normally see in a young person and a child, or in his adult life as well." (ST, Vol. 2:284). Petitioner fantasized about being connected with interesting and popular people in school; however, his sister reported that she never knew Petitioner to be involved with these individuals. *Id.* In addition, it was reported that Petitioner exhibited "odd and embarrassing" behavior in public. *Id.* Dr. Shaffer testified that individuals with Asperger's "tend not to know how to talk socially" and might "get all excited and worked up and talk loudly and embarrass people in public." *Id.*

Regarding his diagnosis of Dissociative Disorder, Dr. Shaffer testified that Dissociative Disorder involved an individual who "will split off from their normal state of awareness" and experience "periods of productive and active behaviors, and then later, have no recollection of that." (ST, Vol. 2:279). An individual with memory

lapses usually had a "traumatic situation at the root of that, usually early in childhood." (ST, Vol. 2:279-280). Dr. Shaffer explained to the jury that Petitioner suffered from Dissociative Disorder as a result of the "violence in his home and battering on his person, causing him at certain times to relate out of Maybe one pocket of his personality." (ST, Vol. 2:280). In that state, Petitioner would be unaware of the "normal judgement and thoughts and memories that he has to bring to bear to a situation." *Id.*

Dr. Shaffer stated that Petitioner's background was marked by physical abuse inflicted by his father and explained that Petitioner had no memory of this abuse, which was not unusual in situations of abuse. (ST, Vol. 2:278). Dr. Shaffer further explained that Petitioner's report of having a good family and childhood was not uncommon and was consistent with families where abuse was present. (ST, Vol. 2:278-279). Dr. Shaffer stated that Petitioner exhibited a "pattern of behavior that is somewhat idealistic in the sense that he wants to see only the best and he has some very compulsive behaviors about maintaining neatness and cleanliness that are consistent with this." (ST, Vol. 2:279).

Dr. Shaffer also told the jury that Petitioner met all of the diagnostic criteria for PTSD. (ST, Vol. 2:284). There was not a significant amount of evidence in the first category, reexperiencing the traumatic stress; however, Dr. Shaffer explained that this lack of evidence was partially due to the fact that some of the trauma occurred prior to Petitioner's "earliest age of memory." (ST, Vol. 2:284-285). Dr. Shaffer then explained to the

jury that there was "pretty strong evidence that there was significant abuse before his age of earliest memory." (ST, Vol. 2:285). Specifically, there was information about cigarette bums on Petitioner's body and a skull fracture. *Id.* Dr. Shaffer testified that Petitioner did experience "intrusions" in the form of disassociation and provided the jury with several examples of Petitioner lacking any memory of wandering off and traveling to other states[58] (ST, Vol. 2:278, 285-287). There was also evidence that Petitioner scratched his face during the night, which suggested that he was having disturbing nightmares. *Id.*

Dr. Shaffer then explained that the second category of diagnostics for PTSD is avoidance of the memories. (ST, Vol. 2:287). Dr. Shaffer testified that there was "clear evidence of a great deal of denial." (ST, Vol. 2:288). Petitioner was an "individual for whom the world is always just right, it's always rosy." *Id.* Petitioner maintained a neat and clean environment, and he viewed himself as "flawless and without problems to an extreme degree." *Id.* Dr. Shaffer explained that this denial was Petitioner's attempt to "avoid re-experiencing the problems and horrors" that occurred in his life. *Id.*

The final witness presented by trial counsel was Petitioner's sister, Dayna Knowles.[59] Ms. Knowles testified

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58. Dr. Shaffer also testified that this was a typical pattern of a person with Dissociative Disorder, and it was usually the result of serious trauma in the person's life. (ST, Vol. 2:287).

59. During the testimony of Ms. Knowles, trial counsel tendered into evidence five photographs of Petitioner and his family. (ST, Vol. 2:306-307).

that she and Petitioner had a "rather difficult" early childhood. (ST, Vol. 2:309). As a young child, Ms. Knowles and Petitioner were taken to daycare by their biological mother and were left there for an extended period of time. *Id.* After the daycare closed, Ms. Knowles and Petitioner would frequently go home with a woman who watched them until their mother arrived. *Id.*

Ms. Knowles described their father as an unhappy man who was hard on them and showed very little affection. (ST, Vol. 2:310). Their father did not handle stress well and would become angry and violent. *Id.* Ms. Knowles told the jury that she and Petitioner were physically abused by their father throughout their childhood. (ST, Vol. 2:310-312). Ms. Knowles stated that they would both receive a whipping from their father with a large belt or stick when he was upset; however, the whippings received by Petitioner were worse. (ST, Vol. 2:311). Ms. Knowles explained that their father would use his fist to whip Petitioner.[60] *Id.*

In addition to the physical abuse, Ms. Knowles testified that she was sexually abused by her father. (ST, Vol. 2:312). Ms. Knowles explained that her father used drugs and described an incident in which he called her into the bathroom. *Id.* Ms. Knowles recalled entering the bathroom and finding her father sitting naked on the

60. In addition to the violence inflicted upon Ms. Knowles and Petitioner, trial counsel elicited testimony of the incident where their stepmother was head-butted by their father. (ST, Vol. 2:315-316). Ms. Knowles testified that in response, Petitioner pulled their father off their stepmother. (ST, Vol. 2:316).

toilet. *Id.* Ms. Knowles complied with her father's request and sat on his lap, and her father then pulled down her shorts. *Id.* During this testimony, Ms. Knowles became emotional and no further testimony was elicited regarding the sexual abuse. (ST, Vol. 2:313).

Additionally, Ms. Knowles told the jury that growing up, she and Petitioner were not allowed to have friends over, leave the yard, or go to a friend's house. (ST, Vol. 2:313-314). Ms. Knowles testified that Petitioner talked about having friends, but she never saw any of them. (ST, Vol. 2:313-314). Petitioner also frequently talked about several families with whom he seemed very attached. (ST, Vol. 2:315). Ms. Knowles explained that Petitioner would refer to these friends' parents as "mom and dad," which she found to be bizarre. *Id.* Ms. Knowles stated that she always wondered if the people that Petitioner talked about were really his friends. (ST, Vol. 2:314).

Following the divorce of her father and stepmother, Ms. Knowles went to live with her stepmother and Petitioner stayed with their father. (ST, Vol. 2:316-317). At some point, Petitioner moved out of their father's house. (ST, Vol. 2:317). Ms. Knowles then decided to move back in with her father as he was alone and was "having a complete breakdown," which she acknowledged was a poor decision. *Id.* During her senior year of high school, Ms. Knowles decided to join the Navy. (ST, Vol. 2:320). Ms. Knowles testified that the Navy was the most positive experience for her as it was the first time in her life that she had self-confidence. (ST, Vol. 2:320-321).

Trial counsel also elicited testimony from Ms. Knowles that Petitioner tried to reconnect with his father. Specifically, Ms. Knowles testified that Petitioner tried to reconnect with his father after he got out of prison in 2002. (ST, Vol, 2:321). Petitioner's father; however, did not show any excitement about Petitioner getting out of prison.[61] (ST, Vol. 2:321-322).

In concluding her testimony, Ms. Knowles expressed sadness over the crime and "unbelievable sadness for the families involved." (ST, Vol. 2:323). In asking the jury to spare Petitioner's life, Ms. Knowles explained that she and Petitioner had "come through sort of a battle," and they "always made it to the other side," albeit in different ways. (ST, Vol. 2:324). Ms. Knowles testified that she loved Petitioner and that he was her "connection to what was real in [her] life, as horrible as it was." *Id.* Ms. Knowles stated that Petitioner had a good heart, and she could not imagine being deprived of the ability to communicate with Petitioner given everything that they had been through in their life. *Id.*

A. No Deficiency

This Court finds that trial counsel's presentation of evidence in mitigation was reasonable and Petitioner was not prejudiced by trial counsel not presenting

61. The Court notes that Dr. Marti Loring testified during Petitioner's trial regarding "traumatic bonding" and explained that "at some point later in life, as with Walter Humphreys, there's a kind of backing off and more of a state of ignoring." (ST, Vol. 2:233).

the additional mitigation evidence presented to this Court, particularly in light of trial counsel's thorough investigation and strategic decisions. Trial counsel is not required to present all mitigation evidence and "[considering the realities of the courtroom, more is not always better. . . . [g]ood advocacy requires 'winnowing out' some arguments, witnesses, evidence, and so on, to stress others." *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2000) (*citing Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir. 1994)). The record reflects that the evidence submitted during habeas proceedings is largely cumulative of the evidence presented at trial. Further, the only substantial "new evidence" concerns Petitioner's past sexual abuse, of which Petitioner failed to disclose to trial counsel, or anyone else, prior to habeas proceedings. As explained below, this Court finds that Petitioner has failed to demonstrate deficient performance or resulting prejudice.

During the proceedings before this Court, Petitioner introduced the testimony of seven lay witnesses and three expert witnesses in an attempt to demonstrate deficient performance of Petitioner's trial counsel. Petitioner introduced the testimony of Kelly Gosselin and her brother, Michael Boudreau. Ms. Gosselin testified that her father, Dennis Boudreau, was married to Petitioner's mother, Becky, from around September of 1977 through the beginning of 1980.[62] (HT, Vol. 1:193, 212, 214). During that time, Petitioner's mother verbally and physically

62. Ms. Gosselin testified that she was between eight and ten when her father married Petitioner's mother. (HT, Vol. 1:193, 212).

abused Ms. Gosselin and Mr. Boudreau, as well as their younger sister. (HT, Vol. 1:196-198, 200, 217-220).

For a period of approximately two weeks, Petitioner and his sister, Dayna, lived in the apartment with Ms. Gosselin and Mr. Bourdreau. (HT, Vol. 1:200-201, 212). Regarding that two week period, Mr. Boudreau recalled one incident in which he and his two sisters fought each other in front of Petitioner and his sister, Dayna. (HT, Vol. 1:222). Additionally, Mr. Boudreau testified that one night Petitioner punched him in the face and gave him a black eye "for no reason." *Id.* Ms. Gosselin, however, did not remember any details from that period of time. (HT, Vol. 1:201-202).[63]

Petitioner also presented testimony from Roger Jones, who was Petitioner's ROTC teacher for two years in high school, and his son, Thomas Jones.[64] (HT, Vol. 2:449-450). Roger Jones testified that Petitioner was in special education for a behavioral disorder and was an average student. (HT, Vol. 2:451). Petitioner followed the rules in his class and was "always respectful." (HT, Vol. 2:451-452). Roger Jones also testified that he never met Petitioner's parents and opined that Petitioner would have done well in the military. (HT, Vol. 2:454). Thomas Jones testified that

63. Ms. Gosselin also testified that her father has been in long-term care facilities in Massachusetts since 1981 for "mental problems." (HT, Vol. 1:206).

64. The record shows that trial counsel searched for Roger Jones; however, none of the addresses and phone numbers listed for Mr. Jones were correct. (HT, Vol. 2:461-462; Vol. 37:13975).

he met Petitioner "briefly" in the early 90s when Petitioner was in his father's ROTC class. (HT, Vol. 1:186). Thomas Jones worked for the Cobb County Sheriff's department and, at the request of his father, visited Petitioner "a few times" while Petitioner was incarcerated in the Cobb County Detention Center. (HT, Vol. 1:187).

Kelly Kory Nagel, who was Petitioner's friend from fifth to ninth grade, also testified during the evidentiary hearing before this Court. Ms. Nagel testified that Petitioner was a "wonderful friend, a great listener," and "her protector." (HT, Vol. 2:433). Ms. Nagel never visited Petitioner's house and never met Petitioner's family. (HT, Vol. 2:435-436). Ms. Nagel also described an incident in which Petitioner told her he was going to commit suicide.[65] (HT, Vol. 2:437). Trial counsel contacted Ms. Nagel in the spring of 2006; however, Ms. Nagel was living in California and unable to travel at the time. (HT, Vol. 2:438-439). Although Ms. Nagel moved back to Georgia in October of 2006, she never contacted anyone from Petitioner's defense team to inform them of her move to Georgia. (HT, Vol. 2:439, 443-444).

Additionally, Petitioner presented testimony from Brenda Dragoone, who lived across the street from Petitioner and his family for approximately one to three years.[66] (HT, Vol. 2:419, 427-428). Ms. Dragoone did not

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65. Ms. Nagel estimated this incident occurred when she and Petitioner were in the seventh grade. (HT, Vol. 2:437-438).

66. Ms. Dragoone stated that Petitioner was in second or third grade when his family moved into the home across the street. (HT, Vol. 2:420).

have a relationship with Petitioner's family aside from conversing with his stepmother, Janie, while walking their children to and from the bus stop, (HT, Vol. 2:420). However, Ms. Dragoone testified that Petitioner and his sister were not allowed out of the yard to play and that their father yelled at them often. (HT, Vol. 2:420-421). Ms. Dragoone also described an incident in which Petitioner's father spanked him in the yard because he "soiled his underwear" and "flushed it down the toilet and backed up the plumbing." (HT, Vol. 2:423-424). Ms. Dragoone opined that Janie was afraid of Petitioner's father and when questioned as to why she believed this she stated "I'm a woman and I would know — you know, you can tell when women are intimidated by men." (HT, Vol. 2:422).

Petitioner presented the testimony of his sister, Dayna Lee, who also testified during the sentencing phase of Petitioner's trial.[67] The record shows that Ms. Lee's testimony at the evidentiary hearing before this Court was largely cumulative of her testimony at trial. During habeas proceedings, Ms. Lee opined that trial counsel could have asked her more questions on the stand at Petitioner's trial and explained "I feel like Maybe everybody felt sorry for me and so they stopped asking me questions, and I — I just feel like they could have asked more." (HT, Vol. 3:638). However, the record reflects that Ms. Lee became emotional while giving testimony regarding sexual abuse she endured by her father and no further testimony regarding the sexual abuse was elicited. (ST, Vol. 2:313).

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67. The Court notes that at the time of Petitioner's trial, Petitioner's sister's name was Dayna Knowles. However, her last name has since been changed to Lee. (HT, Vol. 3:627-628).

Additionally, Petitioner introduced the testimony of two expert witnesses, Dr. Julie Rand Dorney and Dr. Victoria Reynolds.[68] Dr. Dorney, an expert in forensic psychiatry, performed a psychiatric examination of Petitioner at the request of Petitioner's habeas counsel. (HT, Vol. 3:666). In conducting her examination, Dr. Dorney met with Petitioner on two occasions for a total of approximately seven hours. (HT, Vol. 3:674). In addition, Dr. Dorney reviewed the trial transcript, Dr. Shaffer's testing materials, Petitioner's school records, and Petitioner's prison records. (HT, Vol. 3:669-670). Following her examination of Petitioner, Dr. Dorney spoke with Dr. Reynolds and Petitioner's sister, Dayna.[69] (HT, Vol. 3:670).

Dr. Dorney diagnosed Petitioner with obsessive-compulsive disorder and depressive disorder NOS. (HT, Vol. 3:705, 709; Vol. 4:914-915). Additionally, Dr. Dorney found that Petitioner has many symptoms of both PTSD and bipolar disorder; however, Petitioner did not meet all of the criteria for a diagnosis. (HT, Vol. 3:705-706; Vol. 4:914-915). Regarding PTSD, Dr. Dorney explained:

> [Petitioner] is almost 40 years old and he doesn't reenact the trauma anymore in his mind, which

68. Petitioner also presented the testimony of Dr. Bhushan Agharkar, a psychiatrist who evaluated Petitioner on June 28, 2007, at the request of trial counsel. (HT, Vol. 3:732,748). The record shows that Dr. Agharkar was not asked to testify at Petitioner's trial because his evaluation did not support trial counsel's strategy. (HT, Vol. 3:758-759).

69. Dr. Dorney testified that she met with Dr. Reynolds both before and after conducting her examination of Petitioner. (HT, Vol. 3:670).

> means that—you know, typically if someone is traumatized they May have flashbacks from an event or nightmares or they May have intrusive thoughts about it. But if you've been many years away from it and you have learned other ways to cope with it, you May not show that reenactment as much. So because he didn't meet that criteria, I couldn't make the diagnosis. He met all the other—other criteria, except for that.

(HT, Vol. 3:668-669).

Additionally, Dr. Dorney testified that in her second meeting with Petitioner he told her that he was sexually abused by his great-grandmother, Jewel, from the age of five or six until age fourteen. (HT, Vol. 3:680, 682). Dr. Dorney also connected Petitioner's OCD to the sexual abuse and explained:

> [W]hen you pull together all the sexual trauma, it makes sense as to why psychologically he does what he does, because oftentimes with sexual abuse, with sexual trauma, patients tend to be come (sic) obsessive; they tend to basically – you know, it's a way to stay clean, it's a way to stay in control, it's a way to control your environment.

(HT, Vol. 3:687). When asked why a sexual abuse victim would not report it, Dr. Dorney explained "[m]en have a harder time disclosing situations that are vulnerable. And I think, too, he was—he's ashamed; he's humiliated; he, you know, feels very conflicted about it, you know, embarrassed about it." (HT, Vol. 3:704).

Appendix D

Petitioner also presented the testimony of Dr. Reynolds, an expert in trauma and its impact on trauma victims. (HT, Vol. 2:463, 467). The majority of Dr. Reynolds's testimony reiterated the testimony that was presented at trial; however, Dr. Reynolds also testified regarding the sexual abuse Petitioner reported to Dr. Dorney during habeas proceedings. Dr. Reynolds stated "[w]hen I – when I talked to him about Jewel, he did not reveal the sexual abuse. I suspected it, but he did not – he just wasn't going to say it or it wasn't there and available to him; I'm not sure which." (HT, Vol. 3:522),

Although Petitioner did not tell her about the sexual abuse, Dr. Reynolds stated that she suspected Petitioner had been sexually abused based on his level of dissociativeness, his level of compartmentalization, and his sexual activity. (HT, Vol. 3:528). Regarding Petitioner's sexual activity, Dr. Reynolds explained that Petitioner and his sister, Dayna were found "kissing and touching" when they lived with their father and Janie. (HT, Vol. 3:527). Additionally, Petitioner told Dr. Reynolds that he had "sexual relations with little girls" in his neighborhood and had sexual relations with two women in "semi-parental roles." (HT, Vol. 3:529).

In fact, Petitioner never told anyone about the sexual abuse, which Dr. Reynolds explained is called dissociation. (HT, Vol. 3:523). Dr. Reynolds further explained that this is a "compartmentalization where they – the experience gets put in – out of awareness, but it is still there and available to them." *Id.* When questioned as to why Petitioner never told anyone about the sexual abuse, Dr. Reynolds stated

that sexual abuse is "very stigmatizing for a boy" and that "it's double jeopardy for a child to report on the people he needs to depend on" (HT, Vol. 3:525-526). Dr. Reynolds explained that sexual abuse is almost always a very severe trauma for a child or adult. (HT, Vol. 3:507).

Dr. Reynolds described the trauma Petitioner endured growing up including a skull fracture, instability, and physical abuse. (HT, Vol. 3:508-509, 511-512, 515). Dr. Reynolds also discussed the incident in which Petitioner got into a car accident at age 16 and was beaten by his father after getting home from the hospital. (HT, Vol. 3:525-526). Dr. Reynolds explained the effects of this abuse at different times in Petitioner's life. (HT, Vol. 3:519). Dr. Reynolds stated that this trauma caused Petitioner to become dysregulated and explained that he went back and forth between mood and behavioral states. (HT, Vol. 3:519-520). Dr. Reynolds also discussed the trauma in Petitioner's parental history, including Becky Humphreys's psychiatric and medical problems, and stated that both Petitioner's mother and father had been sexually abused. (HT, Vol. 3:508-510).

Dr. Reynolds also discussed Petitioner's OCD and how his trauma history and adaptations impacted him around the time of the crimes. (HT, Vol. 3:552-553). Dr. Reynolds explained that he was living with his grandmother, on parole, he had lost his money, and his truck had been hit and when the "finishing line for paying off that money got farther and farther away, well, that—that kicks up more anxiety for him." (HT, Vol. 553).

Appendix D

As the United States Supreme Court has held, counsel's performance is considered in light of the circumstances as they existed at the time of trial, and "every effort must be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 688-689. The record shows that trial counsel thoroughly investigated Petitioner's background, including interviewing numerous family members; had Petitioner evaluated by two mental health professionals and a social worker; and, specifically asked Petitioner about any sexual abuse he experienced during his childhood. Although Petitioner did not inform trial counsel of his past sexual abuse, his defense team was suspicious and continued to investigate further.[70] (HT, Vol. 4:792-793). "[Reasonable attorney performance includes investigating mitigating evidence to the extent feasible given the defendant's willingness to cooperate." *Perkins v. Hall*, 288 Ga. 810, 815, 708 S.E.2d 335 (2011). When evaluating the reasonableness of trial counsel's investigation, the Court "weigh[s] heavily the information provided by the defendant." *DeYoung v. Schofield*, 609 F.3d 1260, 1288 (11th Cir. 2010) (*citing Newland v. Hall*, 527 F.3d 1162, 1202 (11th Cir. 2008)). Furthermore, Petitioner has not provided this Court with any evidence of sexual abuse that would have been available to trial counsel. Trial counsel "does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). Therefore, trial counsel's performance is not deficient for not presenting evidence that Petitioner withheld from them.

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70. Notably, Petitioner's self-report to Dr. Dorney is the only evidence of Petitioner's past sexual abuse that has been provided to this Court.

B. No Prejudice

This Court finds that trial counsel's investigation and presentation of mental health and mitigating evidence was reasonable. Furthermore, this Court finds that Petitioner has failed to show prejudice as the additional evidence presented in habeas would not have created a reasonable probability of a different outcome.

A comparison of the trial record and the habeas record shows the majority of the evidence presented in habeas reiterated the testimony presented at trial. The testimony of Roger Jones regarding Petitioner's behavioral disorder and participation in ROTC is cumulative of evidence presented at trial and trial counsel is not ineffective for not introducing cumulative evidence. *See Holsey v. Warden. Ga Diagnostic Prison*, 694 F.3d 1230, 1260-1262 (11th Cir. 2012); *see also Sochor v. Sec'y Dep't of Corr.*, 685 F.3d 1016, 1032 (11th Cir. 2012); *Rose v. McNeil*, 634 F.3d 1224, 1243 (11th Cir. 2011); *Schofield v. Holsey*, 281 Ga. 809, 814, 642 S.E.2d 56 (2007); *see also* ST, Vol.l:149-150; 2:223. Similarly, the majority of Ms. Dragoone's testimony is cumulative as numerous witnesses at trial testified that Petitioner's father was abusive. (ST, Vol. 1:144-147, 152-153; 2:166-167, 220-225, 228-229, 278-280, 284-285, 309-312). Further, Ms. Dragoone's opinion regarding the relationship between Petitioner's father and stepmother is unpersuasive as she gave no factual basis for her beliefs.

The testimony of Ms. Gosselin and Mr. Boudreau regarding the abuse they endured by Petitioner's mother is also unpersuasive as Petitioner only lived within the

same household for two weeks. Furthermore, the record shows that testimony was presented to the jury regarding the abuse and neglect Petitioner endured while in his mother's care. (ST, Vol. 2:217, 219-221, 309). Similarly, the testimony of Thomas Jones that he met Petitioner "briefly" when Petitioner was in high school and visited Petitioner a few times while he was incarcerated is unpersuasive and weak. The testimony of Ms. Nagel describing Petitioner as being protective is also cumulative of the testimony elicited from numerous witnesses at Petitioner's trial. (ST, Vol. 1:145; 2:224-225, 228). Although the testimony of Ms. Nagel regarding Petitioner's suicide attempt is new, the Court finds that this testimony is weak.

Additionally, the majority of the expert testimony presented during habeas proceedings is also cumulative and trial counsel is not ineffective for not introducing cumulative evidence.[71] *See Holsey*, 694 F.3d at 1260-1262: *see also Sochor*, 685 F.3d at 1032; *Rose*, 634 F.3d at 1243; *Schofield*, 281 Ga. at 814. Furthermore, the only

71. The Court notes that Petitioner's habeas experts diagnosed Petitioner with OCD whereas trial counsel's experts diagnosed Petitioner with PTSD, Dissociative Disorder, and Asperger's Syndrome. However, the habeas experts and trial counsel's experts based their diagnosis on the same behaviors and "symptoms" exhibited by Petitioner. While OCD might be one possible diagnosis, "it is not the only reasonable diagnosis that could be made from the information contained in the materials." *Card v. Dugger*, 911 F.2d 1494, 1513 (11th Cir. 1990). Furthermore, trial counsel are "not required to 'shop'" for a mental health expert "who will testify in a particular way." *Id.* Therefore, to the extent Petitioner alleges trial counsel were ineffective in failing to present a diagnosis of OCD to the jury, this claim fails.

potentially mitigating "new evidence" presented during habeas proceedings concerns Petitioner's past sexual abuse, of which Petitioner did not disclose to trial counsel, or anyone else, prior to habeas proceedings. As discussed above, trial counsel cannot be found ineffective for failing to discover and present evidence of abuse that their client does not mention to them. *DeYoung v. Schofield*, 609 F.3d 1260, 1288 (11th Cir. 2010); *Newland v. Hall*, 527 F.3d 1162, 1202 (11th Cir. 2008). Furthermore, even if this Court were to find trial counsel's investigation and presentation of Petitioner's sexual abuse deficient, which the Court does not, Petitioner has still failed to demonstrate a reasonable probability in the outcome of the proceedings if this evidence had been presented at trial. This evidence would have had little, if any, mitigating weight at Petitioner's trial. *See Callahan v. Campbell*, 427 F.3d 897, 937 (11th Cir. 2005) and *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001)(finding the fact that none of defendant's siblings had committed violent crimes reduced the value of abuse as mitigating evidence).

This Court finds that there is no reasonable probability that the outcome of the proceedings would have been different based on the additional evidence Petitioner presented during habeas proceedings. The United States Supreme Court has held that a proper prejudice analysis under *Strickland* requires a court "to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-398, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Strickland*, 466 U.S. at 694; *see*

also Humphrey v. Nance, 293 Ga. 189, 218, 744 S.E.2d 706 (2013) ("In assessing prejudice, we 'must consider the totality of the evidence before the judge or jury.'").

At the evidentiary hearing before this Court, the mitigating evidence presented by Petitioner was largely cumulative of the evidence of presented at trial. The additional evidence presented by Petitioner was weak and unpersuasive. Weighing the totality of the aggravating evidence against the totality of the mitigating evidence, this Court finds that any additional mitigating testimony would not have created a reasonable probability of a different outcome. Accordingly, Petitioner's ineffective assistance of counsel claims pertaining to trial counsel's investigation and presentation of evidence at Petitioner's trial are DENIED.

Trial Counsel Not Ineffective for Failing to Strike Juror Chancey

In **Claim VII,** Petitioner alleges that trial counsel were ineffective for failing to strike or challenge prospective juror Linda Chancey, which Petitioner argues resulted in "direct prejudice" to the outcome of his trial. (PB 145). Specifically, Petitioner contends Ms. Chancey should have been stricken when she revealed information during voir dire that: she had been the target of an attempted rape by an escaped mental patient, who she described as a murderer on her juror questionnaire and that she had a close friend who was a real estate agent, the same occupation as the victims in this case. (PB 146; HT, Vol. 36:13916). This Court finds that trial counsel's

performance was not deficient with regard to the conduct of voir dire, and that, even if deficient, Petitioner has failed to demonstrate actual prejudice.

The record shows that Ms. Chancey responded to her summons and reported to the courthouse on Wednesday, September 5, 2007. (TT, Vol. 11:39). At that time she filled out a juror questionnaire, was sworn, instructed not to discuss the case or watch media reports, and told to return with her panel on September 10th at 9:00 a.m. (TT, Vol. 11:39-40). Ms. Chancey's juror questionnaire indicated that she had been the victim of an armed robbery and attempted rape in October, 1976, by a defendant who had been twice convicted of rape and murder and had escaped from a mental hospital. (HT, Vol. 36:13916).

On Saturday, September 8, 2007, Ms. Chancey flew to Las Vegas for a trade show for travel agents. (TT, Vol. 11:40). Ms. Chancey was absent when her panel was read the indictment on Tuesday, September 11, 2007. (TT, Vol. 7:287). On Wednesday, September 12, 2007, there was a discussion regarding Ms. Chancey's absence, and Mr. Berry stated that, from his reading of her juror questionnaire, Ms. Chancey had indicated that she had to travel somewhere. (TT, Vol. 8:215). A bailiff stated that Ms. Chancey had called and discussed her travel plans, and informed the bailiff that she was travelling to Las Vegas on September 8 and would not be back in time. (TT, Vol. 8:215).

Ms. Chancey was present for voir dire on Saturday, September 15, 2007 and was questioned about her absence

and read the indictment. (TT, Vol. 11:39-49). Ms. Chancey affirmed that she had not formed or expressed an opinion in regard to the guilt or innocence of the defendant regarding the charges. (TT, Vol. 11:49). Ms. Chancey also affirmed that she was not related to the defendant, that her mind was perfectly impartial between the State and the accused, and that she had no prejudice or bias either for or against the defendant. (TT, Vol. 11:49-50). Ms. Chancey denied that she was conscientiously opposed to the death penalty, and when asked whether she would always vote to impose the death penalty where a defendant was found guilty of murder, Ms. Chancey replied "[n]ot at all." (TT, Vol. 11:53). Asked whether she would be able to consider and vote for the imposition of life with the possibility of parole, Ms. Chancey responded "[depending upon the evidence, I would be." *Id*. She also indicated that she would be able to consider voting to impose a sentence of life without parole. *Id.* Ms. Chancey denied that she would always vote for the sentences of life or life without parole regardless of the evidence, and indicated that she would be able to vote for any of the three sentencing options, depending upon the evidence. (TT, Vol. 11:54).

When questioned by the State, Ms. Chancey indicated that she knew nothing about the case and had not overheard any information about the case while at the courthouse. (TT, Vol. 11:55). Ms. Chancey reaffirmed that she would be able to consider all three sentencing options if the defendant was found guilty of murder, and would regard the verdict and mitigating circumstances as two separate matters. (TT, Vol. 11:56-57). Ms. Chancey indicated that if the instructions were to fairly consider

all three sentencing options "that is precisely what [she] would do." (TT, Vol. 11:57-58). Ms. Chancey denied that she had leanings towards any particular sentence and stated that "we all err and there is a sanctity of life and only God gives that life" and that "contemplation for remorse is appropriate." (TT, Vol. 11:58-59). Ms. Chancey stated she "absolutely" could consider the defense evidence in mitigation and would vote for whichever sentence she felt was right. (TT, Vol. 11:59-60). She indicated that she understood her responsibility as a juror to hear and consider the views of the other jurors regarding guilt-innocence and sentencing. (TT, Vol. 11:60). Finally, Ms. Chancey indicated that she would vote the way she felt after considering the other jurors' views. *Id.*

When questioned by Mr. Berry regarding her views on the death penalty, Ms. Chancey stated "[t]here is a certain finality with it. I think we are rather predisposed to give a defendant a fair sentence." (TT, Vol. 11:61). Ms. Chancey further stated that there was a "certain sanctity of life," and she thought that "every human being has the right to that sanctity." (TT, Vol. 11:61). She stated that one must "make sure that justice is dealt and in such a manner that would be applicable to the situation and the crimes or the mitigating circumstances." (TT, Vol. 11:62). Ms. Chancey stated that her views on the death penalty were "flexible," and that there was "no retribution once the lives of others that are innocent have been taken." (TT, Vol. 11:65). Ms. Chancey also stated that whether she could consider a life sentence for someone she had found guilty of malice or felony murder was a matter of hearing the mitigating circumstances. *Id.* Ms. Chancey indicated that

if she were in the minority, she would be able to stand up for what she thought was the right thing to do. (TT, Vol. 11:65-66). She affirmed that she would give the defendant the benefit of the doubt, and stated that she was more of a fact-based than emotion-based person. (TT, Vol. 11:66). Ms. Chancey also affirmed that if she had a loved one on trial for his or her life, she would be satisfied with a juror of like attitudes as herself on the jury. *Id.* Mr. Berry ended his questioning at that point, and after Ms. Chancey left the courtroom, the trial court ruled that she was eligible to be considered for further questioning. (TT, Vol. 11:67).

After discussing her employment history, Ms. Chancey freely admitted that she had been the victim of a crime that had happened some time ago in her home in Washington, D.C. (TT, Vol. 11:272-273). Ms. Chancey stated that she did not know the attacker, a convicted murderer who escaped from a mental hospital in Washington, D.C. *Id.* Ms. Chancey stated that the man had been recaptured and "actually didn't do [her] any physical bodily harm. [She] was able to escape before he ever actually physically entered the dwelling, so it was preempted…they were able to capture him and to place him where he should be." (TT, Vol. 11:273-274). Ms. Chancey affirmed that she did not feel that this experience would keep her from sitting as a fair juror if she were chosen for the jury, and that she would "absolutely" listen to and follow the law as given to her by the judge. (TT, Vol. 11:274).

Mr. Berry asked Ms. Chancey whether she had been employed as law enforcement and Ms. Chancey stated she had been a research analyst, and that she never had police

powers. (TT, Vol. 11:289-290). Mr. Berry stated that from his review of her juror questionnaire, he noticed that Ms. Chancey was friends with a real estate agent and he asked whether that would cause her any problems sitting on Petitioner's case. (TT, Vol. 11:290). Ms. Chancey explained that she had known the woman for twenty years and that she had been a realtor for the last two years, but that it would not cause Ms. Chancey any problems hearing the case. *Id.*

On Monday, September 17, the jury was struck and Ms. Chancey was selected. (TT, Vol. 12). On Tuesday, September 18, 2007, before the trial began, the court questioned jurors to determine whether they had heard any information about the case since the time that they received their jury summons. (TT, Vol. 13:8-30). Ms. Chancey indicated that she had not heard any information since receiving her jury summons and had not read anything on the internet. (TT, Vol. 13:20). Although Ms. Chancey had taken a trip to Las Vegas with a friend who was a realtor and had spoken to her that Saturday night to confirm each other's safe return from Las Vegas, Ms. Chancey stated that they had not spoken about the case. (TT, Vol. 13:20-21).

A. No Deficiency

Petitioner has failed to show that trial counsel's performance "fell below an objective standard of reasonableness" because they did not use their strikes to remove Ms. Chancey from the jury. *Strickland*, 466 U.S. at 688. Mr. Berry, an experienced attorney, had picked

hundreds of juries over his career and taught voir dire at numerous death penalty seminars. (HT, Vol. 1:117-118, 140). Additionally, according to the notes taken by the defense team during voir dire, Ms. Chancey "worked with the CDC related to HIV" and had been the victim of a crime in which the defendant had "previously murdered someone" and escaped from a mental health facility. (HT, Vol. 36:13751, 13775). In other juror selection notes, beside Ms. Chancey's name the words "very good" are crossed out and replaced with "very bad b/c of history[y]." (HT, Vol. 36:13 773). According to these notes, which describe other potential jurors as "killers" if they were perceived to be leaning toward the death penalty, Ms. Chancey "believes in the sanctity of life but would adhere to law" and "had flexible views[], just wouldn't want them back in society." *Id.*

As the Georgia Supreme Court has held, "trial counsel's conduct of voir dire and the decision on whether to interpose challenges are matters of trial tactics." *Head v. Carr*, 273 Ga. 613, 623, 544 S.E.2d 409 (2001). The record shows that Petitioner's defense team participated in voir dire and took detailed notes throughout,[72] (HT, Vol. 1:138-139; Vol. 36:13751-13776). The defense team also met following voir dire to compare notes and discuss the potential jurors. (HT, Vol. 1:139). Although Ms. Chancey had been a victim of a crime, she stated numerous times during voir dire that she could impose a life sentence.

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72. Although Petitioner claims Mr. Berry handled voir dire without the assistance of co-counsel, the notes in trial counsel's files indicate that other members of Petitioner's defense team were present and assisting. (*See* HT, Vol. 36:13751, 13773, 13775).

Moreover, trial counsel is not deficient for not challenging Ms. Chancey as there were no grounds to warrant such a challenge. The standard for determining when a prospective juror May be excluded for cause because of his or her views on the death penalty is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) (quoting *Adams v. Texas*. 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)). The record shows that Ms. Chancey's views on capital punishment did not meet the standard to be excluded for cause.

Petitioner has failed to show that trial counsel's decisions regarding the extent of voir dire, as well as whether to challenge Ms. Chancey, were not reasonable and strategic. Therefore, Petitioner has not carried his burden of showing that trial counsel's performance during voir dire fell outside the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Williams v. State*, 258 Ga. 281, 289, 368 S.E.2d 742 (7) (1988).

B. No Prejudice

Furthermore, even if this Court were to find trial counsel's performance deficient in failing to strike Ms. Chancey, this claim still fails as Petitioner has not demonstrated a "reasonable probability (i.e. a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362 (1985). Petitioner states that Ms. Chancey was "settled on a death sentence from the outset;" however, as discussed above, Ms. Chancey repeatedly affirmed that she was open to a life sentence. Petitioner argues that Ms. Chancey was not qualified to serve on Petitioner's jury because she: prejudged Petitioner's guilt and what the appropriate sentence should be; was only willing to only consider a death sentence; and, failed to reveal relevant details about her own experience as a victim of a crime, which allegedly biased her against Petitioner. (PB 160). Petitioner claims that there is a reasonable probability that the jury would have returned a unanimous sentence of life without parole if "an unabiased, qualified juror" had been seated in Ms. Chancey's place. (PB 149).

In support of these allegations, Petitioner presented the testimony of two jurors from Petitioner's trial, Susan Barber and Tara Newsome.[73] O.C.G.A. §§ 9-10-9 and 17-9-41 provide that "[t]he affidavits of jurors May be taken to sustain but not to impeach their verdict." This statutory prohibition is deeply rooted in Georgia law and serves important public policy considerations. *See, e.g., Oliver v. State*, 265 Ga. 653, 654 (3), 461 S.E.2d 222 (1995); *Bowden v. State*, 126 Ga. 578, 55 S.E. 499 (1906) (holding "[a]s a matter of public policy, a juror cannot be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow-jurors, or by showing his own

73. Petitioner submitted affidavits from both Ms. Newsome and Ms. Barber; however, Ms. Barber also testified during the evidentiary hearing in this case. (HT, Vol. 1:165-179).

misconduct or disqualification from any cause."). Moreover, the Supreme Court of Georgia has explicitly applied this statutory prohibition against juror impeachment of the verdict to death penalty cases. *See, e.g., Spencer v. State*, 260 Ga. 640, 643 (3), 398 S.E.2d 179 (1990); *Hall v. State*, 259 Ga. 412, 414(3), 383 S.E.2d 128 (1989)[74] Exceptions are made to this rule in cases where "extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." *Spencer v. State*, 260 Ga. 640, 643, 398 S.E.2d 179 (1990) (citing *Hall v. State*, 259 Ga. 412 (3), 383 S.E.2d 128 (1989)). However, the affidavits in this case do not fall within any exception to O.C.G.A. § 17-9-41 and are therefore, inadmissible.

Furthermore, even if this Court were to consider the juror testimony presented during these proceedings, Petitioner has still failed to show prejudice. Petitioner alleges that Ms. Chancey "harassed, intimidated, and bullied" other jurors who disagreed with her, which constituted misconduct. (PB 165). Petitioner argues that "[o]ver the course of three days of deliberations, [Ms. Chancey] adamantly voted for death, with her behavior becoming increasingly hostile. She segregated herself from the other jurors, called them names, and often refused to engage in the deliberations." (PB 149). Petitioner's allegations of pressuring behaviors indicate

74. This Court notes that the trial court declined to consider juror affidavits submitted on Motion for New Trial as the proposed affidavits did not fall within any exception to O.C.G.A. § 17-9-41, which was upheld by the Georgia Supreme Court on direct appeal. *Humphreys*, 287 Ga. 63, 81, 694 S.E.2d 316.

the "normal dynamic of jury deliberations, with the intense pressure often required to reach a unanimous decision." *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990). *See also Sears v. State*, 270 Ga. 834, 839, 514 S.E.2d 426 (1999)(Testimony by juror that the other jurors yelled at her, insulted her character, and made her change her mind because she was "ostracized" indicated that she finally voted in favor of the death penalty because she felt pressure "only as the result of the normal dynamic of jury deliberations."). Furthermore, the jurors were polled after the verdict was read and all stated that they were not pressured during deliberations as to the penalty. (ST, Vol. 3:466-474).

Petitioner also alleges that Ms. Chancey changed the wording of a note to the court "which had the effect of misleading the court into thinking that the jury was merely struggling as part of the normal course of deliberations, when in fact deliberations had devolved into a tension-filled impasse." (PB 165). Ms. Barber, who served as the foreperson of the jury in Petitioner's trial, testified that the jury collectively drafted a note to the judge asking for direction because they could not agree on a unanimous decision for sentencing. (HT, Vol. 1:166; Vol. 37:13980). The note that the court received read:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. *Currently,* we agreed that life imprisonment with parole is not an acceptable option, we are *currently* unable to *form* a unanimous decision on either death or

> life imprisonment without parole as a sentence. Please advise.

(HT, Vol. 37:13986) (emphasis added). In her affidavit, Ms. Barber stated that after drafting the note, "[o]ne of the other jurors added the word 'currently' and then [Ms. Barber] re-wrote the note and sent it to the judge." (HT, Vol. 37:13980-13981). Additionally, Ms. Barber testified at the evidentiary hearing before this Court that the jury all agreed on the language used in the letter. (HT, Vol. 1:167). Petitioner has failed to demonstrate any juror misconduct regarding the juror note.

Petitioner further argues that the use of the word "currently" was "decisive for both the trial court and the Supreme Court of Georgia on review, in determining that that (sic) it was not an abuse of discretion to instruct the jury to continue to deliberate." (PB 169). Although the Georgia Supreme Court did mention that "currently" was used twice in the note, the Court also noted that "after a lengthy trial, the jury had been deliberating for less than nine hours." *Humphreys*, 287 Ga. 63, 79, 694 S.E.2d 316. Furthermore, the Court noted that "after being instructed to continue, the jury deliberated for about three more hours. The jury foreperson then sent a note to the trial court requesting that the jurors be allowed to rehear Humphreys's taped statement to the detectives." *Id.* Therefore, the Court finds that Petitioner's claim fails.

Additionally, Petitioner's allegation that Ms. Chancey failed to reveal relevant details about her own experience as a victim of a crime is unpersuasive. The record reflects

that Ms. Chancey, in fact, did reveal that she had been a victim of a crime. (HT, Vol. 36:13916; TT, Vol. 11:272-274). Furthermore, Ms. Chancey affirmed that she did not feel that this experience would keep her from sitting as a fair juror if she were chosen for the jury, and that she would "absolutely" listen to and follow the law as given to her by the judge. (TT, Vol. 11:274). Accordingly, this portion of Petitioner's ineffective assistance of counsel claim is DENIED in its entirety.

2. Appellate Counsel

In **Claim VIII** and footnotes to various other claims, Petitioner alleges he received ineffective assistance of counsel at his motion for new trial and on direct appeal. Specifically, Petitioner alleges appellate counsel were ineffective in failing to raise a claim of juror misconduct at either Petitioner's motion for new trial proceedings or in his direct appeal to the Georgia Supreme Court. In his brief, Petitioner argues that appellate counsel should have "compel[ed] the testimony of the jurors themselves." (PB 183).

Even if this Court were to find that appellate counsel were deficient in failing to raise a claim of juror misconduct at either Petitioner's motion for new trial proceedings or on direct appeal, this claim still fails as Petitioner has failed to show resulting prejudice. The record shows that motion for new trial counsel attempted to submit juror affidavits in support of their claim regarding the court's *Allen* charge; however, the court ruled that the juror affidavits were inadmissible as they did not fall within

any exception to O.C.G.A. §17-9-41. The Georgia Supreme Court upheld the trial court's ruling that the affidavits were inadmissible on direct appeal. Therefore, trial counsel is not deficient for failing to present inadmissible evidence. As Petitioner has failed to provide this Court with any admissible evidence in support of this claim, he has also failed to show resulting prejudice. Accordingly, this claim is denied.

3. Sentencing Phase Jury Instructions

In **Claims XIII, XIV,** and **XV,** Petitioner alleges that the trial court erred in its sentencing phase jury instructions. As errors in the sentencing phase charge to the jury are "never barred by procedural default," this claim is properly before this Court for review on the merits. *Head v. Ferrell*, 274 Ga. 399, 403, 554 S.E.2d 155 (2001). Petitioner alleges that the trial court incorrectly and improperly instructed the jury on the principle of unanimity in capital sentencing. (PB 170-178).

In his brief, Petitioner acknowledges that the Georgia Supreme Court previously reviewed and rejected this claim; however, Petitioner alleges that the Georgia Supreme Court erred in its legal conclusions. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. *See Elrod v. Ault*, 231 Ga. 750, 204 S.E.2d 176 (1974). As Petitioner has failed to provide this Court with any changes in law, this claim is precluded from this Court's review as the Georgia

Supreme Court previously reviewed and rejected this claim.[75] *See Humphreys v. State*, 287 Ga. 63, 77-82 (8) and (9), 694 S.E.2d 316 (2010); *see also Tucker v. Kemp*, 256 Ga. 571, 573, 351 S.E.2d 196 (1987) ("[T]here is an exception to the res judicata rule in that habeas would likely be allowed if the law changed which might render a later challenge successful." *Citing Bunn v. Burden*, 237 Ga. 439, 228 S.E.2d 830 (1976)).

V. CONCLUSION

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

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

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75. Petitioner's allegation of ineffective assistance of motion for new trial counsel for failing to present juror testimony on this issue also fails. The Georgia Supreme Court found that the juror affidavits were inadmissible as they did not fall within any exception to O.C.G.A. § 17-9-41, therefore Petitioner is unable to show deficient performance or prejudice in counsel's failure to present these affidavits. *Humphreys v. State*, 287 Ga. 63, 80-82, 694 S.E.2d 316.

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

SO ORDERED, this 7th day of March, 2016.

/s/ Robert L. Russell
HONORABLE ROBERT L. RUSSELL, III, Judge
Superior Court of Butts County
Sitting by Designation

APPENDIX E — ORDER FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 3, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10387

STACEY IAN HUMPHREYS,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-02534-LMM

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

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

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.