APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12034

D.C. Docket No. 3:09-cv-00074-WSD

FREDERICK R. WHATLEY,

Petitioner-Appellee
Cross Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC
AND CLASSIFICATION CENTER,

Respondent-Appellant
Cross Appellee.

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

(June 20, 2019)

Before TJOFLAT, JORDAN, and HULL, Circuit Judges.

TJOFLAT, Circuit Judge:

Frederick R. Whatley ("Petitioner") murdered a bait shop owner in Georgia in 1995. He was convicted and sentenced to death.[1] After the Supreme Court of Georgia affirmed his convictions and death sentence, *Whatley v. State*, 509 S.E.2d 45, 53 (Ga. 1998), he petitioned the U.S. District Court for the Northern District of Georgia for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleged that his lawyer provided ineffective assistance of counsel[2] (1) by failing to investigate and present mitigating evidence during the penalty phase and (2) by failing to object when he testified before the jury during the penalty phase in shackles. The District Court granted relief on the first claim and denied relief on the second. Both parties appeal.

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[1] Along with malice murder, Petitioner was convicted of five other offenses, all committed in conjunction with the murder: "aggravated assault (two counts), armed robbery, motor vehicle hijacking, and possession of a firearm during the commission of a crime." *Whatley v. State*, 509 S.E.2d 45, 47–48 (Ga. 1998). He received a life sentence for the armed robbery offense and terms of imprisonment for the remaining offenses. *Id.* at 48.

The indictment also charged Petitioner (1) with being a felon in possession of a firearm, but the State dismissed the charge before trial, and (2) with felony murder, but the jury acquitted on this charge. *Id.* at 48 n.1.

[2] The Sixth Amendment was made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Parker v. Gladden*, 385 U.S. 363, 364, 87 S. Ct. 468, 470 (1966) (per curiam). The Supreme Court laid out the standard that governs ineffective assistance claims in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

We reverse on the first claim and affirm on the second.

Our opinion proceeds in seven parts. Part I recounts the trial proceedings, with an emphasis the penalty phase. Part II briefly describes the direct appeal. Part III explains the evidence that Petitioner presented to the state habeas court and notes that Court's decision. Part IV explains the Supreme Court of Georgia's decision, which is the decision we effectively review on appeal. Part V recounts the District Court's decision, and Part VI takes up the two issues on appeal. Part VII concludes.

I.

Petitioner was indicted for murder in June of 1996. *Whatley*, 509 S.E.2d at 48 n.1. The Superior Court for Spaulding County, Georgia, appointed Johnny B. Mostiler ("Trial Counsel"), the Spaulding County Public Defender, to represent Petitioner 12 days after his arrest. *Whatley v. Schofield*, No. 99-V-550, slip op. at 5 (Ga. Super. Ct. Nov. 29, 2006) (order denying habeas relief). He was convicted by a jury in January of 1997. *Whatley*, 509 S.E.2d at 48 n.1.

This appeal focuses on how Trial Counsel performed in preparing for the penalty phase of Petitioner's trial and in representing Petitioner during that phase. We must analyze Trial Counsel's conduct under the performance standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). To decide whether Petitioner satisfied *Strickland's* prejudice standard, we must consider

the strength of the State's case. Specifically, what should Trial Counsel have anticipated the State would present in the guilt-innocence phase and, if the jury found Petitioner guilty of murder, what additional evidence would the State present in the penalty phase to persuade the jury to recommend a death sentence?[3] The Superior Court of Butts County (the "State Habeas Court"), which heard Petitioner's habeas petition, described Trial Counsel's decision this way:

> [Trial Counsel] was confronted with a conundrum of trying to defend a death penalty case by denying the obvious guilt of his client, and asserting defenses where there were none and then trying to convince the jury of the defendant's credibility and worthiness as a human being when it came to the [penalty] phase of the trial.

Whatley, slip op. at 5 (order denying habeas relief).

We recount the guilt-innocence phase and the penalty phase separately.

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[3] The district attorney who prosecuted the case against Whatley had an "open file" policy in cases in which Trial Counsel represented the defendant, and this case was no exception. *Whatley*, slip op. at 5 (order denying habeas relief). "This meant that, by having access to the prosecution's files, [Trial Counsel] did not have to spend a great deal of time to determine what the prosecution's evidence was likely to be." *Id*. at 5-6. In addition to accessing the prosecutor's files, Trial Counsel had the unlimited services of his Public Defender's Office Investigator. *Id*. at 5.

A.

Trial Counsel defended Petitioner by putting the State to its proof—that appeared to be the only available defense strategy.

At the time of the murder, Petitioner had recently arrived in Georgia after escaping from a halfway house in Washington, D.C. Shortly after arriving, Petitioner told a cousin that he needed a gun to "make a lick," to commit a robbery.

Here's how he made the lick. He walked into a bait shop and pulled out a gun. *Whatley*, 509 S.E.2d at 48. He forced an employee to lie down behind the counter, pressed the gun against the employee's head, and told another person, the storeowner, to give him the money from the register. *Id.* The storeowner complied and put the money in a sack on the counter; Petitioner grabbed the sack and fired two shots. *Id.* One shot hit the storeowner in the chest, "pierc[ing] his left lung." *Id.* Petitioner fired this shot, according to expert testimony, while standing just 18 inches from the storeowner. *Id.* The second shot missed its mark—Petitioner tried to shoot the employee (still lying behind the counter) in the head, but the bullet hit the counter and missed. *Id.*

Petitioner left the store and ran into a man who was getting out of his car. *Id.* Petitioner forced the man back inside the car and told the man to take him where he wanted to go. *Id.* Before the car could leave, the "mortally wounded" storeowner grabbed a gun from the store and fired "several shots" at

Petitioner. *Id*. Petitioner returned fire, and the storeowner eventually collapsed and died from bleeding caused by the first gunshot. *Id*. Petitioner dropped the sack of money and fled on foot; the man in the car noticed that Petitioner was limping. *Id*.

Officers arrived on the scene, and both the employee and the man who Petitioner tried to carjack told them the attacker had used a "silver revolver." *Id*. The day before, one of the officers had taken a report from a man who said that his silver revolver was missing; he suspected his cousin—Petitioner—had taken it. *Id*. The officers located Petitioner, who was staying with a relative. *Id*. Sure enough, he had a bullet wound in his leg, and the officers found the missing silver revolver under his mattress. *Id*. A firearms expert concluded that the missing silver revolver was in fact the murder weapon. *Id*.

There was more. "The police also found a bloody pair of thermal underwear with a bullet hole in the leg, a bloody towel, and bloody boxer shorts in a trash can behind the house." *Id*. Officers removed a bullet (one that matched the caliber of the murder weapon) from the car that Petitioner tried to carjack. *Id*. There were fibers on the bullet, and the fibers "were consistent with fibers from the thermal underwear, and DNA taken from blood on the fibers matched [Petitioner]." *Id*. Petitioner's palm print was on the sack of money that was dropped outside the store when the attacker fled. *Id*. at 48–49.

Based on this evidence, the jury found Petitioner guilty of malice murder. *Id*. at 49.

B.

A month after the grand jury indicted Petitioner, the State filed a notice of intent to seek the death penalty. *Whatley*, slip op. at 6 (order denying habeas relief).[4] To support its request for death, the State would argue that one or more of these three aggravating circumstances applied: (1) Petitioner committed the murder while engaged in armed robbery, (2) Petitioner committed the murder to obtain money, or (3) Petitioner committed the murder after he had escaped from a place of lawful confinement. The State also told Trial Counsel that it would rely on Petitioner's convictions and probation revocations—in 1988, 1989, and 1990—from Washington, D.C., to establish the aggravating circumstances. Trial Counsel was well aware of this evidence and planned to counter it with evidence that showed (1) Petitioner's life was worth saving and (2) that life imprisonment would be sufficient punishment.[5]

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[4] Under Georgia law, "A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." O.C.G.A. § 16-5-1(a). The indictment alleged that Petitioner killed the storeowner "with malice aforethought." Although the notice was filed a month after Petitioner was indicted, "it had been assumed that this case was likely to involve death penalty issues," apparently from the very beginning. Whatley, slip op. at 6 (order denying habeas relief).

[5] We go into considerable detail in describing the parties' presentations in the penalty phase. We do so because what happened in that phase shaped Petitioner's collateral attack in state court.

We recount the penalty phase chronologically. We begin with the State's case and then consider Petitioner's response. We end with closing arguments.

1.

The State relied on the evidence presented during the guilt-innocence phase to establish the first aggravating circumstance—that Petitioner committed the murder while engaged in armed robbery—and the second aggravating circumstance—that Petitioner committed the murder to obtain money. It relied on records from the District Court for the District of Columbia and the D.C. Superior Court to establish the third aggravating circumstance—that Petitioner committed the murder after escaping from a place of lawful confinement.

The State also used these records to show the extent of Petitioner's criminal history and to paint a broader picture of him. Using the records, the State argued that this murder wasn't Petitioner's "first brush with the law" and that he had "every break possible" to turn things around but failed to do so. The records showed, according to the State, that Petitioner had a history of violence and would always be dangerous.

There are lots of records, and they are, at times, quite convoluted. For the reader's sake, we hit the records' high points, and we explain only those records that are necessary for our analysis.

The records show that Petitioner was charged in three separate criminal cases from 1988 to 1990: (1) he forged a U.S. Treasury check, (2) he robbed a man at gunpoint, and (3) he assaulted a woman in public. The judicial proceedings in these cases overlapped, and many times, what happened in one case affected something in the other. Thus, rather than dividing our discussion by offense or topic, we explain the records chronologically.

In January of 1986, Petitioner stole a U.S. Treasury check, forged the payee's signature, and negotiated the check. In January of 1988, he also robbed a man at gunpoint. He was indicted in the District Court for the forgery, *United States v. Whatley*, No. CR 88-030 (D.D.C.), and he pled guilty in May of 1988. Petitioner was indicted in the Superior Court for the armed robbery,[6] *United States v. Whatley*, No. F-1046-88 (D.C. Super. Ct. Crim. Div.), and he pled guilty to a lesser charge of robbery in April of 1988.

During the plea colloquy in the robbery case, Petitioner admitted that he "put a loaded shotgun … to the [victim's] back and demanded [his] wallet which he forcibly took from [the victim].… [Petitioner] was arrested that same day … and the … loaded shotgun and shells were recovered." The Superior Court accepted the guilty plea and ordered that Petitioner be "committed" to the D.C.

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[6] The indictment alleged that Petitioner, "while armed with a dangerous weapon, … a shot gun, by force and violence, against resistance and by putting in fear, stole … from … Fredy Magallanes, property … consisting of a wallet and its contents."

Department of Corrections "for observation and study" under the Youth Rehabilitation Act (the "YRA")[7] before sentencing. He would be sentenced after the studies were finished.

Later in April of 1988, Petitioner was sentenced in the forgery case. He was ordered to reside at the Hope Village Community Treatment Center for four months and to participate in a drug treatment program. But Petitioner wasn't taken to Hope Village immediately and remained incarcerated until there was room for him at Hope Village. Between April and June of 1988, Petitioner was evaluated according to the YRA. In August of 1988, Petitioner was also given a neuropsychological evaluation, which his caseworker, Eugene Watson ("Caseworker Watson") arranged. As we explain below, Petitioner relies heavily on these reports and evaluations from 1988 to support his habeas petition.

Sentencing in the robbery case was continued several times. Finally, in March of 1989, the Superior Court held the sentencing hearing. At the hearing, Petitioner's lawyer presented a sentencing

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[7] Youth Rehabilitation Act of 1985, D.C. Code §§ 24-901 to 24-907. "The objectives of the YRA are to give the court flexibility in sentencing youthful offenders, separate youth from older and more mature offenders, and provide an opportunity for youth to have the sentence 'set aside' in the future if the youth satisfies the conditions of the sentence." Ellen P. McCann, *The District's Youth Rehabilitation Act: An Analysis* 9 (Sept. 8, 2017) (footnote omitted), https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/page_content/attachments/District%27s%20YRA-An%20Analysis.pdf.

plan that was created by Caseworker Watson.[8] Petitioner's lawyer asked the Court to sentence Petitioner to a term of probation, conditioned on Petitioner's following the sentencing plan.[9] The Court agreed and sentenced Petitioner as follows: "Five to fifteen years [imprisonment] with the execution suspended with a five year period of probation with the condition that he enter and complete the New Life [for Youth] Program, both residential and aftercare."[10]

Petitioner was never taken to the New Life for Youth facility. Instead, he was taken to the Hope Village facility the next month, consistent with his sentence in the forgery case. He absconded from Hope Village about two months later. In turn, his probation in the forgery case was revoked, and he was incarcerated for two months.

In light of this, the Superior Court ordered Petitioner to show cause as to why his probation

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[8] Caseworker Watson was a program developer with the D.C. Public Defender Service, and his job was to develop rehabilitation plans for defendants awaiting sentencing in the Superior Court.

[9] The sentencing plan called for Petitioner to enter the New Life for Youth residential facility to undergo twelve months' inpatient mental health care followed by six months of formal aftercare as an outpatient.

[10] Of course, this sentence conflicted with Petitioner's sentence in the forgery case. He couldn't be at Hope Village and New Life at the same time. But the Superior Court still ordered the sentence because Petitioner's lawyer mistakenly thought that the District Court had suspended the execution of the sentence in the forgery case.

should not be revoked in the robbery case. The Court held a hearing in December of 1989, and, rather than revoking probation, it modified the terms of Petitioner's release.[11]

Fast forward to September of 1990; the Superior Court again ordered Petitioner to show cause as to why his probation should not be revoked in the robbery case. It held a hearing the next month—Petitioner didn't appear, and the Court issued a bench warrant for his arrest.

Seven days after the Court issued the bench warrant, Petitioner was arrested for assaulting a female. He was charged in the Superior Court with "assault with intent to rape."[12] *United States v. Whatley*, No. F 11978-90b (D.C. Super. Ct. Crim. Div.). In December of 1990, he pled guilty to a lesser charge, simple assault. The Court sentenced Petitioner to the custody of the Attorney General for one year.

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[11] We glean this information solely from the case docket sheet, which shows that on December 15, 1989, Petitioner, his attorney "and P.O. [were] present. Show cause hearing held. Order to show cause discharged. Probation modified (illegible); drug surveillance by P.O. Participation in out patient program at New Life…." Under the modified terms, Petitioner was required to submit to drug testing monitored by his probation officer and to participate in an outpatient program with New Life for Youth.

[12] The information alleged that Petitioner "unlawfully assaulted and threatened [Jane Doe] in a menacing manner," "[i]n violation of Section[ ] 22-504, District of Columbia Code." This is a felony.

Finally, in late December of 1990, the Superior Court held a hearing on its show cause order, the order that directed Petitioner to show why his probation should not be revoked in the robbery case. The Court focused on the assault charge that Petitioner had recently pled guilty to and been sentenced for. The question was whether the assault established cause for revoking Petitioner's probation. The Court noted the "Herculean efforts [that] were made" to help Petitioner deal with "difficult personality, and perhaps psychological, problems that he had." It then noted that this was the second probation revocation hearing, and the Court highlighted that Petitioner committed the assault after having been served with a bench warrant for his arrest.

Next, the Court turned to the facts of the assault. Even after considering Petitioner's "dubious" version of the incident,[13] and giving Petitioner "the most benefit of the doubt," the Court noted that Petitioner showed "some violent behavior with somebody … in a way that … could have been quite dangerous." The Court went on and described the incident "as a significant outburst of violent behavior by somebody who was then on the run from me for a prior criminal act of violent behavior, namely a robbery." It concluded with this: "I think there have been serious violations of the probation, here, in the case of somebody who's been given lots and lots of chances … to try to stay out of Lorton

[13] Petitioner's version was set out in the presentence report that was submitted to the court overseeing the assault charge.

[prison] on a long-term basis. And, I think he basically blew it."[14] The Court revoked Petitioner's probation and sentenced him to prison for a term of 4 to 12 years.

Petitioner was incarcerated in Lorton Reformatory immediately. He was released 47 months later, in November of 1994, and put in a halfway house in Washington, D.C. He fled on December 2, 1994, and became a fugitive from justice. He was still a fugitive when he returned to Georgia in January of 1995.[15]

2.

Trial Counsel countered the State's case with nine witnesses; collectively, they portrayed

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[14] The Court acknowledged that Petitioner may have lived a somewhat difficult life, but that did not give Petitioner license to disregard the law:

[A]t some point or another the community, speaking through this judicial system, has a right to say, look, we're sorry if you have problems in life. A lot of us ha[ve]. You can't go around beating up on people. And, if that message doesn't come through probation or other mechanisms, then it may ultimately have to come through incarceration.

[15] The State presented three witnesses to supplement the records. First, it presented a criminal investigator who worked for the D.C. Department of Corrections. Her job was to arrest offenders who escaped from the Department's halfway houses. She testified that—nine days after being put in the halfway house—Petitioner signed out to go to work and never returned. Second, the State presented a police detective who worked on Petitioner's robbery case. Third, it presented the victim Petitioner robbed at gunpoint.

Petitioner's life as worth saving. We focus on three witnesses— Janet Wyche, Lorraine Goodman, and Cleveland Thomas, Jr.—because Petitioner also submitted their testimony in his habeas proceedings. Petitioner testified himself and expressed remorse for what he had done, and Caseworker Watson testified as well.

As a brief introduction, we note that Petitioner was raised by his great-aunt and great-uncle, Marie and Cleveland Thomas. He moved to Washington, D.C., to live with his mother a couple of time during his teenage years. The criminal history that we just explained took place in Washington, D.C. And at the time of the murder, he had just returned to Georgia from Washington, D.C., after escaping from a halfway house. Petitioner explained this during his testimony, which we discuss below.

Janet Wyche knew Petitioner before he went to live with his mother in Washington, D.C. When he returned to Georgia, Petitioner stayed off and on in the same house where Ms. Wyche lived. She said he was nice and got along with everyone. Ms. Wyche didn't comment on Petitioner's childhood or his experience living with the Thomases.

Lorraine Goodman is related to Petitioner. She described him as respectful and knew that he was raised by the Thomases, who took him to church every Sunday. She was unaware of Petitioner getting into any trouble while living with the Thomases. She said that Petitioner stayed at her house when he returned to Georgia from Washington, D.C.; she asked him to leave because they could not afford to

have another person in the house. She claimed that Petitioner looked for a job every day while staying with her, and she said her children "loved him."

Cleveland Thomas, Jr.'s father and stepmother raised Petitioner. He said that as a child growing up, Petitioner was "real nice," had good manners, and did well in school. He "thought the sky was the limit for him," and he asked the jury to "spare [Petitioner's] life."

Five other witnesses testified and generally said positive things about Petitioner.

Next, Trial Counsel called Petitioner himself to the stand.[16] Petitioner first explained his upbringing. As a child, he was told that his mother "had some problems," so she left him with his great-aunt and great-uncle (the Thomases), who raised him. He described the Thomases' household as "very stationary, very unconditional as far as … loving and … support, and ideally everything that a child could … ask for growing up." In eighth or ninth grade, he went to live with his mother, brothers, and sisters in Washington, D.C.—he "had a yearning … to be part of [his] family." But life there was chaotic, and his mother kicked him out after the two got into a fight. He returned to Georgia. At 19, he moved back because he still wanted to be with his mother and siblings. Back in Washington, D.C., he "assumed the position of head of the household." But that

[16] Petitioner was wearing shackles that were visible to the jury while he testified.

deteriorated because his mother was taking money from him, and he moved out.

Petitioner then addressed his involvement with drugs and said he started out dealing drugs for a profit. He noted that he has "always had some dealings in the streets." Next, Petitioner explained his criminal history. He said "trouble came along" when he "got introduced to … and … associated with some individuals that were into forgery and uttering and credit cards, white collar crimes." As for the robbery, Petitioner claimed he "did not have the shotgun on" him during it. He said the victim owed him money, and he stuck a "closed knife" in the victim's back. He claimed the shotgun was around the corner during the robbery, and after taking the victim's money, he was going to retrieve the gun.

Petitioner also explained why he violated his probation in the forgery case. He said he was required to stay at Hope Village[17] for four months, but he got in trouble by taking "a furlough." He claimed he was unaware that he wasn't supposed to leave the facility. When he returned, his supervisor "placed [him] on restriction." The next night, another staff member let him out, and he was considered an escapee.

Moving on to his probation sentence in the robbery case, Petitioner noted that he worked with

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[17] He actually called it a halfway house, but Hope Village was not the sort of facility where convicted persons reside after being released from a prison but before they are discharged from custody.

Caseworker Watson "on a regular basis … for a couple of years." He said they stopped working together when he went "on the run." He was on the run because he hadn't reported to his probation officer, and there was a warrant out for his arrest.

Then, Petitioner explained why he escaped from the halfway house in December of 1994. The night he escaped, Petitioner said, he left work early and went to visit an ex-girlfriend. There was a curfew, and he realized he would be cutting it close, so he called the halfway house and asked for an extension. It was denied. So, Petitioner tried to catch a cab, but he was in a part of town where it was "very difficult" "for a black male to catch a cab that time of night." He called the halfway house again, and he was told that he should still be able to make curfew. He finally found a cab, but the driver had to go pick up another passenger in Maryland. Petitioner explained that he had a curfew, and the driver told Petitioner to give him $25—he didn't have that much money, so the driver just let him out in Maryland. At this point, he had missed curfew, and he didn't report back to the halfway house.

Petitioner bounced around and stayed with different friends and family members. He came back to Georgia hoping to get a job and make some money. Once in Georgia, he continued to stay with other people, and he eventually stole a pistol from a man he was staying with. He stole the pistol because had been selling drugs and needed to go to "rough neighborhoods" to sell. There were also people who owed him money, Petitioner said. On the night of the

murder, "it just so happened" that he got a ride and "passed by" the bait shop. He "felt like it was in a secluded area," so he could "go in," "get the money," and "get out of town."

Finally, Petitioner explained how he wound up shooting the victim.[18] He said he took the money and was backing out of the shop without looking at the door. He heard someone coming to the door and turned around—at that point, the victim grabbed a gun. Petitioner turned back, apparently saw the gun, and fired a shot. This shot, Petitioner claimed, was the one that hit the counter. Petitioner backed out of the shop and ran into a person trying to enter. By this time, the victim had fired his own shot, and Petitioner had made it outside. Once outside, Petitioner and the victim continued shooting at each other. Petitioner said he didn't shoot the victim inside the store; he was hit after chasing Petitioner

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[18] Before doing do, Petitioner said this:

I'd like to say to the members that are here of [the victim's] family that I did not in—in any way—in any intentions—I did not go to that store—and I didn't plan to kill him or I didn't even plan to shoot him. There's nothing that—that I can say that's going to change anything that's I happened, and I realize that. And I grieve about this daily. I really—I really do, because there's—there's nothing that—I realize that there's been a lot—lot of evidence that's been produced and that the prosecutor is trying to paint a picture and to—I just remorselessly … went in and intentionally killed him. But that was not what happened in no way, form or fashion. And I do want to extend my deepest sympathies to you about the occurrence.

outside.[19] Petitioner wrapped up the direct examination by saying he did not intend to kill the victim. He only intended to rob the store.

On cross examination, Petitioner stuck to his story about what happened in the shop—he never admitted that he fired two shots inside the shop, one at the employee who was lying behind the counter, and one at the victim, with the pistol just 15 to 18 inches from the victim's chest.

Petitioner also stuck to his version of what happened during the robbery in Washington, D.C. That is, Petitioner said he did not have the shotgun with him when he robbed the victim. He acknowledged the plea agreement—where he admitted to putting a loaded shotgun to the victim's

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[19] In disputing the State's position that he shot the victim at close range—that the muzzle of his pistol was only 15 to 18 inches from the victim's chest—Petitioner was actually taking issue with the opinion of the State's expert witness. It was undisputed that the pistol Petitioner used to shoot the victim contained six bullet casings, showing that six shots had been fired. It was also undisputed that at the moment the victim was shot, he was wearing a long-sleeved plaid shirt and a white undershirt. Each had a bullet hole in the chest area. The expert testified that she found "scattered particles of gunpowder, unburnt gunpowder around the gunshot hole. "There were scattered particles of gunpowder in a fairly dense pattern around the gunshot hole of entry." "Based on [her] actual testing and test firing the weapon at varying distances, [she] was able to conclude that the muzzle to target distance was approximately fifteen to eighteen inches," from the tip of the barrel to the entry of the victim's chest. "[Y]ou don't see gunpowder deposited on a target after two and half to three feet."

back—but said he was willing to admit facts that didn't happen because of the plea deal. This concluded Petitioner's testimony.

Trial Counsel finished up by calling Caseworker Watson. As we explained above, he created the sentencing plan that the Superior Court considered in Petitioner's robbery case. Caseworker Watson worked with Petitioner for about a year and a half, and he said that he found Petitioner to be both personable and likeable. He thought Petitioner "had a lot of potential." To prepare the plan, Caseworker Watson spoke with the Thomases to better understand Petitioner's background. He talked to them "on a very regular basis, maybe once a week." After talking to the Thomases, Caseworker Watson "could see" "that [Petitioner] came from a good family." Mrs. Watson, especially, gave him something to "latch onto," something he "could convince the [C]ourt was worth investing in." He called them Petitioner's "support."

As part of his work on Petitioner's case, Caseworker Watson arranged for a clinical psychologist and an educational psychologist to evaluate Petitioner. (We consider these reports in detail below.)

Finally, Caseworker Watson discussed his attempt to enroll Petitioner at Howard University. He introduced Petitioner to "certain deans" at Howard, and Petitioner "impressed" them. Caseworker Watson was unable to take the next step, though, and have Petitioner apply for admission because he "wasn't able to raise enough

money to insure his tuition."[20] He concluded his testimony on direct examination with this: "[I]f we had been able to provide tuition and he could have been a student at Howard, I'm convinced that his life would have been different. I know this."[21]

With this, the parties rested and made their closing arguments.

3.

The State argued that life without parole was inadequate given the nature of the murder. It also noted that Petitioner attempted to pin part of the responsibility on the victim and that he showed no remorse.

The State said that Petitioner should have admitted that the murder happened just as the State's evidence showed: that is, he fired two shots intending to kill two people, both at close range. The State compared Petitioner's version of the murder—that he shot the victim after he was out of the store, and only because the victim was shooting at him—with Petitioner's explanations of his criminal history. He cashed the U.S. Treasury check "because

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[20] Caseworker Watson was "circumventing the regular routine" with these efforts. Petitioner's possible admission to Howard University "was off the record, it had nothing to do with the rehabilitation plan." Caseworker Watson "felt an allegiance to [Marie Thomas] and some responsibility, and [he] gave it [his] best effort, and [he] saw [Petitioner] do likewise."

[21] Petitioner conceded that he was on "the run" while Casework Watson was exploring the possibility that he enroll at Howard.

some of his friends talked him into it." He didn't really put a shotgun to his victim's back during the robbery in Washington, D.C. He missed curfew at the halfway house "because the taxi cab driver was late." Petitioner's troubles were always someone else's fault, according to the State. Turning to the lack-of-remorse argument, the State claimed that Petitioner was not sorry for what he did; it said he would "brag" about the murder in prison.

Trial Counsel argued for a life sentence without parole. He claimed that Petitioner would not kill again if he were sentenced to life without parole. Turning to the murder itself, Trial Counsel argued that the murder happened just as Petitioner said it did. That is, Petitioner entered the bait shop with no intention of killing anyone. Trial Counsel argued that Petitioner was remorseful and was reminded of what he did every day. He also tried to humanize Petitioner, calling the Thomases "a good strong family" that taught him right and raised him well. He said Petitioner's tragic mistake was moving in with his dysfunctional mother in Washington, D.C.

The jury recommended the death penalty, and the Court sentenced Petitioner to death.

II.

Petitioner appealed to the Supreme Court of Georgia and raised one argument that's relevant here: he said the trial court—by allowing the jury to see him in shackles—denied his rights to due process, equal protection, a fair trial, and a reliable determination of punishment under the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the U.S. Constitution. Although Petitioner wore shackles during both phases of the trial, the Supreme Court of Georgia held that the jury did not see them during the guilt-innocence phase. *Whatley*, 509 S.E.2d at 52.

The Court implied that the jury did in fact see the shackles during the penalty phase, but it rejected the claim under the invited error doctrine. *See id*. Indeed, it was the State that raised the shackles issue before the penalty phase, and Trial Counsel said, "[w]ell, he's convicted now" and allowed Petitioner to take the stand in front of the jury. *Id*. (alteration in original). The Court said, "A party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." *Id*. (quoting *Dennard v. State*, 435 S.E.2d 26, 29 (Ga. 1993)).

The Court affirmed Whatley's convictions and death sentence, *see id*. at 53, and the Supreme Court of the United States denied certiorari review, *Whatley v. Georgia*, 526 U.S. 1101, 119 S. Ct. 1582 (mem.), *reh'g denied*, 527 U.S. 1016, 119 S. Ct. 2361 (1999) (mem.).

III.

Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County. *Whatley v. Schofield*, No. 99-V-550 (Ga. Super. Ct.). Petitioner claimed that Trial Counsel provided ineffective assistance (1) by failing to investigate and present mitigating evidence about his background and mental health (the "Mitigation Claim") and

(2) by not objecting to Petitioner's appearing before the jury in shackles during the penalty phase (the "Shackles Claim"). By this time, Trial Counsel had died, so the State Habeas Court did not have the benefit of his testimony in deciding whether he provided ineffective assistance under *Strickland*.

We address each claim separately.

A.

The State Habeas Court considered many sources of evidence in deciding the Mitigation claim: the pleadings the State filed while prosecuting the case; the trial transcript; Trial Counsel's hand-written notes that he kept in his case file; Trial Counsel's timesheet entries (which reflected the work he did); the testimony of Trial Counsel's investigator, Dewey Yarbrough ("Investigator Yarbrough"); the testimony of others whom Trial Counsel contacted before and during the trial; and the evidence Petitioner's habeas counsel presented.

The Court held an evidentiary hearing on the Mitigation Claim. We consider Petitioner's evidence first and then take up the State's response.

1.

We group the evidence Petitioner presented to the State Habeas Court into three categories: (1) five reports stemming from the YCA Study,[22] which the

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[22] Four of these reports were part of the study itself, and they were completed by the D.C. Department of Corrections:

Superior Court ordered after Petitioner pled guilty in the robbery case—we refer to these collectively as the "1988 Reports"; (2) affidavits about Petitioner's childhood, from people familiar with his family situation growing up; and (3) affidavits related to Petitioner's mental health—one from a clinical psychologist, Dr. Lisak, and another from a psychiatrist, Dr. Dudley.

Although we group the evidence into three categories, there are two common threads running through each category: Petitioner's troubled childhood and his mental health. Those threads are the bedrock of Petitioner's Mitigation

Claim, so that's where we focus our attention.

a.[23]

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(1) "Psychological Evaluation," dated May 26, 1988; (2) "Classification Study," dated May 31, 1988; (3) "Vocational and Educational Evaluation," dated June 1, 1988; and (4) "Classification Committee's Findings and Conclusions," dated June 3, 1988. The Psychological Evaluation was performed by Dr. Kathleen Shaw, a psychologist.

The fifth report was not performed by the D.C. Department of Corrections, but it was still related to the YCA Study in that Caseworker Watson arranged the evaluation. The report is titled "Neuropsychological Evaluation" and is dated August 18, 1988. It was performed by Dr. Sarah Elpern, a clinical psychologist.

[23] There was some dispute before the State Habeas Court over whether Trial Counsel ever saw the 1988 Reports. Petitioner argued that Trial Counsel never saw the Reports and never learned the information they contained. To support his argument, Petitioner submitted an affidavit from Caseworker

Watson. There, Watson said that he came to Georgia to testify during the penalty phase of Petitioner's trial. Watson claimed that Trial Counsel never asked to see his "file on the case," which included the 1988 Reports. He would have made the documents available to Trial Counsel if he had asked for them. Caseworker Watson spent two hours with

Trial Counsel the night before the penalty phase, but he said they spent less than half an hour talking about his testimony. Finally, Caseworker Watson said that Trial Counsel never told him what questions he was going to ask, and Trial Counsel never told him what to focus on during his testimony.

In response, the State introduced the deposition of Investigator Yarbrough. Investigator Yarbrough remembered having Petitioner sign a release to get his "records." Investigator Yarbrough then asked Caseworker Watson to bring Petitioner's "psychological records" with him when he came to testify during the penalty phase. He "was sure" that Caseworker Watson brought the documents with him to Georgia. He didn't recall whether he personally saw the documents, but he noted that Caseworker Watson arrived in town with "a bag and a briefcase." Finally, Investigator Yarbrough said it was "possible" that Trial Counsel saw the psychological documents, even if he didn't.

The State Habeas Court found that Trial Counsel "performed adequately with regard to [the 1988 Reports]," and the Supreme Court of Georgia concluded that finding was reasonable. Whatley, 668 S.E.2d at 661 ("The [State] [H]abeas [C]ourt's conclusion that [T]rial [C]ounsel performed adequately with regard to these reports is reasonable, as it is supported by the presumption that counsel performed adequately, by documentary evidence showing that counsel obtained a signed release from [Petitioner] and requested the materials from [Caseworker Watson], and by testimony from [Investigator Yarbrough] confirming that counsel sought the records from [Caseworker Watson].").

Because we hold that Petitioner cannot show prejudice from Trial Counsel's failure to use the 1988 Reports during the

The 1988 Reports note that Petitioner's mother neglected her parental duties, and he was raised by his great-aunt and great-uncle. One report says that his great-uncle "provided an excellent role model" for Petitioner "during his formative years." Another one claims that Petitioner "reported a good relationship with his great aunt and uncle." The report also says that Petitioner had "a stable upbringing in his early years," but Petitioner did note "that his great uncle drank regularly and gave him beer" at a young age. Petitioner reported that he began using marijuana at age 15; he also used cocaine in high school.

The 1988 Reports contain two psychological evaluations of Petitioner. One evaluation was done by a psychologist who reported that Petitioner "has uncontrollable impulses which brings him into constant conflictual situations with others because of his naive appreciation of how one plans, executes and attains realistic goals." The report also observed that Petitioner "feels he will be able to get away with anything because he can outsmart" others. It described his "emotional understanding and development" as "delayed and infantile." The report said Petitioner "is fighting against a very disturbed and painful emotional state but decompensating rapidly and escaping through drugs for relief." It noted Petitioner's "schizophrenic symptoms" and attributed much of his hardship to a desire to be closer to his mother: "[Petitioner] is experiencing a mental health breakdown and needs intensive

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penalty phase, we need not decide whether Trial Counsel provided ineffective assistance when dealing with the Reports.

intervention though psychotherapy to help him address his needs before he drifts into more serious adventures in an attempt to get the attention of his mother." The report concluded by recommending "long-term psychotherapy" and "drug therapy."

The other report was done by a clinical psychologist, and the report explains the findings of many tests that were given to Petitioner. One test[24] measured Petitioner's "current level of intellectual functioning" as being "in the Low Average range of ability."[25] But the report pointed out that Petitioner's "potential is at least in the upper half of the Average range … , if not higher."[26] As for Petitioner's "[p]ersonality [f]unctioning," the report noted that he "appears to be experiencing considerable anxiety about his ego integrity, suggesting that the anxiety is so great at times that he comes close to being overwhelmed and losing his sense of reality." "Although some [of] his responses indicate idiosyncrati[c] perceptions and thinking, he does not appear to have schizophrenia." The report said that "[i]t is possible that under a great deal of emotional stress [Petitioner] could become psychotic, but such symptomology is likely to be temporary." Petitioner's "most important need," according to the report, "is intensive psychotherapy to deal with the

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[24] The test is called the Wechsler Adult Intelligence Scale-Revised Test.

[25] The report listed an IQ from 80 to 89 as the "Low Average range of ability."

[26] The report listed an IQ from 90 to 109 as the "Average range of ability."

emotional problems that underlie his drug usage." The report concluded with this: "Despite the complexity of [Petitioner's] problems, he has the capacity to improve his functioning and [to] become a productive member of society."

According to Petitioner, if Trial Counsel had read the 1988 Reports, he would have asked for a trial continuance so he could investigate the information in those Reports. A more thorough investigation would have revealed a childhood that was anything but perfect.

b.

To show what Petitioner's childhood was really like, and what a more thorough investigation would have turned up, Petitioner presented affidavits from seven people to the State Habeas Court. Notably, three of the seven witnesses also testified during the penalty phase. We focus on the testimony of those three and summarize the testimony of the other four.

Lorraine Goodman said in her affidavit that the great-aunt and great-uncle were "overly protective" of Petitioner and "smothered him." She suggested that the Thomases did not let Petitioner play with other children and kept him isolated from the outside world. During the penalty phase of the trial, Ms. Goodman said she was unaware of Petitioner getting into any trouble while living with the Thomases. She also said they took Petitioner to church regularly, and she thought he was "a respectful young man" when he was living with the Thomases. Finally, Ms. Goodman said that she

heard Petitioner testify that he had an "idyllic childhood" with the Thomases—she never suggested during the penalty phase that Petitioner did not in fact have an ideal childhood.

Janet Wyche's affidavit mirrored Ms. Goodman's; she said the Thomases were overly protective of Petitioner and "never wanted [him] to play outside with the other kids." During her testimony at the penalty phase of trial, Ms. Wyche said nothing about Petitioner's childhood or his experience living with the Thomases.

Cleveland Thomas, Jr., said in his affidavit that Petitioner's great-uncle "drank." He also said that he has "always believed that something traumatic happened to [Petitioner]" because Petitioner's attitude about school changed "all of a sudden" before Petitioner was a teenager. This was just something that Mr. Thomas "felt"—Petitioner never told him anything of the sort. Nor did Mr. Thomas imply that the Thomases were responsible for this supposed traumatic event. During the penalty phase of the trial, Mr. Thomas did not comment on Petitioner's childhood, other than to say that Petitioner was "nice" and "mannerable" when living with the Thomases.

The other four witnesses who submitted affidavits to the State Habeas Court did not testify during the penalty phase. They described Petitioner's childhood and painted a picture that was very different from the one Petitioner painted during his testimony at the penalty phase. We summarize their affidavits below.

Petitioner's mother[27] said that Cleveland Thomas was abusive and that he drank a lot. She claimed he yelled at Marie and choked her. She was "terrified" when she found out that Cleveland and Petitioner slept in the same bed while Petitioner was growing up. This terrified her because, in her words, Cleveland was a "child molester"; according to Petitioner's mother, Cleveland molested her when she was a child. Petitioner's mother described a time when Petitioner came to visit her in Washington, D.C. During the visit, she told Petitioner two "things that he was not old enough to handle": (1) the man that Petitioner thought was his father was not actually his father and (2) Cleveland raped her when she was nine months pregnant with him. Finally, one of her friends "forced herself on [Petitioner] and had sex with him" during that visit.

Petitioner's aunt[28] called Cleveland "a drinker, a womanizer, and a wife beater." She said he was "a mean, abusive man." She claimed that Marie "worked hard to make things look good from the outside," despite Cleveland's behavior.

A neighbor[29] said that she "felt sorry for" Petitioner when they were growing up because "Cleveland was a crazy drunk." The Thomases never let Petitioner do what the other kids were doing, and this neighbor "just knew [Petitioner] was going to grow up with problems because they were so

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[27] Her name is Claudette Whatley Johnson.

[28] Her name is Allene Whatley.

[29] Her name is Fetilda Dukes.

overprotective." She said Petitioner "was not raised normally at all" because "[h]e was not allowed to play with other kids, he slept … with Cleveland, and he had to deal with Cleveland's drunken, violent episodes."

Another neighbor[30] from Petitioner's childhood said that the Thomases "were extremely protective of" Petitioner; they never let him play outside. She described Petitioner's home life as "far from normal" because Cleveland drank and would fight with Marie. "Cleveland was known in our neighborhood as a crazy, violent, and scary drunk," she said.

These affidavits were vital to the mental health opinions that Petitioner presented to the State Habeas Court. We now turn to those opinions.

c.

Petitioner presented affidavits from a clinical psychologist and a psychiatrist to explain how Petitioner's childhood—as described in the lay witness testimony that we just laid out above—affected Petitioner's mental health.

First, we consider Dr. David Lisak's (the clinical psychologist) affidavit.[31] Dr. Lisak was asked "to

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[30] Her name is Cara Jackson.

[31] Dr. Lisak considered several things in forming his opinions. He interviewed Petitioner 4 times, for a total of 16 hours, in January and March of 2001. He reviewed Petitioner's school and medical records, as well as Petitioner's mother's psychiatric records. He looked at the 1988 Reports and the court-ordered pretrial evaluations that Dr. Bailey-Smith and

evaluate [Petitioner's] psychological development, with particular focus on the impact of any childhood abuse he may have experienced."

Dr. Lisak described Petitioner as "a child, a teenager, and eventually a young man almost torn in two by the quarreling, violent, impulsive and often intoxicated adults who were responsible for raising him." On the one hand, his great-aunt "tried mightily to maintain a façade of normalcy, and to provide [Petitioner] with at least the basics of a normal upbringing." On the other hand, his great-uncle—"a violent alcoholic and womanizer … [who] terrorized the household with his drunken rages"—"undid her efforts." Dr. Lisak said that Cleveland both "physically assaulted" and "sexually abused" Petitioner.

Petitioner "became a pawn in the bitter conflict between his … mother … and [the Thomases]." In turn, this conflict "ruptured" Petitioner's understanding of "who he was and what his family

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Dr. Fahey made. Finally, he considered documents related to a lawsuit filed against Lorton Reformatory officials, as well as the affidavits of these 14 people: Claudette Whatley Johnson, Norman F. Whatley, Cleveland Thomas, Jr., Franklin White, Leila Mae Dickson, Janet Wyche, Karla Humbles, Lorraine Goodman, Fetilda Dukes, Nancy Ward, Eugene Watson, Allene Whatley, Cara Jackson, and Joseph Johnson.

Dr. Lisak's affidavit is written under eight headings: "Summary of Findings," "Family Background," "[Petitioner's] Early Childhood," "The Revelations that Shattered [Petitioner's] Childhood," "Adolescence," "Incarceration at Lorton Prison," "Release from Lorton," and "Conclusions." We summarize the relevant parts.

members were really like." Dr. Lisak noted Petitioner's visit to Washington, D.C., the visit where his mother told him (1) that his father wasn't who he thought he was, (2) that his great-uncle had raped her, and (3) that his great-uncle was "waging a bitter and nasty war" against her to keep her from Petitioner.[32] During the same visit, Petitioner was raped by his mother's friend.

Because of this damage, Petitioner "lived a dual existence": one part of his identity "was molded by Marie" and her "desire for normalcy, while the other part of his identity was that of "a tougher, drug-using and potentially violent youth who was adapted to life on the streets." By the time Petitioner was arrested in 1995, Dr. Lisak said, "the abuse, conflicts, rejection and abandonment that had shaped [Petitioner] had yielded a very fragmented personality." Petitioner "was prone to severe dissociative episodes, a consequence of years of abuse; and he had developed unusual and at times grandiose ideas that struck mental health evaluators as far back as 1988 as being schizophrenic-like." Dr. Lisak said "[t]he lucid [Petitioner] co-existed with these other aspects of his personality, but they remained in conflict." Unable to "integrate these warring aspects of himself," Petitioner's decisions "were impulsive and often highly irrational." Dr. Lisak concluded with this: "[T]here is a continuous thread connecting his family's history of

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[32] These are the three revelations that Dr. Lisak expanded on under the heading "The Revelations that Shattered [Petitioner's] Childhood." Dr. Lisak also discussed Petitioner's getting raped under this heading, calling it a "traumatic blow."

violence and substance abuse to the moment when [Petitioner] was convicted of murder … and sentenced to death."

Next, we consider Dr. Richard Dudley's (the psychiatrist) affidavit.[33] Dr. Dudley "performed a psychiatric evaluation of" Petitioner. Beginning with Petitioner's family medical history, Dr. Dudley noted that "several persons" in Petitioner's mother's family had mental illnesses that can be passed down genetically. Thus, Dr. Dudley concluded, Petitioner "was born … with a significantly increased risk for the development of similar psychiatric difficulties."[34]

In light of all this, and the abusive childhood that Dr. Lisak noted in his affidavit, Dr. Dudley concluded that Petitioner was suffering from a "mental illness … best described as a Psychotic

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[33] In forming his opinions, Dr. Dudley reviewed Petitioner's hospital records and school records, the 1988 Reports, the transcript of the sentencing phase, the Supreme Court of Georgia's opinion in *Whatley v. State*, 509 S.E.2d 45 (Ga. 1998), a video interview of Petitioner the day after his arrest, Dr. Elpern's report, Petitioner's mother's medical records, pleadings from Petitioner's lawsuit against Lorton Prison, and the same affidavits that Dr. Lisak reviewed.

Dr. Dudley's affidavit is written under two headings: "Summary of Family Background and Social History" and "Summary of Findings and Discussion." In the "Summary of Family Background and Social History" section, Dr. Dudley summarized much of Dr. Lisak's affidavit. We summarize only the parts of the affidavit that are relevant to our analysis.

[34] Specifically, Dr. Dudley said that Petitioner had a "high risk" of developing a psychotic disorder, a mood disorder, and/or a substance abuse disorder.

Disorder NOS,[35] Depressive Disorder NOS, and Polysubstance Abuse with acute cocaine intoxication" when he committed the murder and when he was sentenced to death.[36] The "psychotic disorder is primarily characterized by delusional thinking of the grandiose and paranoid type." As a result, Petitioner's "perceptions of himself and those around him do not reflect reality," and these delusional perceptions inform his decisions and actions.[37] To explain the substance abuse disorder, Dr. Dudley pointed to Petitioner's "long drug history" that began in his early teens. The drug abuse "seems directly related to the abuse and trauma" Petitioner experienced during his childhood because "[t]he drugs provided a temporary respite" from these difficulties.

Next, Dr. Dudley compared his diagnosis to the diagnosis made by Dr. Bailey-Smith and Dr. Fahey. (As we explain below, Dr. Bailey-Smith and Dr. Fahey evaluated Petitioner before trial to see whether he was competent to stand trial and to analyze his level of responsibility.) As Dr. Dudley put it, Dr. Bailey-Smith and Dr. Fahey diagnosed

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[35] "NOS" means "not otherwise specified." Doctors generally use that "when someone doesn't meet the full criteria for the diagnosis."

[36] Dr. Dudley's opinion was "to a reasonable degree of medical and scientific certainty."

[37] Dr. Dudley didn't elaborate much on Petitioner's depressive disorder. He said this: "[Petitioner's] episodes of depression are so severe and cause such extreme impairment of his ability to function that he warrants the diagnosis of depressive disorder NOS."

Petitioner with "personality disorder NOS with antisocial, borderline, narcissistic, and schizotypal features and rule[d] out Bipolar Disorder." Dr. Dudley said that "[t]he constellation of symptoms [they] described … and used to support [their] diagnosis [was] similar to what [he] … identified and used to make [his] diagnosis." But, "because the information from collateral sources about [Petitioner's] history is far more detailed now [in 2001] than it was in 1997," Dr. Dudley "believe[d] that the diagnosis … [he] made better fit[] the symptoms described."

Finally, Dr. Dudley considered the role that Petitioner's mental state played in the murder:

> [I]t is my opinion that [Petitioner's] mental capacity at the time of the offense may have been substantially diminished. He suffered from delusional thinking, was depressed, was on cocaine, and the convergence of these three disorders made him prone to even further deterioration in stressful situations, such as during a robbery. While I do not believe that he was under a delusional compulsion or could not understand right from wrong, there is a strong possibility that at the time of the offense, [Petitioner's] mental capacity was substantially diminished.

2.

In response, the State contested both prongs of *Strickland*. Because we decide the Mitigation Claim

under the prejudice prong, we focus on that part of the State's evidence.[38] To show that Petitioner was not prejudiced by Trial Counsel's alleged deficiencies—especially those related to presenting evidence about Petitioner's mental health—the State called Dr. Bailey-Smith to testify at the evidentiary

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[38] On the first prong, the State argued that Trial Counsel did not provide ineffective assistance (1) by failing to uncover—before trial—evidence that Petitioner was abused as a child, as revealed by the lay witness affidavits, or (2) by failing to hire expert witnesses—such as Dr. Lisak and Dr. Dudley—to explain whether this new information about Petitioner's childhood would have affected his mental health at the time he committed the murder. To support its argument, the State relied on Investigator Yarbrough's testimony.

Investigator Yarbrough said that he met with Petitioner at least 16 times between Petitioner's arrest and trial. He asked Petitioner several times to describe his background, where he had grown up, and what he had experienced. Investigator Yarbrough did not recall Petitioner ever mentioning that he was sexually abused as a child. Had he, Investigator Yarbrough would have told Trial Counsel and pursued the matter. Investigator Yarbrough also believed that Trial Counsel would have presented evidence showing that Petitioner was abused as a child, if there had been any credible evidence of abuse.

Investigator Yarbrough contacted Petitioner's mother, but she wasn't cooperative. During their meetings, Petitioner provided Investigator Yarbrough with the names of potential witnesses and where they could be contacted. Yarbrough got the names of other potential witnesses while interviewing the ones Petitioner identified. In time, with Petitioner's help, Investigator Yarbrough and Trial Counsel compiled a witness list. Together, they reviewed it, struck some names, and added others. Investigator Yarbrough interviewed all whose names were listed and reported what he learned to Trial Counsel. Trial Counsel interviewed several on the list himself, including those he called to testify in the sentencing phase of the trial.

hearing before the State Habeas Court. Before delving into her testimony at the evidentiary hearing, we first explain her connection to Petitioner's case.

a.

Dr. Bailey Smith and Dr. Fahey examined Petitioner in December of 1996. The judge, who would preside over Petitioner's murder trial, asked the doctors to assess (1) whether Petitioner was competent to stand trial and (2) Petitioner's degree of criminal responsibility at the time of the murder.[39]

The doctors found that Petitioner was "in touch with reality" and concluded "that intelligence was not a significant issue in th[e] case." But they still decided to test Petitioner's intelligence to gauge "current functioning."[40] The test showed that

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[39] They were also ordered to assess the threat that Petitioner posed to himself or the community if bail were granted.

They interviewed and tested Petitioner for eight hours on December 13 and seven hours on December 31. To answer these questions, the doctors relied on their interviews with Petitioner; the results of the psychological tests they gave to him; a copy of the Court Order authorizing the evaluation; reports from the Georgia Bureau of Investigation and Griffin Police Department, including witness statements; verbal communication with the Spalding County Sheriff's Department personnel about Petitioner's behavior and mental status while in jail; Orders from the Superior Court; and a videotape of police investigators' questioning of Petitioner on November 28, 1995.

[40] They did so by administering the Kaufman Brief Intelligence Test.

Petitioner was "functioning in the Average range of intellectual abilities." Next, the doctors gave Petitioner two personality tests.[41] His answers to one test were suggestive of someone "with significant psychopathology." People with profiles like Petitioner's "generally appear boastful and egocentric"; while they might "exaggerate their self-worth, their self-concept is actually quite poor." They noted that people with this type of profile may daydream and fantasize in response to stress. As for Petitioner, the doctors said "this appears to take the form of magical thinking. … [Petitioner] thinks he is unique and special, and ordained for a special purpose. He believes he has unique and special powers which can impact and often directly influence other's thinking and behavior, and consequently, the outcome of some situations."

Next, the doctors made a diagnosis: they ruled out bipolar disorder and diagnosed him with "Personality Disorder NOS with antisocial, borderline, narcissistic, and schizotypal features."

Finally, the doctors considered Petitioner's competency to stand trial. They said he had "the verbal skills" to work with his lawyer and the "conceptual skills" to weigh the strengths and weaknesses of his case. The doctors did point out that Petitioner seemed uninterested in using all his skills to help his lawyer; they said this lack of interest stemmed from his "lack of confidence in his

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[41] The Minnesota Multiphasic Personality Inventory-2 and the Millon Clinical Multiaxial Inventory-III.

attorney and the legal system" and from his belief that he is a "special" person. Petitioner didn't show the level of anxiety that they expected someone is his position to show, and this was because Petitioner thought a "higher power" would "ultimately intervene," even if he were found guilty. In turn, Petitioner did not think a death sentence was a realistic possibility, which the doctors said was problematic because he "may understand on a cognitive, but not on a motivational level, the gravity of his situation."

As for the second question—Petitioner's degree of criminal responsibility at the time of the murder—the doctors concluded that "[a]lthough [Petitioner] indicated that he was experiencing a high level of distress, there [was] no evidence that he was suffering from a delusional compulsion at the time of the alleged offense. [Petitioner's] behavior at the time of the alleged offense also indicate[d] he had the ability to distinguish right from wrong."

Dr. Bailey-Smith and Dr. Fahey did not have access to the 1988 Reports when they evaluated Petitioner in 1996.

b.

At the evidentiary hearing, the State used Dr. Bailey-Smith's testimony to rebut the 1988 Reports and the affidavits from Dr. Lisak and Dr. Dudley.

First, the State showed Dr. Bailey-Smith the 1988 Reports and asked whether they caused her to

"change any of [her] conclusions" about Petitioner. She answered no and said she did not "think the results [of her evaluations and testing] would have been any different."

Next, the State showed Dr. Bailey-Smith the affidavits from Dr. Lisak and Dr. Dudley. The State asked whether the affidavits were "written in the typical fashion of psychological reports in the community that [Dr. Bailey-Smith] [was] in." She said no and elaborated:

> I've seen so many in this style I would have to say. They look like they were written for defense's viewpoint. They are more hypothetical, they are more creating—going back and trying to reconstruct the history and create a path of causation, this is what caused this, this is what caused this. Not what psychologists generally do when they do a psychological [report] ….
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> These look more like someone is trying to reconstruct history and describe a person's life and put it almost in a very clean box like this happened and this is what this person felt and this is what happened next… [G]enerally most psychologists wouldn't feel as comfortable assigning causation based on a particular feeling …. I couldn't tell you why you acted the way you did yesterday with any degree of certainty. I don't think any psychologist could. We could tell you some factors that might have led to your behavior

> yesterday. We couldn't tell you the exact factors that caused that.
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> These reports concern me a little bit in that they are going back many, many years and assigning a certain feeling and then saying that feeling caused this behavior and that the psychologist writing this is not hypothesizing [and instead] … is certain…. And that's really out of our realm of scientific certainty. We can't do it that well.

The State then directed Dr. Bailey-Smith to Dr. Dudley's opinion that Petitioner's "mental illness is best described as a psychotic disorder NOS," "primarily characterized by delusional thinking of the grandiose and paranoid type." The State asked Dr. Bailey-Smith whether she saw "any evidence that [Petitioner] had delusional thinking or fixed delusions at the time of the crime or during [her] evaluation." She said she and Dr. Fahey did think that Petitioner had some thought patterns that "were different and bordered delusional thinking" during their evaluations, but the doctors did not think Petitioner had any actual "delusional thoughts … during the time of the crime or during [the] evaluation." Dr. Bailey-Smith agreed that Petitioner had no "fixed delusions" and said they "did not think it went to the level that he was not in touch with reality or didn't know it was real." Instead, "It was more some odd thought patterns, but [they] never thought [Petitioner] was delusional when [they] talked to him. He was very coherent and

very logical and very intelligent when [they] talked to him."

B.

The parties did not present evidence on the Shackles Claim at the evidentiary hearing. Instead, the State Habeas Court relied on the transcript of the penalty phase.[42] Petitioner argued that Trial Counsel was ineffective for failing to object to the shackling and, as a result, he was prejudiced during the penalty phase. He also said the Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005), "strongly supports [his] position." He claimed that—because shackling is inherently prejudicial—"by definition" he was prejudiced due to Trial Counsel's failure to object.

The State argued that Petitioner was not prejudiced. It pointed to the jury's short deliberation before recommending death (90 minutes) and the overwhelming evidence at trial. It also argued that *Deck*, which was decided several years after Petitioner's trial, did not apply.

C.

The State Habeas Court denied relief. *Whatley*, slip op. at 63. It held that Petitioner could not show prejudice on any of his three claims of ineffective assistance of counsel. First, the Court held that Petitioner was not prejudiced by Trial Counsel's

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[42] During the guilt-innocence phase of the trial, the jurors were unaware that Whatley was wearing shackles.

failure to discover evidence of abuse that he allegedly experienced as a child. *Id.* at 48–49. It noted that the lay witness "affidavit testimony … was either cumulative … , of questionable mitigating value, biased in contradiction of the mitigation strategy … at trial … or of other testimony presented … at [the evidentiary] hearing or … during the [penalty] phase, or [was] speculative."[43] *Id.* at 49.

Second, the Court held that Petitioner was not prejudiced by Trial Counsel's failure to examine the 1988 Reports or by his failure to ask Caseworker Watson what the Reports revealed. *Id.* at 35. The Court found, "as a matter of fact," that the 1988 Reports "contained information that was just as potentially harmful to Petitioner's case as it was potentially helpful." *Id.* For example, one report said that Petitioner showed no remorse for the robbery crime and instead showed only embarrassment for not acting smarter than he did. *Id.* The Court also discounted the report that said Petitioner was "experiencing a mental breakdown" and needed intense psychotherapy. *Id.* It did so because that report's author didn't actually diagnose Petitioner with a psychological disorder and because the report noted that Petitioner thought he could get away with anything because he could outsmart others. *Id.*

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[43] The Court also found that Trial Counsel was not deficient in failing to discover this evidence because Petitioner did not inform Trial Counsel or Investigator Yarbrough about the evidence and because it was not mentioned in Petitioner's earlier psychological reports. *Id.* at 47–48.

Third, the Court held that Petitioner was not prejudiced by Trial Counsel's failure to hire a mental health expert who would echo Dr. Lisak's and Dr. Dudley's testimony that Petitioner was suffering from a major mental illness at the time of the murder. *Id.* at 49. The Court found that most of Dr. Lisak's and Dr. Dudley's conclusions were "speculative, at best." *Id.* And "their finding, some years later, that 'Petitioner was delusional and out of touch with reality at the time of his crimes' upon which their ultimate findings were largely based was refuted by Dr. Bailey-Smith's testimony." *Id.*

Finally, the State Habeas Court found that Petitioner was not prejudiced by Trial Counsel's failure to object to his wearing visible shackles during the penalty phase. *See id.* at 21. The Court pointed out that the jury had already convicted him of malice murder (without knowing that he was wearing shackles), and the jury was aware of his escapee status. *Id.*

IV.

Petitioner appealed the State Habeas Court's denial of relief to the Supreme Court of Georgia.[44]

On the Mitigation Claim, Petitioner argued that Trial Counsel failed to investigate and present a mitigation strategy. Petitioner specifically mentioned Caseworker Watson, and he argued that

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[44] Petitioner filed an application for a certificate of probable cause to appeal, and the Supreme Court of Georgia granted it. *Whatley v. Terry*, 668 S.E.2d 651, 653 (Ga. 2008).

Trial Counsel failed to even look at Watson's file. Had he looked, Trial Counsel would have discovered the information about Petitioner's family and the prior mental evaluations, all of which was presented to the State Habeas Court. Petitioner argued that he was prejudiced by this lackluster investigation during the penalty phase. Rather than presenting Petitioner as someone who came from a "good strong family," Trial Counsel would have told the jury about the abuse Petitioner suffered as a child and the mental problems Petitioner had, if only Trial Counsel had done a reasonable investigation. That type of testimony, according to Petitioner, would have convinced one juror to spare his life.

As we explain in more detail below, the Supreme Court of Georgia assumed Trial Counsel performed deficiently and considered all of the mitigating evidence that Petitioner presented. *See Whatley v. Terry*, 668 S.E.2d 651, 659–63 (Ga. 2008). It then weighed the mitigating evidence against all of the evidence that would be presented if the penalty phase were retried. *See id*. It held that Petitioner was not prejudiced by Trial Counsel's deficient performance. *Id*. at 659.

Moving to the Shackles Claim, Petitioner argued that Trial Counsel provided ineffective assistance of counsel by not objecting to his shackles. The Court again assumed that Trial Counsel performed deficiently and held that Petitioner did not show *Strickland* prejudice. *See id*. at 663.

Petitioner appealed to the Supreme Court of the United States, but it denied his petition for writ of

certiorari. *Whatley v. Terry*, 556 U.S. 1248, 129 S. Ct. 2409 (2009) (mem.).

V.

Petitioner filed a petition for a writ of habeas corpus in the District Court. The petition raised several claims, including the Mitigation Claim and the Shackles Claim now before us. The Court granted relief on the Mitigation Claim. *Whatley v. Upton*, No. 3:09-CV-0074-WSD, 2013 WL 1431649, at *34 (N.D. Ga. Apr. 9, 2013). It explained that even though Trial Counsel knew Petitioner had "prior psychological evaluations" and "a troubled upbringing," Trial Counsel "chose not to pursue" this information. *Id*. at *26. Thus, according to the District Court, Trial Counsel did not reasonably investigate Petitioner's "background and mental and psychological health," *id*., and Trial Counsel's deficient investigation prejudiced Petitioner during the penalty phase, *id*. at *34.

The District Court denied relief on the Shackles Claim. *Id*. at *39. It found that Trial Counsel "could have had a number of valid reasons for declining to object to his client being seen in restraints during the penalty phase." *Id*. at *38. Thus, the District Court found that Trial Counsel was not ineffective. *Id*. Alternatively, the Court found that even if Trial Counsel were ineffective, Petitioner was not prejudiced. *Id*. at *39.

VI.

The State appeals the District Court's decision granting the writ on the Mitigation Claim. Petitioner cross-appeals the Court's decision denying his Shackles Claim. We set out the standard of review and then consider each claim separately.

A.

Our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> Under AEDPA, a federal court may not grant a habeas corpus application with respect to any claim that was adjudicated on the merits in State court proceedings, 28 U.S.C. § 2254(d), unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, § 2254(d)(1).

Johnson v. Upton, 615 F.3d 1318, 1329 (11th Cir. 2010) (quoting *Berghuis v. Thompkins*, 560 U.S. 370, 380, 130 S. Ct. 2250, 2259 (2010)).

Here, we apply AEDPA and ask (1) whether the Supreme Court of Georgia's decisions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined" in *Strickland*, *see* 28 U.S.C. § 2254(d)(1), or (2) whether the Supreme Court of Georgia's decisions were "based on an unreasonable determination of the facts

in light of the evidence presented in the state court proceeding," *id*. § 2254(d)(2).

In answering these questions, we keep two points in mind. First, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 2149 (2004)). Second, we "presume[]" that the state court's findings of fact are correct. 28 U.S.C. § 2254(e)(1). So, if Petitioner challenges state court rulings that rest on findings of fact, he must overcome two hurdles. One, he must rebut the presumption of correctness that attaches to findings of fact, and he must do so with "clear and convincing evidence." *Id*. Two, he must overcome the deference that we give to the state court's legal decision under § 2254(d).

To succeed on an ineffective assistance claim under *Strickland*, Petitioner must show (1) that his trial "counsel's performance was deficient" and (2) that it "prejudiced [his] defense." 466 U.S. at 687, 104 S. Ct. at 2064.

Petitioner satisfies the second element only if he shows there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694, 104 S. Ct. at 2068. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the

proceeding.'" *Richter*, 562 U.S. at 104, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067). Instead, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.*, 131 S. Ct. at 787–88 (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064).

B.

With these principles in hand, we consider each claim separately.

1.

First, we address the State's appeal of the District Court's decision granting habeas relief on the Mitigation Claim. The District Court refused to defer to the Supreme Court of Georgia's decision—which it resolved under *Strickland's* prejudice prong—on the Mitigation Claim. *Whatley*, 2013 WL 1431649, at *34. To decide whether the District Court erred, we begin with the exact version of the claim that Petitioner presented—in his briefing—to the Supreme Court of Georgia.[45]

In his brief to the Supreme Court of Georgia, Petitioner criticized the way Trial Counsel portrayed

[45] We do so because Petitioner brought several claims for ineffective assistance of counsel before the State Habeas Court. The State Habeas Court listed the claims based on their numbers. See, e.g., Whatley, slip op. at 32. But the Supreme Court of Georgia considered Petitioner's claims of ineffective assistance of counsel by subject matter, not by claim number. Thus, we also consider the claims by subject matter.

his childhood: "At trial, [Trial] [C]ounsel told the jury in closing argument that [Petitioner] came from a 'good strong family.'" "Had counsel done a reasonable investigation, he would have learned that just the opposite was true." "[H]ad [Trial] [C]ounsel done a basic investigation, he would have been able to present a compelling life history of [Petitioner], much like the one presented in Dr. Lisak's affidavit." That is, "[t]he jury would have heard powerful testimony about a childhood filled with physical, psychological, and sexual abuse." The jury would have heard about Petitioner's "mental problems and learned how they developed." "For example, the jury did not hear that [Petitioner's] mother was raped by her uncle [who raised Petitioner] when she was nine months pregnant with [Petitioner]." Petitioner's mother then "left him to be raised by the rapist uncle and his wife. The uncle was such a violent alcoholic that when [Petitioner] was growing up, his aunt would keep hammers by the doors of her house so … she could fight off her husband's violent attacks during his drunken rages." According to Petitioner, "This is the type of testimony which could have convinced one juror to vote for life."

The Supreme Court of Georgia assumed that Trial Counsel "performed deficiently," but it held that Petitioner failed to show *Strickland* prejudice: "the absence of those professional deficiencies would not in reasonable probability have resulted in a different outcome in either phase of [Petitioner's] trial." *Whatley*, 668 S.E.2d at 659.

The Supreme Court of the United States has told reviewing courts how to decide *Strickland* prejudice in cases like this, cases where a petitioner alleges that his lawyer was deficient in failing to present mitigating evidence. The Supreme Court has said that "*Strickland*'s point [is] that the reviewing court must consider all the evidence—the good *and the bad*—when evaluating prejudice." *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (*per curiam*) (emphasis added) (citing *Strickland*, 466 U.S. at 695–96, 700, 104 S. Ct. at 2068–69, 2071); *see also id*. at 22, 130 S. Ct. at 387–88 (noting that the habeas petitioner could not show prejudice, in part, because "aspects of [petitioner's mitigating] character [evidence] … would have triggered admission of … powerful … evidence in rebuttal").

So, reviewing courts must consider (1) evidence from the original guilt-innocence phase, (2) evidence from the original penalty phase, (3) evidence the petitioner presented to the state habeas court, and (4) evidence the state presented to the state habeas court. When deciding what evidence the state would present in response, reviewing courts must consider whether the proffered mitigating evidence would "open[] the door" to other aggravating evidence. *See id*. at 18, 130 S. Ct. at 385. The bottom line is that in weighing all of the evidence, reviewing courts must anticipate what a retrial of the penalty phase would look like.

Here, the Supreme Court of Georgia did just that.[46] *See Whatley*, 668 S.E.2d at 659–63. Although it did not explicitly walk through the entire penalty phase— the State's case, Petitioner's case, and the State's rebuttal—it did enough to show that it weighed Petitioner's new evidence against all of the evidence, including any aggravating evidence the new evidence would bring in. After all, under AEDPA, we're most concerned with the reviewing court's "ultimate conclusion," not the quality of its written opinion. *See Gill v. Mecusker*, 633 F.3d 1272, 1290–91 (11th Cir. 2011); *see also Richter*, 562 U.S. at 98, 131 S. Ct. at 784 (noting that a state court does not have to give "a statement of reasons" for its decision).[47]

The Supreme Court of Georgia began the reweighing process by discounting the affidavits—especially those from Dr. Lisak and Dr. Dudley—that Petitioner presented to the State Habeas Court: it "note[d] that much of [his] arguments rely upon the description and interpretation of his background

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[46] The State Habeas Court did as well. *See Whatley*, slip op. at 35, 48–49.

[47] We think the Supreme Court of Georgia made three assumptions in reweighing the evidence. First, it assumed the State would rely on the evidence it presented in the initial penalty phase. Second, it assumed Petitioner would abandon the strategy that Trial Counsel used at the initial penalty phase and would instead rely on the evidence he proffered to the State Habeas Court. Third, it assumed the State would counter Petitioner's case in rebuttal by cross-examining Petitioner's witnesses and by introducing additional aggravating evidence.

in the affidavit testimony" from Dr. Lisak and Dr. Dudley. *Whatley*, 668 S.E.2d at 659. The Court acknowledged that experts may rely on "statements of others" in forming their expert opinions. *Id*. But, the Court said, "[T]hose opinions should be given weight only to the extent that the statements upon which they rely are themselves found to have been proven reliable."[48] *Id*. So, in deciding whether a jury "would have been swayed" by the additional testimony from Dr. Lisak and Dr. Dudley, the Court "d[id] not assume the correctness of the facts alleged in the experts' affidavits [and] instead … consider[ed] the experts' testimony in light of the *weaker* affidavit testimony upon which that testimony, in part, relied." *Id*. (emphasis added) (footnote omitted). With that, the Court "g[ave] significant weight to the [State] [H]abeas [C]ourt's finding that [Petitioner's] new experts' affidavits were 'of questionable credibility and value.'" *Id*.

There are at least two findings of fact embedded in the Court's decision to discount the experts' affidavits. First, the Court found that the facts alleged in the affidavits were not reliable. We know this because the Court did not assume the facts were correct; in other words, the facts were not "proven reliable." Second, the Court found that the expert opinions themselves were not credible because they were based, in part, on unreliable facts. These credibility-based determinations are findings of fact, *see Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301,

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[48] As the Court pointed out, "An expert witness must not be permitted to serve merely as a conduit for hearsay." *Id*.

1310 (11th Cir. 2012) (labeling the state court's credibility finding a "factual finding" that is presumed correct on federal habeas review), therefore we presume they are correct, *see* 28 U.S.C. § 2254(e)(1).[49]

Although Georgia trial courts have broad discretion to admit mitigating evidence during the penalty phase of a capital case, "the hearsay rule is not suspended." *Pace v. State*, 524 S.E.2d 490, 505 (Ga. 1999). Hearsay may be admitted, however, if the defendant demonstrates that "the potentially mitigating influence of the testimony" would outweigh "the harm" "the violation of the rule" would cause. *Collier v. State*, 261 S.E.2d 364, 376 (Ga. 1979), *overruled on other grounds by Thompson v. State*, 426 S.E.2d 895 (Ga. 1993).

This point on hearsay is relevant because Petitioner does not say whether he would try to introduce in a penalty phase retrial the affidavits that he presented to the State Habeas Court that paint the Thomases in a bad light. If he introduced them, they would have little probative value. More on that below.

Then, the Supreme Court of Georgia continued the reweighing process and considered six pieces of evidence that Petitioner said Trial Counsel should have presented during the penalty phase. This

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[49] *See also Bottoson v. Moore*, 234 F.3d 526, 535 (11th Cir. 2000) (analyzing "whether the finding of fact discounting [an expert's] opinion is entitled to the statutory presumption of correctness" and concluding that it is).

evidence, Petitioner argued, would have propped up his mitigation defense. In considering the six pieces of evidence, the Court analyzed how mitigating each piece would be in a hypothetical retrial. Many of the Court's conclusions on mitigation flowed naturally from the State Habeas Court's findings of fact. Although the Court didn't always explicitly cite these factual findings, we still presume they are correct under § 2254(e)(1). As the Court itself pointed out, it accepted the State Habeas Court's findings of fact unless they were clearly erroneous. *Whatley*, 668 S.E.2d at 659. Plus, our review is not limited to the reasons the Court gave in its analysis. *See Gill*, 633 F.3d at 1291–92. So, we presume the State Habeas Court's relevant findings of fact are correct, and we flag them below.

First, Petitioner argued that evidence showing his great-uncle raped his mother would have been mitigating. *Whatley*, 668 S.E.2d at 660. The Court found that this evidence "would not have been significantly mitigating[because it] may have offended the jurors if they perceived counsel as attacking the one couple who, while they were still living, had taken care of [Petitioner]." *Id.* This is a natural conclusion to draw from one of the State Habeas Court's critical findings of fact. The State Habeas Court found that the affidavit testimony Petitioner presented was "biased in contradiction of the mitigation strategy employed by [Trial Counsel] at trial or … during the sentencing phase." *Whatley*, slip op. at 49 (order denying habeas relief). During both the guilt and penalty phases, Petitioner painted a positive picture of his great-aunt and great-uncle,

the couple who took him in, raised him, and gave him an ideal childhood. Evidence that Petitioner's great-uncle raped Petitioner's mother no doubt conflicts with the mitigation strategy, and we presume the State Habeas Court's finding—including its finding that the affidavit evidence was biased—is correct.

Second, Petitioner argued that evidence showing that he was subjected to "brutal treatment" at Lorton Prison would have been mitigating because it would have showed why he never returned to the D.C. halfway house. *Whatley*, 668 S.E.2d at 660. The Court disagreed—"the jury would not have been significantly swayed by an argument that [Petitioner's] fear of returning to prison justified his escape from the halfway house." *Id.* at 660–61. Implicit in this statement is a finding that Petitioner's self-serving argument is not credible, and we presume that finding is correct. *Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1150 (11th Cir. 2009) (noting that the presumption of correctness "applies to fact findings made by both state trial courts and state appellate courts").

Third, Petitioner argued that the 1988 Reports would have been mitigating because they showed that his mother neglected him and that he had mental health problems. *See Whatley*, 668 S.E.2d at 661. But as the Court explained, the Reports also would have cut against Petitioner's mitigation case: "[the Reports] contain material that would have been damaging to [Petitioner's] mitigation case, including statements that he lacked remorse for his crimes

and believed he could 'get away with anything.'" *Id.* This finding mirrored the State Habeas Court's; it found "as a matter of fact" that the Reports contained just as much potentially harmful information as potentially helpful information. *Whatley*, slip op. at 35 (order denying habeas relief). We presume this finding is correct. The Supreme Court of Georgia also noted that the Reports' findings about Petitioner's mental health were "tentative," and they would have had "little effect" because "no clear findings of mental illness were noted in another mental health examination performed in preparation for [Petitioner's] murder trial."[50] *Whatley*, 668 S.E.2d at 661.

Fourth, Petitioner argued that additional testimony[51] "from his friends and … jail guards" about his alleged remorse would have been mitigating. *Id.* at 661–62. Rightly anticipating the State's rebuttal—the "bad"—the Court concluded this evidence "would not have had a significant impact on the jury, particularly because the [State] would have been able to explain [Petitioner's] emotional reaction to learning that the victim had died as being a concern for his own punishment rather than true remorse for his actions." *Id.* at 662.

Fifth, Petitioner argued that Trial Counsel should have given Dr. Bailey-Smith the 1988

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[50] The Court presumably was referencing Dr. Bailey-Smith and Dr. Fahey's reports.

[51] "Trial counsel presented testimony from [Petitioner] himself suggesting that he was remorseful." *Id.*

Reports that were prepared as part of the YRA Study. *Id.* Petitioner seemed to think Dr. Bailey-Smith's report would have been more favorable if she had seen the Reports. But as the Court concluded, Dr. Bailey-Smith's testimony defeated that argument. She testified "that [the 1988 Reports] would not have changed her expert opinions if she had seen them pre-trial and, therefore, [Trial Counsel's] use of her report would not have been affected by his alleged failure to obtain the [1988 Records] either in a timely fashion or at all." *Id.* Thus, any argument that Dr. Bailey-Smith's report would have been more favorable if she had seen the 1988 Reports conflicts with Dr. Bailey-Smith's own testimony. The Court resolved this conflict in Dr. Bailey-Smith's favor, and we presume this finding of fact is correct. The Court further explained, "The diagnostic impression set out in [Dr. Bailey-Smith's] report contained hints of mitigation, but overall it could have been more aggravating than mitigating."[52] *Id.*

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[52] For example, Dr. Bailey-Smith "never concluded that [Petitioner] suffered from psychosis." *Id.* And "her report's description of the possible 'psychopathology' suggested that [Petitioner] merely had a 'boastful and egocentric' attitude and that he had a 'form of magical thinking' characterized merely by a belief that he was 'unique and special' and had 'unique and special powers' to influence others." *Id.* This was her diagnosis: "'Rule Out [i.e., there are some signs of but not enough to reach a diagnosis of] Bipolar Disorder' and 'Personality Disorder NOS [not otherwise specified] with antisocial, borderline, narcissistic, and schizotypal features.'" *Id.* (alterations in original).

Sixth, Petitioner argued that Trial Counsel should have presented the 1988 Reports to the trial court in a renewed motion for Petitioner to get his own expert. *See id*. This allegedly would have increased Petitioner's chances of prevailing on the motion. The Court held, as a matter of law, that Trial Counsel's failure to give the 1988 Reports directly to the trial court did not prejudice Petitioner's ability to prevail on his motion for an expert. *Id*. The Court pointed out that the evaluations described in the Reports were "conducted more than eight years before Dr. Bailey-Smith's, and they reached conclusions similar to, and in some respects less favorable than, the conclusions reached in Dr. Bailey-Smith's report."[53]Id.

Next, we consider Petitioner's argument to the District Court. There, he said the Supreme Court of Georgia's prejudice decision is not entitled to AEDPA deference because it was an unreasonable application of the *Strickland* prejudice standard, *see* 28 U.S.C. § 2254(d)(1), and because it was based on an unreasonable determination of the facts in light of the evidence presented to the State Habeas Court,[54] *see id*. § 2254(d)(2). The decision was based

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[53] "For example, although the older evaluations referred to [Petitioner] as 'evidenc[ing] symptoms of schizophrenia,' those symptoms are described in the reports as arising from [Petitioner's] use of illegal drugs." *Id*. at 662–63 (second alteration in original).

[54] In addition to the evidence the parties presented during the evidentiary hearing, the transcripts from both phases of Petitioner's trial were also before the State Habeas Court.

on an unreasonable determination of the facts, Petitioner said, because the Supreme Court of Georgia failed to fully consider the evidence he presented to the State Habeas Court.

The District Court found that Trial Counsel performed deficiently. *Whatley*, 2013 WL 1431649, at *26–27 (concluding that Trial Counsel failed to conduct an adequate investigation). Then, instead of reviewing the Supreme Court of Georgia's analysis of *Strickland* prejudice, it conducted its own analysis. *Id.* at *27. That procedural error was fatal. As the District Court itself said, it "reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence, both adduced at trial and in the state habeas proceedings." *Id.* It "f[ound] that in reweighing the evidence in aggravation against the totality of available mitigating evidence, from both the [penalty] phase at trial and from the state habeas proceedings, there is a reasonable probability that one member of the jury would have voted for life instead of death." *Id.* at *34.

Only then, after reweighing the evidence itself, did the District Court consider the Supreme Court of Georgia's decision on prejudice. *Id.* But it never asked whether the Supreme Court of Georgia's decision was reasonable. Instead, the District Court held that the Court's decision was not entitled to AEDPA deference because it disagreed with the Supreme Court of Georgia. *See* id. The District Court disagreed with the Court's factual findings on how the jury would perceive the new mitigation evidence, *see id.* at *33–34, so it rejected the Court's ultimate

conclusion: that there was no reasonable probability the mitigation evidence affected the outcome, *see id.* at *34.[55]

Now, we must review the District Court's decision. "We review *de novo* the District Court's decision about whether the state court's ruling was contrary to federal law, involved an unreasonable application of federal law, or was based on an unreasonable determination of the facts." *Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 844 (11th Cir. 2011) (*per curiam*).

We hold that the District Court erred by deciding *Strickland* prejudice— reweighing all of the evidence—*de novo*. When a district court reviews a state court's decision under AEDPA, it must first consider the claim as it was presented to the state court. Next, it considers the state court's decision. If the state court applied the correct Supreme Court precedent—here, the Supreme Court of Georgia correctly applied *Strickland*—the district court decides whether the state court applied the Supreme Court precedent unreasonably. *See* 28 U.S.C. § 2254(d)(1). The district court also considers whether the state court's decision was based on an unreasonable determination of the facts. *Id.*

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[55] The District Court explicitly said that that the Supreme Court of Georgia's decision on the performance prong of Strickland was not entitled to deference under 28 U.S.C. §§ 2254(d)(1), (2). *See id.* But it did not make the same explicit statement about the Supreme Court of Georgia's decision on the prejudice prong. Instead, it said only that Petitioner was in fact prejudiced. *See id.*

§ 2254(d)(2). If the district court decides the state court's decision was based on an unreasonable application of Supreme Court precedent, or if it decides the state court's decision was based on an unreasonable determination of the facts, only then can it review the claim *de novo*. *See McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1266 (11th Cir. 2009) (reviewing a petitioner's claim *de novo* after finding that the petitioner satisfied § 2254(d)).

Here, the District Court reviewed the prejudice decision *de novo* without first considering whether the Supreme Court of Georgia's findings of fact were unreasonable. Again, the Supreme Court of Georgia found that the evidence Petitioner presented to the State Habeas Court had little probative value. *See Whatley*, 668 S.E.2d at 659–63. In turn, the Court reweighed all of the evidence and found that there was no reasonable probability that the outcome of the penalty phase would have been different, even if the jury heard Petitioner's proffered evidence. *See id.* at 659. These findings were the foundation of the Supreme Court of Georgia's ultimate conclusion—that Petitioner was not prejudiced by Trial Counsel's deficient performance. With no finding that the state court's decision was based on an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(2), and with no basis to say that the state court unreasonably applied *Strickland*, *see* 28 U.S.C. § 2254(d)(1), the District Court should have been constrained by AEDPA.

On top of deciding the prejudice issue *de novo* and failing to consider the state courts' findings of

fact, the District Court obviously failed to presume that these findings of fact were correct, which AEDPA requires. *See* 28 U.S.C. § 2254(e)(1). To make these findings of fact, the state courts assessed credibility and considered the reliability of the evidence that Petitioner presented to the State Habeas Court. *See Whatley*, slip op at 49 (order denying habeas relief) (noting that much of the affidavit testimony Petitioner presented was "biased" and conflicted with other evidence presented at trial). These findings of fact—and any credibility or reliability determinations that they rested on—are presumed correct. *See Mansfield*, 679 F.3d at 1310 (labeling the state court's credibility finding a "factual finding" that is presumed correct on federal habeas review). Remember, because these findings of fact were the foundation for the Supreme Court of Georgia's conclusion that Petitioner was not prejudiced, this presumption of correctness is the first hurdle that Petitioner must clear, even before getting to § 2254(d) deference.

In sum, given the District Court's procedural error, we would normally vacate its judgment granting the writ on the Mitigation Claim and remand the case to the District Court with instructions. But because we have the same cold record as the District Court had before it, we will do the proper analysis ourselves.

We presume the Supreme Court of Georgia's factual findings are correct, 28 U.S.C. § 2254(e)(1), so we must decide whether Petitioner has overcome that presumption. The Supreme Court of Georgia

found that the affidavits from Dr. Lisak and Dr. Dudley were "of questionable credibility and value." *See Whatley*, 668 S.E.2d at 659. And it found that the six pieces of evidence Petitioner proffered would not have been mitigating. *Id*. at 660–62.

Above, we said that when a reviewing court weighs all of the evidence, it reconstructs a hypothetical retrial. And we also said that the Supreme Court of Georgia did not explicitly walk through every step of a hypothetical retrial. But it didn't have to. Indeed, we are not limited to the reasons the Court gave and instead focus on its "ultimate conclusion," *see Gill*, 633 F.3d at 1291—here, that Petitioner was not prejudiced by Trial Counsel's deficient performance. Under 28 U.S.C. § 2254(d), we must "determine what arguments or theories … *could* have supported … the state court's decision." *See Richter*, 562 U.S. at 102, 131 S. Ct. at 786 (emphasis added). Thus, we walk through some of the steps of a hypothetical retrial to show why Petitioner has not overcome the presumption of correctness that applies to the Supreme Court of Georgia's findings of fact. These steps also show that the Court's decision was not an unreasonable application of *Strickland*.

It's unclear whether Petitioner would try to introduce in a penalty phase retrial the affidavits that he presented to the State Habeas Court. He presented affidavits from lay witnesses and from Dr. Lisak and Dr. Dudley; they all paint the Thomases in a bad light. If Petitioner were

permitted to introduce the affidavits, they would have little probative value.

We take the lay witness testimony first. The State would argue that these affidavits were little more than after-the-fact attempts to save Petitioner from the death penalty. Remember, three of the witnesses who submitted affidavits also testified during the initial penalty phase. They said nothing about Petitioner growing up in an abusive environment. In fact, Petitioner told the jury in 1997, "The household in which I was reared here in Georgia … was a very stationary, very unconditional as far as for loving and—and support, and ideally everything that a child could—could ask for growing up, I had with my great-aunt and great-uncle." That testimony is consistent with the 1988 Reports, which say that Petitioner reported having a good relationship with his great-aunt and great-uncle. The Reports also note that Petitioner had a stable upbringing.

So, the State would argue that Petitioner—conveniently—never revealed the alleged abuse before initiating his state habeas proceedings. That is, he didn't tell (1) the psychologists or psychiatrists who evaluated him as part of the YCA Study in 1988; (2) Caseworker Watson, who worked with him for 18 months to develop a sentencing plan in the robbery case in the D.C. Superior Court; (3) Dr. Bailey-Smith and Dr. Fahey, who evaluated his competence to stand trial and his level of responsibility before trial, in December 1996; (4) Trial Counsel; or (5) Investigator Yarbrough. All

these people were in Petitioner's corner, so he had no incentive to keep the alleged abuse from them. In fact, the people involved with the YCA Study were compiling information that Caseworker Watson would then rely on when crafting a proposed rehabilitation plan. Had Caseworker Watson known of the alleged abuse, the proposed plan would have been different. Petitioner must have known that.

If Petitioner presented this version of his childhood by introducing the affidavits, the State would expose it through argument. If the witnesses testified live, the State would expose the same points through cross-examination.

Presumably, Petitioner himself would take the stand and tell this new version of his childhood. Using the evidence we just explained, the State would impeach him on cross-examination, gutting his credibility. Additionally, the State would also explore the reason Petitioner gave for leaving Georgia and moving to Washington, D.C., in the fall of 1987—a longing to be with his mother. The State would refer to the 1988 Reports that quoted Petitioner as saying, "I moved to D.C. from near Atlanta in … 1987." It would then remind Petitioner that, at his trial in 1997, he testified that he went to Washington, D.C., because he wanted to live with his mother. After Petitioner agreed, the State would refer him to the FBI report attached to Dr. Bailey-Smith and Dr. Fahey's pretrial report. The FBI report shows that Petitioner was arrested in Griffin, Georgia, on October 2, 1987, and charged with two counts of burglary, each committed on that date. He

was then released on bail. The State would ask Petitioner whether the FBI report is accurate and whether he skipped bail and fled to Washington, D.C., to avoid prosecution.

Now, Dr. Lisak's and Dr. Dudley's opinions. It wouldn't matter if Petitioner presented their opinions by introducing their affidavits or by having them testify. The result would be the same: the State would refute their opinions with testimony from Dr. Bailey-Smith. Before the State Habeas Court, Dr. Bailey-Smith said Dr. Lisak's and Dr. Dudley's reports "concern[ed] [her] a little bit in that they are going back many, many years and assigning a certain feeling and then saying that feeling caused this behavior and that the [author] … is not hypothesizing [and instead] … is certain." She said "that's really out of our [psychologists'] realm of scientific certainty. We can't do it that well." And she noted that both reports "look like they were written for defense's viewpoint." At a retrial, the State would call Dr. Bailey-Smith as a witness, and her testimony would seriously undermine the opinions of Dr. Lisak and Dr. Dudley.

This picture of a hypothetical retrial shows that Petitioner did not overcome with clear and convincing evidence the presumption of correctness that applies to the Supreme Court of Georgia's findings of fact. *See* 28 U.S.C. § 2254(e)(1). It also shows that the Supreme Court of Georgia did not unreasonably apply *Strickland* in finding that Petitioner could not show *Strickland* prejudice. And finally, the picture supports our holding that the

District Court erred by disregarding the Supreme Court of Georgia's analysis of the prejudice issue and by deciding it *de novo*.

2.

Petitioner cross-appeals the District Court's rejection of his Shackles Claim. Recall, before Petitioner took the stand during the penalty phase, the State raised the shackles issue. *Whatley*, 509 S.E.2d at 52. Trial Counsel didn't object and simply said, "Well, he's convicted now." *Id.* (alteration omitted). Petitioner then testified, which included a "physical demonstration of his version of events," with visible shackles. *Whatley*, 668 S.E.2d at 663.

On direct appeal, Petitioner raised a *substantive* shackling claim, but the Supreme Court of Georgia rejected it under the invited error doctrine. *Whatley*, 509 S.E.2d at 52. Doing so, the Court really treated the substantive shackling claim as procedurally defaulted; that is, it denied the claim because it was not raised and rejected in the trial court. Petitioner agrees that the Court treated the substantive claim as procedurally defaulted.

Unable to bring the procedurally defaulted substantive claim on collateral attack,[56] Petitioner

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[56] Under Georgia law, "a failure to make timely objection to *any* alleged [trial court] error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus." *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985). But "an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for

brought an *ineffective assistance of counsel* claim instead. Before the Supreme Court of Georgia again, Petitioner argued that Trial Counsel performed deficiently by failing to object to the shackles. On *Strickland*'s prejudice prong, Petitioner argued that "because shackling is 'inherently prejudicial,' by definition, [he] was prejudiced by [Trial] [C]ounsel's failure to object." To show that shackling is "inherently prejudicial," he cited *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005), and *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.) (*per curiam*), *opinion withdrawn in part on denial of reh'g*, 833 F.2d 250 (11th Cir. 1987). Both of these cases say that shackling a defendant without a justified state interest violates a criminal defendant's due process rights under the Fourteenth Amendment. *See Deck*, 544 U.S. at 629, 125 S. Ct. at 2012; *Elledge*, 823 F.2d at 1450–52.[57] And if certain conditions are met, these cases say that courts—on direct appeal—should presume the defendant was prejudiced by the unconstitutional shackling. *See Deck*, 544 U.S. at 635, 125 S. Ct. at 2015; *Elledge*, 823 F.2d at 1450–

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failure to object or to pursue on appeal *and* a showing of actual prejudice to the accused." *Id.* Here, Petitioner has never argued that he can show cause and prejudice to excuse the procedural bar.

[57] The defendants in *Deck* and *Elledge* would have been unable to raise a Sixth Amendment ineffective assistance of counsel claim on collateral attack because their trial counsel objected to the shackles in both cases. *See Deck*, 544 U.S. at 625, 125 S. Ct. at 2010; *Elledge*, 823 F.2d at 1450. They appealed on the ground that the trial courts' overruling their objections violated the Fifth and Fourteenth Amendments. *See Deck*, 544 U.S. at 625–28, 125 S. Ct. at 2010–11; *Elledge*, 823 F.2d at 1442.

52. Petitioner concluded his argument with a hypothetical: "Had [Trial] [C]ounsel made appropriate objections …, [Petitioner] would have been tried without the unconstitutional prejudice of being seen in shackles or had his sentence reversed [on direct appeal] as a result of being tried while in shackles."

The Supreme Court of Georgia rejected this claim. *See Whatley*, 668 S.E.2d at 663. It noted that a presumption of prejudice would apply if Petitioner's claim were on direct appeal. *See id.* ("On direct appeal where unconstitutional shackling has occurred, there is a presumption of harm that can be overcome only upon a showing by the State that the shackling was harmless beyond a reasonable doubt."). But it refused to apply the presumption because Petitioner's shackling claim was based on ineffective assistance of counsel (not due process), and it was brought on collateral attack (not direct appeal). *See id.* ("However, where, as here, the issue is the ineffective assistance of trial counsel in failing to object to such shackling, the petitioner is entitled to relief only if he or she can show that there is a reasonable probability that the shackling affected the outcome of the trial."). That is, the Court held that Fourteenth Amendment due process cases did not apply to Petitioner's Sixth Amendment ineffective assistance claim. So, it applied *Strickland*'s actual prejudice standard and held there was no reasonable probability that Trial Counsel's failure to object affected the sentence. *See id.*

Petitioner argues that the due process cases, and the presumption of prejudice they bring with them, do apply to his ineffective assistance of counsel claim. And he says the Supreme Court of Georgia, and the District Court in reviewing that Court's decision, erred by refusing to consider the outcome of his hypothetical direct appeal.[58]

We pause briefly to consider exactly what Petitioner is asking us to do. He is asking us to consider what would have happened if Trial Counsel had objected. And he is asking us to assume that the trial court botched the objection, either by overruling it without a hearing or by overruling it after holding a hearing and erroneously finding that the state met its burden under *Elledge*. Then, Petitioner says, imagine that Trial Counsel raised the *substantive* shackling claim on direct appeal. Of course, that could never happen in this case because the substantive shackling claim is procedurally barred. But Petitioner pushes forward and says, finally, we should assume that the Supreme Court of Georgia applied *Elledge* and *Deck*, that it presumed prejudice, and that it vacated his sentence—all based on the procedurally defaulted substantive shackling claim.

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[58] When we considered the Mitigation Claim, we focused on how the District Court resolved the claim. We did so to explain why the Court erred. Because we find no error with the District Court's decision on the Shackles Claim, and because we review the claim *de novo*, we do not focus on the District Court's decision.

The question before us is whether Petitioner can borrow the presumed prejudice that would apply on direct appeal—a direct appeal that would never happen because the substantive claim is procedurally defaulted—to show actual prejudice under *Strickland*. The answer is obvious. Under Georgia law, a petitioner cannot rely on the legal standard that would have applied on direct appeal (here, presumed prejudice)—*if only* the claim weren't procedurally defaulted—to show ineffective assistance of counsel on collateral attack (that is, actual *Strickland* prejudice).[59] Georgia case law explains this.

In *Seabolt v. Hall*, the defendant was convicted of murder after a jury trial. 737 S.E.2d 314, 315 (Ga. 2013). At the trial, a witness was allowed to testify in chambers, and only the judge and the lawyers were present. *Id.* at 316. The testimony was transmitted live to the jury through television. *Id.* The defendant's lawyer did not object on the ground that defendant had a constitutional right to confront the witness, and the defendant did not raise the issue on direct appeal. *Id.* The defendant then filed a habeas petition and argued that trial counsel was ineffective in failing to object and by failing to raise the issue on direct appeal. *Id.* "Rather than decide [the defendant's] claim as it was raised [on collateral attack], the [state] habeas court first analyzed the case as if it were a direct appeal" and applied "a

[59] At least not without arguing cause and prejudice to excuse the procedural default. Petitioner does not make that argument before us.

presumption of prejudice." *Id*. The Supreme Court of Georgia reversed. *Id*. at 318. Even though prejudice would have been presumed on direct appeal, the Court noted, the defendant had to show *actual* prejudice because the error was raised in the context of an ineffective assistance of counsel claim. *See id*. at 317. Nor did the defendant argue that she could show cause and prejudice to excuse the procedural default of the substantive claim. *Id*. at 737.[60]

Hall directly controls. Like the defendant in *Hall*, Petitioner's substantive claim is procedurally defaulted. And like the defendant in *Hall*, Petitioner says the court hearing his collateral attack should treat the claim as though it were raised on direct appeal. But Georgia law bars this. Petitioner must show actual prejudice—as *Strickland* requires—to succeed on his ineffective assistance claim. Or he must show cause and prejudice to overcome the procedural bar on the substantive claim. He does not make this argument before us.[61]

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[60] Even outside the ineffective assistance of counsel context, the Supreme Court of Georgia has made clear that "a convicted defendant seeking to overcome a procedural bar is not entitled to the benefit of a presumption of prejudice that would otherwise apply." *Turpin v. Todd*, 493 S.E.2d 900, 907 (Ga. 1997). Instead, the defendant must show actual prejudice to overcome the procedural bar. *Id*. at 908–09.

[61] Nor would his burden be any easier if he did. To excuse procedural default, a petitioner must show *actual* prejudice, a showing that the error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin*, 493 S.E.2d at 907 (quoting

We must respect Georgia's procedural law. *Mincey v. Head*, 206 F.3d 1106, 1135 (11th Cir. 2000) ("It is well-settled that federal habeas courts may not consider claims that have been defaulted in state court pursuant to an adequate and independent state procedural rule, unless the petitioner can show 'cause' for the default and resulting 'prejudice,' or 'a fundamental miscarriage of justice.'"). And we cannot breathe life into Petitioner's defaulted claim—tossing Georgia procedural law aside—by treating his collateral attack as a direct appeal.

Indeed, to apply a presumption of prejudice from a procedurally defaulted claim would have courts treating collateral review the same as direct review. *See Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006) ("To hold that the presumption of prejudice applies not only when properly preserved structural [trial court] errors are raised on appeal but also when related ineffective assistance claims are raised in a collateral proceeding would diminish the difference between direct and collateral review."). In turn, "Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural [trial court] error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed." *Id*. So, it's hardly surprising that Georgia procedural law prohibits a petitioner from relying on a substantive

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United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1595–96 (1982)).

standard that would apply—if only the claim weren't defaulted—to then show prejudice under *Strickland*.

After all, "Consider the farce that would be created if trial counsel, in a case such as [this], could for strategic reasons agree to the challenged arrangement [here, shackles] and then, if the strategy failed, have the client's conviction set aside on appeal." *Hall v. Warden*, 686 F. App'x 671, 690 (11th Cir. 2017) (Tjoflat, J., dissenting). This respect for state procedural law has no doubt driven the outcome in other cases where courts have said a petitioner cannot borrow the legal standard from one context and apply it in another. The borrowing is prohibited because it borrows from a procedurally defaulted claim. *See*, *e.g.*, *Premo v. Moore*, 562 U.S. 115, 129–30, 131 S. Ct. 733, 744 (2011) (noting that the state court's decision that the petitioner failed to show *Strickland* prejudice could not have been "contrary to [*Arizona v.*] *Fulminante*, [499 U.S. 279, 111 S. Ct. 1246 (1991)], for *Fulminante* says nothing about prejudice for *Strickland* purposes"); *Jones v. Secretary*, 834 F.3d 1299, 1321 (11th Cir. 2016) ("[W]hile *Deck* altered the burden of proof in a substantive shackling claim brought under the Due Process Clause, it did not affect the petitioner's burden to prove actual prejudice when raised in an ineffective assistance of counsel claim on collateral review…." (citing *Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1313–14 (11th Cir. 2005))).

Put simply, Petitioner cannot borrow presumed prejudice from a hypothetical direct appeal—that would never happen because the substantive

shackles claim is procedurally defaulted—and use it to show actual prejudice under *Strickland*.[62] Doing so would violate Georgia's procedural laws and, for that matter, common sense.

So, Petitioner must show actual prejudice, as *Strickland* requires: "a reasonable probability that, but for his trial counsel's failure to object to [the] shackling, the result of his sentencing would have been different." *Jones*, 834 F.3d at 1321 (alteration

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[62] The Dissent faults us (and the Georgia Supreme Court) for distinguishing *Deck*. It says that we distinguish *Deck* (and the other due process cases) because *Deck* "involved a due process challenge on direct appeal and not an ineffective assistance of counsel claim." Dissenting Op. at 9. But, the Dissent argues, "This distinction … is one without a difference." *Id*. Two quick points on this. First, the Dissent correctly explains the reason we distinguished *Deck*. But the Dissent doesn't explain the analytical point we made by distinguishing it. We distinguished *Deck* to explain why the presumption of prejudice that comes with *Deck* does not apply in this context. That is, we drove home the point that a presumption of prejudice that applies to a properly raised substantive claim does not apply to an ineffective assistance of counsel claim that's based on a procedurally defaulted substantive claim. We did not distinguish *Deck* as a way of discounting the effect that shackling has on a jury. Second, by calling the difference in procedural posture a distinction without a difference, the Dissent all but borrows presumed prejudice that would apply on direct appeal to show actual prejudice under Strickland. For the reasons we've explained, the law does not allow this sort of borrowing. The Dissent does not go so far as to say that it's borrowing the prejudice, but that's the practical effect of its analysis. It thumbs the scale so far in favor of prejudice, based on the "inherently prejudicial effect" of shackling, *see id*. at 8-10, that it's difficult to imagine a situation when actual Strickland prejudice wouldn't be shown.

in original) (quoting *Marquard*, 429 F.3d at 1313). On top of that, he must show that the Supreme Court of Georgia's decision on actual prejudice is unreasonable. He cannot. The Supreme Court of Georgia reasonably concluded that the shackles had little effect on the jury in this case. The evidence showed that Petitioner had a violent criminal history. He robbed a man at gunpoint and assaulted a woman in public. He had been given many chances to turn things around, but he never did. As for the murder in this case, the State presented evidence that showed Petitioner tried to kill two people—he just happened to miss one of them—presumably trying to leave no witnesses. He fired both shots at close range. Put simply, the shackles were trivial in light of evidence before the jury.[63]

Again, we give state court decisions "the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 360 (2002) (*per curiam*), and we must respect the state court's decision "so long as 'fairminded jurists could disagree' on the correctness of" it. Richter, 562 U.S. at 101, 131 S. Ct. at 786 (quoting Yarborough, 541 U.S. at 664, 124 S. Ct. at 2149). Petitioner has the burden of overcoming this deferential standard, *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398 (2011), and he has

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[63] We are mindful that deciding Strickland prejudice is a fact-intensive question. That said, we think it is telling that the Dissent cites just two out-of-Circuit cases that (1) found Strickland prejudice based on shackling and (2) granted federal habeas relief based on that prejudice. And one of those cases doesn't even mention the role the AEDPA deference plays in federal review of state habeas proceedings.

not done that here. The District Court's decision on this claim is affirmed.

VII.

The judgment of the District Court is

REVERSED IN PART AND AFFIRMED IN PART.

JORDAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion with one exception, and that exception is Mr. Whatley's ineffective assistance of counsel claim related to shackling. On that claim, I respectfully dissent.

At the sentencing phase of his capital trial, Mr. Whatley was called by his counsel to testify. He stood up from the defense table and shuffled to the witness stand, revealing to the jury that he was restrained by leg shackles. The shackles had not been visible to the jury during the guilt phase of the trial because a curtain had been draped over the defense table to shield them from view. The visible shackles proved to be only the beginning of the problem.

During cross-examination, the prosecutor asked Mr. Whatley to come down into the well of the courtroom. Mr. Whatley complied, with the shackles around his ankles yanking his legs together as he moved. The prosecutor then handed Mr. Whatley a toy gun and said, "Now, this is not the type of gun you had that day. I hope you'll understand why I don't want to give you a real gun." Mr. Whatley grasped the prop as the jury looked on. The prosecutor then instructed Mr. Whatley to re-enact his crime (the fatal shooting of a store owner during an armed robbery). As the demonstration unfolded, Mr. Whatley was repeatedly told to point the gun at the prosecutor, who was simultaneously directing the scene and playing the role of the murder victim.

The next day, the jurors who observed this demonstration were asked to decide whether Mr. Whatley should be sentenced to death. In his closing argument, the prosecutor—with the image of Mr. Whatley re-enacting the murder fresh in everyone's mind—harped on Mr. Whatley's future dangerousness and urged the jury to impose the death penalty. The jury did as he requested, sentencing Mr. Whatley to death.

I part company with the majority on the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). In my view, the Georgia Supreme Court's ruling—that the sight of Mr. Whatley re-enacting the murder while shackled was not prejudicial—constituted an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

The Georgia Supreme Court erred in three critical ways. First, it failed to conduct the prejudice inquiry with proper regard for the inherent harm that results from visible shackling. Second, it did not take into account the fact that Mr. Whatley wore the shackles not just while walking to the witness stand, but while re-enacting the murder in front of the jury with the prosecutor playing director and victim. And third, it failed to analyze how the shackles may have affected the jurors' views regarding Mr. Whatley's alleged propensity for future violence, one of the major themes of the prosecutor's closing argument.

I

The Supreme Court has long considered the use of visible physical restraints (like handcuffs or leg irons) on criminal defendants to be an inherently prejudicial practice. *See Deck v. Missouri*, 544 U.S. 622, 626–29 (2005); *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986); *Illinois v. Allen*, 397 U.S. 337, 343–44 (1970). Because visible restraints inevitably imply that a defendant is a dangerous person, they are justified only by a particularized and essential state interest and should only be used as "a last resort." *Allen*, 397 U.S. at 344. For decades, we have similarly viewed the risk of prejudice posed by visible restraints to be *so serious* that due process secures a defendant the right to contest their necessity. *See Elledge v. Dugger*, 823 F.2d 1439, 1451–52 (11th Cir.) (defendant restrained at sentencing phase), *opinion withdrawn in part*, 833 F.2d 250 (11th Cir. 1987); *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223–24 (11th Cir. 1983) (defendant restrained at guilt phase). The Georgia Supreme Court has come to the same conclusion. *See Allen v. State*, 221 S.E.2d 405, 409 (Ga. 1975) (explaining that restraints should not be used on a criminal defendant unless the trial court determines that special circumstances warrant added security precautions).

During the guilt phase of a trial, the use of visible restraints seriously jeopardizes a defendant's right to a presumption of innocence. At the sentencing phase, capital defendants are no longer presumed innocent, but the Supreme Court still

recognizes that the prejudicial effect of visible restraints is substantial. *See Deck*, 544 U.S. at 633. One reason is that "the defendant's life turns on the same jury's answer to the question of *future* dangerousness." *Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994) (emphasis in original). The use of shackles "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community…." *Deck*, 544 U.S. at 633. The Supreme Court has explained, therefore, that "[t]he use of shackles can be a thumb on death's side of the scale." *Id*.

In this case, the prosecutor made Mr. Whatley's propensity for future violence a major theme in his argument for the death penalty. During closing argument, the prosecutor warned the jury that "Frederick Whatley is going to kill somebody else unless you execute him. He is going to do that just as sure as I'm standing here talking to you." This point was reiterated many times over. The jurors were told that Mr. Whatley was "dangerous," and that prison would "only make him smarter and meaner." They were twice asked to consider whether Mr. Whatley would "kill a guard if that guard [stood] between him and freedom." To make sure there were no doubts, the prosecutor answered his own rhetorical question for the jurors: "He will be a threat until the day he is executed."

II

To prove ineffective assistance of counsel, a defendant must show that his counsel's performance fell below minimum professional standards, and that

there is a reasonable probability that counsel's error affected the outcome of the proceeding. *See Strickland*, 466 U.S. at 688, 694. To establish a reasonable probability, Mr. Whatley does not need to show that, but for his counsel's errors, a different outcome was more likely than not. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000) (explaining that a defendant does not need to establish *Strickland* prejudice by a preponderance of the evidence). Instead, he need only establish "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Because Georgia requires a unanimous jury to impose a death sentence, we conduct the prejudice inquiry by asking whether there is a reasonable probability that one member of the jury would have returned a life sentence rather than a death sentence. *See Jones v. GDCP Warden*, 753 F.3d 1171, 1184 (11th Cir. 2014).

The Georgia Supreme Court assumed that trial counsel's failure to object to the visible shacking was deficient performance, but it concluded that Mr. Whatley had not established prejudice under *Strickland*: "In view of the balance of the evidence presented at his trial, we conclude as a matter of law that [Mr.] Whatley cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence." *Whatley v. Terry*, 668 S.E.2d 651, 663 (Ga. 2008).

Under 28 U.S.C. § 2254(d)(1), we must defer to the Georgia Supreme Court's decision unless it "was contrary to or involved an unreasonable application

of, clearly established Federal law, as determined by the Supreme Court of the United States." A state court decision involves an unreasonable application of federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case…." *Williams*, 529 U.S. at 407–08. I believe that the Georgia Supreme Court's conclusion regarding prejudice involved an unreasonable application of *Strickland*. I am mindful that a state court decision is not unreasonable just because a federal court would have reached a different outcome, and recognize that the § 2254(d)(1) showing is a "difficult" one. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). A state court's application of federal law must be "objectively unreasonable" to warrant habeas relief. *See Williams*, 529 U.S. at 409. But even giving the Georgia Supreme Court's prejudice determination the deference it is due under AEDPA, I believe Mr. Whatley is entitled to habeas relief.

A

As explained above, the *Strickland* prejudice inquiry requires that we ask whether counsel's error (in reasonable probability terms) affected the outcome. Because the relevant error is counsel's failure to object to the visible shackling at sentencing while Mr. Whatley re-enacted the murder, we should first ask whether the objection would have been sustained. If a timely objection would have been properly overruled, then Mr. Whatley cannot show prejudice.

A few considerations lead me to conclude that the objection would have been sustained. First, it was the prosecutor who expressed a concern about the restraints at sentencing and asked the trial court whether measures should be taken to prevent the jurors from seeing Mr. Whatley in shackles. The prosecutor told the trial court that he "was just wondering about the chains." The only response of Mr. Whatley's counsel was, "Well, he's convicted now." This exchange reveals that the prosecutor would not have opposed an objection if Mr. Whatley's counsel had raised one (and would not have requested that Mr. Whatley be in shackles, particularly given that he was planning on having him re-enact the murder in front of the jury). Second, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 694. As the Georgia Supreme Court noted, the standards governing shackling at the time, even at a sentencing hearing, strongly suggested that it was unconstitutional to shackle capital defendants in front of the jury without a showing that the particular defendant presented a security risk. *See*, *e.g.*, *Moon v. State*, 375 S.E.2d 442, 459 (Ga. 1988) (citing *Elledge*, 823 F.2d at 1451). Third, the prosecutor never presented any evidence that warranted such a security measure. Proceeding on the assumption that the trial court was aware of the applicable authority at the time of

the sentencing hearing, as *Strickland* instructs, it is reasonably probable that it would have taken measures to shield Mr. Whatley's shackles from the jury's view. For example, it could have had Mr. Whatley walk to the witness box when the jury was out of the courtroom and could have had him re-enact the crime from the witness box, where his shackles were not visible.

The Georgia Supreme Court did not base its prejudice ruling on whether or not the objection would have been successful. That is to say, it did not hold that the failure to object was not prejudicial because the trial court would have overruled such an objection. Rather, it held that, "in view of the balance of evidence presented at trial," the shackles did not affect the outcome. *Whatley*, 668 S.E.2d at 663. That analysis was deficient.

To decide whether a defendant was prejudiced by ineffective assistance of counsel at sentencing, we typically correct for counsel's error and "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). But in the shackling context, the Supreme Court has explained that the sight of visible restraints "inevitably undermines the jury's ability to weigh accurately all relevant considerations— considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death." *Deck*, 544 U.S. at 633. *See also Elledge*, 823 F.2d at 1450 ("[A] jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior

which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision."). The Georgia Supreme Court did not take this inherently prejudicial effect into account. Nor did it factor in the re-enactment of the murder in front of the jury or the prosecutor's dogged focus on future dangerousness. *See Whatley*, 668 S.E.2d at 663.

The majority, like the Georgia Supreme Court, distinguishes the Supreme Court's opinion in *Deck* because that case involved a due process challenge on direct appeal and not an ineffective assistance of counsel claim. This distinction, however, is one without a difference. The question for us is whether Mr. Whatley was prejudiced by being shackled during sentencing in front of the jury while he re-enacted his crime with the prosecutor (the avenging angel who later asked for death) playing the victim.

Deck speaks directly to that issue: "The appearance of the offender during the penalty phase in shackles [ ] almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community." *Deck*, 544 U.S. at 633. We have recognized that reality as well. *See United States v. Durham*, 287 F.3d 1297, 1305 (11th Cir. 2002) ("One of the most prominent concerns about the use of most methods of restraint comes from the possibility of prejudice to the defendant if those restraints are visible to the jury."); *Elledge*, 823 F.2d at 1451 (stating that "[w]hen shackling occurs, it must be subjected to close judicial scrutiny," and a court must consider

"whether less restrictive, less prejudicial methods of restraint were considered or could have been employed") (citations omitted). *See also Stephenson v. Neal*, 865 F.3d 956, 959 (7th Cir. 2017) ("The possibility that the defendant's having to wear [a visible] stun belt—for no reason, given that he had no history of acting up in a courtroom—contaminated the penalty phase of the trial persuades us to reverse the district court's denial of Stephenson's petition for habeas corpus [claiming ineffective assistance of counsel.]"); *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002) (granting habeas relief under § 2254(d) on an ineffective assistance of counsel claim because "the extreme inherent prejudice associated with shackling," along with "the considerable mitigating evidence," established a reasonable probability that the outcome would have been different if counsel had not failed to object to shackling the defendant at sentencing).

The majority points out that I have only been able to cite two cases where a court found *Strickland* prejudice due to shackling. *See* Majority Op. at 77 n.63. I concede that this case presents a somewhat unique basis for an ineffective assistance claim—where defense counsel neglected to object to his client being shackled while he was forced to re-enact the murder in front of the jury and where the prosecutor focused on future dangerousness to justify the death penalty. I would point out, however, that the majority does not cite a single case where a court concluded that the defendant was not prejudiced under comparable circumstances. It instead relies on two cases where there was no

evidence that the jury ever saw the defendant in shackles. *See Jones v. Secretary*, 834 F.3d 1299, 1319 (11th Cir. 2016); *Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1309 (11th Cir. 2005).

The majority claims not to "discount[ ] the effect that shacking has on a jury," and distinguishes *Deck* because Mr. Whatley did not raise a substantive shackling claim on direct appeal. *See* Majority Op. at 76 n.62. Yet the majority sidesteps the language in *Deck*—and in *Elledge*—describing the inherent prejudice that shacking causes in this context. It is telling that the majority devotes several pages to explaining that we do not presume prejudice when the defendant challenges his shackling through an ineffective assistance claim, but devotes only one paragraph to whether there is a reasonable probability that the shackling here affected the outcome at Mr. Whatley's capital sentencing hearing.

B

Mr. Whatley's crime, like all murders, was a terrible offense which deserved severe punishment. But the question the jury faced was whether that punishment should be death—the ultimate sanction imposed by society. Although the murder was committed during an armed robbery, Mr. Whatley's criminal past was relatively minor, and he did not have a significant history of violence. He had prior convictions for forgery and simple assault, and when he was a teenager, he was convicted of a robbery in Washington D.C. for stealing one dollar.

At sentencing, the prosecutor presented evidence regarding Mr. Whatley's alleged lack of remorse. The centerpiece of the state's lack-of-remorse argument was that Mr. Whatley had expressed concern over missing the Super Bowl because he had to be in court. In response, defense counsel called mitigation witnesses to testify on Mr. Whatley's behalf. They explained that Mr. Whatley had been abandoned by his mother, that he had redeeming qualities, and that he was deserving of forgiveness.

The jury found two statutory aggravating circumstances: (1) the crime was committed while Mr. Whatley was engaged in the commission of an armed robbery; and (2) Mr. Whatley committed the crime after escaping from a place of lawful confinement (Mr. Whatley had fled from a halfway house). These statutory aggravators, while serious, are not the worst of the worst. I cannot agree with the majority that the aggravating circumstances in this case were so overwhelming that they rendered "trivial" the sight of Mr. Whatley re-enacting his crime while in chains. This is especially true given that the prosecutor repeatedly argued that Mr. Whatley's future dangerousness demanded the death penalty.

I might agree with my colleagues had the shackles merely been visible to the jury when Mr. Whatley walked to the witness box. Or if the trial court had given a curative instruction to the jury about the restraints. Or if Mr. Whatley was not forced to re-enact the murder in front of the jury while the prosecutor played the role of the victim. Or

if the prosecutor had not explicitly made Mr. Whatley's future dangerousness a key theme in favor of his request for death. But prejudice under *Strickland* requires a holistic inquiry, and here the confluence of circumstances leaves me no doubt that there was prejudice.

In determining whether Mr. Whatley was prejudiced, the majority does not consider the circumstances under which the jury saw Mr. Whatley in shackles. That context, I think, is essential. The "concept of prejudice is defined in different ways depending on the context in which it appears," and "when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on the 'fundamental fairness of the proceeding.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Starting with the recognition that visible shackling is "inherently prejudicial," *see Holbrook v. Flynn*, 475 U.S. 560, 568 (1986), the degree of prejudice mounts as one considers how visible the shackles were and how Mr. Whatley was forced to wear them while he re-enacted the murder. *See Durham*, 287 F.3d at 1305 (noting that, compared to a stun belt, "handcuffs … are not so easily concealed, and the possibility of prejudice is more obvious in such cases"). When considered together with the prosecutor's focus on future dangerousness during closing argument, the prejudice in *Strickland* terms is undeniable.

III

The Georgia Supreme Court committed three errors which rendered its prejudice determination

unreasonable under § 2254(d)(1). First, it did not take into account the inherently prejudicial effect of shackling in a capital case. Second, it did not consider the fact that Mr. Whatley had to re-enact the murder in front of the jury in shackles with the prosecutor playing the victim. Third, it failed to account for the prosecutor's focus on future dangerousness in asking for the death penalty. It is "reasonably probable" that at least one juror's decision was tipped in favor of death due to counsel's failure to object, and that sufficiently undermines confidence in the outcome. I would grant Mr. Whatley partial habeas relief and require the state to provide him a new sentencing hearing.

APPENDIX B

Case 3:09-cv-00074-WSD

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

FREDRICK R. WHATLEY,

Petitioner,

v.

STEPHEN UPTON, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

OPINION AND ORDER

This matter is before the Court on Fredrick R. Whatley's ("Petitioner") Motion to Alter and Amend Judgment [58] ("Motion to Alter").

I. BACKGROUND

On June 4, 1996, a grand jury in the Superior Court of Spalding County indicted Petitioner for malice murder, felony murder, aggravated assault, armed robbery, motor vehicle hijacking, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. (Resp't's Ex. 1A at 9-11). The charges were tried before a jury

in Spalding County, which, on January 16, 1997, found Petitioner guilty of malice murder and the other offenses with which he was charged. Petitioner was sentenced to death.[1] *Whatley*, 509 S.E.2d at 48 n.1. On December 4, 1998, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence. *Id*. at 53. Petitioner's application for a writ of certiorari to the United States Supreme Court was denied. *Whatley v. Georgia*, 526 U.S. 1101, *reh'g denied*, 527 U.S. 1016 (1999).

On August 6, 1999, Petitioner filed, in the Butts County Superior Court, his state petition for writ of habeas corpus. *Whatley*, 668 S.E.2d at 653. On December 8, 2005, closing arguments on the state habeas petition were heard in the Butts County Superior Court, and on November 29, 2006, an order was entered denying Petitioner's habeas petition on the grounds that several of Petitioner's claims were procedurally barred and that Petitioner was not otherwise entitled to relief. *Whatley*, 668 S.E.2d at 653; (Resp't's Ex. 64 at 1, 3-4; Resp't's Ex. 71 at 63). On October 6, 2008, the Supreme Court of Georgia affirmed, *Whatley*, 668 S.E.2d at 664, and on May 18, 2009, the United States Supreme Court denied Petitioner's application for writ of certiorari, *Whatley v. Terry*, 129 S. Ct. 2409 (2009).

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[1] In addition to his death sentence, Petitioner also was sentenced to serve consecutive terms of life imprisonment for armed robbery, two twenty-year terms for the aggravated assault, a twenty-year term for motor vehicle hijacking, and a five-year term for possessing a firearm during the commission of a crime.

On June 30, 2009, Petitioner filed his Federal Petition for Writ of Habeas Corpus in this Court, asserting eighteen claims. Of these, seventeen were dismissed as either procedurally barred, abandoned, or that Petitioner was not otherwise entitled to relief. On April 9, 2013, relief was granted to Petitioner on his claim of ineffective assistance of counsel based on inadequate investigation (Claim IX, Subpart A). (Order of Apr. 9, 2013, at 82.)

On May 7, 2013, pursuant to Federal Rule of Civil Procedure 59(e), Petitioner moved the Court to reconsider its order with respect to Claim IX, Subpart C, in which Petitioner asserted a claim for ineffective assistance of counsel based on his trial attorney's failure to object to Petitioner appearing before the jury in shackles during the penalty phase of his trial.

During the penalty phase, Petitioner was called, while in shackles, to testify and reenact the murder before the jury. In a bench conference prior to Petitioner taking the stand, the prosecutor asked whether the jury should leave the courtroom before Petitioner took the stand so that they would not see Petitioner's shackles. (Resp't's Ex. 13A at 1412). Petitioner's counsel responded, "Well, he's convicted now." *Id*. Thus, without any objection by his counsel, the jury watched Petitioner take the stand and testify while shackled.

II. DISCUSSION

A. Standard for Granting a Motion to Amend Judgment Pursuant to Rule 59(e)

A motion under Rule 59(e), which permits a party to move for relief from a judgment, is granted only under limited circumstances. To alter or amend a judgment, the moving party must show either "an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *United States v. Battle*, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003). The Rule 59(e) movant "must demonstrate why the court should reconsider its decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id*. (internal quotations omitted). The decision whether to grant a Rule 59(e) motion is "committed to the sound discretion of the district judge." *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). "The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory [or] to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." *Mincey v. Head*, 206 F.3d 1106, 1137 n. 69 (11th Cir. 2000).

B. Analysis

Petitioner contends that this Court committed clear error by denying him relief on one of his claims for ineffective assistance of counsel. In evaluating a habeas petition under 28 U.S.C. § 2254, a district court evaluates whether a state court's adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *See also Williams v. Taylor*, 529 U.S. 362, 379 (2000). "The decision of a state court is not 'contrary to' federal law 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.'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1325 (11th Cir. 2013) (en banc) (quoting *Cummings v. Sec'y, Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009)). In determining whether federal law is "settled" or "clearly established," the court must look at the status of the law "at the time the state conviction became final." *In re Perez*, 682 F.3d 930, 933 (11th Cir. 2012) (quoting *Williams*, 529 U.S. at 380). "The question under [Section 2254(d)(1)] is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable—a substantially higher threshold." Evans, 703 F.3d at 1325 (quoting *Cummings*, 588 F.3d at 1355). This standard "was intended to be, and is, a difficult one." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)).

This Court determined, and Petitioner agrees, that the law applicable to a claim for ineffective assistance of counsel is set out in *Strickland v. Washington*, 466 U.S. 688 (1984). *Strickland* provides a two-part test for demonstrating ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

Petitioner argues that this Court erred in evaluating whether the Georgia Supreme Court reasonably applied *Strickland*. The Georgia Supreme Court considered Petitioner's claim that competent counsel would have objected to presenting Petitioner to the jury in shackles during the penalty phase of trial, and concluded that Petitioner could not, as a matter of law, demonstrate that he had been prejudiced. The opinion of Georgia Supreme Court includes the following discussion:

> Whatley argues that his trial counsel rendered ineffective assistance by failing to object to his being placed in visible shackles during the

sentencing phase, including during his physical demonstration of his version of events for the jury. The Supreme Court of the United States decided in 2005, well after Whatley's trial and direct appeal, that visibly shackling a defendant during the sentencing phase is unconstitutional unless the record shows "'an essential state interest'-such as the interest in courtroom security-specific to the defendant on trial." The Warden argues that counsel should not be regarded as having performed deficiently by failing to object to the shackling, because the practice had not yet been established as unconstitutional. However, at the time of Whatley's trial, this Court had already strongly suggested in dictum that it was unconstitutional to place visible shackles on a death penalty defendant during the sentencing phase without a showing of particular need. We therefore assume, at least for the purpose of this discussion, that trial counsel performed deficiently in failing to recognize the legal basis for an objection to visible shackling in the sentencing phase.

On direct appeal where unconstitutional shackling has occurred, there is a presumption of harm that can be overcome only upon a showing by the State that the shackling was harmless beyond a reasonable doubt. However, where, as here, the issue is the ineffective assistance of trial counsel in failing to object to such shackling, the petitioner is entitled to relief only if he or she can show that there is a reasonable

> probability that the shackling affected the outcome of the trial. In view of the balance of the evidence presented at his trial, we conclude as a matter of law that Whatley cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence.

Whatley, 668 S.E.2d at 663 (footnotes omitted).[2]

Petitioner maintains that his counsel's failure to object to his shackling must be considered as evidence of counsel's incompetence, because his decision not to object to Petitioner's shackles was not a reasonable trial strategy. It is not necessary to consider this trial strategy question here. The Georgia Supreme Court assumed that trial counsel's performance was deficient. The Georgia Supreme Court based its decision only on the second *Strickland* prong, whether Petitioner was prejudiced by counsel's failure to object to Petitioner's visible shackles. The Supreme Court found that Petitioner had not been prejudiced. *Id*.[3] In its April 9, 2013,

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[2] The United States Supreme Court held in *Deck v. Missouri*, 544 U.S. 622, (2005) that shackling at the penalty phase of a trial was unconstitutional. This rule, however, does not apply retroactively to Petitioner's conviction in 1997. *See Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1312 (11th Cir. 2005) (holding that *Deck* did not apply retroactively to a 1993 conviction).

[3] The Supreme Court of Georgia also "assume[d], at least for the purpose of this discussion," that Petitioner's lawyer's conduct, when evaluated under the first *Strickland* prong, was deficient. *Id*.

Order, this Court held that it was unable to conclude, as a matter of law, that it was unreasonable for the Georgia Supreme Court to find that Petitioner had not been prejudiced by counsel's failure to object. The Court, on the record before it, determined that Petitioner's claim for relief was required to be denied. (Order of Apr. 9, 2013, at 94.) *See Evans*, 703 F.3d at 1325.

In requesting the Court to reconsider this finding in its order, Petitioner argues that the prejudice he suffered is apparent in this case because, had his counsel objected, Petitioner's shackles would have been removed or action taken to prevent their detection, or Petitioner would have preserved the right to challenge his shackling on appeal. Petitioner argues that had this issue been preserved for appeal, his sentence and conviction would have been vacated. Petitioner claims his success on appeal is self-evident because the Georgia Supreme Court, as noted, "had already strongly suggested in dictum that it was unconstitutional to place visible shackles on a death penalty defendant during the sentencing phase without a showing of particular need." *See Whatley*, 668 S.E.2d at 663.

The Court addressed in its April 9, 2013, Order the argument that Petitioner raises in his Motion to Alter. The question is whether Petitioner can demonstrate that, absent shackles, the jury would not have sentenced him to death. *See Strickland*, 466 U.S. at 695 ("When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability

that, absent errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). The Georgia Supreme Court concluded that Petitioner could not make this showing, and Petitioner has not provided this Court with any basis for concluding that this determination is unreasonable. Indeed, as this Court previously found,

> [c]onsidering the evidence that was introduce at trial, the jury's implicit rejection of Whatley's [version of events], the State's case in aggravation during the penalty phase, and that there was some support for a need to protect the jury during the reenactment, the Court is unable to conclude—even if there were unprofessional errors by his counsel—that there is a reasonable probability that Whatley would have received a sentence other than death had Whatley's counsel objected to his being seen in shackles.

(Order of Apr. 9, 2013, at 94.) Petitioner did not demonstrate any error with this analysis, and the Court does not find any now.[4]

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[4] In its April 9, 2013, Order, the Court determined that Petitioner was entitled to habeas relief on his claim of ineffective assistance of counsel based on inadequate investigation (Claim IX, Subpart A). In this Opinion and Order, the Court recognized that Petitioner's counsel also may have conducted himself outside the bounds of professional competence by failing to object to Petitioner's shackling during the sentencing phase of Petitioner's trial. However, the Court

Petitioner has failed to demonstrate either "an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice," *Battle*, 272 F. Supp. 2d at 1357. Petitioner's motion under Rule 59(e) is required to be denied.

III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Fredrick R. Whatley's Motion to Alter or Amend Judgment [58] is **DENIED**.

SO ORDERED this 9th day of October, 2013.

/s/William S. Duffy
WILLIAM S. DUFFY JR.
UNITED STATES DISTRICT JUDGE

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specifically finds that Petitioner's shackling is not an independent basis for habeas relief because Petitioner is unable to show that counsel's failure to object to the shackling affected the jury's decision to impose the death penalty. That is, the Court does not find that the cumulative effect of Petitioner's counsel's errors warrants habeas relief, except as determined in the April 9, 2013, Order.

APPENDIX C

No. 3:09-cv-0074-WSD

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

FREDRICK R. WHATLEY,

Petitioner,

v.

STEPHEN UPTON, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

OPINION AND ORDER

This matter is before the Court on Fredrick R. Whatley's ("Petitioner" or "Whatley") Petition for Writ of Habeas Corpus by a Person in State Custody ("Federal Petition for Writ of Habeas Corpus") [1].

I. BACKGROUND[1]

On June 4, 1996, a grand jury in the Superior Court of Spalding County indicted Petitioner with malice murder, felony murder, aggravated assault,

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[1] Under 28 U.S.C. § 2254(e)(1), "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The Court held in its March 20, 2012, Order that Petitioner was not prevented from diligently developing the factual basis for his claims in the state habeas court, that Petitioner did not suffer a deprivation of due process, and that the determination of factual issues made by the state habeas court shall be presumed to be correct. (Order of Mar. 20, 2012, at 13-14); *See Also Slater v. Sec'y, Dep't of Corr.*, 260 F. App'x 177, 179 (11th Cir. 2007) (district court did not err in denying petitioner's request for evidentiary hearing and applying presumption of correctness to state court's factual findings where petitioner received full and fair evidentiary hearing on his claims in state court). Thus, the facts in this action that are taken from the state habeas court and Georgia Supreme Court findings are presumed to be correct unless they are rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Whatley v. Terry*, 668 S.E.2d 651 (Ga. 2008); *Whatley v. State*, 509 S.E.2d 45 (Ga. 1998); (Resp't's Ex. 71 [14.14]). Having reviewed the record in this action, the Court finds that where the Court does not accept as true a specific fact, a finding based on an interpretation of multiple facts, or a general interpretation of facts by the state courts, Petitioner has rebutted these facts and inferences based on clear and convincing evidence that exists in the record. The Court in this Order also reviews the evidence presented in the state court proceedings to determine if the state court adjudication of the claims resulted in a decision that was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d), (e)(1).

armed robbery, motor vehicle hijacking, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. (Resp't's Ex. 1A at 9-11). These charges were tried before a jury in Spalding County, which, on January 16, 1997, found Petitioner guilty of malice murder and the other offenses with which he was charged. Petitioner was sentenced to death. *Whatley*, 509 S.E.2d at 48 n.1. On December 4, 1998, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence. *Id*. at 53. Petitioner's application for a writ of certiorari to the United States Supreme Court was denied. *Whatley v. Georgia*, 526 U.S. 1101, *reh'g denied*, 527 U.S. 1016 (1999).

On August 6, 1999, Petitioner filed his state petition for writ of habeas corpus ("state habeas petition") in the Butts County Superior Court. *Whatley*, 668 S.E.2d at 653. The petition was amended on April 30, 2001. *Id*.

On July 30, 2002, an evidentiary hearing on the state habeas petition was held at the Georgia Diagnostic and Classification Center. *Id*.; (Resp't's Ex. 39). At the hearing, Petitioner presented affidavits, depositions, documentary evidence, and witness testimony in support of his claims. (Resp't's Exs. 39-43).[2]

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[2] The hearing was held before Fulton County Superior Court Judge Roland W. Barnes. Judge Barnes was murdered in his courtroom on March 11, 2005, by Brian Nichols, and Fulton County Superior Court Judge John S. Langford was assigned to complete Petitioner's state habeas proceeding, including based

On December 8, 2005, closing arguments on the state habeas petition were heard in the Butts County Superior Court, and on November 29, 2006, an order was entered denying Petitioner's habeas petition on the grounds that several of Petitioner's claims were procedurally barred and that Petitioner was not otherwise entitled to relief. *Whatley*, 668 S.E.2d at 653; (Resp't's Ex. 64 at 1, 3-4; Resp't's Ex. 71 at 63). On October 6, 2008, the Supreme Court of Georgia affirmed the denial of Petitioner's request for habeas corpus relief. *Whatley*, 668 S.E.2d at 664. Petitioner's application for writ of certiorari was denied by the United States Supreme Court on May 18, 2009. *Whatley v. Terry*, 129 S. Ct. 2409 (2009).

On June 30, 2009, Petitioner filed his Federal Petition for Writ of Habeas Corpus in this Court. In his Petition, Whatley asserts the following eighteen (18) claims:

> Claim I – The State failed to disclose exculpatory information under the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).
>
> Claims II and III – Petitioner was deprived of an impartial jury through improper juror exclusion and inclusion.
>
> Claim IV – Petitioner's constitutional rights were violated by the introduction of prejudicial and inflammatory evidence at trial.

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on the record of the July 30, 2002, evidentiary hearing over which Judge Barnes presided. (Resp't's Ex. 64 at 1, 3-4).

Claim V – Petitioner's constitutional rights were violated when he was visibly shackled during his trial and sentencing.

Claim VI – Petitioner's constitutional rights were violated because the trial court did not provide him with the necessary assistance of competent and independent mental health experts.

Claim VII – Petitioner's constitutional rights were violated because his trial counsel's overwhelming caseload rendered the adversarial process meaningless under *United States v. Cronic*, 466 U.S. 648 (1984).

Claim VIII – Petitioner's constitutional rights were violated because his trial counsel's overwhelming caseload created an actual conflict of interest between Whatley's rights and the rights of the other indigent criminal defendants represented by his trial counsel.

Claim IX – Petitioner's trial counsel rendered ineffective assistance of counsel before, during, and after his trial because of counsel's:

A – Failure to investigate and prepare evidence in mitigation, and to rebut evidence in aggravation, at Petitioner's sentencing;

B – Mishandling of requests for mental health experts;

C – Failure to object to unwarranted and improper shackling of Petitioner during sentencing;

D – Failure to obtain assistance of a ballistics expert and to move for a ballistics expert;

E – Failure to object to the prosecutor's improper closing argument during sentencing;

F – Failure to move to strike for cause certain prospective jurors;

G – Failure to object to the trial court's improper response to a juror question regarding the possibility of parole; and

H – "Additional areas" of ineffective assistance of counsel.

Claim X – Petitioner was deprived of his right to effective assistance of counsel in the filing of his motion for new trial, and on direct appeal.

Claim XI – Petitioner's constitutional rights were violated when the prosecutor and other law enforcement officials engaged in serious misconduct by secretly paying and threatening a witness in violation of the principles in *Giglio v. United States*.

Claim XII – Petitioner's constitutional rights were violated when the prosecutor engaged in

improper conduct during his closing argument because of the prosecutor's:

> A – Improper argument that Whatley committed other crimes and that his criminal history was more extensive than the evidence showed;
>
> B – Improper "testimony" about conditions in prison;
>
> C – "Other instances of misconduct" during closing argument; and
>
> D – Argument, without evidentiary support, that Whatley would kill again.

Claim XIII – Petitioner's constitutional rights were violated when the trial court erroneously failed to answer the jury's question about parole eligibility.

Claim XIV – Petitioner's constitutional rights were violated when he was required to be represented by an attorney who was known by the courts to be a racist.

Claim XV – Petitioner's death sentence is tainted by racial bias and discrimination of the decision-makers in his case.

Claim XVI – Petitioner's constitutional rights were violated when the trial court failed to inquire into a report from the court-appointed

mental health expert that there were serious concerns about his competency.

Claim XVII – Petitioner was tried while incompetent in violation of his constitutional rights.

Claim XVIII – When the cumulative effect of the errors are considered, Petitioner is entitled to relief.

On November 9, 2009, Stephen Upton, Warden, Georgia Diagnostic and Classification Center ("Respondent") filed his Motion and Brief in Support of Procedural Defenses to Petitioner's Procedurally Defaulted and Unexhausted Claims Raised in his Petition for Writ of Habeas Corpus. On March 29, 2011, the Court issued its Order on Respondent's procedural defenses and concluded that Petitioner's Claims II, IV, VI, XIV, XV, and XVI were procedurally defaulted, without prejudice to Petitioner demonstrating cause and prejudice to excuse the default; that Petitioner's Claim XI was not procedurally defaulted, but only if Petitioner can show cause and prejudice to set aside his procedural default; and, that Petitioner's Claim XVII was not procedurally defaulted. (Order of Mar. 29, 2011, at 17). On May 11, 2011, Petitioner filed his Motion for Evidentiary Hearing [29], which the Court denied on March 20, 2012. (Order of Mar. 20, 2012, at 15).

Twelve claims remain in the habeas proceeding. Petitioner briefed only Claims I, VII, VIII, IX, XI,

XII, and XVIII.[3] In his Brief in Support of his Petition, Petitioner asserts, for the first time, that his federal habeas action should be stayed and held in abeyance in light of Georgia's new lethal injection protocol.

This action arises from Petitioner's conviction in the Superior Court of Spalding County of malice murder, two counts of aggravated assault, armed robbery, motor vehicle hijacking, and possession of a firearm during the commission of a crime. Petitioner was sentenced to death based on his malice murder

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[3] Because Petitioner did not brief Claims III, V, X, XIII, and XVII, these claims are deemed abandoned. *See Isaacs v. Head*, 300 F.3d 1232, 1253 n.6 (11th Cir. 2002). Petitioner also did not brief the following subparts of his ineffective assistance of counsel claim, Claim IX: Subpart E, "Counsel Was Ineffective for Failing to Object to Improper Closing Argument Made by the Prosecutor During the Sentencing Phase;" Subpart F, "Trial Counsel Was Ineffective for Failing to Strike for Cause Prospective Jurors;" Subpart G, "Counsel Failed to Object to the Court's Improper Response to a Juror Question Regarding the Possibility of Parole;" and Subpart H, "Additional Areas of Ineffective Assistance of Counsel." The Court deems these subparts of Claim IX to be abandoned. *See id*. The Court also finds that Petitioner failed to show that the state court adjudication on the merits of these unbriefed claims 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 "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1), (2).

conviction.[4] The Georgia Supreme Court described the events that led to his conviction as follows:

> At 8:45 p.m. on January 26, 1995, Whatley entered Roy's Bait Shop in Griffin armed with a .32 caliber revolver he had stolen from a relative. The only persons inside the store at the time were the owner, Ed Allen, and an employee named Tommy Bunn. Whatley forced Bunn to lie on the floor behind the service counter and held the .32 caliber revolver to Bunn's head, and he threatened to shoot Bunn if Allen did not comply with his demand for the money from the cash register. Allen placed the money in a paper sack, and Whatley took it. Whatley backed around to the front of the counter and fired two shots, one shot striking Allen in the chest from a range of 15 to 18 inches and a second shot striking the counter that Bunn was lying behind from a range of 8 inches. Allen pursued Whatley and fired his .44 caliber single-action pistol at him. Whatley left the store and encountered Ray Coursey, who had just arrived at the store in an automobile. Whatley held the revolver to Coursey and demanded a ride. Allen came out of the store and continued firing his

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[4] In addition to his death sentence, Petitioner also was sentenced to serve consecutive terms of life imprisonment for armed robbery, two twenty-year terms for the aggravated assault, a twenty-year term for motor vehicle hijacking, and a five-year term for possessing a firearm during the commission of a crime.

> pistol at Whatley. Whatley exited Coursey's automobile on the side opposite from Allen's position, and he fled on foot. At some point, Whatley was shot in the right knee. After Whatley ran away, Allen returned to the store, told Bunn to call 911, lay down on the floor, and died of internal bleeding.

Whatley, 668 S.E.2d at 653.[5]

II. DISCUSSION

A. Section 2254 Standard of Review

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"),

> [a]n 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

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[5] "We quote extensively from the [state court's] decision because its factfinding, arguments and theories must be the focus of our inquiry under AEDPA. The Supreme Court has made clear that 'a habeas court must determine what arguments or theories supported… the state's court decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court].'" *Evans v. Sec'y, Dep't of Corrs.*, 681 F.3d 1241, 1250 n.11 (11th Cir. 2012) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)), *vacated other grounds*, 703 F.3d 1316 (11th Cir. 2013) (*en banc*).

> 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.

28 U.S.C. § 2254(d). A state court's determination of factual issues is "presumed to be correct" unless a petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." *Id.* § 2254(e)(1).

In evaluating a habeas petition under § 2254(d)(1), a district court must first determine the applicable "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor*, 529 U.S. 362, 379 (2000) (quoting 28 U.S.C. § 2254(d)(1)). "The decision of a state court is not 'contrary to' federal law 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.'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1325 (11th Cir. 2013) (*en banc*) (quoting *Cummings v. Sec'y, Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009)). In determining whether federal law is "settled" or "clearly established," the court must look at the status of the law "at the time the state

conviction became final." *In re Perez*, 682 F.3d 930, 933 (11th Cir. 2012) (quoting *Williams*, 529 U.S. at 380).

Second, the court must determine whether a state court decision is "'contrary to, or involved an unreasonable application of,' that clearly established law." *Williams*, 529 U.S. at 379 (quoting 28 U.S.C. § 2254(d)(1)). "The question under [§ 2254(d)(1)] is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable—a substantially higher threshold." *Evans*, 703 F.3d at 1325 (quoting *Cummings*, 588 F.3d at 1355). "Error alone" by the state court "is not enough" to warrant habeas corpus relief because "an *unreasonable* application of federal law is different from an incorrect application of federal law," and "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (quoting *Harrington*, 131 S. Ct. at 786 (2011)); *Accord Evans*, 703 F.3d at 1326. The inquiry requires the court to "determine what arguments or theories supported or, [if none were stated], could have supported [ ] the state court's decision" and then to "ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Evans*, 703 F.3d at 1326 (alterations in original) (quoting *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286–87 (11th Cir. 2012)). This standard "was intended to be, and is, a difficult one." *Johnson*, 643 F.3d at 910 (citing *Harrington*, 131 S. Ct. at 786).

But there are cases that merit relief under the standard. *See id*. at 911.

B. The Claims of the Federal Habeas Petition

1. *Claim I - Petitioner's claim that favorable evidence was suppressed in violation of Brady v. Maryland*

Whatley claims that favorable evidence was suppressed in violation of *Brady v. Maryland* when the State failed to disclose, prior to trial, a second statement that Tommy Bunn ("Bunn"), a key prosecution witness, gave regarding the events of Ed Allen's death (the "January 27th Statement"). *See* 373 U.S. 83 (1963). This second statement was given to local law enforcement the day after Allen's death. The state habeas court and the Supreme Court of Georgia found that Whatley's Brady claim[6] was procedurally defaulted.[7]

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[6] Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. When the Government withholds evidence, a *Brady* violation occurs only if the evidence is (1) favorable to the accused (because it is exculpatory or impeaching) and (2) material (so that its non-disclosure caused the defendant prejudice). *See*, *E.g.*, *Cone v. Bell*, 556 U.S. 449, 469-70 (2009); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 745-46 (11th Cir. 2010). The government's failure to produce to a defendant impeaching or exculpatory evidence in its possession constitutes a violation of a defendant's due process rights if: (i) the government suppressed the evidence either willfully or inadvertently; and

"[W]here the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, *Sykes* requires the federal court to respect the state court's decision." *Bailey v. Nagle*, 172 F.3d 1299, 1302 (11th Cir. 1999) (citing *Wainright v. Sykes*, 433 U.S. 72 (1977)); *See Also Mincey v. Head*, 206 F.3d 1106, 1135 (11th Cir. 2000) ("It is well-settled that federal habeas courts may not consider claims that have been defaulted in state court pursuant to an adequate and independent state procedural rule, unless the petitioner can show 'cause' for the default and resulting 'prejudice,' or 'a

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(ii) prejudice ensued, i.e., the evidence was material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Favorable evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 698 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). A defendant "must show a reasonable probability of a different result." *Id*. at 699 (quoting *Kyles*, 514 U.S. at 435).

[7] Petitioner seems to assert that Respondent waived his procedural default defense to the *Brady* claim by failing to raise it in his Answer. (*See* Pet'r's Reply Br. in Supp. of Pet. at 2). The Court notes, however, that Respondent stated in his Answer that "Respondent expressly adopts and relies upon any findings made by the state courts as to the procedural default of any and all claims not timely raised at trial and on appeal as required by O.C.G.A. § 9-14-48(d)." (Resp't's Answer at 11). The state habeas court and Supreme Court of Georgia both found this claim was procedurally defaulted. *See Whatley*, 668 S.E.2d at 655; (Resp't's Ex. 71 at 55-56); *See Also Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (Claims may also be procedurally defaulted if a petitioner failed to present them in state court 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.").

fundamental miscarriage of justice.'"). When a state court addresses the merits of a claim and finds a procedural default, a district court should apply the procedural bar and decline to reach the merits of the claim. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Osborne v. Terr*y, 466 F.3d 1298, 1315 (11th Cir. 2006); *White v. Singletary*, 972 F.2d 1218, 1227 (11th Cir. 1992); *Richardson v. Thigpen*, 883 F.2d 895, 898 (11th Cir. 1989); *Hittson v. Humphrey*, No. 5:01-CV-384 (MTT), 2012 WL 5497808, at *8 n.10 (M.D. Ga. Nov. 13, 2012).

a. State court adjudication

The state habeas court found that Whatley's *Brady*-based claim was not raised at trial or on direct appeal, and thus was procedurally defaulted. *Whatley*, 668 S.E.2d at 655. Under Georgia law, a petitioner may excuse his procedural default of an evidence suppression claim in a habeas proceeding by satisfying a two-part cause and prejudice test. *See id*. To satisfy the "cause" prong, a petitioner must show that the State breached a "constitutional duty" to disclose the information forming the basis of the claim. *See id*. at 655 n.8 (citing *Turpin v. Todd*, 493 S.E.2d 900 (Ga. 1997)). To demonstrate prejudice, a petitioner must show:

> (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable

> probability exists that the outcome of the trial would have been different.

Schofield v. Palmer, 621 S.E.2d 726, 731 (Ga. 2005) (applying *Brady*, 373 U.S. at 87).

The state habeas court determined that the January 27th Statement was disclosed and available to Whatley at the time of his trial and direct appeal and thus Whatley failed to satisfy his burden to show his procedural default should be excused. The Supreme Court of Georgia also found that Whatley did not satisfy his burden of setting aside the procedural default, but disagreed with the state habeas court's rationale for concluding that Whatley's evidence suppression claim was procedurally defaulted. The Georgia Supreme Court determined that the state habeas court erred when it applied the cause and prejudice test to Whatley's evidence suppression claim because there was cause to excuse Whatley's failure to raise the issue of nondisclosure of the January 27th Statement at trial and on direct appeal. The state Supreme Court based this conclusion on (1) the nondisclosure of the statement prior to the completion of Whatley's trial and direct appeal, and (2) the failure of the State to disclose the "arguably contradictory" January 27th Statement by Bunn. *See Whatley*, 668 S.E.2d at 655. The Supreme Court of Georgia stated in its opinion:

> Whatley forced Bunn at gunpoint to lie on the floor next to the cash register during the robbery, and Bunn remained there until all of the shooting had stopped. The theory presented to the jury by the State at trial

was that, as Whatley began backing away from the service counter, he fired twice, once at Allen at close range and once downward toward Bunn. Bunn's testimony under direct examination in the guilt/innocence phase was consistent with this theory, as he maintained that he had heard two shots fired before Allen stepped over him to pursue Whatley. Trial counsel then cross-examined Bunn by specifically referring to a statement Bunn made to police on the night of the murder, January 26, 1995. The written investigative summary counsel was referring to in his cross-examination reports that Bunn stated as follows on January 26:

> [Whatley] moved off of me and backed around the counter, when he went around the counter and Ed come around over top of me going after him. I don't know where he was. I was still laying on the floor when I heard the shot.

Counsel did not read this statement aloud at trial but, instead, simply had the witness himself acknowledge that he did not tell the police in his January 26 interview that shots were fired before Allen stepped over him. Counsel specifically stated that it was the January 26 interview that he was relying on in forming his questions to Bunn. Bunn explained his account in his January 26 interview regarding the timing of the shots by stating that he was "upset" during that

interview. Counsel, by pointing out to Bunn that Allen had not bled on him, was also able to get Bunn to admit on cross-examination that he did not know when Allen was shot. Whatley testified in the sentencing phase to a version of events different from Bunn's: Whatley claimed that he never intended to shoot anyone and that he fired at Allen only after Allen pulled out his gun.

At the habeas hearing, Whatley presented an audio recording of an interview of Bunn that was conducted the day after the murder, January 27. Whatley obtained the recording through an Open Records Act request to the Griffin Police Department, which request was legally available only after Whatley's criminal case was concluded. Like the January 26 statement used by counsel at trial, part of the January 27 interview at least arguably suggests that Allen stepped over Bunn to pursue Whatley before any shots were fired. Bunn stated as follows in the January 27 interview:

> [Whatley] done got the money and all, you know. I figured he's going on out, and that's when I see Ed go over me, and he went out, and that's when the shooting and all starts.

However, earlier in this January 27 interview, Bunn gave a different chronology, stating as follows:

> Then [Whatley] got off me, and backed around the corner, you know. I guess he was going on back toward the door. I heard something start shooting. Then I seen Ed come across me, on around the corner, too. Next thing I know I just kept hearing, ya know, gun shots.

Thus, at the most, the January 27 interview contains two contradictory chronologies, one placing the shooting before Allen stepped over Bunn to pursue Whatley and one placing the shooting after. Furthermore, in between these two arguably contradictory chronologies in the January 27 interview, Bunn expressed uncertainty when asked specifically whether the shots began before or after Allen stepped over him and went around the corner of the counter. Bunn was then further asked, "Who started shooting?" He responded as follows: "I guess [Whatley]. But, you know, I don't know." He then provided the following explanation for his uncertainty: "[I]t happened so quick, and I'm all shook up, too."

Whatley argues that his cross-examination of Bunn would have been enhanced if counsel had been provided the January 27 interview, particularly because counsel could have emphasized that, although Bunn might have been confused because he was "upset" on January 26, he would have calmed down by January 27 and would have given a more

> accurate account of the crime. Whatley argues that the portion of the January 27 interview in which Bunn arguably indicated that Allen began to pursue Whatley before any shots were fired could have been used to show that Whatley did not enter the store with the intent to commit murder, which the jury might have found mitigating in the sentencing phase.

Id. at 653-54.

Although it found cause to excuse Whatley's procedural default based on the State's failure to disclose the January 27th interview, the Supreme Court of Georgia also found that Whatley failed to satisfy the prejudice prong. The Supreme Court determined that prejudice did not result from the failure to disclose the January 27th Statement because, had the statement been disclosed to the defense, there is no reasonable probability that the outcome of the trial would have been different. *See id*. at 659.[8]

The Supreme Court of Georgia reasoned that Whatley failed to establish prejudice under the rule established in *Brady v. Maryland*:

> We conclude that Whatley has failed to satisfy the fourth element [of the test for

[8] The evaluation of the prejudice prong for excusing a procedural default of an evidence suppression claim is "co-extensive" with a merits evaluation of a claim under the standard of *Brady v. Maryland*. *See Whatley*, 668 S.E.2d at 656.

prejudice under *Brady*], a showing that having the January 27 interview at trial would have created a reasonable probability of a different outcome. As we noted above, the January 27 interview arguably contains contradictory statements by Tommy Bunn regarding whether the first shots were fired before or after Ed Allen began to pursue Whatley, as well as statements expressing uncertainty regarding the timing of those shots. However, Bunn himself ultimately testified under cross-examination at trial that he could not recall whether the shots came first or whether Allen's stepping over him to pursue Whatley came first. Thus, the jury, either with or without being presented with the full January 27 interview, would have concluded that Bunn could not be relied upon to establish a detailed chronology.

Furthermore, the district attorney persuasively argued that Whatley must have fired at Allen before Allen was armed, because Allen was shot in the chest at a range of 15 to 18 inches and because it otherwise would have been unlikely for Whatley to have shot Allen in the chest from such a close distance without being shot himself by Allen somewhere other than just in the leg. Furthermore, Whatley's account of events cannot be reasonably reconciled with the testimony at trial indicating that he fired a shot toward either Allen or Bunn from a distance of merely eight inches from the

> service counter. We conclude as a matter of law that there would not have been a reasonable probability of a different outcome at trial if Whatley had been provided the January 27 interview and, therefore, that he can neither show merit to his underlying evidence suppression claim nor satisfy the prejudice prong of the cause and prejudice test, issues that are "co-extensive."

Id. at 656.

The Supreme Court of Georgia weighed the evidence presented in the state court proceedings, determined that timely disclosure of the "arguably contradictory" January 27th Statement would not have affected the outcome of the proceedings, and applied the clearly established Federal law standard established in Brady v. Maryland to determine that Whatley failed to satisfy his burden of showing that his procedural default should be excused. *See Whatley*, 668 S.E.2d at 655-56.

b. Review of the state court adjudication

The January 27th Statement, while it arguably might have been helpful on Bunn's cross-examination, was, as the Supreme Court of Georgia noted, contradictory, uncertain, and not dispositive of the determination of who fired first during the robbery by Whatley.[9] The Court also

[9] The Court has reviewed Bunn's testimony at trial, as well as the January 27th Statement, and concludes the Supreme Court

notes, as did the Supreme Court of Georgia, that the timely disclosure of the January 27th Statement would not have presented a reasonable probability of changing the outcome at trial because the weight of the evidence admitted at trial—to include ballistics evidence regarding Whatley having discharged his handgun at the counter while demanding money from Allen—supported that Allen was shot at close range while behind the counter before obtaining his firearm and pursuing Whatley, which is inconsistent with Whatley's alternative theory that he fired the fatal shots only after Allen fired first and as Whatley was running out of the bait shop.

The Court finds the Supreme Court of Georgia correctly, and reasonably, applied Georgia's two-part test for excusing a procedural default in determining that Whatley's Brady claim is procedurally barred.[10]

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of Georgia's finding that Bunn testified that he was not sure whether Whatley or Allen fired first and that Bunn could not recall the sequence of events during the robbery of the bait shop is not an unreasonable determination of the facts. *See Whatley*, 668 S.E.2d at 655-56; (Resp't's Ex. 11 at 894-935; Resp't's Ex. 41F at 1406-21).

[10] Petitioner argues that the Supreme Court of Georgia "clearly and explicitly found this claim procedurally defaulted" and the Court should conduct a *de novo* review because there was no ruling on the merits of Petitioner's *Brady* claim. (Pet'r's Br. in Supp. of Pet. at 22-24). Petitioner overlooks that, in determining that Petitioner's *Brady* claim was procedurally defaulted, the Supreme Court of Georgia concurrently evaluated whether Whatley could "prevail on the underlying evidence suppression claim" on the merits by applying the rule established in *Brady v. Maryland* to find "that Whatley has failed to satisfy the fourth element [of the *Brady* analysis], a showing that having the January 27 interview at trial would

The Court respects and defers to the state court's determination that the claim is procedurally barred and finds Whatley is not entitled to relief on this claim. *See Harris*, 489 U.S. at 264 n.10; *Bailey*, 172 F.3d at 1302; *Richardson*, 883 F.2d at 898.

Even if Whatley was entitled to a *de novo* review of this claim, the Court finds the Supreme Court of Georgia correctly applied Georgia's procedural default principles and the standards under *Brady*, and did not arrive at 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," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whaley was prejudiced by the unavailability of Bunn's second statement. 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003); *Williams*, 529 U.S. at 379, 385.

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have created a reasonable probability of a different outcome." *Whatley*, 668 S.E.2d at 655-56 (Whatley "can neither show merit to his underlying evidence suppression claim nor satisfy the prejudice prong of the cause and prejudice test, issues that are 'co-extensive.'"). Even considering the merits of Petitioner's *Brady* claim, the Court concludes the state court adjudication did not result in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1), (2). The Court does not find the Supreme Court of Georgia unreasonably interpreted the facts or unreasonably applied clearly established Federal law in deciding this claim.

Whatley is not entitled to relief on his suppression of evidence claim.

2. *Claim IX – Ineffective assistance of counsel under Strickland v. Washington*[11]

Whatley contends he was denied, in several ways, his constitutionally guaranteed right to the effective assistance of counsel, including because his trial lawyer failed to investigate and to offer to the sentencing jury substantial mitigating evidence about his background and mental health. He claims the Georgia habeas court and the Georgia Supreme Court failed to find his effective assistance of counsel right was violated and that he is entitled to federal habeas relief because his trial counsel was ineffective during his trial.

The threshold question under the AEDPA is whether the state courts, in adjudicating Whatley's ineffective assistance of counsel claim, applied a rule of law that was "clearly established" at the time his state-court conviction became final. *See* 28 U.S.C. § 2254(d)(1). The Supreme Court has held that "[i]t is past question that the rule set forth in *Strickland [v. Washington*, 466 U.S. 668 (1984)] qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams*, 529 U.S. at 391.

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[11] The Court considers Petitioner's *Strickland* claim (Claim IX) before his *Cronic* and actual conflict of interest claims (Claims VII and VIII) because these claims derive from a claim under *Strickland*.

The next question is whether the Georgia state court adjudication of the death sentence was "contrary to" or was an "unreasonable application of" *Strickland*. *See* 28 U.S.C. § 2254(d)(1).

> "The Supreme Court has described this standard as 'a highly deferential' one that 'demands that state-court decisions be given the benefit of the doubt.'" [*Johnson v. Upton*, 615 F.3d 1318, 1329 (11th Cir. 2010)] (quoting *Renico v. Lett*, 559 U.S. 766, 130 S. Ct. 1855, 1862, 176 L. Ed.2d 678 (2010)). The decision of a state court is not "contrary to" federal law 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." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009) (quoting *Kimbrough v. Sec'y, Dep't of Corr.*, Fla., 565 F.3d 796, 799 (11th Cir. 2009)). The decision of a state court is not an "unreasonable application" of federal law 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." *Id*. (quoting *Kimbrough*, 565 F.3d at 799). "The question under [the Act] is not whether a federal court believes the state

> court's determination was correct but whether that determination was unreasonable—a substantially higher threshold." *Id.* (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007)).

Evans, 703 F.3d at 1325.

"[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 1326 (quoting *Richter*, 131 S. Ct. at 786). "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* (quoting *Premo v. Moore*, 131 S. Ct. 733, 740 (2011)).

Under *Strickland*, a defendant is constitutionally denied effective counsel if two showings are made:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. To establish ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This *Strickland* test necessarily is one that requires application on a case-by-case basis. See *Wright v. West*, 505 U.S. 277, 308 (1992). To conclude that Whatley's counsel was constitutionally ineffective, the Court must find that rejection of his ineffectiveness claim was either "contrary to, or involved an unreasonable application of" *Strickland*. "[A] federal habeas court [may] 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins*, 539 U.S. at 520 (citing *Williams*, 529 U.S. at 413). "In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous… [it] must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-21 (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); See Also *Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). "To obtain [federal] habeas relief a 'state prisoner must show that the state court's ruling on the claim being presented in the 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.'" *Evans*, 703 F.3d at 1326 (quoting

Reese, 675 F.3d at 1286). "The decision of a state court is not an 'unreasonable application' of federal law 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.'" *Id.* at 1325 (quoting *Cummings*, 588 F.3d at 1355).

In evaluating reasonableness, "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made [and] by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla*, 545 U.S. at 381 (quoting *Strickland*, 466 U.S. at 689, 691) (internal citation omitted). The evaluation is conducted "as if one stood in counsel's shoes." *Id.* In determining reasonableness of counsel's representation, a court may consider strategic decisions counsel may make for not introducing mitigating evidence. The deference owed to strategic decisions is judged based on the adequacy of the investigation supporting those judgments. As the Supreme Court stated in *Strickland*:

> [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.

466 U.S. at 690-91; *See Also Wiggins*, 539 U.S. at 524 ("investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor'") (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989)).[12]

In evaluating the reasonableness of an investigation, a court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*,

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[12] In reviewing the application of *Strickland* in *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court "concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'" *Wiggins*, 539 U.S. at 522 (quoting *Williams*, 529 U.S. at 396).

539 U.S. at 526-27 (courts cannot use "strategic decision" as a *post hoc* rationalization to explain counsel's investigation shortfalls and inattention to mitigation investigation). In evaluating whether an investigation met *Strickland*'s performance standards, the Supreme Court has

> emphasize[d] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.

Wiggins, 539 U.S. at 533.

There are, however, some fundamental benchmarks for a required investigation. For example, failure to examine a defendant's prior conviction file falls below the level of reasonable performance where counsel knows that the government intends to prove that the defendant had a history of felony convictions indicating the use or threat of use of violence as an aggravating factor. *Rompilla*, 545 U.S. at 383. "[O]btain[ing] information that the State has and will use against the defendant is not simply a matter of common sense," it is also what the ABA Standards for Criminal Justice require, standards the Supreme Court has "long referred to as 'guides to determining what is reasonable.'" *Id*. at 387 (quoting *Wiggins*,

539 U.S. at 524);[13] *See Also Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009) ("This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, or would have been apparent from documents any reasonable attorney would have obtained. It is instead a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'") (internal citations omitted).

The analytical template a federal habeas court is required to use to evaluate ineffective assistance of counsel claims under *Strickland* has been refined by

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[13] The ABA Standards for Criminal Justice provide:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). The commentary accompanying the Standards explain that defense counsel "has a substantial and important role to perform in raising mitigating factors," and that "[i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself." *Id*. at 4-55.

the United States Supreme Court and the Eleventh Circuit in recent years, especially claims regarding the adequacy of counsel's pre-trial and pre-sentencing investigations. The Supreme Court in *Wiggins* considered, under *Strickland*, the Maryland state courts' considerations of the adequacy of counsel's investigation. The Supreme Court held:

> [T]he Maryland Court of Appeals' conclusion that the scope of counsel's investigation into petitioner's background met the legal standards set in *Strickland* represented an objectively unreasonable application of our precedent. Moreover, the court's assumption that counsel learned of a major aspect of Wiggins' background, *i.e.*, the sexual abuse, from the DSS records was clearly erroneous.

Wiggins, 539 U.S. at 528-29 (counsel's investigation into Wiggins' background did not reflect reasonable professional judgment and counsel's decision to end investigation when they did was neither consistent with professional standards that prevailed in 1989, nor reasonable in light of evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further) (internal citation omitted).

Thus, if a federal habeas court finds that an investigation was inadequate or based on facts clearly erroneously found, a state court conclusion to the contrary may be an unreasonable application of *Strickland*. If so, the federal habeas court must next determine if a petitioner was prejudiced by the inadequate investigation. "In assessing prejudice, we

reweigh the evidence in aggravation against the totality of available mitigating evidence. In this case our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." *Id.* at 534.[14] In evaluating prejudice the court evaluates the "totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding…." *Williams*, 529 U.S. at 397-98 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); *See Also Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.").

a. Claim IX, Subpart A – Petitioner's claim that his trial counsel provided ineffective assistance of counsel based on his failure to conduct an adequate investigation, prepare a

[14] "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background….may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (consideration of life history "part of the process of inflicting the penalty of death.").

case in mitigation, or rebut the State's evidence in aggravation

To evaluate a state court's adjudication of the constitutional effectiveness of counsel's penalty-phase investigation and presentation, the Court must determine whether an adequate investigation was conducted and, if not, then consider the evidence presented during the penalty phase and the evidence offered in the state habeas proceeding to assess whether there was prejudice to Whatley from an investigation found to be inadequate. *See Wiggins*, 539 U.S. at 520-34, 537; *Williams*, 529 U.S. at 397-98. The Court first reviews the factual findings of the state court and then its adjudication of Whatley's claim that he was provided ineffective assistance of counsel in the investigation of his case. In doing so, the Court considers whether the Georgia state court adjudication of this claim was "contrary to" or was an "unreasonable application of" *Strickland*.

i. State court adjudication

The state habeas court made the following factual findings regarding Whatley's background:

> Frederick Ramon [sic] Whatley was born on June 7, 1968 in Griffin, GA to Claudette Whatley[,] a very young, unmarried female. Identity of his father is either unknown or is of conflicting information. The "father" has never been significantly involved in Whatley's life. The mother, though an occasional person in his life, abandoned or

failed to function in any reasonable inspirational or meaningful parenting role. Frederick was, for all practical purposes raised by his mother's maternal aunt, Marie Thomas and her husband, Cleveland Thomas. The Thomas' [sic] were regarded as a religious family who provided guidelines to Frederick during his formative years. He presented no problem in that home and was an active participant in church activities. In his early school years he performed well but in later high school years his performance and grades became very poor. He was suspended from Griffin High School in 1986 for sexual misconduct in the school building. He apparently began involvement with and use of a variety of illegal drugs at about age 15. He became sexually active at an early age, including sexual relationships with women twice his age. He received a high school equivalency certificate of some kind apparently as a pre-condition to being accepted into the Navy. He ultimately was turned down by both the Navy and the Army due to drug involvement. He has no history of sustained employment and no noted job skills. He deals poorly with authority figures and with women. Several times he left Georgia to go to the District of Columbia to be with his mother. Each of these sojourns resulted badly, with Frederick getting into trouble with the law, fighting with his mother, using drugs with his mother, being ejected from her house to allow space for her

then current male companion. He is an admitted regular user of illegal drugs. He has been in trouble with the law, mostly in Washington D.C. His criminal record is follows:

- Forgery and uttering, Washington D.C., Sentenced 4/24/88
- Robbery, Washington D.C., Sentenced 3/30/89, Probation Revoked 12/21/90
- Simple Assault, Washington D.C. Sentenced 12/12/90

He has served prison time in the Lorton (District of Columbia) prison, where he had some involvement in a prison riot. In 1995, he was sentenced to a community based controlled residential facility commonly called a "halfway house." At some point he failed to return to the facility and a warrant was issued for "escape" from a correctional facility. He left the District of Columbia at that time and traveled to Griffin, Georgia. He became involved in the drug trade there, needed money and planned the robbery (colloquially referred to as a "lick"). He pilfered a gun from his cousin. The following day he coaxed a friend to drive him to a beer store on a secondary street so he could hit a "lick." The friend was to pick him up a few minutes later on the other side of an adjacent road embankment….

> There is some mention in the evidence (and in Whatley's information that he gave to Attorney Mostiler) that Whatley's childhood was "ideal." He was adequately cared for and supervised by his extended family during his younger years. When he began to have interaction with his mother, by visits from her or by visits to her in Washington D.C., his behavior began to deteriorate — using drugs, sometimes with his mother, learning of her sexual promiscuity history and exploits, and being exposed to and encouraged in sexual activity with females of a variety of ages.
>
> Mental health and intellect evaluations conducted after his arrests were inconclusive except to the effect that, as a youthful offender in Washington a fairly extensive mental examination was performed. This young man was felt to have fairly high intellect — even college potential, but he was selfishly impatient and had poor judgment. He failed to achieve success in a probation program crafted specifically for him. He had difficulty getting along with people either in or out of prison. He appears to have developed into a "loner" with no willingness to be trained, no ability to get or maintain employment and no track record of success except in criminal conduct.

(Resp't's Ex. 71 at 7-9).

Regarding Mostiler's investigation into Whatley's history for information to be used as mitigating evidence and his investigation into the State's evidence in aggravation, the state habeas court found:

> A review of the evidence showed that counsel's pursuit and investigation of mitigation evidence began long before the commencement of Petitioner's trial. Further, a review of the guilt phase transcript showed that trial counsel elicited arguably mitigating evidence from State's witness Tommy Bunn during the guilt phase of trial when he had Mr. Bunn admit that he did not know who fired the first shot.
>
> In an attempt to find other potential mitigating evidence to present at trial, counsel and his investigator met with Petitioner on many different occasions. During these meetings, Petitioner was asked about his life and background and any information, including potential witnesses, that, he thought would be helpful to his case. The evidence showed that investigator Yarbrough shared the information that Petitioner provided to him with counsel.
>
> Additionally, the evidence showed that investigator Yarbrough contacted and attempted to interview each of the potential witnesses Petitioner identified prior to trial including his biological mother, Mr. Watson, the program director for the Washington

D.C. Public Defender's Office, and Petitioner's former Washington D.C. attorney and informed counsel of the substance of these conversations so that counsel could make an informed decision as to whether to call these witnesses to testify.

Although Mr. Yarbrough attempted to convince Petitioner's biological mother to testify on Petitioner's behalf, the evidence showed that she was not cooperative….

As to Mr. Watson, although investigator Yarbrough was unable to make contact with him upon his initial attempts, this Court finds that the evidence showed that counsel interviewed Mr. Watson several times prior to his testifying for the sentencing stage.

In addition to contacting and attempting to interview the aforementioned individuals, the evidence showed that investigator Yarbrough also interviewed the son of Petitioner's uncle, Cleveland Thomas, Jr., Reverend McDougal who knew Petitioner from church, his wife, Mrs. McDougal, Nancy Ward, one of Petitioner's former Sunday school teachers, Arnetta Hall and Barbara Ellis, friends of Petitioner, Linda Dixon, a member of Petitioner's church, and Reverend Walker, another clergy person who knew Petitioner from church on counsel's behalf to attempt to uncover further potential mitigating evidence, and provided counsel

> with the information he learned as a result of these interviews.
>
> [T]he evidence showed that counsel declined to call them either because "they didn't want to testify" or because "there wasn't anything that they could tell us that would help" Petitioner's case.
>
> To further pursue potential mitigating evidence, the evidence showed that counsel sought and obtained a court-ordered pre-trial psychological evaluation of Petitioner….
>
> In addition to the defense team's…attempts to secure mitigating evidence,…the evidence showed that the defense team attempted to interview all of the State's penalty phase witnesses prior to their taking the stand.

(*Id.* at 42-44 (internal record citations omitted)).

With regard to Mostiler's investigation into Whatley's prior mental health history, the state habeas court further stated:

> The evidence showed that counsel learned in advance of trial that Petitioner had previously been evaluated in connection with his Washington D.C. criminal cases. To facilitate his acquisition of these reports, counsel had Petitioner sign a release form which was faxed to Eugene Watson of the Washington D.C. Public Defender's Office who, by Petitioner's own admission, had

> access to these reports. As counsel's investigator testified, he specifically recalled Mr. Mostiler asking him to "dig up a release form and make sure that it was sent to Watson" to obtain "anything that Watson had." Further, investigator Yarbrough testified that he recalled informing Mr. Watson that Mr. Mostiler wanted all of Petitioner's Washington D.C. records and additionally recalled that Mr. Watson brought several documents with him when he came to Georgia to meet with Mr. Mostiler prior to his testimony in this case.

(*Id.* at 32-33 (internal record citations and footnote omitted)). Although there was evidence in the state court proceedings that Mostiler sent a written, signed request for records to Watson prior to trial, the state habeas court noted that the evidence was ambiguous regarding whether those files were delivered to Mostiler prior to the conclusion of Whatley's trial. (*Id.* at 33-34).[15]

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[15] Investigator Yarbrough testified it was possible Mostiler reviewed documents in Watson's possession prior to the end of the trial, but Watson submitted an affidavit denying that this information was available to Mostiler prior to trial. (Resp't's Ex. 71 at 33-34). The record evidence and the state court determination therefore are that there is no evidence that Mostiler ever received Whatley's psychological records. At most the record and the state court determination are that Yarbrough testified that he assumed Watson brought some unknown and unspecified documents to Georgia because he had a bag and briefcase with him. Yarbrough's testimony at his deposition on these matters was vague, speculative, and circumspect. For example, Yarbrough stated he tried to get in

With regard to the presentation of evidence in mitigation during the penalty phase of Whatley's trial, the state habeas court noted:

> A review of the sentencing phase transcript showed that trial counsel called eleven witnesses to testify on Petitioner's behalf. These witnesses, which consisted of

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touch with Whatley's former attorney, but then immediately stated: "I may have never made contact with him at all…." (Dep. Yarbrough at 26). In another exchange, Yarbrough's information about contacting Whatley's mother was consistently qualified by his claim that it was to the "best of [his] recollection," signaling that after the passage of many years, it was the best he could recall in the absence of any handwritten notes. (*Id*. at 37). Yarbrough could not recall "off the top of [his] head" if Mostiler had a strategy in mitigation, but merely presumed there was one. (*Id*. at 47). On cross examination and through leading questions, the State had to explain to Yarbrough that Mostiler did not have an independent psychological evaluation completed. (*Id*. at 49-50). Yarbrough was confused regarding whether funds were made available by the State to obtain the assistance of Watson at trial. (*Id*. at 50). Yarbrough could not recall if he, as the investigator, knew of the existence of prior psychological reports for Whatley, could not recall seeing any documents that Watson brought with him to Georgia, could not recall the substance of any conversations between Watson and Mostiler, and could not remember ever seeing Whatley's prior psychological reports that were produced in the state habeas court. (*Id*. at 55, 61, 64). Contrasted against Watson's clear affidavit testimony that no mental health documents were provided to Mostiler, the Court finds that there is no proof, and the state court factual findings do not support, that Mostiler received Whatley's prior mental health records from Watson and it was unreasonable and plainly erroneous for the state court to give the weight it did to Yarbrough's faulty memory and deposition testimony.

> Petitioner, several of his friends, a relative, and Eugene Watson, the program developer for the Washington, D.C. Federal Defender's Office, testified either concerning Petitioner's background, his redeeming qualities and their desire for his life to be spared, and/or Petitioner's remorse for his crimes.

(*Id*. at 45).

The state habeas court also noted that, although Mostiler did not tell the witnesses the questions he would ask or rehearse their testimony, Mostiler's investigator spoke with each witness "prior to trial about their potentially helpful testimony and then reported [that] information to counsel." (*Id*. at 45-46). The state habeas court found that there was no credible evidence at the time of the trial that Whatley had been sexually abused as a child, that Whatley did not inform his counsel or counsel's investigator of any prior sexual abuse, and that there are no allegations of sexual abuse in Whatley's prior psychological evaluations or pre-trial mental health evaluation. (*Id*. at 47-48).

Based on the state habeas court's findings of fact, the Supreme Court of Georgia concluded—as to all of Whatley's various ineffective assistance of counsel claims—"as a matter of law that, even if counsel performed deficiently in the ways we assume in the discussion below, the absence of those professional deficiencies would not in reasonable probability have resulted in a different outcome in either phase of Whatley's trial, and, accordingly, we affirm the habeas court's denial of Whatley's

ineffective assistance claim." *Whatley*, 668 S.E.2d at 659.

Regarding Whatley's specific claim of ineffective assistance of counsel based on an inadequate investigation into his background to develop evidence in mitigation and rebut the State's evidence in aggravation, the Supreme Court of Georgia stated:

> Whatley argues that trial counsel rendered ineffective assistance by failing to contact certain witnesses and by failing to use the testimony of other witnesses, including, in particular, witnesses from the District of Columbia. Whatley argues that counsel failed to make use of testimony from his mother; however, the defense investigator testified that he made repeated attempts to contact her but that she "was not that cooperative" and that his "first interview with [her] went to hell in a handbasket." Whatley contends that trial counsel failed to contact the defense attorney who had represented him in the District of Columbia; however, the defense investigator testified that he contacted the attorney and then "put him on the phone with" trial counsel when the investigator grew nervous answering the attorney's questions about Whatley's murder case.[16] Whatley argues that trial counsel

[16] The Court notes again here that the Supreme Court of Georgia's reliance on the memory and recollection of Yarbrough for the conclusion that events, such as this supposed phone call,

failed to obtain criminal records in the District of Columbia, but transcripts of Whatley's criminal proceedings were served on defense counsel and placed in the trial record by the prosecution, so trial counsel certainly were aware of them. The psychological records associated with those criminal proceedings are discussed below. Whatley argues that trial counsel rendered ineffective assistance by failing to contact his step-siblings; however, these minors were living with Whatley's uncooperative mother. He argues that trial counsel should have contacted one of his aunts and two of his uncles; however, a review of their affidavit testimony reveals little mitigating evidence that was unknown to trial counsel and that would have been admissible. We note that these affidavits in large part concern things that affected Whatley's family members, such as his mother, aunts, and uncles, rather than things that would have directly affected Whatley.

Whatley argues that trial counsel rendered ineffective assistance in failing to develop evidence regarding Cleveland and Marie Thomas, Whatley's great uncle and great aunt, who raised him but who had passed away by the time of Whatley's trial. First,

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occurred that are not documented in writing in Whatley's case file is unreasonable in light of the vague, unreliable, and uncertain nature of his deposition testimony.

the evidence shows that the investigation into Whatley's life with the Thomases was not deficient, because the defense investigator testified that he met 16 times with Whatley and contacted the Thomases' son, who testified at trial. Whatley told trial counsel and testified at trial that he had an "ideal" childhood living with the Thomases. Vague allegations now that Cleveland Thomas drank too much, abused Marie Thomas, shared a bed with Whatley, and touched him inappropriately fail to show that the defense team was deficient in its attempts to find mitigating evidence, because the defense investigator testified that Whatley never revealed these alleged facts. The allegation that Cleveland Thomas raped Whatley's mother might have been discoverable pre-trial, because there are references to it in her mental health records; however, this allegation, and the alleged fact that she informed Whatley of the rape when he was a boy, would not have been significantly mitigating, particularly in light of the fact that use of the allegations may have offended the jurors if they perceived counsel as attacking the one couple who, while they were still living, had taken care of Whatley.

Whatley argues that trial counsel rendered ineffective assistance by failing to obtain evidence that Whatley, along with other inmates, had been involved in a successful

lawsuit against guards at the prison in the District of Columbia where he was previously incarcerated. He argues that evidence that he suffered brutal treatment at the prison could have been used at trial to explain why he never returned to a halfway house in the District of Columbia when he was out past curfew one night. This argument lacks merit, because the jury would not have been significantly swayed by an argument that Whatley's fear of returning to prison justified his escape from the halfway house. Furthermore, Whatley has not shown that he informed his trial counsel of the alleged brutality, and Whatley did not mention being afraid of returning to prison when he testified in the sentencing phase about his escape from the halfway house.

Whatley argues that trial counsel made deficient use of the testimony available from Eugene Watson, a caseworker in the District of Columbia who designed a rehabilitation plan for Whatley as part of Whatley's criminal proceedings there. Based on the testimony of the defense investigator and billing records, it is clear that trial counsel had repeated contacts with Watson and considered Watson's testimony to be the centerpiece of the sentencing phase strategy. The record shows that, not only did counsel communicate with Watson by telephone, but counsel also met with Watson in person

several times once he arrived in Georgia and that counsel even arranged to have Watson with him and Whatley in a room near the courtroom during breaks at trial. Watson's habeas testimony downplaying the level of contact he had with trial counsel does not show the habeas court's conclusion that counsel performed adequately to be error in light of the entire record.

Whatley also argues that trial counsel failed to properly prepare mitigation witnesses for their testimony. The record supports the habeas court's finding that the defense team, through the efforts of both trial counsel and the defense investigator, interviewed the mitigation witnesses and were aware of their potential testimony. Although it might be understandable that those witnesses now state that they felt ill at ease because trial counsel did not give them detailed instructions about what they should expect at trial, it was not unreasonable attorney conduct for trial counsel not to rehearse his witnesses' testimony with them. As the habeas court found and as was supported by the testimony of the defense investigator, trial counsel reasonably chose not to overly prepare his witnesses, because he wanted their testimony to come across as sincere.

Whatley argues that trial counsel failed to obtain several mental health reports that had been prepared in the District of

Columbia as a result of his criminal activities there and that trial counsel failed to interview the experts who authored the reports. The habeas court's conclusion that trial counsel performed adequately with regard to these reports is reasonable, as it is supported by the presumption that counsel performed adequately, by documentary evidence showing that counsel obtained a signed release from Whatley and requested the materials from Whatley's caseworker in the District of Columbia, and by testimony from the defense investigator confirming that counsel sought the records from Whatley's caseworker. This conclusion is not made erroneous simply because Whatley's caseworker, in giving his habeas testimony, could not recall providing the materials to counsel. The habeas court also correctly concluded that Whatley would not have been prejudiced by counsel's alleged failure to obtain and use these mental health reports or to present testimony from the experts who authored them. A review of the reports confirms the habeas court's finding that they contain material that would have been damaging to Whatley's mitigation case, including statements that he lacked remorse for his crimes and believed he could "get away with anything." The reports did note signs of neglect by Whatley's biological mother and a potential for psychotic symptoms under stress; however, these tentative findings would have proved of little

> effect, particularly in light of the fact that no clear findings of mental illness were noted in another mental health examination performed in preparation for Whatley's murder trial.
>
> Trial counsel presented testimony from Whatley himself suggesting that he was remorseful. However, Whatley argues that trial counsel rendered ineffective assistance by failing to present additional testimony about his alleged remorse from his friends and from jail guards. This additional testimony about Whatley's remorse would not have had a significant impact on the jury, particularly because the prosecutor would have been able to explain Whatley's emotional reaction to learning that the victim had died as being a concern for his own punishment rather than true remorse for his actions.
>
> Whatley argues that trial counsel failed to present any records from his past other than his school records. Other than the records discussed elsewhere in this opinion, Whatley has not elaborated on what records trial counsel failed to obtain or how that failure affected his trial.

Whatley, 668 S.E.2d at 660-62 (alteration in original) (footnote omitted).

ii. Review of the State court adjudication

Whatley asserts that his counsel, Mostiler, failed to conduct an adequate investigation, prepare a case in mitigation, or rebut the State's evidence in aggravation by not developing evidence about childhood sexual and physical abuse, failing to obtain information about his background and mental health, and failing to prepare for the examination of the State's witnesses at trial. Whether Mostiler, individually and through his investigator, adequately prepared for trial and undertook an adequate investigation into Whatley's background that was not "outside the wide range of professionally competent assistance" is an important issue that deserves critical analysis. *See Strickland*, 466 U.S. at 690.

a) Whether Mostiler conducted an adequate investigation into Whatley's background

The Court initially finds that it was not unreasonable for Mostiler not to develop mitigating evidence regarding childhood physical or sexual abuse including because Whatley did not tell his counsel about any childhood sexual abuse and there otherwise was no available information indicating childhood abuse. *See DeYoung v. Schofield*, 609 F.3d 1260, 1288 (11th Cir. 2010) ("[A] defense attorney 'does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him.'"); (Resp't's Ex. 13B at 1468; Resp't's Ex. 71 at 48); *See Also McClain v. Hall*, 552 F.3d 1245, 1251-52 (11th Cir. 2008); *Lambrix v. Singletary*, 72 F.3d 1500, 1505-06

(11th Cir. 1996). The Court acknowledges that Mostiler's investigation began promptly, involved his investigator seeking to contact each of the State's witnesses, obtained Whatley's school and criminal-history records, and involved interviews of people who knew Whatley and who provided information about Whatley's upbringing and background. *See Sears v. Upton*, 130 S. Ct. 3259, 3264-67 (2010) (adequate investigation should include more than spending one day talking to witnesses selected by a petitioner's mother and should include efforts to determine if significant mental or psychological impairments exist); *Rompilla*, 545 U.S. at 383, 389-90 (adequate investigation should include examination of school and criminal-history records); *Williams*, 529 U.S. at 393-96 (investigation inadequate where penalty-phase preparations did not commence until one week before trial); *Johnson*, 643 F.3d at 931-33 (investigation inadequate where no inquiry into petitioner's background and preparation of case in mitigation did not begin until the "eleventh hour" before trial); *Ferrell v. Hall*, 640 F.3d 1199, 1227-31, 1237-38 (11th Cir. 2011) (counsel not inadequate for failing to investigate mental health issues where petitioner's behavior not unusual, but investigation inadequate where penalty-phase preparations did not begin until immediately following guilt-innocence phase); *Williams v. Allen*, 542 F.3d 1326, 1340-41 (11th Cir. 2008) (investigation unreasonable where trial counsel relied upon a

single family member for information about petitioner's background).[17]

The concern with the adequacy of counsel's representation of Whatley involves the adequacy of Mostiler's investigation into Whatley's background and mental health issues and Whatley's claim of prejudice based on Mostiler's failure "to obtain several mental health reports that had been prepared in the District of Columbia as a result of his criminal activities there and…to interview the experts who authored the reports." *Whatley*, 668 S.E.2d at 659-662. An understanding of the dates these reports were created, their contents, Mostiler's knowledge of their existence,[18] and what investigative steps he took to understand their meaning and to investigate these mental health

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[17] As the Supreme Court of Georgia noted, it was not unreasonable to take penalty-phase testimony from Whatley's witnesses without detailed witness preparation in order to avoid having it sound rehearsed. *See McClain*, 552 F.3d at 1253 (quoting *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008)) ("The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel."); *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir. 1998) ("The question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct.").

[18] The Court notes that it is difficult to determine what Mostiler knew because he died and, unlike in most habeas actions, was unavailable to testify regarding his knowledge and decisions. Although Mostiler did not testify, the record is complete enough to reconstruct what information was conveyed to him and what he knew through his handwritten notes, time record, billing record, and Yarbrough's deposition.

issues further, is the necessary first step to evaluate the constitutional adequacy of Mostiler's investigation into Whatley's background and mental health history and whether his development of a penalty-phase strategy was ineffective assistance.

b) Evidence of Whatley's mental health history

On April 19, 1988, the Superior Court of the District of Columbia issued an order that committed Whatley for observation and study under the Youth Rehabilitation Act of 1985. (Pet'r's Habeas Court Ex. 30). The order was based on Whatley's robbery of a citizen of $1.00 in the Georgetown section of Washington, D.C., on January 28, 1988. (*Id.*). A report was produced by a classification committee (the "Classification Committee Report"), based on information developed during the study and observation of Whatley. (*Id.*). Part of the study was conducted by a psychologist, Dr. Shaw. (*Id.*). The Classification Committee Report contained detailed background information about Whatley. (*Id.*). This background information was similar in meaningful ways to the information in the post-trial affidavits presented in the state habeas court. (*Id.*). The background information includes details about Whatley's upbringing, his strained relationship with his mother and his history of substance abuse, and concludes that he "evidences symptoms of schizophrenia and uses it to deal with his problems" and is a "deeply disturbed person." (*Id.*). The Classification Committee Report observed that "Whatley is not a criminally oriented individual,

rather one whose parental abandonment has prompted anti-social behavior." (*Id.*). The examining psychologist, Dr. Shaw, recommended a treatment program that includes "long-term psy[]chotherapy, drug therapy and stabilization in an educational program." (*Id.*).

On August 18, 1988, Whatley was administered a neuropsychological evaluation by Dr. Sarah Jane Elpern, Ph.D., in Virginia. (Pet'r's Habeas Court Ex. 34). The results of this evaluation contain information about Whatley's difficult relationship with his mother, his upbringing in Georgia, his drug use, and his overall functioning and intelligence. (*Id.*). The evaluation concludes there is evidence of brain dysfunction. (*Id.*). Dr. Elpern recommended that Whatley be provided drug treatment, psychotherapy, and vocational rehabilitation. (*Id.*).

It is undisputed that the Classification Committee Report and the August 18, 1988, neuropsychological report (collectively, the "1988 Reports") were both in the possession of Watson throughout the duration of Mostiler's representation of Whatley.

The evidence also is that Whatley directed Mostiler to these materials. On May 19, 1995, Mostiler noted on his time record to "order psychological" from Watson and listed Watson's number and address in Washington, D.C. (Resp't's Habeas Court Ex. 20).[19] Mostiler, however, did not

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[19] There are also undated, handwritten notes by Mostiler in the state habeas court record about Watson and the need to

order any psychological records from Watson for more than nineteen (19) months.

On September 29, 1995, Mostiler noted in his time record that Whatley had psychological testing done in 1988 and that Mostiler wanted to "check Personal Growth Center" for records from a counseling center in Griffin, Georgia, to which Whatley had been sent by his great uncle and aunt. (Resp't's Habeas Court Exs. 20 and 61). Mostiler did not take any steps to obtain these psychological records for more than fifteen (15) months.

Not until November 8, 1996, shortly before trial was to begin, was any psychological evaluation of Whatley conducted and it was ordered by the trial judge, based on a request by Mostiler, for Whatley to be given an evaluation to assess Whatley's: "1) competency to stand tr[ia]l, 2) degree of criminal responsibility at the time of the act, and 3) the threat posed to himself or the community if bond was granted." (Resp't's Habeas Court Ex. 61).

The competency evaluation was conducted on December 13, 1996, by Drs. Karen Bailey-Smith and Margaret A. Fahey, who interviewed and tested Whatley for approximately eight (8) hours. (*Id.*).[20] Drs. Bailey-Smith and Fahey did not have access to

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coordinate his attendance at trial. (Resp't's Habeas Court Ex. 74).

[20] On December 31, 1996, they also interviewed and tested Whatley for seven (7) hours. (Resp't's Habeas Court Ex. 61).

the 1988 Reports or any other psychological counseling records for Whatley. (*Id*.).

On December 19, 1996, about three weeks before the trial began, Whatley's investigator, for the first time, contacted Watson about his testifying on Whatley's behalf and to determine what information he had about Whatley's background and activities in Washington, D.C.[21] (*See* Pet'r's Habeas Court Ex. 19). Mostiler was responsible for determining what Watson might know and whether what he knew would be helpful at trial. (Dep. Yarbrough at 61-62).

On January 3, 1997, Drs. Bailey-Smith and Fahey issued their competency report (the "Court Report"). (Resp't's Habeas Court Ex. 61). The Court Report found Whatley competent to stand trial and determined that he could distinguish right from wrong at the time of the offense. (*Id*.). The Court Report also noted:

> - "There are no obvious memory impairments evident but he did indicate that he frequently loses his 'focus' for periods of 30 to 60 minutes and will have no recollection afterward of what transpired during these episodes."

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[21] Yarbrough testified that when Watson asked Yarbrough questions that he was not comfortable answering, he put Watson on the phone with Mostiler and they spoke at that time. (Dep. Yarbrough at 58-59). Watson stated in his affidavit that he did not speak to Mostiler until after the trial started. (Pet'r's Habeas Court Ex. 4).

- "[Whatley] expressed some paranoia in terms of evil forces seeking to undermine him and influence his mind."

- "Judgement [sic], as measured by common-sense type questions, is somewhat impaired."

- "He has some insight into his condition, but does not appear to fully appreciate the extent to which his thinking deviates from the norm."

- "His responses on the [Minnesota Multiphastic Personality Inventory-2] resulted in an interpretable profile, which is suggestive of an individual with significant psychopathology."

- Individuals, such as Whatley, with an interpretable profile "often become disorganized and they may engage in excessive daydreaming and fantasy. At such times, their thinking may become autistic and circumstantial. Their behavior may be unpredictable and they may act out unexpectedly. At such times, their judgment and reality testing may be quite poor. In Mr. Whatley's case, this appears to take the form of magical thinking. Specifically, Mr. Whatley thinks he is unique and special, and ordained for a special purpose. He believes he has unique and special powers which can impact and often directly influence other's

> thinking and behavior, and consequently, the outcome of some situations."
>
> - "Based on all available information, the examiners believe that Mr. Whatley's behavior can be best described by the following diagnoses: Rule Out Bipolar Disorder [and] Personality Disorder [Not Otherwise Specified] with antisocial, borderline, narcissistic, and schizotypal features."
>
> - "Although he expressed a cognitive understanding of the fact that he could receive the death penalty, due to his belief in his own importance and the fact that he has been endowed with a special mission, he does not think that a death sentence is a realistic possibility. He indicated that he believes that God would intervene to prevent this from happening."
>
> - "Due to his belief in his own importance and his special mission, Mr. Whatley does not think that a death sentence is a realistic possibility."

(*Id.*). The Court Report, which was received three days before trial started, also included a "brief social history" that stated, based exclusively on what Whatley conveyed to the examining psychologists, that he had a troubled relationship with his psychologically-troubled mother, that Whatley had engaged in substance abuse as a youth, and that Whatley had received unknown, prior psychological

counseling as a youth at the Personal Growth Center in Griffin, Georgia. (*Id*.).

On January 6, 1997, on the first day of voir dire, Mostiler, for the first time, spoke with Watson on the phone. (Pet'r's Habeas Court Exs. 4, 44). Three days later, on January 9, 1997, while in the middle of trial, Mostiler spoke again with Watson. (Pet'r's Habeas Court Ex. 44). Also on January 9, 1997, Mostiler sent to Watson a records release authorization for Whatley's records and asked Watson if he could come to Georgia for the trial if they flew him in the following Tuesday. (Resp't's Habeas Court Ex. 71).

At some point early in the trial, Whatley, Mostiler and Yarbrough exchanged a series of handwritten questions and answers on a piece of paper. (See Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75). At the top of the page was an entry written by Yarbrough about a witness. (Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75). Beneath this entry, Whatley wrote a note asking to talk to Mostiler during a break. (Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75). In the next entry, Whatley asks if any efforts had been made to get Whatley's 1988 psychological records from Watson or Mr. Stern, Whatley's former attorney in the District of Columbia, to compare to the court-ordered evaluation. (Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75). Even though Mostiler had already spoken on the phone twice with Watson, Mostiler wrote a note in response to Whatley asking who were Stern and Watson. (Dep. Yarbrough at

24-26; Resp't's Habeas Court Ex. 75). In a later handwritten note, Whatley stated that Watson was the program developer from Washington, D.C., who supervised his rehabilitation program after his armed robbery conviction. (Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75). Beneath this entry, Yarbrough wrote that several calls had been made to find Stern or Watson, but the calls were unsuccessful. (Dep. Yarbrough at 24-26; Resp't's Habeas Court Ex. 75).

On January 15, 1997, after Whatley's conviction, Watson arrived in Georgia to testify at Whatley's sentencing proceeding. (Pet'r's Habeas Court Ex. 4). Mostiler's billing statement indicates the he "interviewed" Watson for two hours that day in anticipation of his testimony the following day. (Pet'r's Habeas Court Ex. 44). Yarbrough's deposition and Watson's affidavit state that this was a dinner meeting and did not involve any substantive review of Watson's knowledge of Whatley or the documents that Watson may have had in his possession. (Dep. Yarbrough at 63-64; Pet'r's Habeas Court Ex. 4).

On January 16, 1997, Watson testified at trial. Watson mentioned, but did not discuss, the 1988 Records and briefly discussed Whatley's social history and background. Mostiler focused his questioning on Watson's opinion of how Whatley would react to a long prison sentence.

c) Mostiler's knowledge and possession of Whatley's mental health information

The record in the state habeas court supports the timeline stated above. The record does not show that Mostiler ever received or reviewed the 1988 Reports. Yarbrough testified that he talked to Watson on December 19, 1996, just before trial, and that during this call he believes he asked Watson what documents he had about Whatley and whether Watson could bring any documents he had with him when he came to Georgia so Mostiler could review them. (Dep. Yarbrough at 60-61). Yarbrough testified that he could not recall seeing the 1988 Reports and could not recall if Mostiler ever saw them.[22] (*Id*. at 61). Watson stated in his affidavit that he did not talk to Mostiler until after the trial began, that Mostiler had not prepared a defense case in mitigation, and that Mostiler did not ask for, and he did not provide him with, any of the documents he brought with him from Washington, D.C., to include the 1988 Reports. (Pet'r's Habeas Court Ex. 4).

It is, however, undisputed that Mostiler knew of the existence of prior psychological reports, including

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[22] When asked by counsel for the State in his October 11, 2002, deposition if it was possible Mostiler saw these documents, Yarbrough acknowledged that it was possible. (Dep. Yarbrough at 62). Yarbrough was not aware what Mostiler discussed with Watson and did not know when or where they met other than a meeting in a meeting area in the basement of the courthouse during a trial break and over dinner. (*Id*. at 64). Yarbrough did not state what was discussed during these meetings. (*Id*.). Yarbrough vaguely recalled a discussion of some kind between Mostiler and Watson at Mostiler's office regarding some psychological issue, the specifics of which he did not remember. (*Id*.).

the 1988 Reports, as early as May 19, 1995, including based upon information that Whatley provided to him, and that Mostiler did not, for nineteen (19) months, even talk to Watson. When he did, he generally asked him to bring any documents he had on Whatley. There is no evidence he asked specifically for the 1988 Reports or asked Watson what they showed. This is so even though he knew the result of the Court Report on Whatley's competency and thus knew the mental health and psychological assessment presented in the report. (*See* Pet'r's Habeas Court Ex. 1; Resp't's Habeas Court Ex. 61; Dep. Yarbrough at 48). The Court Report stated that Whatley had significant psychological issues and the "brief social history" in the Court Report indicated Whatley's difficult relationship with his psychologically-troubled mother, and that Whatley had a substance abuse problem. (*See* Resp't's Habeas Court Ex. 61). Mostiler did not act on the information contained in the Court Report and did not ask for a continuance to develop evidence in mitigation based on the contents of the report. The question is whether Mostiler's failure to act in the face of the evidence that his client had significant signs of psychological issues by conducting further investigation, his failure to obtain the 1988 Reports once aware of them, his failure to ask Watson about the findings in the 1988 Reports, and his failure to request a continuance to look into these significant psychological and mental health issues, was objectively reasonable for counsel representing a defendant in a capital case, particularly where the evidence of his guilt was significant and where the

expectation was high that the penalty phase would be the most important part of Whatley's prosecution. *See Johnson*, 643 F.3d at 932-33.

The Supreme Court of Georgia's factual finding that Mostiler "facilitated" the receipt of the 1988 Reports by having a release signed by Whatley, and the inference made that Mostiler reviewed the 1988 Reports in Georgia when Watson arrived to testify at trial, to suggest later that Mostiler made strategic decisions not to introduce the 1988 Reports or their contents is disputed by the record and is erroneous. The state habeas court's further finding that the evaluations in the 1988 Reports and those conducted by Drs. Bailey-Smith and Fahey were "inconclusive" is demonstrated by the reports themselves and this finding is also erroneous.

d) Whether Mostiler acted reasonably by not conducting further investigation into Whatley's mental health based on the information known to him

The Supreme Court and the Eleventh Circuit have made clear that when a document or information in the possession of a trial counsel indicates significant adverse circumstances or mental health problems in the background of a defendant facing the death penalty, a reasonably competent attorney will necessarily pursue this information to make an informed choice among possible defenses and strategies for a case in mitigation. *See Wiggins*, 539 U.S. at 525; *Johnson*,

643 F.3d at 933. It is unreasonable to fail to investigate further where "potentially powerful mitigation evidence stare[s] [an attorney] in the face or would have been apparent from documents any reasonable attorney would have obtained." *See Bobby*, 130 S. Ct. at 19 (internal citation omitted). The information developed is not required to be presented as mitigating evidence, but the information must be developed so a trial counsel may make informed decisions about defenses and mitigation strategies. *See Wiggins*, 539 U.S. at 523-25; *Johnson*, 643 F.3d at 932-33.

In *Williams*, a petitioner challenged the adequacy of his counsel's investigation into his background and asserted that his counsel provided ineffective assistance by failing to investigate and discover information about his "nightmarish childhood," lack of education, and deficits in cognitive thinking. 529 U.S. at 393-95. Counsel for petitioner failed to begin to prepare for the penalty phase until a week before trial and a diligent investigation would have uncovered records containing substantial mitigating evidence, much like the circumstances here where Mostiler could have obtained the 1988 Reports had he made even a minimal, much less a diligent, effort to obtain the documents from Watson. See id. at 394-96. In *Williams*, this failure to investigate and uncover available evidence of a significant mitigating nature constituted an inadequate investigation that, under *Strickland*, constituted ineffective assistance of counsel. *Id*.

In *Wiggins*, the Supreme Court considered facts similar to those here. *See* 539 U.S. at 521-22. There the Court considered the adequacy of counsel's investigation into a petitioner's background and mental health in a death penalty case. *Id.* Counsel obtained limited records and received reports from a psychologist who conducted a number of tests on petitioner, similar to the court-ordered evaluation testing that was conducted in this action. *See id.* at 523. The report of the examining psychologist in *Wiggins* revealed "features of a personality disorder" and counsel knew rudimentary information about petitioner's background and life history based on a handful of documents obtained during an investigation, which included facts that petitioner had a poor relationship with his alcoholic mother and had a troubled upbringing. *Id.* at 523-25. Counsel did not expand their investigation beyond these sources of information and did not further investigate or develop information about petitioner's background or social history. *Id.* The Supreme Court found that petitioner's counsel in *Wiggins* did not exercise reasonable judgment by failing to conduct further inquiry into his background in light of the information that was in his possession and that this conduct "fell short of the professional standards that prevailed in…1989," the same standards that applied during Mostiler's representation of Whatley. *See id.* at 523-24, 534.

In *Johnson*, the Eleventh Circuit, in a case similar to the one here, addressed the inadequacy of a counsel's investigation into a petitioner's background and mental health issues where there

was "overwhelming evidence of guilt" such that "any reasonable attorney would have known…that the sentence stage was the only part of the trial in which [petitioner] had any reasonable chance of success." *See* 643 F.3d at 931-32. In *Johnson*, the petitioner reported to his counsel that "he had a bad childhood, including an alcoholic and abusive father who would abandon the family," similar to Whatley's report to Mostiler and Yarbrough that he was abandoned by his mother. *See id*. at 932. Petitioner's counsel did not follow up on or develop any information beyond taking, at face value, his father's denial of an abusive relationship. *Id*. at 932-33. The Circuit found that, given the overwhelming evidence of petitioner's guilt, it was unreasonable for counsel not to investigate petitioner's claim of an abusive and troubled childhood. *Id*. Finding that counsel failed to adequately investigate the information communicated to him by his client, the Circuit held that counsel's conduct "was 'outside the wide range of professionally competent assistance'" guaranteed by the Sixth and Fourteenth Amendments to the Constitution. *Id*. at 934 (quoting *Strickland*, 466 U.S. at 690).

In *Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252 (11th Cir. 2012), the petitioner alleged that his counsel failed to conduct an adequate background investigation, failed to present mental health information in mitigation, and failed to obtain records on his behalf that he told him about. The Eleventh Circuit found effective the assistance of counsel that was provided, but in doing so underscored the adequacy of the investigation

required. See *Pooler*, 702 F.3d at 1270-74. The Circuit based its conclusion on the fact that an extensive, multi-source investigation was conducted by counsel and his investigator, and that counsel obtained confirmation of Pooler's background information by means other than those that the petitioner alleged were required. *Id*. The Circuit concluded that

> (1) trial counsel was already performing a mitigation investigation into Pooler's background, including an inquiry into his medical and psychological history; and (2) well before trial, counsel read the reports from, and heard the competency-hearing testimony of, multiple experts who had evaluated Pooler's then-current mental functioning. And most importantly, nothing in those expert reports during competency proceedings, or in the additional mitigation search [counsel] performed, suggested a need for mental health experts to look further.

Id. at 1273. The Circuit noted that counsel diligently attempted and made a concerted effort to obtain documents about Pooler's military service, education, and employment history and that it was reasonable to stop looking when he did and after obtaining information from relatives on the matters expected to be covered in those records. *See id*. The Circuit observed that Pooler was not "a case where counsel ignored evidence in his possession that cast doubt upon his client's story or suggested the need for

further investigation." *Id*. at 1272. The facts in Whatley's case are very different.

The Court finds that *Williams*, *Wiggins*, and *Johnson* are substantially similar to the circumstances here and support, together with *Pooler*, that Mostiler's conduct in response to the information in his possession—and provided to him by Whatley—about Whatley's background and mental health was objectively unreasonable.[23] Whatley's counsel did not take the routine step of arranging to get the 1988 Reports, even after Whatley advised him of their existence and, as a result, Mostiler did not have them at a time when meaningful further investigation was possible regarding the significant information about Whatley and his mental health that was set out in the reports. Even when Mostiler became aware of the Court Report, indicating that Whatley showed signs of "significant psychopathology," "magical thinking," paranoia, blackout episodes, and a belief that God would intervene in his case to prevent him from being sentenced to death, Mostiler did not

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[23] The issue on this claim is whether Mostiler undertook a constitutionally adequate investigation. The Court recognizes that the Supreme Court of Georgia found based on the record that some unspecified, unknown documents were provided by Watson to Mostiler on the eve of Watson's testimony on the last day of trial. This factual determination by the Supreme Court of Georgia, to the extent it is supported by the record, does not undermine the conclusion that Mostiler's investigation of Whatley's background was inadequate because Mostiler's conduct in investigating Whatley's background prior to trial is what is relevant to the analysis of the adequacy of his investigation.

investigate further and did not request a continuance for the time necessary to do so.

Mostiler even received information, presumably from Whatley, about the adverse circumstances of Whatley's youth and the existence of the 1988 Reports, and yet did not conduct any further investigation to develop this information. *See Pooler*, 702 F.3d at 1269; *Johnson*, 643 F.3d at 932-35. In short, confronted with the undisputed facts known by Mostiler before trial—to include that Whatley had undergone previous psychological examination in 1988 in Washington, D.C., and that Whatley had signs of "significant psychopathology" based on the court-ordered competency examination that was received by Mostiler before trial—Mostiler chose not to pursue any further investigation of Whatley's background or his mental health by either ensuring that he obtained Whatley's mental health records from Watson before trial, or by requesting an independent mental health examination by a defense expert who could have developed the mental health and social history information that was self-evident in the 1988 Reports and the Court Report.

The Court finds that, because it was reported to Mostiler that his client had prior psychological evaluations performed in 1988, that Whatley had a troubled upbringing, and that his client had signs of "significant psychopathology" and other serious mental health issues based on the results of the court-ordered mental health examination, under these circumstances, no reasonably competent counsel would choose not to pursue additional

mental health, social history, or other additional information about his client, and the failure to do so violated the professional standards to which Mostiler was required to abide in his death penalty representation of Whatley. *See*, *E.g.*, *Rompilla*, 545 U.S. at 381; *Wiggins*, 539 U.S. at 522-27, 533; *CF. Bobby*, 130 S. Ct. at 19. There simply is no evidence of a conscious, deliberate effort by Mostiler to pursue obviously available information as part of his penalty-phase investigation and there is no evidence that an adequate investigation was done upon which counsel could competently rely to make reasonable, meaningful strategic decisions. *See Strickland*, 466 U.S. at 690-91; *Pooler*, 702 F.3d at 1272-73. Even giving significant deference to Mostiler's judgments and considering his perspective at the time his decisions in Whatley's case were made, Mostiler's conduct, under the circumstances here and specifically his failure to inquire further into Whatley's background and mental and psychological health, "was 'outside the wide range of professionally competent assistance'" guaranteed by the Sixth and Fourteenth Amendments. *See Johnson*, 643 F.3d at 934 (quoting *Strickland*, 466 U.S. at 690). There can be no post hoc rationalization that can explain this serious deficiency in his investigation of this case or his representation of Whatley. *See*, *E.g.*, *Rompilla*, 545 U.S. at 381; *Wiggins*, 539 U.S. at 522-27, 533; *CF. Bobby*, 130 S. Ct. at 19.

Considering the investigatory and case-preparation actions taken by Mostiler and his knowledge of Whatley's background, the Court finds Mostiler failed to "conduct[] an adequate background

investigation [and did not] reasonably decide[] to end the background investigation when he did." *See Johnson*, 643 F.3d at 931-32 (citing *Strickland*, 466 U.S. at 690-91); *See Also Wiggins*, 539 U.S. at 522-27, 533; *DeYoung*, 609 F.3d at 1285-88; *Chandler v. United States*, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000) (ambiguities or omissions in the record regarding a trial counsel's investigation are not sufficient to overcome presumption of reasonableness on part of trial counsel). The Court finds that fairminded jurists would not disagree that the Supreme Court of Georgia's conclusion that Mostiler conducted an adequate investigation into Whatley's background and mental health issues was objectively unreasonable under the facts of this case, outside the wide range of professionally competent assistance, and contrary to clearly established Federal law. *See Wiggins*, 539 U.S. at 520-22, 526-27; *Wright*, 505 U.S. at 308; *Strickland*, 466 U.S. at 687; *Evans*, 703 F.3d at 1325-26; *Johnson*, 643 F.3d at 934. The Court finds that the failure to conduct an adequate investigation and enacting a mitigation presentation without one failed to meet the professional norms that apply to the representation of defendants in death penalty cases and that fairminded jurists would all agree that the state court's finding of an adequate investigation is an objectively unreasonable application of *Strickland*. *See Wiggins*, 539 U.S. at 520-21; *Evans*, 703 F.3d at 1326. Finally, the Court concludes that the Supreme Court of Georgia's decision was based on an unreasonable determination of the facts presented in the state court proceedings, including that Mostiler sought to "facilitate" obtaining the

1988 Reports and received and reviewed them when Watson came to Georgia, and the clearly erroneous assumption that a decision was made that the contents of the 1988 Reports were not helpful in mitigation and that this was the likely reason they were not presented. These facts were not supported, and in fact were contradicted, by the record. *See Wiggins*, 539 U.S. at 528-29, 534.

e) Whether Mostiler's inadequate investigation prejudiced Whatley

Having determined that Mostiler's performance and investigation of Whatley's background and mental health issues was inadequate and violated Whatley's Sixth and Fourteenth Amendment rights, the Court must next determine if Whatley was prejudiced such that there is a reasonable probability that the outcome of the sentencing phase would have been different had Mostiler conducted an adequate investigation. *See*, *E.g.*, *Wiggins*, 539 U.S. at 534, 536-38; *Williams*, 529 U.S. at 397-98. To do so, the Court must reweigh the evidence in aggravation against the totality of available mitigating evidence, both adduced at trial and in the state habeas proceedings. *See Wiggins*, 539 U.S. at 534, 536-38; *Williams*, 529 U.S. at 397-98.

f) The evidence adduced at trial and in the state habeas proceedings

During the penalty phase of Whatley's trial, the State presented evidence of Whatley's lack of

remorse for the death of Allen, evidence of Whatley's dangerousness, and evidence about Whatley's prior convictions for forgery, armed robbery, and assault. The State also presented evidence of Whatley's status as an escapee from a halfway house at the time of the murder. The State's argument that death was an appropriate punishment was based on the premise that Whatley "is dangerous and he's always going to be dangerous until the day he's executed." (Tr. at 1323).

To show lack of remorse, the State presented witnesses who testified regarding Whatley's request to have the money he stole from the bait shop returned to him and Whatley's concern during the trial about how long it would take to be processed to state prison after the conclusion because he did not want to miss the Super Bowl. (*Id*. at 1324-32). To illustrate dangerousness, the State presented testimony from a detective from Washington, D.C., and introduced a number of exhibits and testimony regarding Whatley's commission of an armed robbery using a shotgun in Washington, D.C., in 1988. (*Id*. at 1332-48). The victim of the armed robbery testified that Whatley placed the shotgun in his back and that he heard two clicking noises after Whatley did so, to support that Whatley had readied the weapon to fire. (*Id*. at 1348-53).

The State introduced exhibits that documented Whatley's convictions for the offenses of forgery and simple assault, as well as exhibits and testimony regarding his probation revocation and assignment to the halfway house from which he escaped before

returning to Georgia in January 1995. (State's Trial Exs. 42, 43, 50, 51).

In arguing against the imposition of the death penalty, Whatley's counsel sought to highlight the adverse upbringing that Whatley experienced and argued that, even though he had been in trouble with the law, Whatley's youth and rehabilitative potential made death an inappropriate punishment. (Tr. at 1323-24). Whatley's counsel presented the testimony of eleven witnesses, including Whatley, several friends who knew him while growing up in Georgia, relatives, and Watson.[24] (*Id*. at 1355-1510). These witnesses "testified either concerning Petitioner's background, his redeeming qualities and their desire for his life to be spared, and/or Petitioner's remorse for his crimes." (Resp't's Ex. 71 at 45).

Whatley's friends and relatives generally testified about his redeeming qualities, his upbringing, and asked that his life be spared.[25] (Tr.

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[24] One of Whatley's eleven witnesses was the custodian of the records for the Griffin-Spalding County Schools, through whom Whatley introduced a copy of his school records for consideration by the jury during the sentencing phase.

[25] Whatley's friend, Barbara Ellis, testified that Whatley had redeeming qualities and was a good person. Janet Wyche, a cousin, testified about how Whatley previously lived with her in Griffin, Georgia, was obedient, and stayed out of trouble. Linda Dixon testified about how she taught Whatley in Sunday school while he was growing up and how he was a nice and respectful young man. Cleveland Thomas, Jr., testified about how Whatley was raised by his father and stepmother, expressed his belief that Whatley had potential to do great things with his

at 1355-1412). Several witnesses testified about Whatley's lack of a relationship with his mother and that he was raised by his great uncle and aunt, Cleveland Thomas, Sr. and Marie Thomas. One of Whatley's relatives, Lorraine Goodman, explained that Whatley did not know his father, that Whatley's mother was incapable of raising him, that his mother abandoned him, and that Whatley was very involved in his church as a youth. (*Id*. at 1366-74). Goodman testified that Whatley returned to Griffin, Georgia, before the murder of Allen, was not working, and that she had to ask him to stop staying at her home when he failed to pay rent. (*Id*.).

Whatley's older cousin, Franklin White, testified about Whatley's upbringing in the Griffin, Georgia, community. (*Id*. at 1374-79). White, who knew Whatley most of his life, explained that Whatley was a nice young boy who was very involved in church activities. (*Id*.). White explained that, when Whatley returned to Griffin from Washington, D.C., White tried to help him, provided him money, saw Whatley interact favorably with his young grandchildren when they were at his house, and that he did not expect him to steal his handgun. (*Id*.).

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life, and pleaded with the jury to spare Whatley's life. Arnetta Hall testified about how she knew Whatley while growing up, how he was a respectful man, and that his life is worth saving. Nancy Ward, who taught Whatley in Sunday school while he was growing up in Griffin, testified about how Whatley was a nice, well-mannered, and helpful young man who deserves forgiveness. Ward also testified about how Whatley's mother left him in Georgia to be raised by the Thomases when she left for Washington, D.C.

Watson explained that he worked with Whatley in 1989 to develop a rehabilitation plan for him while he was awaiting sentencing after his armed robbery conviction. (*Id*. at 1486-1510). Watson explained that he sought to understand Whatley's social history and psychological background. (*Id*. at 1489-90). Watson told the jury how he developed a social history of Whatley based on numerous discussions with Whatley and after speaking with the Thomases, while they were still alive. (*Id*.). Watson stated that he attempted to contact Whatley's mother on multiple occasions, but was unable to contact her and was not able to get her involved in Whatley's rehabilitation. (*Id*. at 1494).

Watson stated that a clinical psychologist and educational psychologist examined Whatley to determine his academic potential, vocational potential, and whether a rehabilitation plan was realistic. (*Id*. at 1490).[26] Watson developed a workable rehabilitation plan for Whatley based on these examinations and in consultation with the other organizations and individuals who would assist in helping Whatley become a productive member of society. (*Id*. at 1491).

Watson testified that he presented the proposed rehabilitation plan to the sentencing judge in Whatley's criminal case and that it envisioned psychological counseling, vocational training, and academic refresher training to prepare Whatley for

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[26] Watson was not asked to elaborate on Whatley's social or psychological background based on the findings in the 1988 Reports or otherwise.

possible college courses and to find employment. (*Id*. at 1491-92). Watson stated he was pleased when the judge in Whatley's case approved the plan to be implemented. (*Id*.). Watson explained how he worked with Whatley for a year and a half and met with him about once every other week to help him execute the rehabilitation plan. (*Id*. at 1493). Watson testified that the execution of the rehabilitation plan ended when Whatley absconded from the halfway house to which he was assigned. (*Id*.).

Based on the totality of his experiences with Whatley, Watson stated his view that Whatley came from a good family having been raised by the Thomases and that he was personable, likeable, bright, and ambitious with a lot of potential. (*Id*. at 1493-94). Watson believed that Whatley's success in being rehabilitated was adversely affected by his relationships with female acquaintances because it often caused him to miss his curfew at the halfway house. (*Id*. at 1495-97).

Watson expressed his opinion that Whatley was a very complicated person who would not react well to being incarcerated. (*Id*. at 1493, 1497-99). Based on this belief, Watson stated that life in prison without parole would punish Whatley every day of confinement and that incarceration would affect him more deeply than the average prisoner. (*Id*. at 1499-1500). Watson stated that Whatley had rehabilitative potential and is one of the few people he had worked with who, when facing incarceration, responded enthusiastically to a rehabilitation plan. (*Id*. at 1500-01).

Whatley testified about his upbringing, criminal history, and about the death of Allen. (*Id.* at 1412-86). He explained that he was raised by the Thomases because his mother had problems that prevented her from raising him. (*Id.* at 1413-15). Whatley said he had an ideal childhood while growing up with the Thomases and that he left their household around the eighth or ninth grade to be with his mother in Washington, D.C., because he wanted to have a relationship with her. (*Id.* at 1414-15). Whatley said that he had a poor relationship with his mother, did not know who his father was, and that this contributed to many of his problems in life. (*Id.* at 1414-16). Whatley explained that his mother initially lied to him about his father's identity, only to later reveal his father was someone else, and that this confused him. (*Id.* at 1415-16).

Whatley testified that in his later teenage years, he moved back in with his mother and worked multiple jobs as a laborer and security guard in an attempt to support her and her family. (*Id.* at 1421-23). He eventually moved out for good after his mother began taking money from him and reported him to the police for possessing drugs. (*Id.*).

Whatley testified at length about his criminal history. (*Id.* at 1423-35). He explained that, to try and support his mother and her family in Washington, D.C., he began dealing drugs and financing street-level drug dealers to sell drugs on his behalf. (*Id.* at 1423). Whatley later became involved with "some individuals that were into

forgery and uttering and credit cards, white-collar crimes," explaining that this led to being arrested for using a fake identification card to cash a check that was mistakenly delivered to his mailbox at one of the residences where he was staying. (*Id.* at 1424). He was placed on probation for this forgery offense and required to move into a halfway house. (*Id.* at 1424-27). His probation ultimately was revoked after he failed to return to the halfway house. (*Id.*).

Whatley testified that the victim in the Washington, D.C., robbery offense for which he was convicted actually owed Whatley money, that he did not use a shotgun to commit the crime, and that he only stuck a closed knife in the victim's back to make him think that he had a gun.[27] (*Id.* at 1428-29). Whatley received a suspended sentence and probation for the robbery and spent the following year working, reporting to his probation officer, and working with his program developer, Watson, who helped Whatley integrate into society. (*Id.* at 1429-31).

Whatley was reassigned to a halfway house after failing to report to his probation officer, and later was reincarcerated. (*Id.* at 1431-34). Whatley missed his halfway house curfew one evening and did not know what would happen if he returned, having

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[27] Whatley's version of events was directly contradicted on cross-examination when District Attorney McBroom used the transcript from his sentencing in Washington, D.C. for the armed robbery conviction, where he admitted to using a shotgun to rob the victim, to impeach Whatley's version of events. (Tr. at 1448-51).

been deemed an escapee. (*Id*.). Whatley decided to return to Georgia to earn some money so he could return to Washington, D.C., in a better financial situation. (*Id*. at 1434-35).

Whatley stayed with different acquaintances after returning to Griffin, sold drugs in Griffin, and stole Franklin White's gun because he feared for his safety. (*Id*. at 1435, 1437-38).

Whatley explained the circumstances surrounding the murder of Allen, asserted it was not premeditated, and that he only shot Allen after Allen shot at him as he was leaving the store.[28] (*Id*. at 1438-41). Whatley expressed his remorse to Allen's family and stated that he had asked God for forgiveness for the crime. (*Id*. at 1436, 1477). On cross-examination, Whatley re-enacted the crime in front of the jury. (*Id*. at 1478-81). The shackles he was wearing, which previously were not visible to the jury, were visible during the re-enactment. (*Id*.).

No evidence of Whatley's psychological or mental health issues was presented to the jury during the penalty phase of his trial.[29]

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[28] Whatley admitted in his testimony that he fired one shot inside the store that hit the counter in front of where Tommy Bunn was laying and behind which Allen was standing.

[29] Whatley's comments to the examining psychologist, Dr. Bailey-Smith, for the court-ordered mental health examination were used by the State during its cross-examination of Whatley during the penalty phase.

The jury sentenced Whatley to death on his malice murder conviction. *Whatley*, 509 S.E.2d at 48 n.1.

At the state habeas proceeding, the mitigating evidence presented was broader, more extensive, and different from that presented during sentencing. The evidence specifically addressed various aspect of Whatley's background and upbringing, the nature of his social and family relationships, and his mental health and psychological history, characteristics, and problems, little of which was presented to the jury during the penalty phase.

Affidavits and testimony were presented from a number of people who knew Whatley and who, if called at his sentencing, could have testified about significant events in Whatley's life while living with his relatives in Griffin that impacted his long-term psychological and mental health and other information which could account for Whatley's behavior, or at least inform an evaluation of it.

Several of Whatley's family members and friends submitted affidavits testifying about Whatley's background and upbringing, including that Whatley had a bad relationship with his mother, that he had a regrettable childhood because he was raised, in part, by an abusive alcoholic uncle, and that he was exposed to various forms of mental illness and abuse, including forms of sexual abuse, throughout his childhood. (*See* Pet'r's Habeas Court Exs. 5-8, 10, 12-15, 18, 20-21). Other individuals submitted affidavits testifying that they observed Whatley express remorse for Allen's killing, including when

he learned of Allen's death. (*See* Pet'r's Habeas Court Exs. 9, 16-17, 24). Some who testified at the sentencing indicated that they felt unprepared to testify because Mostiler failed to meet with them individually or go over their testimony—he simply addressed them all once as a group and advised them to "say nice things" about Whatley. (*See* Pet'r's Habeas Court Exs. 8-9, 12, 14-18). Those who did not testify at the sentencing stated that they would have if Mostiler had asked them to. (*See* Pet'r's Habeas Court Exs. 5, 7, 10-11, 13, 20).

Additional evidence of Whatley's remorse upon learning of the death of Allen was also presented. (*See* Pet'r's Habeas Court Exs. 9, 16-17, 23-24, 56). Jason Jackson, who was incarcerated for nine months in the Spalding County Jail with Whatley prior to his trial, testified in an affidavit that Whatley had remorse at the death of Allen. (Pet'r's Habeas Court Ex. 23). Mostiler never talked to him about Whatley. (*Id.*). Bridgette Bridges, who was employed as a guard at the Spalding County Jail while Whatley was incarcerated there after his arrest, testified in an affidavit that she treated Whatley's wounds after he was first admitted to the jail and that Whatley told her that he was high on drugs when he murdered Ed Allen, testifying further that Whatley expressed remorse when he learned that Allen had died. (Pet'r's Habeas Court Ex. 56). Bridges stated that if she had been asked by Mostiler, she would have told him this information and that she could have been a helpful witness at trial. (*Id.*).

Whatley also presented an affidavit from Watson, the Offender Division Program Developer from Washington, D.C. (Pet'r's Habeas Court Ex. 4). Watson discussed his knowledge of Whatley's background based on his having worked with him in the District of Columbia after his criminal convictions. (*Id.*). Watson explained the steps taken to obtain evaluations of Whatley by a neuropsychologist, to get him treatment, and to put him on the path to a successful future. (*Id.*). Watson discussed his interactions with Mostiler and stated that Mostiler's characterizations of their contacts and the duration of the discussions in Mostiler's billing records are inaccurate. (*Id.*). Watson expressed his belief that Mostiler did not have a theory for his case in mitigation and that he was first contacted in December 1996 by Mostiler's investigator. (*Id.*). Watson testified that he did not talk to Mostiler until the first week of January, after the trial had started. (*Id.*). Watson stated his opinion that the defense case in mitigation was a "charade" and that "[i]t was clear that Mr. Mostiler had not prepared for the sentencing phase and was just throwing witnesses up so it looked like there was a mitigation case being presented." (*Id.*). Watson asserted further that Mostiler did not ask for, and he did not provide him with, any documents in his possession from Washington, D.C., to include the 1988 Reports. (*Id.*).

There was significant evidence offered about Whatley's psychological issues and mental health during the state habeas proceeding. Whatley presented a transcript of the deposition of Dr.

Bailey-Smith, the examining psychiatrist for Whatley's court-ordered psychological evaluation following the murder of Ed Allen. (Pet'r's Habeas Court Ex. 1). Dr. Bailey-Smith testified in her deposition that if Mostiler had called her to discuss mitigating evidence, she would have provided information about Whatley and how there were areas in his psychological background that merited further investigation. (*Id.*). The results of Whatley's pre-trial, court-ordered psychiatric examinations by Drs. Bailey-Smith and Fahey were attached to the deposition transcript. (*Id.*).

Whatley also introduced copies of the 1988 Reports and presented the affidavit of Richard G. Dudley, Jr., M.D. (Pet'r's Habeas Court Ex. 2). Dr. Dudley is a New York psychiatrist who examined Whatley following his conviction and sentencing. (*Id.*). His evaluation included a review of relevant documents pertaining to Whatley and his background. (*Id.*). Dr. Dudley documented an abusive and troubling upbringing. (*Id.*). He presented a picture of a troubled young man with mental health issues. (*Id.*). He noted that the 1988 psychological evaluation of Whatley that was done as part of the District of Columbia Department of Corrections and Youth Study showed evidence of "symptoms of schizophrenia" and the 1997 Court Report noted "significant psychopathology." (*Id.*). Dr. Dudley concluded that there are grave concerns regarding whether Whatley was competent to stand trial, that his history and mental disorders offer an explanation for his conduct, and that Whatley's

mental capacity at the time of the offense may have been substantially diminished. (*Id*.).

Whatley also presented the affidavit of Dr. David Lisak, a clinical psychologist from Massachusetts who also examined Whatley. (Pet'r's Habeas Court Ex. 3). Dr. Lisak's findings and conclusions mirror those of Dr. Dudley, but provide a more in-depth analysis of Whatley's background and that Whatley was the victim of male sexual abuse. (*Id*.).[30]

Respondent presented evidence[31] during the state habeas hearing that it argues supports that Whatley's counsel conducted a thorough background investigation, engaged in substantive motions practice, received information from the State about his background and prior convictions, subpoenaed numerous witnesses to potentially testify (to include Drs. Fahey and Bailey-Smith), and made deliberate strategic decisions in the presentation of his mitigation case.[32]

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[30] The Court considers the affidavits of Drs. Dudley and Lisak as examples of the kind of independent evaluation that was not requested by Mostiler and the type of information that could be presented to a jury in a death penalty sentencing phase and for use in evaluating the prejudice suffered by Whatley based on Mostiler's inadequate investigation in this case.

[31] Mostiler's death, before the state habeas proceedings were conducted, denied the state habeas court, the Supreme Court of Georgia, and this Court of Mostiler's explanation for his investigation decisions and why he made the mitigation presentation decisions that he did.

[32] The Court notes that the state courts reached a variety of conclusions about trial counsel's conduct based on information

g) Whether there is a reasonable probability that one member of the jury would have voted for life

The evidence presented to the state habeas court establishes that if Mostiler had conducted an adequate investigation and obtained the significant information about Whatley's social history and mental health that was available, the jury would have learned about a number of significant, compelling mitigating circumstances in Whatley's life and they would have been provided a complete picture of the adverse circumstances that affected Whatley's conduct, behavior, and mental and psychological health. *See*, *E.g.*, *Wiggins*, 539 U.S. at

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provided by investigator Yarbrough. These findings did not critically evaluate the nature and uncertainty of Yarbrough's testimony. The Court notes, as it did previously in this Order (*see* footnote 15), that many of the responses by Yarbrough to questions about Mostiler's rationale for certain strategic decisions were based on Yarbrough's recollection of the case and his attempt to interpret what Mostiler may have done and may have decided based on his past experiences working with him. For obvious reasons, Yarbrough's recollection was poor and, to the extent he tried to provide interpretive information, it was prompted by leading questions which, even then, resulted in unspecific, speculative answers. The Court finds that Yarbrough's testimony does not discredit the undisputed fact that, prior to trial, Mostiler did not obtain the 1988 Reports, did not have Whatley examined by an independent mental health expert, and did not conduct any other mental or psychological health evaluation such that the investigation into this aspect of Whatley's life was constitutionally inadequate under *Strickland*. *See Strickland*, 466 U.S. at 687; *Evans*, 703 F.3d at 1325-26.

534-37 (powerful mitigating evidence included physical abuse, sexual molestation, homelessness, diminished mental capabilities, and having an absentee mother with substance abuse problems); *Williams*, 529 U.S. at 397-98. Although mental health and psychological evidence may be a double-edged sword that can work against a defendant during a sentencing proceeding, the information presented before the state habeas court does not suggest an enhanced risk of dangerousness to others or that Whatley was irretrievably broken. *See Evans*, 703 F.3d at 1328-29. The mitigating evidence regarding Whatley's background and mental health presented to the state habeas court that was not available to the sentencing jury focuses on how Whatley's mental health issues, drug abuse, and upbringing affected his conduct and perception of events and people. The 1988 Reports support that he is intelligent, subject to being rehabilitated, was not a lost cause, and had mental and social environmental influences and events that would cause a reasonable jury to conclude the death penalty should not be imposed.

The Court finds that in reweighing the evidence in aggravation against the totality of available mitigating evidence, from both the sentencing phase at trial and from the state habeas proceedings, there is a reasonable probability that one member of the jury would have voted for life instead of death. *See*, *E.g.*, *Wiggins*, 539 U.S. at 534, 537; *Williams*, 529 U.S. at 397-98 ("[T]he graphic description of [petitioner's] childhood, filled with abuse and privation…might well have influenced the jury's

appraisal of his moral culpability."). That is, the jury would not have sentenced Whatley to death if Mostiler had conducted an adequate investigation of his background and mental health issues. *See*, *E.g.*, *Wiggins*, 539 U.S. at 534, 536-38; *Williams*, 529 U.S. at 397-98.[33]

The Court thus finds that the Supreme Court of Georgia's decision regarding Whatley's claim of ineffective assistance of counsel based on an inadequate background investigation "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21, 537; *Williams*, 529 U.S. at 379, 385, 397-98. The Court further finds that Whatley was prejudiced by the ineffective assistance of his counsel including because counsel's investigation was constitutionally inadequate and did not allow an effective penalty-phase strategy to be developed, and denied the jury of information that had a reasonable probability of producing a different sentencing result. Whatley thus is entitled to relief on his ineffective assistance of counsel claim based on a failure by Mostiler to conduct an adequate investigation, and his death sentence is required to be vacated.

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[33] An adequate investigation was the necessary first step to developing a penalty-phase strategy. *See Wiggins*, 539 U.S. at 534, 537; *Williams*, 529 U.S. at 397-98.

b. Claim IX, Subpart B – Petitioner's claim that his trial counsel provided ineffective assistance of counsel in mishandling requests for mental health experts

Whatley's claim regarding the mishandling of requests for mental health experts is that his counsel was constitutionally ineffective in failing to renew a motion to retain, and in failing to present testimony from, a mental health expert. (*See* Pet'r's Br. in Supp. of Pet. at 117-18; Pet. for Writ of Habeas Corpus ¶¶ 142-47); *See Also Ake v. Oklahoma*, 470 U.S. 68 (1985). Because Whatley bases his claim upon the decisions of his counsel and not a denial of a request for assistance by the trial court, this claim also is required to be evaluated under *Strickland*.

i. State court adjudication

Regarding Whatley's claim that his trial counsel was constitutionally ineffective in his handling of requests for mental health experts, the Supreme Court of Georgia stated:

> Whatley also argues that trial counsel rendered ineffective assistance in his preparation and use of new mental health evidence. Counsel initially sought funds from the trial court to obtain his own mental health expert. The trial court authorized an initial examination of Whatley by psychologists working for the state mental hospital, Dr. Karen Bailey-Smith and Dr.

Margaret Fahey. Counsel received two written reports from the evaluation. Dr. Bailey-Smith gave inconsistent testimony in the habeas proceedings, the balance of which suggested that she possibly spoke with trial counsel but that she could not specifically recall doing so. The defense investigator testified that counsel did communicate with Dr. Bailey-Smith after reviewing her report, and it is clear that counsel did receive a copy of her report. Thus, the evidence supports the habeas court's finding of fact that counsel did communicate with Dr. Bailey-Smith. Whatley faults trial counsel for not providing Dr. Bailey-Smith the mental health evaluations performed in the District of Columbia as a result of his criminal proceedings there; however, she testified in the habeas hearing that they would not have changed her expert opinions if she had seen them pre-trial and, therefore, counsel's use of her report would not have been affected by his alleged failure to obtain the records either in a timely fashion or at all. Dr. Bailey-Smith's report did note that Whatley's MMPI-2, a personality inventory, "was suggestive of…significant psychopathology" and that Whatley used some "idiosyncratic" words. However, she never concluded that he suffered from psychosis, and, in fact, she testified at the habeas hearing that she "didn't think he had any delusional thoughts" but merely had "some thought patterns that we thought were different and

bordered delusional thinking." Furthermore, her report's description of the possible "psychopathology" suggested that Whatley merely had a "boastful and egocentric" attitude and that he had a "form of magical thinking" characterized merely by a belief that he was "unique and special" and had "unique and special powers" to influence others. The diagnostic impression set out in her report contained hints of mitigation, but overall it could have been more aggravating than mitigating. That diagnosis was as follows: "Rule Out [i.e., there are some signs of but not enough to reach a diagnosis of] Bipolar Disorder" and "Personality Disorder NOS [not otherwise specified] with antisocial, borderline, narcissistic, and schizotypal features."

As we noted above, counsel's use at trial of Dr. Bailey-Smith's report would not have been affected if counsel had not failed, as Whatley alleges, to obtain the records from mental health evaluations performed in the District of Columbia as a result of his criminal proceedings. We further conclude as a matter of law that the failure of trial counsel to present the records directly to the trial court in a renewed motion for Whatley's own expert did not result in significant prejudice to his ability to prevail on that motion. The evaluations described in those records had been conducted more than eight years before Dr. Bailey-Smith's, and they

> reached conclusions similar to, and in some respects less favorable than, the conclusions reached in Dr. Bailey-Smith's report. For example, although the older evaluations referred to Whatley as "evidenc[ing] symptoms of schizophrenia," those symptoms are described in the reports as arising from Whatley's use of illegal drugs.
>
> Whatley also argues that trial counsel performed deficiently in failing to cite certain case law or to request an ex parte hearing in support of his motion for a defense expert. Even assuming counsel performed deficiently in these respects, we conclude that Whatley's motion for his own expert was not prejudiced by those deficiencies.
>
> In light of the foregoing discussion, we conclude as a matter of law that, even given the deficiencies in counsel's performance that we have assumed in our discussion above, Whatley's defense was not prejudiced. This is true because, even if counsel had performed in the manner Whatley now says he should have, counsel still would reasonably have declined to renew Whatley's motion for his own mental health expert and because the trial court would have properly denied such a renewed motion if it had been made.

Whatley, 668 S.E.2d at 662-63 (footnotes and internal citation omitted).

ii. Review of the state court adjudication

Mostiler made his mental health expert assistance determinations based on the results of state-provided, pre-trial mental health evaluations and his initial investigation into Whatley's background. The diagnostic impressions by Dr. Bailey-Smith in Whatley's pre-trial mental health evaluation did not conclude that he suffered from psychosis, but contained information, as recounted above, that contained significant mitigating evidence. Based on the results of Dr. Bailey-Smith's evaluation of Whatley, and it having discounted the existence of a trial defense based on a lack of *mens rea*, Mostiler did not pursue a further mental examination of his client by renewing his motion for expert assistance. *See Ake*, 470 U.S. at 82-83 (government-provided mental health expert warranted "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial"); *McClain*, 552 F.3d at 1253 ("The relevant question is not what actually motivated counsel, but what reasonably could have motivated counsel.").

The Court concluded that Mostiler failed to adequately investigate Whatley's background and mental and psychological health and should have conducted further inquiry by retaining the services of an independent psychological or other expert and ensuring he received Whatley's prior psychological records. The ineffective assistance claim presented here is based on a failure to renew a motion. A

decision by Mostiler to forgo further inquiry into Whatley's mental health by not renewing his request for expert assistance occurred after Mostiler received the pre-trial mental health evaluations from Drs. Bailey-Smith and Fahey. There are no grounds to support a request for further evaluation under Ake or state law.[34] *See Ake*, 470 U.S. at 83 (where petitioner's competence to stand trial is not in question, no constitutional right to a psychiatrist of own choosing or funds to hire one); *Hightower v. Schofield*, 365 F.3d 1008, 1015, 1026 (11th Cir. 2004), vacated other grounds, 545 U.S. 1124 (2005); *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995); *Brockman v. State*, —S.E.2d —, No. S12P1490, 2013 WL 776589, at *6 (Ga. Mar. 4, 2013); *Bright v. State*, 455 S.E.2d 37, 46-47, 50-51 (Ga. 1995) (indigent defendant has burden of showing, with reasonable degree of precision, how capacity to understand wrongfulness of conduct would be a significant and critical issue during penalty phase in order to obtain expert mental health assistance to help prepare case in mitigation).

Mostiler's decision not to renew a motion for expert assistance is entitled to a presumption that it was "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Whatley did not rely upon a *mens rea* defense and there were no competency issues identified in the

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[34] This request is not reasonably interpreted as a general request for an independent psychological evaluation for mitigation purposes but to request the kind of evaluation which the state court agreed to conduct and which was conducted by Drs. Bailey-Smith and Fahey.

Court Report. Thus, it was not unreasonable for Mostiler to determine that renewal of his motion for a mental health expert was not necessary or warranted. *See McClain*, 552 F.3d at 1253; *Holladay v. Haley*, 209 F.3d 1243, 1250 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 691) ("[T]he choice not to seek out such an evaluation is a tactical decision, which 'must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'"). The Court is unable to conclude that Mostiler committed "acts or omissions [that] were outside the wide range of professionally competent assistance" by failing to renew his motion for a mental health evaluation after receiving the results of Whatley's pre-trial psychological evaluations and considering the futility of that request under *Ake* and governing state-law standards. *See Strickland*, 466 U.S. at 690.

Assuming, as did the Supreme Court of Georgia, that Mostiler exhibited unprofessional judgment errors in not renewing a motion for a mental health expert, the Court further concludes that there is no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" during the guilt or penalty phase. Had Mostiler renewed his motion for mental health expert assistance after receiving the pre-trial mental health evaluation reports or the 1988 Reports, relied on controlling applicable case law in his renewed motion, required further examination by someone Whatley chose, or sought an *ex parte* hearing on any renewed motion, there is no reasonable likelihood that his motion to be

provided funds for further assistance by mental health experts would have been granted by the trial court because there was an absence of information indicating that Whatley suffered from a specified mental illness, that Whatley's capacity to understand wrongfulness of conduct was impaired, or that there were other questions of competency sufficient to justify granting his request. *See Ake*, 470 U.S. at 83 (where petitioner's competence to stand trial is not in question, no constitutional right to psychiatrist of own choosing or funds to hire one); *Hightower*, 365 F.3d at 1015, 1026; *Medina*, 59 F.3d at 1107; *Brockman*, 2013 WL 776589, at *6; *Bright*, 455 S.E.2d at 46-47, 50-51.

The Court does not find that the Supreme Court of Georgia's decision regarding Whatley's claims of ineffective assistance of counsel based on Mostiler's failure to renew a mental health expert request "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whatley was prejudiced by Mostiler's failure to renew this request. 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. Whatley is not entitled to relief on his ineffective assistance of counsel claim based on a failure by Mostiler to renew his request for a further mental health evaluation.

c. Claim IX, Subpart C – Petitioner's claim that his trial counsel provided

ineffective assistance of counsel in failing to object to his unwarranted and improper visible shackling during the penalty phase of his trial

Whatley's claim is not that his substantive constitutional rights were violated by his being visibly shackled during the penalty phase of his trial, but that his counsel was constitutionally ineffective for failing to object to his being visibly shackled during the penalty phase of his trial.[35] The ineffective assistance of counsel standards established by *Strickland* apply to this claim.

Under *Strickland*'s deferential standard, a court must first determine "whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential…. [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. Courts "must avoid second-guessing counsel's performance," recognizing that "the Petitioner's burden of persuasion—though the presumption is not

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[35] *See Deck v. Missouri*, 544 U.S. 622, 624 (2005) ("[T]he Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial.") (quoting *Holbrook v. Flynn*, 474 U.S. 560, 568-69 (1986)).

insurmountable—is a heavy one." *Chandler*, 218 F.3d at 1314.

Second, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *See Also Allen*, 611 F.3d at 751. The court may "dispose of [the] ineffectiveness [claim] on either of its two grounds." *Atkins*, 965 F.2d at 959; *See Also Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim… to address both components of the inquiry if the defendant makes an insufficient showing on one.").

i. State court adjudication

The Supreme Court of Georgia made the following determination regarding Whatley's claim that his counsel provided ineffective assistance of counsel by failing to object to his being visibly shackled before the jury during the penalty phase of his trial:

> Whatley argues that his trial counsel rendered ineffective assistance by failing to object to his being placed in visible shackles during the sentencing phase, including during his physical demonstration of his version of events for the jury. The Supreme Court of the United States decided in 2005, well after Whatley's trial and direct appeal, that visibly shackling a defendant during the

sentencing phase is unconstitutional unless the record shows "'an essential state interest'-such as the interest in courtroom security-specific to the defendant on trial." The Warden argues that counsel should not be regarded as having performed deficiently by failing to object to the shackling, because the practice had not yet been established as unconstitutional. However, at the time of Whatley's trial, this Court had already strongly suggested in dictum that it was unconstitutional to place visible shackles on a death penalty defendant during the sentencing phase without a showing of particular need. We therefore assume, at least for the purpose of this discussion, that trial counsel performed deficiently in failing to recognize the legal basis for an objection to visible shackling in the sentencing phase.

On direct appeal where unconstitutional shackling has occurred, there is a presumption of harm that can be overcome only upon a showing by the State that the shackling was harmless beyond a reasonable doubt. However, where, as here, the issue is the ineffective assistance of trial counsel in failing to object to such shackling, the petitioner is entitled to relief only if he or she can show that there is a reasonable probability that the shackling affected the outcome of the trial. In view of the balance of the evidence presented at his trial, we conclude as a matter of law that Whatley

> cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence.

Whatley, 668 S.E.2d at 663 (footnotes omitted).

ii. Review of the state court adjudication

The Court finds that Whatley's counsel did not render constitutionally ineffective assistance of counsel by failing to object to Whatley being seen in shackles by the jury after he had been convicted.

Whatley's counsel could have had a number of valid reasons for declining to object to his client being seen in restraints during the penalty phase of his trial and the Court, avoiding a "second-guessing [of] counsel's performance," presumes that Mostiler's decisions fell "within the wide range of reasonable professional assistance" expected of a trial counsel. *See Chandler*, 218 F.3d at 1314 & n.15 (quoting *Strickland*, 466 U.S. at 689); *See Also McClain*, 552 F.3d at 1253. On the facts of this case, the Court concludes that Whatley's counsel's decision in 1997— before the Supreme Court determined that visible shackling was unjustified absent a state interest specific to a particular trial[36]—not to object to Whatley's visible shackling was not a professional error that fell "outside the wide range of

[36] The Supreme Court of Georgia had suggested visible shackling should not occur. *See Moon v. State*, 375 S.E.2d 442, 449 (Ga. 1988).

professionally competent assistance." *See Strickland*, 466 U.S. at 690; *See Also Deck*, 544 U.S. at 624. The Court also concludes that there is no presumption of prejudice from the visible shackling, based on an ineffective assistance or due process claim, because Whatley was given an opportunity to object and declined to do so. *See Moon v. Head*, 285 F.3d 1301, 1317 (11th Cir. 2002); *Holladay*, 209 F.3d at 1255 (citing *Elledge v. Dugger*, 823 F.2d 1439, 1452 (11th Cir. 1987), withdrawn in part on other grounds, 833 F.2d 250 (11th Cir. 1987) (*per curiam*)); (Resp't's Ex. 13A at 1412).[37]

In evaluating whether there is a reasonable probability that the result of the proceeding would have been different if Whatley's counsel had objected, the Court notes that Whatley was seen in restraints during the penalty phase of his trial while testifying and reenacting, before the jury, Allen's murder, which implicates an interest in jury and courtroom security —an essential state interest. Considering the evidence that was introduced at trial, the jury's implicit rejection of Whatley's claim that Allen shot at him first, the State's case in aggravation during the penalty phase, and that

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[37] The Court notes that Petitioner is incorrect in asserting that "had counsel objected at trial, the result of Petitioner's appeal would have been different." (Pet'r's Br. in Supp. of Pet. at 89). *Elledge v. Dugger*, upon which Petitioner relies for that proposition, found reversible error where a petitioner was not afforded an opportunity to object or respond to the imposition of visible shackles. *See Holladay*, 209 F.3d at 1255 (citing *Elledge*, 823 F.2d at 1452). Here, Petitioner was given an opportunity to object and he did not do so. (Resp't's Ex. 13A at 1412).

there was some support for a need to protect the jury during the reenactment, the Court is unable to conclude—even if there were unprofessional errors by his counsel—that there is a reasonable probability that Whatley would have received a sentence other than death had Whatley's counsel objected to his being seen in shackles.

The Court does not find that the Supreme Court of Georgia's decision regarding Whatley's claim of ineffective assistance of counsel based on a failure to object to shackling disclosed during a reenactment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whatley was prejudiced by Mostiler's failure to object to Whatley's visible shackling. *See* 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. Whatley is not entitled to relief on his ineffective assistance of counsel claim based on a failure by Mostiler to object to his visible shackling during the penalty phase of his trial.

d. Claim IX, Subpart D – Petitioner's claim that his trial counsel provided ineffective assistance of counsel in failing to obtain the assistance of a ballistics expert and for failing to file a proper motion for a ballistics expert

Like Whatley's claims of error regarding counsel's failure to conduct an adequate investigation, to obtain mental health experts, or to object to Whatley's visible shackling, Whatley's claim of ineffective assistance of counsel in failing to retain and present testimony from an independent ballistics expert is also required to be evaluated under *Strickland*.

i. State court adjudication

The Supreme Court of Georgia, in reviewing Whatley's ineffective assistance claim based on his trial counsel's failure to obtain an independent ballistics expert, stated:

> Finally, Whatley argues that his trial counsel rendered ineffective assistance by failing to obtain funds for a ballistics expert. In support of his argument, Whatley cites the affidavit testimony of an expert witness opining that the evidence in Whatley's case is inconsistent with Whatley's having fired downward toward Tommy Bunn, that it would have been "virtually impossible" for the bullet that struck the service counter to have deflected upward and struck the

ceiling, and that the gunshot wound to Ed Allen's chest from a range of 15 to 18 inches could have been inflicted after Allen had stepped over Bunn and had gone around the service counter pursuing Whatley. The habeas court filed an order striking the affidavit, among others, because it was filed without authorization after the close of the evidentiary hearing.

The affidavit alleges that the gunpowder residue pattern associated with the bullet mark on the service counter demonstrates that the bullet was traveling on a trajectory somewhat level with the floor, not sharply downward toward Tommy Bunn. However, this testimony, coupled with the still-uncontradicted trial testimony showing that the bullet that struck the counter very close to Allen's position was fired from a range of approximately eight inches, would have led the jury to conclude, at the most, that the shot was intended for Allen and was fired at very close range before Whatley had retreated from the counter. The affidavit's assertions that the shot that struck the counter could not have also struck the ceiling and that the shot to Allen's chest could have been inflicted as Whatley was exiting and being pursued fail to shed light on the question of whether Whatley fired his pistol before Allen armed himself, particularly given the fact that Whatley fired at least one shot in the direction of either Allen or Bunn

> from a distance of only eight inches from the counter. Thus, even assuming trial counsel should have obtained expert testimony like that contained in the affidavit, we conclude as a matter of law that Whatley's defense did not, by his being deprived of such testimony at trial, suffer prejudice sufficient to support his ineffective assistance claim. Accordingly, even assuming the habeas court erred in refusing to consider Whatley's untimely affidavit, such error would be harmless.

Whatley, 668 S.E.2d at 664 (footnote omitted).

ii. Review of the state court adjudication

Mostiler's initial decision to seek an expert in ballistics was premised on a possibility that someone other than Whatley may have committed the murder of Ed Allen.[38] That Whatley's counsel did not further pursue his motion is not an unprofessional error where it likely, and quickly, became clear based on a

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[38] The Supreme Court of Georgia limited its review to the evidence before the state habeas court and did not consider Petitioner's ballistics expert affidavit (the "Fite Affidavit") as part of the record in its resolution of his claim on merits. Although the Supreme Court of Georgia assumed the assertions in the affidavit *arguendo* in its resolution of Petitioner's claim, the Fite Affidavit was not made part of the record that was before the Supreme Court. This Court's review under Section 2254 is similarly limited to the record before the Supreme Court of Georgia and the Fite Affidavit will not be considered. *See Grim v. Sec'y, Fla. Dep't of Corrs.*, 705 F.3d 1284, 1286 n.3 (11th Cir. 2013) (*per curiam*).

review of the State's evidence that Whatley was the person who shot and killed Ed Allen. See *McClain*, 552 F.3d at 1253. The decisions regarding whether to pursue independent ballistics expert assistance are, inherently, the sort of tactical and strategic decisions of counsel that, under *Strickland*'s deferential standards, should not be second guessed unless that decision was so "patently unreasonable that no competent attorney would have chosen it." *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987) (*per curiam*) (quoting *Adams v. Wainwright*, 709 F.2d 1443, 1445 (11th Cir. 1983) (*per curiam*)); *See Also Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995). The Court is unable to conclude here that Mostiler's decision not to retain and present testimony from an independent ballistics expert after determining that Whatley shot Allen is the sort of unprofessional error that falls "outside the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690.

The Court is also unable to conclude that there is a reasonable probability that Whatley was prejudiced by the absence of an independent ballistics expert. The Supreme Court of Georgia noted the information in the Fite Affidavit, which is not part of the state habeas record, does not support Whatley's alternative theory that he only shot Allen after Allen shot at him and does not call into question the uncontradicted trial testimony showing that the gunshots fired into the counter in front of Allen were fired from a range of eight inches—which supports that Whatley shot at Bunn and that Allen was shot and killed at close range by Whatley before

Allen had the opportunity to retrieve his gun and pursue Whatley out of the bait shop.[39]

The Court does not find that the Supreme Court of Georgia's decision regarding Whatley's claim of ineffective assistance of counsel based on a failure to retain and present testimony from an independent ballistics expert "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whatley was prejudiced by Mostiler's failure to retain and present testimony from an independent ballistics expert. *See* 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. Whatley is not entitled to relief on his ineffective assistance of counsel claim based on a failure by Mostiler to retain and present testimony from an independent ballistics expert.

3. *Claim VII – Ineffective assistance of counsel should be presumed under the rule of United States v. Cronic because his trial counsel's caseload rendered the adversarial process meaningless*

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[39] Petitioner's argument regarding the inadmissible, extra-record information in the Fite Affidavit about a "bullet impact area" around the frame of the door to the bait shop is consistent with the facts found by the state court that there was an exchange of gunfire between Whatley and Allen after Allen was shot and Whatley was fleeing the scene of the crime. *See Whatley*, 668 S.E.2d at 664; (Resp't's Ex. 52A).

Under *United States v. Cronic*, a defendant may demonstrate ineffective assistance of counsel that renders the adversarial process meaningless where it is shown that "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." 466 U.S. at 659-60. The circumstances under which prejudice is presumed are "very narrow" and the burden on a petitioner to demonstrate prejudice under *Cronic* is "a very heavy one." *See Stano v. Dugger*, 921 F.2d 1125, 1153 (11th Cir. 1991).[40] Whatley asserts that his trial counsel's "overwhelming caseload at the time of Mr. Whatley's trial created one of those circumstances." (Pet'r's Br. in Supp. of Pet. at 30).

a. State court adjudication

The state habeas court made the following factual findings regarding Whatley's legal representation:

> The petitioner was represented at trial and on appeal by Attorney Johnny Mostiler, the contract Public Defender for Spalding County. Mr. Mostiler had been admitted to practice law in Georgia since 1977. In 1990,

[40] The narrow circumstances where a presumption of prejudice may be found to exist include: (i) a denial of counsel; (ii) various kinds of state interference with counsel's assistance; and, (iii) where counsel is burdened with an actual conflict of interest. *See Smith v. Robbins*, 528 U.S. 259, 287 (2000).

under the direction of the Superior Court Judges of the Circuit and the Spalding County governing commission, Mr. Mostiler was engaged to serve as the Public Defender for that county, to provide, with assistance from other qualified attorneys, representation for indigent defendants. The contractor Mostiler, apparently received funding and, approval, or at least acquiescence, from the Indigent Defense Council for the State of Georgia. However, the contract between Mostiler and the county as Public Defender did not apply to "any case in which the State seeks the death penalty." Death Penalty cases involving indigent defendants were defended by attorneys (including Mr. Mostiler) individually and specifically appointed by a judge. Mr. Mostiler was appointed as defense counsel in this case on Feb. 7, 1995. He was an experienced criminal defense attorney and was prima facie presumed qualified to represent a person confronting the possibility of receiving a death sentence.

Attorney Mostiler was generally well known and well regarded in the legal community and was professionally well regarded in the legal community in which he practiced. He was generally permitted an "open file" policy by the District Attorney's office on this and other cases. This meant that, by having access to the prosecution's files, he did not have to spend a great deal of time to

> determine what the prosecution's evidence was likely to be. Nevertheless he filed appropriate motions and demands to see that the defense was provided with the information compellable to be produced by the state.

(Resp't's Ex. 71 at 5-6).[41]

The Supreme Court of Georgia, applying the clearly established federal law in *Cronic*, made the following factual and legal determination regarding Whatley's claim that Mostiler's "heavy caseload as the contract defender for Spalding County" requires a presumptive finding of prejudice:

> In general, an ineffective assistance claim can succeed only where the prisoner can show actual prejudice to his or her defense that in reasonable probability changed the outcome of the trial. However, Whatley correctly notes that an exception to this general rule applies and prejudice will be presumed where,
>
> > although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

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[41] Mostiler died shortly after the conclusion of Whatley's direct appeal. (Resp't's Ex. 71 at 26).

An example of where such extreme circumstances existed is a case where the entire membership of the state bar had been appointed to defend racially vilified defendants in a highly emotional public setting, where it "'was a matter of speculation only'" whether anyone would actually represent the defendants at trial until the last moment, where "[n]o attempt was made to investigate… [and n]o opportunity to do so was given," and where the trial began "within a few moments after counsel for the first time charged with any degree of responsibility began to represent [the defendants]."

Whatley asserts that, during the two-year period when his case was pending, Mostiler represented 70% of 1,558 felony defendants with the remainder being represented by his associate, opened 70 civil cases, represented one murder defendant outside the county, and represented four death penalty defendants. A review of the record reveals that Whatley's assertion may be somewhat exaggerated; however, more importantly, we find that his assertion regarding Mostiler's general caseload is irrelevant. As was noted by the habeas court, it is the amount of time *actually* spent by Mostiler on Whatley's case that matters, not the number of other cases he might have had that *potentially* could have taken his time. The habeas court found that Mostiler was a highly experienced

attorney, was experienced in death penalty cases, was appointed two years before Whatley's trial, and "spent over 157 hours on [Whatley's] case in addition to the 96 hours that his investigator logged." The habeas court further noted with approval testimony by the defense investigator stating that it was likely that Mostiler's billing records under-represented the time he actually spent on the case.

The Eleventh Circuit recently addressed a similar claim regarding Mostiler's heavy caseload and its bearing on another death penalty case in which he was defense counsel. Although the case was decided on procedural grounds, the Eleventh Circuit stated the following in dictum:

> As the district court found, Mostiler was an experienced and effective advocate for Osborne. Osborne presented no evidence, other than vague statistics, to support his allegation that trial counsel's caseload impeded his representation. As such, Osborne cannot show that Mostiler's representation fell below an objective standard of reasonableness such that prejudice is presumed.

We agree with the reasoning of the Eleventh Circuit that vague statistics that fail to shed light on the amount of work actually done in the particular case at issue are insufficient to show the kind of complete breakdown in

> representation necessary for prejudice to the defense to be presumed.

Whatley, 668 S.E.2d at 656-57 (alterations in original) (footnotes omitted).

b. Review of the state court adjudication

Whatley's statistical analysis of the hours expended by Mostiler in preparing for Whatley's trial, and his claim that Mostiler's failure to spend the recommended amount of hours set forth by the American Bar Association constitutes a presumption of prejudice, fails to meet the heavy burden to demonstrate that Mostiler's performance rendered the adversarial process meaningless. The Court agrees with the Eleventh Circuit and Supreme Court of Georgia that statistics regarding hours spent in preparation for trial or the number of cases assigned to a contract public defender are not alone sufficient to establish that a presumption of prejudice arises. *See Osborne*, 466 F.3d at 1315 n.3; *Whatley*, 668 S.E.2d at 657. Here, it is undisputed that Mostiler spent more than 100 hours preparing for Whatley's trial, his investigator spent 96 hours assisting with his defense,[42] Mostiler challenged the State's evidence at trial through cross-examination, Mostiler presented opening and closing argument,

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[42] Trial counsel does not perform deficiently by delegating the mitigation investigation to his investigators and relying upon them to interview potential witnesses. *See Rhode v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009).

and Mostiler presented evidence during the sentencing phase of Whatley's trial.[43]

A review of the sentencing phase transcript showed that trial counsel called eleven witnesses to testify on Petitioner's behalf….

The Court does not find that the Supreme Court of Georgia's decision regarding Whatley's claim of presumed prejudice "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whatley was prejudiced by Mostiler's heavy caseload. *See* 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. Whatley is not entitled to relief on his claim that there is a presumption of ineffective assistance of counsel under *Cronic* based on Mostiler's heavy caseload.

4. *Claim VIII – Trial counsel's caseload created an actual conflict of interest between Petitioner's rights and those of his counsel's other clients*

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[43] The state habeas court made the following factual determinations:

[T]he evidence [also] showed that counsel filed over twenty pretrial motions in this case, interviewed potential guilt phase and penalty witnesses in preparation for trial, examined the crime scene, and reviewed the State's investigative file.

(Resp't's Ex. 71 at 45, 62).

Where a defendant has a constitutional right to counsel, the Sixth Amendment right to representation is one that must be free from an actual conflict of interest. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981). An actual conflict of interest exists where a counsel's loyalties are divided and he is unable to pursue his client's interests "single-mindedly." *See id.* at 271-72. To demonstrate an actual conflict of interest, a petitioner "must show 'inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'" *McConico v. Alabama*, 919 F.2d 1543, 1546 (11th Cir. 1990) (quoting *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987)). An actual conflict of interest typically includes circumstances where a lawyer represents different parties or codefendants whose interests are in actual conflict. *See Wood*, 450 U.S. at 267-72; *Cuyler v. Sullivan*, 446 U.S. 335, 345-48 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978) (citing *Glasser v. United States*, 315 U.S. 60 (1942)); *McConico*, 919 F.2d at 1546 n.2.

The existence of an actual conflict of interest is an exception to the general rule under Strickland that a criminal "defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (citing *Strickland*, 466 U.S. at 694). Where a petitioner objects at trial to

representation based on an actual conflict of interest, prejudice is presumed entitling a petitioner to an automatic reversal of his conviction, unless the trial court determines that a conflict of interest in the representation does not exist. *See id*. at 167-68. Absent an objection by trial counsel to concurrent representation of parties or codefendants whose interests are in conflict, a petitioner "must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" *See id*. at 168 (quoting *Cuyler*, 446 U.S. at 348-49).

Whatley asserts that Mostiler was unable to pursue his rights with undivided loyalty free of an actual conflict of interest because:

> Trial counsel worked as the contract public defender for Spalding County at the time he represented Mr. Whatley. Because the contract required counsel to accept far more cases than he could handle, Mr. Mostiler was forced to choose between defending the rights of Mr. Whatley and the rights of the many other clients to which he was assigned.

(Pet'r's Br. in Supp. of Pet. at 43).

a. State court adjudication

The Supreme Court of Georgia reviewed, and rejected, Whatley's claim that his "trial counsel was forced to choose between representing Whatley and representing counsel's other clients." *Whatley*, 668 S.E.2d at 658. The Supreme Court of Georgia stated:

The Supreme Court [of the United States] has cast some doubt on Whatley's assertion that the alleged circumstances in his case should be considered under specialized Sixth Amendment conflict of interest case law requiring presumptions of prejudice rather than under ordinary Sixth Amendment ineffective assistance of counsel case law, because Whatley's case is not a case involving the joint representation of co-defendants and because it appears not to be a case involving other factors that make prejudice both highly probable and exceptionally difficult to prove. However, the discussion below shows that, even assuming that Whatley's allegation of a potential conflict of interest should be subjected to analysis under specialized Sixth Amendment conflict of interest case law, prejudice should not be presumed in his case, because he has not shown that an actual conflict of interest adversely affected his trial counsel's performance.

The Supreme Court has emphasized that a trial court should pay special attention to counsel when he or she attempts to satisfy the professional duty to notify the trial court that his or her representation might be compromised by a conflict of interest, and the Supreme Court has stated that it will apply "an automatic reversal rule" where counsel has announced the existence of a conflict of interest arising out of the joint

representation of co-defendants "unless the trial court has determined that there is no conflict." However, that particular automatic reversal rule clearly does not apply in Whatley's case, because there was no joint representation of co-defendants and no objection by counsel.

The Supreme Court has further held that, in general, other potential conflicts of interest may warrant a presumption of prejudice only if the defendant proves the existence of a conflict that "actually affected the adequacy of [counsel's] representation." A trial court certainly bears a duty to inquire into a potential conflict of interest whenever "the trial court is aware of" circumstances creating more than "a vague, unspecified possibility of conflict." However, the Supreme Court has held that a trial court's failure to inquire into the circumstances of a "potential conflict" does not relieve a prisoner of his or her duty to show on appeal that, in fact, a conflict existed that "adversely affected his [or her] counsel's performance."

As the discussion above highlights, Whatley has shown nothing more than "vague statistics[ ] to support his allegation that trial counsel's caseload impeded his representation." Given the time counsel actually dedicated to Whatley's case and the quality of representation that the record shows that counsel provided, Whatley's

> vague statistics are not sufficient to show the existence of an actual conflict of interest that adversely affected counsel's performance.
>
> Accordingly, Whatley is not entitled to any presumption that his defense suffered prejudice.

Id. (second, third, and fourth alterations in original) (footnotes omitted).

b. Review of the state court adjudication

Although Mostiler was the contract defender for Spalding County, it is undisputed that he did not have an actual conflict of interest based on his representation of co-defendants, witnesses, or other parties involved in Whatley's criminal case. Mostiler did not represent to the state trial court or Whatley that he believed his representation was compromised by his representation of other criminal defendants. Whatley did not identify any circumstance where an actual conflict of interest caused Mostiler to make "a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." *See McConico*, 919 F.2d at 1546 (quoting *Smith*, 815 F.2d at 1404).

The Court concludes that Mostiler did not have an actual conflict of interest that affected his representation of Whatley. The fact that Mostiler had other clients to whom he owed obligations of professional representation did not affect, or

interfere with, his trial decisions or representation of Whatley in his criminal case. Whatley failed to demonstrate that Mostiler's representation of other criminal defendants adversely affected his performance in Whatley's case including because Mostiler effectively advocated for Whatley by challenging the State's evidence and presenting the jury with an alternative version of events suggesting that Whatley acted in self-defense after Allen armed himself with a firearm.[44]

The Court does not find that the Supreme Court of Georgia's decision regarding Whatley's claims of an actual conflict of interest "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," or that Whatley was prejudiced by any perceived conflict of interest. *See* 28 U.S.C.

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[44] To the extent Petitioner argues that "[t]he trial court was plainly on notice" of a conflict of interest based on Mostiler's representation of other defendants as the Spalding County contract public defender, this argument is unfounded. (Pet'r's Br. in Supp. of Pet. at 45). A conflict of interest is not demonstrated by "a vague, unspecified possibility of conflict" or a speculative or hypothetical conflict. *See Mickens*, 535 U.S. at 169; *See Also McConico*, 919 F.2d at 1546. The issue of a conflict of interest involving Mostiler's representation of Whatley was not raised and the trial court was not required to speculate regarding whether any such conflict existed. *See Mickens*, 535 U.S. at 168-69. Indeed, a possibility of a conflict "inheres in almost every instance" where an attorney represents multiple defendants. *See id*.

§ 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 386. Whatley is not entitled to relief on his claim that that Mostiler was unable to pursue his rights with undivided loyalty free of an actual conflict of interest.

5. *Claim XI – Petitioner's claim that the prosecutor and other law enforcement personnel failed to disclose threats and payments to a witness, Rarlan Jackson, in violation of the Constitution and the rule of Giglio v. United States*

Whatley asserts there was a secret, undisclosed arrangement between the State and Rarland Jackson that violated the Constitution and violated the disclosure principles of *Giglio v. United States*, 405 U.S. 150 (1972). Jackson testified at trial that Whatley had told him prior to the murder of Ed Allen that Whatley was planning on robbing a store in the vicinity of the bait shop, that Whatley asked him for a gun to use in the robbery, and that Whatley later admitted that he committed the robbery and had been shot in the process. (Resp't's Ex. 11A at 998-1001).

Whatley asserts, based on affidavits admitted during the state habeas proceedings, "that: 1) the State[, through Sergeant Sanders of the Spalding County Sheriff's Department,] paid Mr. Jackson for his testimony; 2) the State threatened Mr. Jackson with prosecution if he did not testify in the manner that the prosecutor desired; and 3) Mr. Jackson changed his testimony in response to these threats." (Pet'r's Br. in Supp. of Pet. at 162). In the state

habeas court, Whatley supported this claim with affidavit testimony. Jackson testified in the state habeas court that his testimony at Whatley's trial was truthful and was not improperly influenced by the State. (*See* Resp't's Ex. 39B at 142-209).

After reviewing the evidence presented in the state habeas proceedings, the state habeas court determined that Whatley's Giglio claim[45] was procedurally defaulted.[46] (Resp't's Ex. 71 at 56-59).

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[45] Under Giglio, the prosecution must turn over to the defense evidence in its possession or control which could impeach the credibility of an important prosecution witness. *United States v. Jordan*, 316 F.3d 1215, 1226 & n.16 (11th Cir. 2003) (citing *Giglio*, 405 U.S. at 154). This includes "any agreement, formal or informal, the prosecution has with a witness concerning criminal charges against that witness, and the failure to disclose such an agreement violates the due process requirements of *Brady v. Maryland*." *Childress v. State*, 489 S.E.2d 799, 799 n.1 (Ga. 1997). A failure to disclose information required by *Giglio* does not "automatically require a new trial," but requires one "only if the [undisclosed] evidence is material in the sense that its suppression undermines confidence in the outcome of the trial, i.e., 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Owen v. State*, 453 S.E.2d 728, 730-31 (Ga. 1995) (quoting *Giglio*, 405 U.S. at 154; *United States v. Bagley*, 473 U.S. 667, 676-78, 682 (1985)); *See Also United States v. Agurs*, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

[46] As with Petitioner's Brady claim, to the extent Petitioner asserts that Respondent waived the defense of a procedural default regarding his *Giglio* claim by failing to raise it in his Answer, the Court disagrees. Respondent stated in his Answer

"[W]here the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, Sykes requires the federal court to respect the state court's decision." *Bailey*, 172 F.3d at 1302 (citing *Sykes*, 433 U.S. at 72); *See Also Mincey*, 206 F.3d at 1135-36 ("It is well-settled that federal habeas courts may not consider claims that have been defaulted in state court pursuant to an adequate and independent state procedural rule, unless the petitioner can show 'cause' for the default and resulting 'prejudice,' or 'a fundamental miscarriage of justice.'"). When a state court addresses the merits of a claim and also finds a procedural default, a district court should apply the procedural bar and decline to reach the merits of that claim. *See Harris*, 489 U.S. at 264 n.10; *Osborne*, 466 F.3d at 1315; *White*, 972 F.2d at 1227; *Richardson*, 883 F.2d at 898; *Hittson*, 2012 WL 5497808, at *8 n.10.

a. State court adjudication

Whatley did not raise this claim on direct appeal and the state habeas court found it was procedurally defaulted. (Resp't's Ex. 71 at 56-59).[47] The state

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that "Respondent expressly adopts and relies upon any findings made by the state courts as to the procedural default of any and all claims not timely raised at trial and on appeal as required by O.C.G.A. § 9-14-48(d)." (Resp't's Answer at 11). The state habeas court found this claim to have been procedurally defaulted. (*See* Resp't's Ex. 71 at 56-57); *See Also Coleman*, 501 U.S. at 735 n.1.

[47] The Supreme Court of Georgia did not address Petitioner's *Giglio* claim in its review of the state habeas court's decision

habeas court also found that there was no cause or prejudice to excuse the default because there was no agreement between the State and Jackson for his testimony. (*Id*.).

The cause and prejudice analysis of a *Giglio* evidence suppression claim is the same as that for a *Brady* claim. *See Walker v. Johnson*, 646 S.E.2d 44, 45-46 (Ga. 2007); *Schofield*, 621 S.E.2d at 730. Under Georgia law, a petitioner may excuse his procedural default for an evidence suppression claim in a habeas proceeding by satisfying the two-part cause and prejudice test. *See Whatley*, 668 S.E.2d at 655. A petitioner may satisfy the "cause" prong of the test by showing the State breached a "constitutional duty" to disclose the information forming the basis of the claim. *See id*. at 655 n.8. To demonstrate prejudice, a petitioner must show that

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

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and, thus, the state habeas court's decision is the last state court to rule on his claim and that decision is subject to review under Section 2254 by this Court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

Schofield, 621 S.E.2d at 731.[48]

In concluding that Whatley's *Giglio* claim was procedurally defaulted, the state habeas court stated:

> Although Sergeant Sanders obtained funds from the Spalding County Sheriff's Department to secure Mr. Jackson's release from a non-payment probation revocation hold following the completion of Petitioner's trial, this Court finds based on its review of the evidence that his occurrence was not the result of a deal for Mr. Jackson's testimony in this case. As Sergeant Sanders explained, he did not even learn that Mr. Jackson was incarcerated due to his failure to pay his remaining parole fines until after the conclusion of Petitioner's trial.
>
> Although the case number for Petitioner's case was included on the paperwork documenting the disbursement, this Court credits Sergeant Sanders' testimony that this occurrence was merely the result of his

[48] A petitioner asserting a *Giglio* claim need only show that there was "any reasonable likelihood" that false testimony could have affected the judgment of the jury and resulted in a different result in the guilt or sentencing phase. *See Ventura v. Attorney Gen.*, 419 F.3d 1269, 1278 (11th Cir. 2005). The Court notes that the state habeas court applied the stricter "no reasonable probability" *Brady* standard to Petitioner's claim. This error is harmless because the court found that there was no deal and there was no false testimony sufficient to establish prejudice to set aside the procedural default of this claim.

supervisor's instruction to include on the paperwork the number of the last case that Mr. Jackson voluntarily provided information on, the instant case, along with the date of the inception of that case.

Thus, as Petitioner failed to prove that Sergeant Sanders' arrangement for the payment of Mr. Jackson's fines to get him released from jail was the result of a deal for Mr. Jackson's cooperation or trial testimony in this case, this Court finds that Petitioner failed to establish prejudice to overcome his default of this *Giglio* claim. *See Childress*, 268 Ga. 386, 388, 489 S.E.2d 799 (1977) (no *Giglio* violation for "failing to reveal the terms of a non-existent deal").

Thus, as Petitioner failed to show the existence of a deal between Mr. Jackson and the prosecution team and as this Court finds that there is no reasonable probability that the outcome of this case would have been different without Mr. Jackson's trial testimony, this *Giglio* claim is defaulted.

This Court also finds that Petitioner failed to establish prejudice to overcome the default of this claim as this Court finds following its review of all of the evidence presented that Rarland Jackson's trial testimony, which was consistent with his voluntary statements made at a time when Mr. Jackson was not incarcerated on any charges, was not the product of a deal.

> As former Sergeant Sanders testified in his affidavit, "[n]either I nor any other law enforcement officer made any threats or promises to Rarland nor said anything to lead him to believe that he might receive some kind of benefit in exchange for his cooperation in the Whatley case. As in the past, Rarland's cooperation [in this case] was entirely voluntary." Thus, this Court finds that this claim is barred from litigation on the merits in this proceeding.

(Resp't's Ex. 71 at 57-59 (alteration in original) (footnote and internal record citations omitted)).

The state habeas court weighed the evidence presented in the habeas proceedings, determined that there was no agreement in exchange for Jackson's testimony, concluded that the non-existence of a deal meant that Whatley was unable to establish prejudice on his *Giglio* claim, and applied the clearly established Federal law standard established in *Giglio* to determine that Whatley failed to satisfy his burden of showing that his procedural default is excused.

b. Review of the state court adjudication

This Court stated in its March 29, 2011, Order that if Whatley could show cause for setting aside the procedural default of his *Giglio* claim, the Court could consider the prejudice prong of his claim. (*See* Order of Mar. 29, 2011, at 9).

The Court permitted Whatley the opportunity to present clear and convincing evidence of the existence of an arrangement required to be disclosed under *Giglio* that is sufficient to overcome the presumption of correctness that attaches to the state habeas court's factual finding that there was no agreement in exchange for Jackson's testimony. The Court finds Whatley did not present clear and convincing evidence upon which to conclude that the state habeas court was unreasonable in its determination that there was no agreement, and thus no cause or prejudice exists to set aside the procedural default.

The Court otherwise agrees with the state habeas court that Whatley's post-trial evidence from Jackson was not credible or reliable and was insufficient to call into doubt his trial testimony or to support a conclusion that there was an agreement for his testimony. Jackson denied the existence of any agreement and testified that his trial testimony was truthful and voluntary. (Resp't's Ex. 39B at 142-209). The state habeas court's conclusion that Whatley did not establish the existence of an agreement was not unreasonable and was sufficiently supported by the State's evidence, which included affidavit and deposition testimony of retired Sergeant Richard Sands, and testimony from District Attorney Bill McBroom and Officer Sam Parks of the Griffin Police Department. The Court finds it significant that an employee of the Federal Public Defender Program assisted Jackson in preparing the affidavit that was submitted by Jackson to the state habeas court, and that Jackson,

during the state habeas court proceedings, denied the truth of the contents of the affidavit, stating that he signed the affidavit only because he was told that "it was the same as what was said in court [at trial]" and that he took the Federal Public Defender employee at her word that it was. (*See* Resp't's Br. in Opp'n to Pet. at 132 (quoting Resp't's Ex. 71 at 56 n.3); *See Also* Resp't's Ex. 39B at 142-209, 241).

The Court also finds that the state habeas court correctly concluded, based on the record in the habeas proceedings, that Whatley failed to show prejudice. Even if Whatley had proved that an agreement existed between the State and Jackson, the Court would find that Whatley was not prejudiced because Whatley did not show that Jackson's trial testimony was false, including because Jackson testified at the state habeas hearing that his testimony was true. *See Hammond v. Hall*, 586 F.3d 1289, 1307 (11th Cir. 2009) ("The testimony or statement elicited or made must have been a false one."); *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1335 (11th Cir. 2009) ("Accurate statements do not violate the Giglio rule."); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989). Without demonstrating an agreement with Jackson for his testimony or that Jackson's trial testimony was false, Whatley has not shown a reasonable likelihood that the result of the proceeding would have been different, he is not entitled to set aside his procedural default, and he is not entitled to any other relief on his *Giglio* claim.

See Bagley, 473 U.S. at 676-78, 682; *Owen*, 453 S.E.2d at 730-31.[49]

The state habeas court correctly determined that Whatley's *Giglio* claim is procedurally barred and that there is no prejudice from any asserted suppressed information regarding a claimed undisclosed agreement for Jackson's testimony. The Court thus respects and defers to the state court's determination that the claim is procedurally barred. *See Harris*, 489 U.S. at 264 n.10; *Osborne*, 466 F.3d at 1315; *Bailey*, 172 F.3d at 1302; *White*, 972 F.2d at 1227; *Richardson*, 883 F.2d at 898; *Hittson*, 2012 WL 5497808, at *8 n.10.

To the extent Whatley claims he is entitled to a *de novo* review of his claim, the Court finds the state habeas court correctly applied Georgia's procedural default principles, examined the merits of Whatley's claim to determine if prejudice existed from any failure to disclose under the standards of *Giglio*, and did not reach 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 "was based on an unreasonable determination of the facts in

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[49] Even if Petitioner had (i) shown cause by demonstrating that a deal existed, and (ii) shown that Jackson's testimony was false in light of that deal, the Court would also find that Whatley was not prejudiced because because the weight of the evidence at trial supporting Petitioner's guilt in the absence of Jackson's testimony would not have been affected such that there would be any reasonable likelihood that the result of the proceeding would have been different.

light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. The Court further finds that Whatley was not prejudiced by law enforcement's alleged failure to disclose. Whatley is not entitled to relief on his claim regarding a secret, undisclosed agreement for Jackson's testimony or that *Giglio* was violated.

6. *Claim XII – Petitioner's claim that the prosecutor engaged in improper conduct during his closing argument at the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution*

Whatley next claims that the prosecutor's comments during his penalty phase argument violated his constitutional rights because the prosecutor (i) improperly argued that Whatley committed other crimes and his criminal history was more extensive than the evidence showed; (ii) improperly "testified" about conditions in prison; (iii) engaged in other instances of misconduct throughout his closing argument; and, (iv) argued, without evidentiary support, that Whatley would kill again. (Pet. for Writ of Habeas Corpus ¶¶ 202-213).

"Improper argument will only warrant relief if it renders a petitioner's trial or sentencing 'fundamentally unfair.'" *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985); *See Also United States v. Hernandez*, 145 F.3d 1433, 1438 (11th Cir. 1998) (holding that prosecutorial misconduct warrants

relief "only if… the remarks (1) were improper and (2) prejudiced the defendant's substantive rights"). A sentencing is fundamentally unfair if "there is a reasonable probability that, in the absence of the improper arguments, the outcome would have been different." *See Drake*, 762 F.2d at 1458; *See Also United States v. Hill*, 643 F.3d 807, 849 (11th Cir. 2011) (citing *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995)) ("For a prosecutor's prejudicial comments to affect a defendant's substantial rights, there must be a reasonable probability that, but for the remarks, the outcome would have been different."). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *See Drake*, 762 F.2d at 1458 (quoting *Strickland*, 466 U.S. at 695). "Thus, the defendant must show a reasonable probability that, but for the prosecutor's statements, the result of the proceeding would have been different." *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994).

a. State court adjudication

Whatley raised his claim regarding the prosecutor's penalty-phase comment on direct appeal, where the Supreme Court of Georgia found there was no prosecutorial misconduct and that the claim was procedurally defaulted. *Whatley*, 509 S.E.2d at 50. If the prosecutor made improper comments in his argument, any alleged prejudicial errors in the State's closing argument in the penalty phase did not present a reasonable probability of affecting the outcome and the jury's ultimate determination that Whatley should be sentenced to

death. *See id*. Whatley raised this argument again in the state habeas court, which concluded:

> This Court finds following its review of the Georgia Supreme Court's opinion that his claim was addressed and decided adversely to Petitioner on direct appeal. *Whatley*, 270 Ga. at 298-299, 301, and 302. Accordingly, this Court finds that this claim is *res judicata* and non-justiciable in this proceeding. *Gunter v. Hickman*, 256 Ga. 315, 348 S.E.2d 644 (1986).
>
> To the extent that Petitioner attempted to raise new arguments or alleged facts in support of this claim in this habeas proceeding, this Court finds that these allegations are procedurally defaulted as Petitioner failed to show cause and prejudice or a miscarriage of justice to overcome his default of these new allegations. *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985); *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E.2d 370 (1985). Thus, this claim is denied as barred.

(Resp't's Ex. 71 at 16).

b. Review of the state court adjudication

Having found this claim was procedurally defaulted, cause and prejudice is required to be

found to overcome the procedural default.[50] The Court reviews Whatley's claim to determine if cause and prejudice exists. *See Mincey*, 206 F.3d at 1135-36.

The Court finds that a reasonable probability does not exist that the sentencing verdict would have been different had the allegedly improper arguments not been made during the sentencing hearing. The State's closing argument comments about Whatley's criminal history, his capacity for future violence, his conduct during the trial, prison conditions, and analogies to other well-known criminals either were proper inferences from the evidence admitted at trial or failed to give rise to a reasonable probability that they altered the outcome of the sentencing proceedings. *See Romine v. Head*, 253 F.3d 1349, 1366, 1368 (11th Cir. 2001); *See Also Whatley*, 509 S.E.2d at 52-53.

The Court concludes that the state habeas court and Supreme Court of Georgia correctly determined

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[50] As with Petitioner's *Brady* and *Giglio* claims, to the extent Petitioner asserts that Respondent waived the defense of a procedural default regarding his prosecutorial misconduct claims by failing to raise them in his Answer, the Court disagrees. Respondent stated in his Answer that "Respondent expressly adopts and relies upon any findings made by the state courts as to the procedural default of any and all claims not timely raised at trial an on appeal as required by O.C.G.A. § 9-14-48(d)." (Resp't's Answer at 11). The Supreme Court of Georgia on direct appeal and state habeas court found this claim to have been procedurally defaulted. *See Whatley*, 509 S.E.2d at 50; (Resp't's Ex. 71 at 16); *See Also Coleman*, 501 U.S. at 735 n.1.

that Whatley's prosecutorial misconduct claims were procedurally barred and that there was no "reasonable probability that, in the absence of the improper arguments, the outcome would have been different." *See Drake*, 762 F.2d at 1458. Because the state habeas court and the Supreme Court of Georgia correctly applied Georgia's procedural default rules and addressed the merits of any prejudice from the alleged prosecutorial misconduct, the Court respects and defers to the state court determination that the claim is procedurally barred. *See Harris*, 489 U.S. at 264 n.10; *Osborne*, 466 F.3d at 1315; *Bailey*, 172 F.3d at 1302; *White*, 972 F.2d at 1227; *Richardson*, 883 F.2d at 898; *Hittson*, 2012 WL 5497808, at *8 n.10.

To the extent Whatley is entitled to a *de novo* review of his claim, the Court finds that the state habeas court correctly applied Georgia's procedural default principles, examined the merits of Whatley's claim to determine if prejudice existed from any prosecutorial misconduct, and did not reach 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 "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1), (2); *See Also Wiggins*, 539 U.S. at 520-21; *Williams*, 529 U.S. at 379, 385. The Court further finds that Whatley was not prejudiced by any alleged prosecutorial misconduct. Whatley is not entitled to relief on his prosecutorial misconduct claim.

7. *Claim XVIII - Petitioner's claim that when the errors are considered as a whole, Whatley is entitled to relief under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution*

Whatley claims that each of his individual claims, when "taken as a whole, [leave] no doubt that [his] conviction and death sentence are unreliable and violate the Fifth, Sixth, Eighth, and Fourteenth Amendment[s]." (Pet. for Writ of Habeas Corpus ¶ 256).

Neither the Supreme Court of the United States nor the State of Georgia recognize a "cumulative error" claim in a habeas proceeding. If a claim of cumulative error was cognizable in a habeas proceeding under Section 2254, it is required to be denied where the Court finds merit only in a single claim for relief and there are thus no errors to accumulate. *See Hardwick v. Benton*, 318 F. App'x 844, 847 n.5 (11th Cir. 2009); *United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004); *See Also Sneed v. Fla. Dep't of Corrs.*, 496 F. App'x 20, 28 (11th Cir. 2012) ("[T]here are no errors to accumulate, and the state court's rejection of [a cumulative error] claim [is] not contrary to or an unreasonable application of Supreme Court law."). The Court finds there is no cumulative effect of errors that deprived Whatley of a fair trial or sentencing proceeding. *See Hardwick*, 318 F. App'x at 847 n.5; *Conklin v. Schofield*, 366 F.3d 1191, 1210 (11th Cir. 2004). Even if the Court were to find

additional errors beyond the inadequacy of Mostiler's investigation into Whatley's background and mental and psychological health, the Court would still find, in light of its review of the record, that there was no fundamental unfairness in Whatley's state court proceedings that would make consideration of his cumulative error claim appropriate. *See Cargill v. Turpin*, 120 F.3d 1366, 1386-87 (11th Cir. 1997).[51]

C. Certificate of Appealability

A district court "must issue or deny a Certificate of Appealability when it enters a final order adverse to the appellant." *See* Rule 11 of the Rules Governing Section 2254 Proceedings. This Court finds that a Certificate of Appealability should not issue with regards to the claims on which Petitioner is not afforded relief because Whatley has not made a substantial showing of the denial of a constitutional right or that reasonable jurists could find "debatable or wrong" the conclusion that Whatley is not entitled

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[51] Petitioner raised, for the first time in his merits brief, a claim challenging Georgia's use of lethal injection as an execution method. (Pet'r's Br. in Supp. of Pet. at 174-77). Petitioner's challenge to Georgia's method of execution is not cognizable in a habeas proceeding and is appropriately brought in a Section 1983 action. *See Hill v. McDonough*, 547 U.S. 573, 579-83 (2006) (challenges to methods of execution that do not imply the invalidity of confinement or sentence are properly brought under Section 1983); *Tompkins v. Sec'y, Dep't of Corrs.*, 557 F.3d 1257, 1261 (11th Cir. 2009) ("A [Section] 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures."). To the extent Petitioner seeks to challenge Georgia's lethal injection execution procedures as a habeas claim, that claim is denied. *See Hill*, 547 U.S. at 579-83; *Tompkins*, 557 F.3d at 1261.

to relief on his variety of claims for which the Court has not granted relief. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A certificate of appealability is denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Fredrick R. Whatley's Petition for Writ of Habeas Corpus by a Person in State Custody [1] is **GRANTED IN PART** and **DENIED IN PART**. The Petition is **GRANTED** with respect to Petitioner's claim of ineffective assistance of counsel based on an inadequate investigation (Claim IX) and **DENIED** on Claims I, III, V, VII, VIII, X, XI, XII, and XIII. Petitioner's sentence of death in Case No. 96R-374 in the Superior Court of Spalding County, Georgia, is **VACATED** and the State of Georgia shall, within a reasonable amount of time, decide whether to hold a new sentencing hearing or impose a lesser sentence consistent with the law.

IT IS FURTHER ORDERED that Petitioner is **DENIED** a certificate of appealability.

The effect of this Order will be automatically stayed pending resolution of any appeal to the Eleventh Circuit Court of Appeals.

SO ORDERED this 9th day of April, 2013.

/s/ William S. Duffey
WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

In the Supreme Court of Georgia

Decided: October 6, 2008

S08A1076. WHATLEY v. TERRY.

SEARS, Chief Justice.

A jury found Frederick R. Whatley guilty of the murder of Ed Allen and related offenses and sentenced him to death. This Court affirmed Whatley's convictions and sentences in 1998.[1] Whatley filed a petition for writ of habeas corpus on August 6, 1999, which he amended on April 30, 2001. An evidentiary hearing was held on July 30, 2002, and, after a new judge was assigned to the case, closing arguments were heard on December 8, 2005. The habeas court denied Whatley's petition in an order filed on December 4, 2006, and this Court granted Whatley's application for certificate of probable cause to appeal. For the reasons set forth below, we affirm the habeas court's denial of Whatley's habeas petition.

I. Factual Background

The evidence at trial supports the following description of the murder. At 8:45 p.m. on January 26, 1995, Whatley entered Roy's Bait Shop in Griffin armed with a .32 caliber revolver he had stolen from a relative. The only persons inside the store at the

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[1] *Whatley v. State*, 270 Ga. 296 (509 SE2d 45) (1998).

time were the owner, Ed Allen, and an employee named Tommy Bunn. Whatley forced Bunn to lie on the floor behind the service counter and held the .32 caliber revolver to Bunn's head, and he threatened to shoot Bunn if Allen did not comply with his demand for the money from the cash register. Allen placed the money in a paper sack, and Whatley took it. Whatley backed around to the front of the counter and fired two shots, one shot striking Allen in the chest from a range of 15 to 18 inches and a second shot striking the counter that Bunn was lying behind from a range of 8 inches. Allen pursued Whatley and fired his .44 caliber single-action pistol at him. Whatley left the store and encountered Ray Coursey, who had just arrived at the store in an automobile. Whatley held the revolver to Coursey and demanded a ride. Allen came out of the store and continued firing his pistol a t Whatley . Whatley exited Coursey's automobile on the side opposite from Allen's position, and he fled on foot. At some point, Whatley was shot in the right knee. After Whatley ran away, Allen returned to the store, told Bunn to call 911, lay down on the floor, and died of internal bleeding.

II. Alleged Suppression of Evidence by the State

A. Background of the Claim

Whatley forced Bunn at gunpoint to lie on the floor next to the cash register during the robbery, and Bunn remained there until all of the shooting had stopped. The theory presented to the jury by the State at trial was that, as Whatley began backing away from the service counter, he fired twice, once at

Allen at close range and once downward toward Bunn. Bunn's testimony under direct examination in the guilt/innocence phase was consistent with this theory, as he maintained that he had heard two shots fired before Allen stepped over him to pursue Whatley. Trial counsel then cross-examined Bunn by specifically referring to a statement Bunn made to police on the night of the murder, January 26, 1995. The written investigative summary counsel was referring to in his cross-examination reports that Bunn stated as follows on January 26:

> [Whatley] moved off of me and backed around the counter, when he went around the counter and Ed come around over top of me going after him. I don't know where he was. I was still laying on the floor when I heard the shot.

Counsel did not read this statement aloud at trial but, instead, simply had the witness himself acknowledge that he did not tell the police in his January 26 interview that shots were fired *before* Allen stepped over him. Counsel specifically stated that it was the January 26 interview that he was relying on in forming his questions to Bunn. Bunn explained his account in his January 26 interview regarding the timing of the shots by stating that he was "upset" during that interview. Counsel, by pointing out to Bunn that Allen had not bled on him, was also able to get Bunn to admit on cross-examination that he did not know when Allen was shot. Whatley testified in the sentencing phase to a version of events different from Bunn's: Whatley

claimed that he never intended to shoot anyone and that he fired at Allen only *after* Allen pulled out his gun.

At the habeas hearing, Whatley presented an audio recording[2] of an interview of Bunn that was conducted the day after the murder, January 27. Whatley obtained the recording through an Open Records Act request to the Griffin Police Department, which request was legally available only *after* Whatley's criminal case was concluded.[3] Like the January 26 statement used by counsel at trial, part of the January 27 interview at least arguably suggests that Allen stepped over Bunn to pursue Whatley *before* any shots were fired. Bunn stated as follows in the January 27 interview:

> [Whatley] done got the money and all, you know. I figured he's going on out, and that's when I see Ed go over me, and he went out, and that's when the shooting and all starts.

However, earlier in this January 27 interview, Bunn gave a different chronology, stating as follows:

> Then [Whatley] got off me, and backed around the comer, you know. I guess he was

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[2] An unofficial transcript of the recording is also in the record, but our quotations from the recording are drawn from our review of the recording itself. We note, however, that there are no differences between the unofficial transcripts and the original evidence that affect our decision.

[3] See OCGA § 50-18-72 (a) (4); *Parker v. Lee*, 259 Ga. 195 , 197-198 (4) (378 SE2d 677) (1989).

> going on back toward the door. I heard something start shooting. Then I seen Ed come across me, on around the comer, too. Next thing I know I just kept hearing, ya know, gun shots.

Thus, at the most, the January 27 interview contains two contradictory chronologies, one placing the shooting before Allen stepped over Bunn to pursue Whatley and one placing the shooting after. Furthermore, in between these two arguably contradictory chronologies in the January 27 interview, Bunn expressed uncertainty when asked specifically whether the shots began before or after Allen stepped over him and went around the corner of the counter. Bunn was then further asked, "Who started shooting?" He responded as follows: "I guess [Whatley]. But, you know, I don't know." He then provided the following explanation for his uncertainty: "[I]t happened so quick, and I'm all shook up, too."

Whatley argues that his cross-examination of Bunn would have been enhanced if counsel had been provided the January 27 interview, particularly because counsel could have emphasized that, although Bunn might have been confused because he was "upset" on January 26, he would have calmed down by January 27 and would have given a more-accurate account of the crime. Whatley argues that the portion of the January 27 interview in which Bunn arguably indicated that Allen began to pursue Whatley before any shots were fired could have been used to show that Whatley did not enter the store

with the intent to commit murder, which the jury might have found mitigating in the sentencing phase.

B. Procedural Default

The habeas court correctly found that this claim, at least as an initial matter, is barred by procedural default because it was not raised in the trial court or on direct appeal.[4] However, the bar to procedurally-defaulted claims can be overcome by satisfying the cause and prejudice test.[5] Because the habeas court applied the cause and prejudice test in a manner we found questionable, we directed the parties to address that issue on appeal.

1. Alleged Cause for Failure to Raise the Claim Previously

The cause portion of the cause and prejudice test is satisfied where evidence was "concealed from [the defendant] by the State" at the time of trial and direct appeal.[6] Thus, the cause prong of the cause

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[4] *Head v. Ferrell*, 274 Ga. 399. 401-402 (III) (554 SE2d 155) (2001); OCGA § 9-14-48 (d). See also *Waldrip v. Head*, 279 Ga. 826, 832-833 (II) (H) (620 SE2d 829) (2005) (applying procedural default and the cause and prejudice test to an evidence suppression claim).

[5] *Ferrell*, 274 Ga. at 401-402 (III) (describing the cause and prejudice test and noting that relief is also available despite procedural default under circumstances. not alleged to be present in Whatley's case, amounting to a miscarriage of justice).

[6] *Schofield v. Palmer*, 279 Ga. 848, 851 (2) (621 SE2d 726) (2005).

and prejudice test would be satisfied in Whatley's case if the facts showed that trial counsel was not given notice of and access to the contents of the January 27 statement. Without any detailed analysis, the habeas court found that Whatley had failed to show cause for his failure to raise this claim in the trial court and on direct appeal, concluding that the claim "was available for presentation" at that time.

We find that the habeas court's finding of an absence of cause to excuse the procedural default was erroneous. In its analysis of the prejudice prong of the cause and prejudice test, which is discussed below, the habeas court found that "a review of trial counsel's cross-examination questions and Mr. Bunn's responses to these questions showed trial counsel's awareness of' the January 27 interview. A review of the trial transcript does not support this finding of fact. Trial counsel's cross-examination questions about Tommy Bunn's having failed to inform police that shots were fired before Allen began to pursue Whatley could have been derived from the January 26 interview, the January 27 interview, or both. However, trial counsel specifically stated in his cross-examination that he was relying on the January 26 interview. Although not discussed in the habeas court's order, the district attorney conceded in his habeas testimony that *he* had not been provided the January 27 interview by the police department and, therefore, that trial counsel would not have had access to it. Trial counsel, having passed away, was not available to give habeas testimony on the subject; however, the January 27

interview was not contained in trial counsel's file, and the defense investigator testified that *he* had not been aware that the interview existed. In light of the trial transcript and the uncontradicted habeas testimony, including an admission by the district attorney, we find that the habeas court's finding of fact that the January 27 interview was available to counsel at trial and on direct appeal was clearly erroneous.

The State's duty to disclose exculpatory evidence applies to every part of the State that is involved in the prosecution, which, of course, would include the police department in Whatley's case.[7] Given the fact that the State bore this duty of disclosure and given the absence of any reason to believe trial counsel should have been aware of the likelihood of a second, arguably contradictory interview of Bunn, the failure of trial counsel to discover the undisclosed interview should not be ascribed to a lack of reasonable diligence.[8]

Accordingly, we conclude that Whatley has shown cause for his failure to raise his claim regarding the undisclosed January 27 interview at trial and on direct appeal.

2. Alleged Prejudice from Inability to Raise the Claim Previously

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[7] *Id*. at 852 (2).

[8] See *Turpin v. Todd*, 268 Ga. 820, 824-827 (2) (a) (493 SE2d 900) (1997) (finding cause to excuse a procedural default where the State breached a "constitutional duty" to disclose the information forming the basis of the claim).

Although Whatley has shown cause to excuse the procedural default to this evidence suppression claim, he must also satisfy the prejudice prong of the cause and prejudice test before his claim can be considered on its merits. However, because the prejudice necessary to satisfy the cause and prejudice test is a prejudice of constitutional proportions and because an evidence suppression claim is a constitutional claim, the prejudice analysis and the analysis of the merits of the evidence suppression claim "are co-extensive."[9]

As was noted above, the habeas court found that trial counsel's cross-examination of Tommy Bunn "showed trial counsel's awareness of the statements Mr. Bunn made during this interview that was allegedly suppressed." However, we have concluded that this finding was clearly erroneous. Thus, the habeas court's resolution of the prejudice question rests on an erroneous finding of fact.

The habeas court's error does not necessarily mean, however, that Whatley can demonstrate prejudice. Even though the facts show without contradiction that Whatley was not provided the January 27 interview before trial and direct appeal, we must consider whether his not having the interview created prejudice of constitutional proportions. To show that, Whatley must demonstrate that he can prevail on his underlying evidence suppression claim, which requires a showing of each of the following:

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[9] *Waldrip*, 279 Ga. at 832 (II) (H).

> (1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.[10]

We conclude that Whatley has failed to satisfy the fourth element, a showing that having the January 27 interview at trial would have created a reasonable probability of a different outcome. As we noted above, the January 27 interview arguably contains contradictory statements by Tommy Bunn regarding whether the first shots were fired before or after Ed Allen began to pursue Whatley, as well as statements expressing uncertainty regarding the timing of those shots. However, Bunn himself ultimately testified under cross-examination *at trial* that he could not recall whether the shots came first or whether Allen's stepping over him to pursue Whatley came first. Thus, the jury, either with or without being presented with the full January 27 interview, would have concluded that Bunn could not be relied upon to establish a detailed chronology. Furthermore, the district attorney persuasively argued that Whatley must have fired at Allen before Allen was armed, because Allen was shot in the chest at a range of 15 to 18 inches and because it

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[10] *Palmer*, 279 Ga. at 852 (2) (applying *Brady v. Maryland*, 373 U. S. 83 (1963)).

otherwise would have been unlikely for Whatley to have shot Allen in the chest from such a close distance without being shot himself by Allen somewhere other than just in the leg. Furthermore, Whatley's account of events cannot be reasonably reconciled with the testimony at trial indicating that he fired a shot toward either Allen or Bunn from a distance of merely eight inches from the service counter. We conclude as a matter of law that there would not have been a reasonable probability of a different outcome at trial if Whatley had been provided the January 27 interview and, therefore, that he can neither show merit to his underlying evidence suppression claim nor satisfy the prejudice prong of the cause and prejudice test, issues that are "co-extensive."[11]

III. Alleged Meaninglessness of the Adversarial Process

Whatley argues that his defense counsel, Johnny Mostiler, had such a heavy caseload as the contract defender for Spalding County that this Court should presume that Whatley's defense suffered prejudice. In general, an ineffective assistance claim can succeed only where the prisoner can show actual prejudice to his or her defense that in reasonable probability changed the outcome of the trial.[12] However, Whatley correctly notes that an exception

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[11] *Waldrip*, 279 Ga. at 832 (II) (H).

[12] *Strickland v. Washington*, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984); *Smith v. Francis*, 253 Ga. 782, 783-784 (1) (325 SE2d 362) (1985).

to this general rule applies and prejudice will be presumed where,

> although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.[13]

An example of where such extreme circumstances existed is a case where the entire membership of the state bar had been appointed to defend racially-vilified defendants in a highly-emotional public setting, where it "'was a matter of speculation only'" whether *anyone* would actually represent the defendants at trial until the last moment, where "[n]o attempt was made to investigate … [and n]o opportunity to do so was given," and where the trial began "within a few moments after counsel for the first time charged with any degree of responsibility began to represent [the defendants]."[14]

Whatley asserts that, during the two-year period when his case was pending, Mostiler represented 70% of 1,558 felony defendants with the remainder being represented by his associate, opened 70 civil cases, represented one murder defendant outside the

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[13] *United States v. Cronic*, 466 U. S. 648, 659-660 (III) (104 SC 2039, 80 LE2d 657) (1984).

[14] *Id*. at 660 (III) (quoting *Powell v. Alabama*, 287 U.S. 45, 56-58 (53 SC 55, 77 LE 158) (1932)).

county, and represented 4 death penalty defendants. A review of the record reveals that Whatley's assertion may be somewhat exaggerated; however, more importantly, we find that his assertion regarding Mostiler's general caseload is irrelevant. As was noted by the habeas court, it is the amount of time *actually* spent by Mostiler on Whatley's case that matters, not the number of other cases he might have had that *potentially* could have taken his time. The habeas court found that Mostiler was a highly-experienced attorney, was experienced in death penalty cases, was appointed two years before Whatley's trial, and "spent over 157 hours on [Whatley's] case in addition to the 96 hours that his investigator logged." The habeas court further noted with approval testimony by the defense investigator stating that it was likely that Mostiler's billing records under-represented the time he actually spent on the case.

The Eleventh Circuit recently addressed a similar claim regarding Mostiler's heavy caseload and its bearing on another death penalty case in which he was defense counsel. Although the case was decided on procedural grounds, the Eleventh Circuit stated the following in dictum:

> As the district court found, Mostiler was an experienced and effective advocate for Osborne. Osborne presented no evidence, other than vague statistics, to support his allegation that trial counsel's caseload impeded his representation. As such, Osborne cannot show that Mostiler's

> representation fell below an objective standard of reasonableness such that prejudice is presumed.[15]

We agree with the reasoning of the Eleventh Circuit that vague statistics that fail to shed light on the amount of work actually done in the particular case at issue are insufficient to show the kind of complete breakdown in representation necessary for prejudice to the defense to be presumed.[16]

IV. Alleged Conflict of Interest

Based on the same allegations regarding his trial counsel's heavy caseload set forth above, Whatley argues that his trial counsel labored under a conflict of interest in violation of the Sixth Amendment. Specifically, Whatley argues that trial counsel was forced to choose between representing Whatley and representing counsel's other clients.

The Supreme Court has cast some doubt on Whatley's assertion that the alleged circumstances in his case should be considered under specialized Sixth Amendment conflict of interest case law requiring presumptions of prejudice rather than under ordinary Sixth Amendment ineffective assistance of counsel case law, because Whatley's case is not a case involving the joint representation of co-defendants and because it appears not to be a

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[15] *Osborne v. Terry*, 466 F3d 1298, 1315 n.3 (11th Cir. 2006).

[16] See *Cronic*, 466 U. S. at 659-660 (III). See also *Williams v. Anderson*, 174 FSupp. 2d 843, 874 (V) (D) (N.D. Ind. 2001); *Williams v. State*, 706 NE2d 149, 161 (II) (Ind. 1999).

case involving other factors that make prejudice both highly probable and exceptionally difficult to prove.[17] However, the discussion below shows that, even assuming that Whatley's allegation of a potential conflict of interest should be subjected to analysis under specialized Sixth Amendment conflict of interest case law, prejudice should *not* be presumed in his case, because he has not shown that an actual conflict of interest adversely affected his trial counsel's performance.

The Supreme Court has emphasized that a trial court should pay special attention to counsel when he or she attempts to satisfy the professional duty to notify the trial court that his or her representation might be compromised by a conflict of interest, and the Supreme Court has stated that it will apply "an automatic reversal rule" where counsel has announced the existence of a conflict of interest arising out of the joint representation of co-defendants "unless the trial court has determined that there is no conflict."[18] However, that particular automatic reversal rule clearly does not apply in Whatley's case, because there was no joint representation of co-defendants and no objection by counsel.

The Supreme Court has further held that, in general, other potential conflicts of interest may

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[17] *Mickens v. Taylor*, 535 U. S. 162, 174-175 (III) (122 SC 1237, 152 LE2d 291) (2002).

[18] *Id*. at 168 (II) (citing *Holloway v. Arkansas*, 435 U. S. 475 (98 SC 1173, 55 LE2d 426) (1978)).

warrant a presumption of prejudice only if the defendant proves the existence of a conflict that "'actually affected the adequacy of [counsel's] representation."[19] A trial court certainly bears a duty to inquire into a potential conflict of interest whenever "the trial court is aware of" circumstances creating more than "a vague, unspecified possibility of conflict."[20] However, the Supreme Court has held that a trial court's failure to inquire into the circumstances of a "potential conflict" does not relieve a prisoner of his or her duty to show on appeal that, in fact, a conflict existed that "adversely affected his [or her] counsel's performance[21]."

As the discussion above highlights, Whatley has shown nothing more than "vague statistics to support his allegation that trial counsel's caseload impeded his representation."[22] Given the time counsel actually dedicated to Whatley's case and the quality of representation that the record shows that counsel provided, Whatley's vague statistics are not sufficient to show the existence of an actual conflict of interest that adversely affected counsel's performance. Accordingly, Whatley is not entitled to any presumption that his defense suffered prejudice.

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[19] Id. at 168 (II) (quoting *Cuyler v. Sullivan*, 446 U. S. 335, 348-349 (100 SC 1708 , 64 LE2d 333) (1980)).

[20] Id. at 168 (II).

[21] Id. at 172-173 (II).

[22] *Osborne*, 466 F3d at 1315 n.3.

V. Alleged Ineffective Assistance of Counsel

In addition to the specialized Sixth Amendment claims discussed above, Whatley also has raised an ordinary ineffective assistance of counsel claim. To prevail on this claim, Whatley must show that counsel's performance fell below constitutional standards and that prejudice of constitutional proportions resulted.[23] To demonstrate sufficient prejudice, Whatley must show 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 [cit.].[24]

On appeal, we accept the habeas court's findings of fact unless they are clearly erroneous; however, we apply those facts to the law de novo in determining the reasonableness of counsel's conduct and the prejudice resulting from any deficiencies in counsel's conduct.[25] We conclude as a matter of law that, even if counsel performed deficiently in the ways we assume in the discussion below, the absence of those professional deficiencies would not in reasonable probability have resulted in a different outcome in

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[23] *Strickland*, 466 U. S. at 687 (III); *Smith*, 253 Ga. at 783-784 (1).

[24] *Smith*, 253 Ga. at 783 (1).

[25] *Strickland*, 466 U. S. at 698; *Lajara v. State*, 263 Ga. 438, 440 (3) (435 SE2d 600) (1993).

either phase of Whatley's trial, and, accordingly, we affirm the habeas court's denial of Whatley's ineffective assistance claim[26].

A. General Matters Regarding the Evidence

As a preliminary matter, we note that much of Whatley's arguments rely upon the description and interpretation of his background in the affidavit testimony of a psychologist and a psychiatrist. Although an expert witness may rely on the statements of others in forming his or her expert opinions, those opinions should be given weight only to the extent that the statements upon which they rely are themselves found to have been proven reliable.[27] An expert witness must *not* be permitted to serve merely as a conduit for hearsay. Therefore, in considering whether a jury in reasonable probability would have been swayed by additional testimony not presented by counsel, we do not assume the correctness of the facts alleged in the experts' affidavits but, instead, we consider the experts' testimony in light of the weaker[28] affidavit

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[26] See *Schofield v. Holsey*, 281 Ga. 809, 812 n.1 (642 SE2d 56) (2007).

[27] *Roebuck v. State*, 277 Ga. 200, 202 (1) (586 SE2d 651) (2003).

[28] In this vein, we note that one affiant, Rarlan Jackson, testified that one of his affidavits contained false testimony obtained by an investigator working for Whatley who misrepresented the affidavit's contents when having Jackson sign it. The habeas court found Jackson's in-court denial of the truthfulness of his affidavit to be credible. Another notarized document, a records release form purportedly signed by Rarlan Jackson, was excluded from evidence by the habeas court because Jackson denied in his in-court testimony that the

testimony upon which that testimony, in part, relied.[29] Accordingly, we give significant weight to the habeas court's finding that Whatley's new experts' affidavits were "of questionable credibility and value."

Also, as a preliminary matter, we note that Whatley consistently exaggerates the record by stating that "trial counsel" did not do certain things but neglecting to note that the defense investigator did those things. For example, the defense investigator testified that he met 16 times with Whatley and worked with Whatley to obtain a list of potential witnesses, including witnesses in the District of Columbia. It is entirely reasonable for trial counsel to have delegated an investigation into potential witness testimony to his investigator and to follow up with his own interviews of witnesses when it appeared prudent to do so, which the record shows counsel did. We also note that, because Whatley's trial counsel had passed away before Whatley's habeas proceedings, much of what counsel

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signature on it was truly his. The investigator involved denied any wrongdoing in either matter. As in another case with similar circumstances, we find these matters "troubling," and we urge the lower courts in such circumstances to make a full inquiry, make any appropriate findings of facts, and take appropriate action in light of those findings of fact. *Holsey*, 281 Ga. at 814 n.2.

[29] Although the habeas court's findings of fact are sufficient for us to render judgment in Whatley's case, we take this occasion to urge the habeas courts to make detailed findings of fact and credibility and rulings on admissibility where affidavits are submitted as evidence and where such affidavits are relied upon by expert witnesses in forming their opinions.

did must be reconstructed through his files and through the testimony of others involved in the case, and we note that trial counsel's passing does not relieve Whatley of his burden to show counsel's ineffectiveness.[30]

B. Evidence of Whatley's Background

Whatley argues that trial counsel rendered ineffective assistance by failing to contact certain witnesses and by failing to use the testimony of other witnesses, including, in particular, witnesses from the District of Columbia. Whatley argues that counsel failed to make use of testimony from his mother; however, the defense investigator testified that he made repeated attempts to contact her but that she "was not that cooperative" and that his "first interview with [her] went to hell in a handbasket." Whatley contends that trial counsel failed to contact the defense attorney who had represented him in the District of Columbia; however, the defense investigator testified that he contacted the attorney and then "put him on the phone with" trial counsel when the investigator grew nervous answering the attorney's questions about Whatley's murder case. Whatley argues that trial counsel failed to obtain criminal records in the District of Columbia, but transcripts of Whatley's criminal proceedings were served on defense counsel and placed in the trial record by the prosecution, so trial counsel certainly were aware of them. The

[30] *Schofield v. Meders*, 280 Ga. 865, 867 n.2 (632 SE2d 369) (2006).

psychological records associated with those criminal proceedings are discussed below. Whatley argues that trial counsel rendered ineffective assistance by failing to contact his step-siblings; however, these minors were living with Whatley's uncooperative mother. He argues that trial counsel should have contacted one of his aunts and two of his uncles; however, a review of their affidavit testimony reveals little mitigating evidence that was unknown to trial counsel and that would have been admissible. We note that these affidavits in large part concern things that affected Whatley's family members, such as his mother, aunts, and uncles, rather than things that would have directly affected Whatley.

Whatley argues that trial counsel rendered ineffective assistance in failing to develop evidence regarding Cleveland and Marie Thomas, Whatley's great uncle and great aunt, who raised him but who had passed away by the time of Whatley's trial. First, the evidence shows that the investigation into Whatley's life with the Thomases was not deficient, because the defense investigator testified that he met 16 times with Whatley and contacted the Thomases' son, who testified at trial. Whatley told trial counsel and testified at trial that he had an "ideal" childhood living with the Thomases. Vague allegations now that Cleveland Thomas drank too much, abused Marie Thomas, shared a bed with Whatley, and touched him inappropriately fail to show that the defense team was deficient in its *attempts* to find mitigating evidence, because the defense investigator testified that Whatley never

revealed these alleged facts. The allegation that Cleveland Thomas raped Whatley's mother might have been discoverable pre-trial, because there are references to it in her mental health records; however, this allegation, and the alleged fact that she informed Whatley of the rape when he was a boy, would not have been significantly mitigating, particularly in light of the fact that use of the allegations may have offended the jurors if they perceived counsel as attacking the one couple who, while they were still living, had taken care of Whatley.

Whatley argues that trial counsel rendered ineffective assistance by failing to obtain evidence that Whatley, along with other inmates, had been involved in a successful lawsuit against guards at the prison in the District of Columbia where he was previously incarcerated. He argues that evidence that he suffered brutal treatment at the prison could have been used at trial to explain why he never returned to a halfway house in the District of Columbia when he was out past curfew one night. This argument lacks merit, because the jury would not have been significantly swayed by an argument that Whatley's fear of returning to prison justified his escape from the halfway house. Furthermore, Whatley has not shown that he informed his trial counsel of the alleged brutality, and Whatley did not mention being afraid of returning to prison when he testified in the sentencing phase about his escape from the halfway house.

Whatley argues that trial counsel made deficient use of the testimony available from Eugene Watson, a caseworker in the District of Columbia who designed a rehabilitation plan for Whatley as part of Whatley's criminal proceedings there. Based on the testimony of the defense investigator and billing records, it is clear that trial counsel had repeated contacts with Watson and considered Watson's testimony to be the centerpiece of the sentencing phase strategy. The record shows that, not only did counsel communicate with Watson by telephone, but counsel also met with Watson in person several times once he arrived in Georgia and that counsel even arranged to have Watson with him and Whatley in a room near the courtroom during breaks at trial. Watson's habeas testimony downplaying the level of contact he had with trial counsel does not show the habeas court's conclusion that counsel performed adequately to be error in light of the entire record.

Whatley also argues that trial counsel failed to properly prepare mitigation witnesses for their testimony. The record supports the habeas court's finding that the defense team, through the efforts of both trial counsel and the defense investigator, interviewed the mitigation witnesses and were aware of their potential testimony. Although it might be understandable that those witnesses now state that they felt ill at ease because trial counsel did not give them detailed instructions about what they should expect at trial, it was not unreasonable attorney conduct for trial counsel not to rehearse his witnesses' testimony with them. As the habeas court

found and as was supported by the testimony of the defense investigator, trial counsel reasonably chose not to overly prepare his witnesses, because he wanted their testimony to come across as sincere.[31]

Whatley argues that trial counsel failed to obtain several mental health reports that had been prepared in the District of Columbia as a result of his criminal activities there and that trial counsel failed to interview the experts who authored the reports. The habeas court's conclusion that trial counsel performed adequately with regard to these reports is reasonable, as it is supported by the presumption that counsel performed adequately, by documentary evidence showing that counsel obtained a signed release from Whatley and requested the materials from Whatley's caseworker in D.C, and by testimony from the defense investigator confirming that counsel sought the records from Whatley's caseworker. This conclusion is not made erroneous simply because Whatley's caseworker, in giving his habeas testimony, could not recall providing the materials to counsel. The habeas court also correctly concluded that Whatley would not have been prejudiced by counsel's alleged failure to obtain and use these mental health reports or to present testimony from the experts who

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[31] Compare *Turpin v. Christenson*, 269 Ga. 226, 234-242 (12) (B) (497 SE2d 216) (1998) (finding ineffective assistance where a mitigation case was "cobbled together at the last minute," where information relevant to mitigation witnesses' cross-examination was not discovered by counsel, and where mitigation witnesses were neither contacted until the last minute nor prepared to testify).

authored them. A review of the reports confirms the habeas court's finding that they contain material that would have been damaging to Whatley's mitigation case, including statements that he lacked remorse for his crimes and believed he could "get away with anything." The reports did note signs of neglect by Whatley's biological mother and a potential for psychotic symptoms under stress; however, these tentative findings would have proved of little effect, particularly in light of the fact that no clear findings of mental illness were noted in another mental health examination performed in preparation for Whatley's murder trial.

Trial counsel presented testimony from Whatley himself suggesting that he was remorseful. However, Whatley argues that trial counsel rendered ineffective assistance by failing to present additional testimony about his alleged remorse from his friends and from jail guards. This additional testimony about Whatley's remorse would not have had a significant impact on the jury, particularly because the prosecutor would have been able to explain Whatley's emotional reaction to learning that the victim had died as being a concern for his own punishment rather than true remorse for his actions.

Whatley argues that trial counsel failed to present any records from his past other than his school records. Other than the records discussed elsewhere in this opinion, Whatley has not elaborated on what records trial counsel failed to obtain or how that failure affected his trial.

C. Mental Health Evidence

Whatley also argues that trial counsel rendered ineffective assistance in his preparation and use of new mental health evidence. Counsel initially sought funds from the trial court to obtain his own mental health expert. The trial court authorized an initial examination of Whatley by psychologists working for the state mental hospital, Dr. Karen Bailey-Smith and Dr. Margaret Fahey. Counsel received two written reports from the evaluation. Dr. Bailey-Smith gave inconsistent testimony in the habeas proceedings, the balance of which suggested that she possibly spoke with trial counsel but that she could not specifically recall doing so. The defense investigator testified that counsel did communicate with Dr. Bailey-Smith after reviewing her report, and it is clear that counsel did receive a copy of her report. Thus, the evidence supports the habeas court's finding of fact that counsel did communicate with Dr. Bailey-Smith. Whatley faults trial counsel for not providing Dr. Bailey-Smith the mental health evaluations performed in the District of Columbia as a result of his criminal proceedings there; however, she testified in the habeas hearing that they would not have changed her expert opinions if she had seen them pre-trial and, therefore, counsel's use of her report would not have been affected by his alleged failure to obtain the records either in a timely fashion or at all.[32] Dr. Bailey-Smith's report did note

[32] See *Holsey*, 281 Ga. at 813 (II) (holding that "the critical issue" in such a case is what the expert consulted at the time of trial "would have been willing to testify to had he [or she] been

that Whatley's MMPI-2, a personality inventory, "was suggestive of … significant psychopathology" and that Whatley used some "idiosyncratic" words. However, she never concluded that he suffered from psychosis, and, in fact, she testified at the habeas hearing that she "didn't think he had any delusional thoughts" but merely had "some thought patterns that we thought were different and bordered delusional thinking." Furthermore, her report's description of the possible "psychopathology" suggested that Whatley merely had a "boastful and egocentric" attitude and that he had a "form of magical thinking" characterized merely by a belief that he was "unique and special" and had "unique and special powers" to influence others. The diagnostic impression set out in her report contained hints of mitigation, but overall, it could have been more aggravating than mitigating. That diagnosis was as follows: "Rule Out [i.e. there are some signs of but not enough to reach a diagnosis of] Bipolar Disorder" and "Personality Disorder NOS [not otherwise specified] with antisocial, borderline, narcissistic, and schizotypal features."

As we noted above, counsel's use at trial of Dr. Bailey-Smith's report would not have been affected if counsel had not failed, as Whatley alleges, to obtain the records from mental health evaluations performed in the District of Columbia as a result of his criminal proceedings. We further conclude as a matter of law that the failure of trial counsel to

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provided the materials trial counsel allegedly failed to provide").

present the records directly to the trial court in a renewed motion for Whatley's own expert did not result in significant prejudice to his ability to prevail on that motion. The evaluations described in those records had been conducted more than eight years before Dr. Bailey-Smith's, and they reached conclusions similar to, and in some respects less-favorable than, the conclusions reached in Dr. Bailey-Smith's report. For example, although the older evaluations referred to Whatley as "evidenc[ing] symptoms of schizophrenia," those symptoms are described in the reports as arising from Whatley's use of illegal drugs.

Whatley also argues that trial counsel performed deficiently in failing to cite certain case law[33] or to request an ex parte hearing in support of his motion for a defense expert. Even assuming counsel performed deficiently in these respects, we conclude that Whatley's motion for his own expert was not prejudiced by those deficiencies.

In light of the foregoing discussion, we conclude as a matter of law that, even given the deficiencies in counsel's performance that we have assumed in our discussion above, Whatley's defense was not prejudiced. This is true because, even if counsel had performed in the manner Whatley now says he should have, counsel still would reasonably have declined to renew Whatley's motion for his own mental health expert and because the trial court

[33] To the extent Whatley argues that trial counsel failed to do sufficient legal research in other, unspecified areas, we find that he has shown neither deficient performance nor prejudice.

would have properly denied such a renewed motion if it had been made.[34]

D. Shackling During the Sentencing Phase

Whatley argues that his trial counsel rendered ineffective assistance by failing to object to his being placed in visible shackles during the sentencing phase, including during his physical demonstration of his version of events for the jury.[35] The Supreme Court of the United States decided in 2005, well after Whatley's trial and direct appeal, that visibly shackling a defendant during the sentencing phase is unconstitutional unless the record shows "'an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial."[36] The Warden argues that counsel should not be regarded as having performed deficiently by failing to object to the shackling, because the practice had not yet been established as unconstitutional.[37] However, at the time of

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[34] See *Lance v. State*, 275 Ga. 11, 13-14 (2) (560 SE2d 663) (2002) (setting forth the standards by which an indigent defendant's motion for funds for expert assistance should be decided).

[35] See *Whatley*, 270 Ga. at 302 (14) (holding that Whatley had waived his right to complain on direct appeal about his shackling, because he had failed lo object at trial).

[36] *Deck v. Missouri*, 544 U.S. 622, 624 (125 SC 2007, 161 LE2d 953) (2005) (quoting *Holbrook v. Flynn*, 475 U. S. 560, 568-569 (106 SC 1340, 89 LE2d 525) (1986)).

[37] See *Overstreet v. State*, 877 NE2d 144, 161-162 (D) (Ind. 2007) (holding that trial counsel's performance should not be deemed deficient because counsel failed to anticipate that the prohibition against shackling defendants during the

Whatley's trial, this Court had already strongly suggested in dictum that it was unconstitutional to place visible shackles on a death penalty defendant during the sentencing phase without a showing of particular need.[38] We therefore assume, at least for the purpose of this discussion, that trial counsel performed deficiently in failing to recognize the legal basis for an objection to visible shackling in the sentencing phase.

On direct appeal where unconstitutional shackling has occurred, there is a presumption of harm that can be overcome only upon a showing by the State that the shackling was harmless beyond a reasonable doubt. However, where, as here, the issue is the ineffective assistance of trial counsel in failing to object to such shackling, the petitioner is entitled to relief only if he or she can show that there is a reasonable probability that the shackling affected the outcome of the trial.[39] In view of the balance of the evidence presented at his trial, we conclude as a matter of law that Whatley cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence.

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guilt/innocence phase would be extended in *Deck*, *id*., to the sentencing phase); *Marquard v. Sec'y for the Dep't of Corr*., 429 F3d 1278, 1313 (IV) (B) (11th Cir. 2005).

[38] See *Moon v. State*, 258 Ga. 748, 755 (12) (b) (375 SE2d 442) (1988) (citing *Elledge v. Dugger*, 823 F2d 1439, 1450-1452 (VI) (11th Cir. 1987)).

[39] See *Marquard*, 429 F3d at 1312-1314 (IV) (B) (addressing a visible shackling claim and finding no reasonable probability of a different outcome in the sentencing phase).

E. Ballistics Evidence

Finally, Whatley argues that his trial counsel rendered ineffective assistance by failing to obtain funds for a ballistics expert. In support of his argument, Whatley cites the affidavit testimony of an expert witness opining that the evidence in Whatley's case is inconsistent with Whatley's having fired downward toward Tommy Bunn, that it would have been "virtually impossible" for the bullet that struck the service counter to have deflected upward and struck the ceiling, and that the gunshot wound to Ed Allen's chest from a range of 15 to 18 inches could have been inflicted after Allen had stepped over Bunn and had gone around the service counter pursuing Whatley. The habeas court filed an order striking the affidavit, among others, because it was filed without authorization after the close of the evidentiary hearing.

The affidavit alleges that the gunpowder residue pattern associated with the bullet mark on the service counter demonstrates that the bullet was traveling on a trajectory somewhat level with the floor, not sharply downward toward Tommy Bunn. However, this testimony, coupled with the still-uncontradicted trial testimony showing that the bullet that struck the counter very close to Allen's position was fired from a range of approximately eight inches, would have led the jury to conclude, at the most, that the shot was intended for Allen and was fired at very close range before Whatley had retreated from the counter. The affidavit's assertions that the shot that struck the counter could not have

also struck the ceiling and that the shot to Allen's chest could have been inflicted as Whatley was exiting and being pursued fail to shed light on the question of whether Whatley fired his pistol before Allen armed himself, particularly given the fact that Whatley fired at least one shot in the direction of either Allen or Bunn from a distance of only eight inches from the counter. Thus, even assuming trial counsel should have obtained expert testimony like that contained in the affidavit, we conclude as a matter of law that Whatley's defense did not, by his being deprived of such testimony at trial, suffer prejudice sufficient to support his ineffective assistance claim. Accordingly, even assuming the habeas court erred[40] in refusing to consider Whatley's untimely affidavit, such error would be harmless.

F. Combined Effect of Counsel's Deficiencies

Considering the combined effect of the deficiencies we have assumed in the discussion above, we conclude that those deficiencies would not

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[40] But see *Bloomfield v. Bloomfield*, 282 Ga. 108, 110 (1) (d) (646 SE2d 207) (2007) (noting the trial court's "broad discretion to reopen evidence" and citing *Page v. State*, 249 Ga. 648, 650-651 (2) (c) (292 SE2d 850) (1982)); *Village Creations, Ltd. v. Crawfordville Enterprises, Inc.*, 232 Ga. 131, 132-133 (206 SE2d 3) (1974) (finding no abuse of discretion where the trial court refused to consider an affidavit filed after the deadline that had been set by the trial court).

in reasonable probability have changed the outcome of either phase of Whatley's trial.[41]

VI. Abandoned Claims

In a footnote, Whatley purports to incorporate by reference "all arguments and claims raised in the habeas court." We deem any additional claims not addressed in this opinion to have been abandoned.[42]

Judgment affirmed. All the Justices concur, except Hunstein, P.J., who concurs in the judgment only as to Division V (D).

[41] See *Holsey*, 281 Ga. at 812 n.1 (holding that the combined effect of trial counsel's deficiencies should be considered).

[42] See Supreme Court Rule 22; *Head v. Hill*, 277 Ga. 255, 269 (VI) (A) (587 SE2d 613) (2003) (finding death penalty habeas claims abandoned under Supreme Court Rule 22).

APPENDIX E

No.13-12034

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D.C. Docket No. 3:09-cv-00074-WSD

FREDERICK R. WHATLEY,

Petitioner-Appellee
Cross Appellant,

v.

WARDEN, GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent-Appellant
Cross Appellee.

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

Before ED CARNES, Chief Judge, WILSON,
WILLIAM PRYOR, MARTIN, JORDAN,
ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH,
GRANT, LUCK, and LAGOA, Circuit Judges.

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be

reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

MARTIN, Circuit Judge, dissenting from the denial of rehearing en banc:

Frederick R. Whatley is a prisoner on death row in Georgia. A panel of the court denied his federal habeas petition. *Whatley v. Warden*, 927 F.3d 1150 (11th Cir. 2019). I asked the full court to rehear Mr. Whatley's case en banc, because I believe the panel opinion applied the wrong legal standard in deciding whether, under 28 U.S.C. § 2254(d),[1] to defer to the Georgia Supreme Court's denial of Mr. Whatley's claim that his counsel was ineffective during the penalty phase of his trial. This court is bound by the rule pronounced by the Supreme Court in *Wilson v. Sellers*, 584 U.S.___, 138 S. Ct. 1188 (2018), as well as our own precedent in *Meders v. Warden*, 911 F.3d 1335 (11th Cir. 2019). This precedent requires our court to review "the specific reasons given by the state court" for denying the petitioner's claim "and defer[] to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192; *see also Meders*, 911 F.3d at 1349. The panel's analysis in *Whatley* conflicts with this precedent by suggesting that federal courts may look beyond the reasons a state court gives for denying habeas relief. *See* 927 F.3d at 1182. I believe

[1] This statute is a part of the Antiterrorism and Effective Death Penalty Act of 1996. I refer to it as AEDPA.

this court should hear this case en banc, in order to fix the panel's departure from established law, and make clear the standard for assessing the reasonableness of a state court's rationale, which limits us to the specific reasons given by the court. I dissent from the court's decision to let the *Whatley* panel opinion stand.

> W*hatley* begins by correctly articulating the § 2254(d) analysis:
>
> When a district court reviews a state court's decision under AEDPA, it must first consider the claim as it was presented to the state court. Next, it considers the state court's decision. If the state court applied the correct Supreme Court precedent … the district court decides whether the state court applied the Supreme Court precedent unreasonably. The district court also considers whether the state court's decision was based on an unreasonable determination of the facts.

Whatley, 927 F.3d at 1181 (citations omitted). However, at three points in its analysis, the *Whatley* opinion suggests that the actual reasons a state court gives for denying habeas relief play a minimal role in the federal habeas court's decision to defer to the state court's ruling. First, *Whatley* says "under [§ 2254(d)], we're most concerned with the reviewing [state] court's ultimate conclusion, not the quality of its written opinion." *Id.* at 1177 (quotation marks omitted). It continues by saying "our review is not limited to the reasons the [state] Court gave in its analysis." *Id.* at 1178. Third, it says "we are not

limited to the reasons the [state] Court gave and instead focus on its ultimate conclusion." Id. at 1182 (quotation marks omitted). The *Whatley* opinion concludes its recitation of the legal standard by saying this Court "*must* 'determine what arguments or theories *could* have supported the state court's decision.' Id. (first emphasis added and alteration adopted) (*quoting Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011)).

These statements conflict with precedent that binds federal judges in deciding the extent to which we defer to a state court's decision during our review of those decisions on federal habeas review. *See* 28 U.S.C. § 2254(d). The Supreme Court set the rule that must govern our § 2254(d) deference analysis in *Wilson v. Sellers*, 138 S. Ct. 1188, and this Court applied that rule in *Meders v. Warden*, 911 F.3d 1335. Neither *Wilson* nor *Meders* is cited anywhere in the *Whatley* opinion.

Section 2254(d) bars federal courts from issuing a writ of habeas corpus to a state prisoner on any claim adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Section 2254(d) sets a high (although not insurmountable) bar. *Williams v. Taylor*, 529 U.S. 362, 402-13, 120 S. Ct. 1495, 1518-23 (2000). Where the last state court to

address the prisoner's claims issued a reasoned decision, the Supreme Court tells us that the deference analysis is a "straightforward inquiry." *Wilson*, 138 S. Ct. at 1192. We are to "simply review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable." *Id*. "Deciding whether a state court's decision involved an unreasonable application of federal law or was based on an unreasonable determination of fact requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why the state courts rejected a state prisoner's federal claims." *Id*. at 1191-92 (quotation marks omitted).

The deference analysis set forth in *Whatley* cannot be squared with the Supreme Court's rule stated in *Wilson*. Indeed, *Whatley* makes no effort to square them. Yet, *Wilson* made clear that it is not proper for federal judges to try and come up with any rationale that could have supported the state court's decision. Instead, we must defer to the specific reasons given by the state court, so we must, in turn, focus on the particular reasons the state court gave.

I recognize that *Wilson* was decided in a different procedural posture than that presented by Mr. Whatley's case.[2] But that does not change

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[2]*Wilson* held that federal courts "should 'look through' [an] unexplained [state court] decision to the last related state-court decision that does provide a relevant rationale" and then "presume that the unexplained decision adopted the same reasoning." 138 S. Ct. at 1192. Federal courts must decide

Wilson's mandate that our court's decision about whether to give AEPDA deference to a state court ruling must be based on the reasons the state court gave, as opposed to whatever reason a federal court can come up with.

The *Whatley* opinion also ignores this Court's precedent that reinforces the *Wilson* analysis. Since *Wilson*, this court has consistently looked to the specific reasons the last reasoned state-court decision gave and examined whether those reasons merit AEDPA deference. *See, e.g.*, *Meders*, 911 F.3d at 1349 ("Deciding whether a state court's decision involved an unreasonable application of federal law requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision." (citation omitted and alteration adopted)); *see also Hawthorne v. Sec'y, Dep't of Corr.*, 786 F. App'x 896, 899 (11th Cir. 2019) (per curiam) (unpublished) ("*Wilson* informs our analysis."); *Junes v. Fla. Dep't of Corr.*, 778 F. App'x 639, 641 (11th Cir. 2019) (per *curiam*) (unpublished) ("The district court must consider the particular factual and legal reasons that the state court rejected the prisoner's federal claims."); *Johnson v. Sec'y, Dep't of Corr.*, 737 F. App'x 438, 441 (11th Cir. 2018) (*per curiam*)

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whether to defer based on the reasons given by the last state court to issue a reasoned decision. *Id.* at 1195-96. Here, the last state court to address Mr. Whatley's claims was the Georgia Supreme Court, so there is no need to rely on *Wilson's* "look through" presumption. *See generally Whatley v. Terry*, 668 S.E.2d 651 (Ga. 2008).

(unpublished) (explaining standard set forth in *Wilson v. Sellers*). Our prior precedent rule required the *Whatley* panel to follow *Meders*. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc."). But it did not.

I agree with the *Whatley* opinion when it says the Georgia Supreme Court did not have to walk through every step of a "hypothetical retrial" of Mr. Whatley's penalty phase. *Whatley*, 927 F.3d at 1182. It is not my purpose to suggest the Georgia court must take this walk. I know that *Wilson* does not mean that federal judges must (or even may) "flyspeck" the state court decision. *Meders*, 911 F.3d at 1349. But it does mean that "we are to focus not merely on the bottom line ruling of the decision but on the reasons, if any, given for it." *Id*. The *Whatley* majority said it was not required to do as *Meders* instructs. Thus, it promotes an incorrect statement of law.

The *Whatley* majority looks mainly to *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770 (2011), and *Gill v. Mecusker*, 633 F.3d 1272 (11th Cir. 2011). See 927 F.3d at 1182. But *Richter* never advocates that federal judges look only to the state court's resolution of the case, as opposed to its reasoning. In *Richter*, the Supreme Court held that AEDPA deference applies even when the state court gives no reasons for its decision. 562 U.S. at 98, 131

S. Ct. at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."). Nevertheless, *Richter* does not tell us to look beyond the reasons the state court actually gave. Nor does it license federal judges to invent any reason that could support the state court's resolution of the case. Rather, it established a presumption that a state court adjudicated a claim on the merits when it gives no other reason for its decision. *Id*. at 98-99, 131 S. Ct. at 784-85. *Richter* recognized that this "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id*. at 99-100, 131 S. Ct. at 785 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991)). In *Wilson*, the Court reiterated that this presumption is overcome where an earlier state court decision sets forth reasons. 138 S. Ct. at 1195-96. *Wilson* told us we must presume the unexplained state court decision relied on the same rationale as the last reasoned opinion, absent some reason to think otherwise. *Id*. And it told us to look to the reasons the state court gave, not those we think up ourselves. *Id*. Finally, if it is true that *Gill* reads *Richter* as requiring us to focus on the state court's conclusion to the exclusion of its rationale, *see Gill*, 633 F.3d at 1290-91, then *Gill* has been "undermined to the point of abrogation by the Supreme Court," because of the *Wilson* decision. *See Archer*, 531 F.3d at 1352.

I dissent from the denial of rehearing en banc because as written, *Whatley* contains an incorrect

statement of law. I believe the *Whatley* opinion requires our en banc court to make clear that this court's evaluation of the reasonableness of the Georgia Supreme Court's rationale in denying Mr. Whatley relief must be limited to the specific reasons that court gave, and that it is improper for our court to supply its own. I dissent from the court's vote declining to rehear Mr. Whatley's case.