No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

VIRGIL DELANO PRESNELL,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
Capital Case

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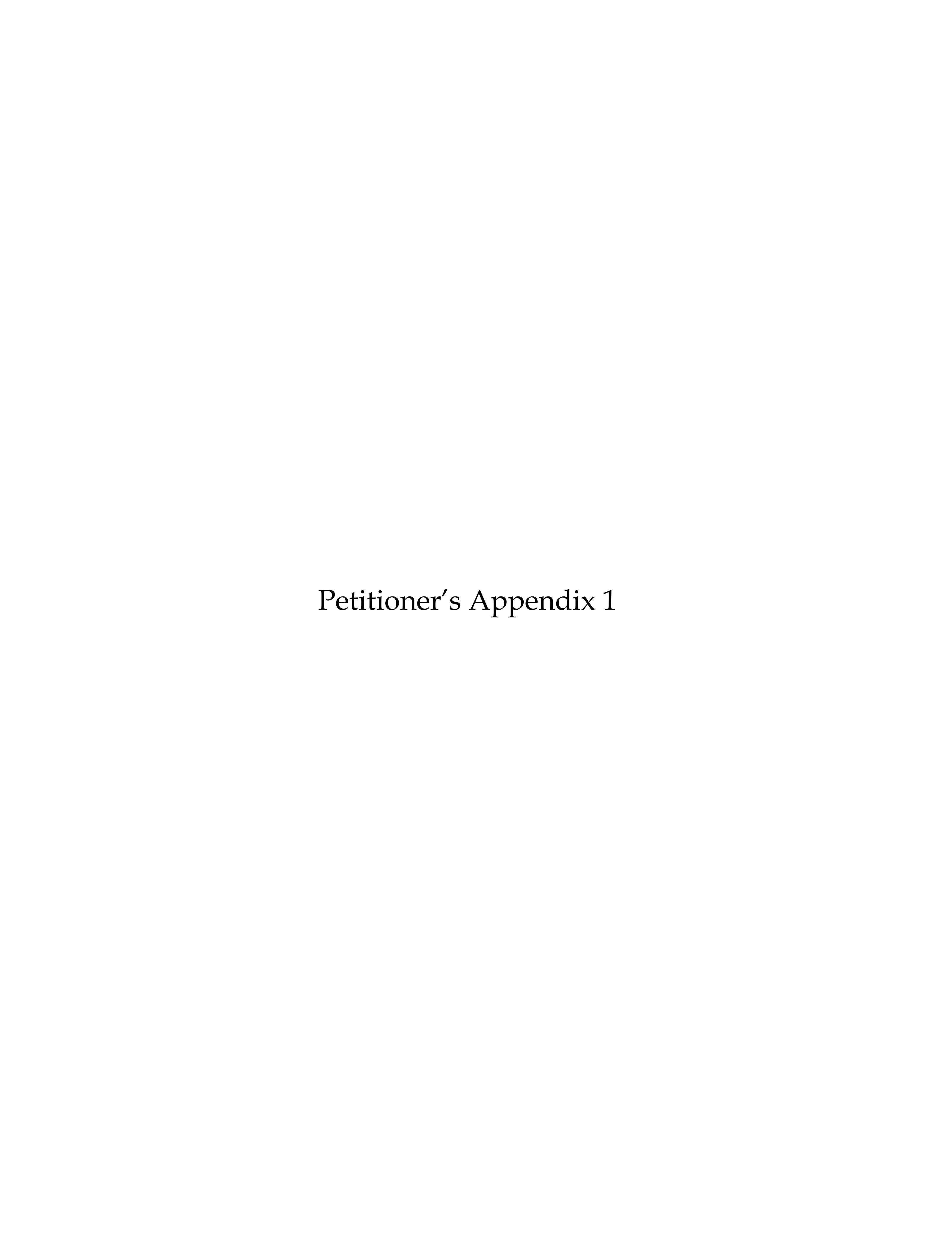

Petitioner's Appendix 1

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14322

D.C. Docket No. 1:07-cv-1267-WBH

VIRGIL DELANO PRESNELL,

Petitioner-Appellant,

versus

WARDEN.

Respondent-Appellee.

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

(September 16, 2020)

Before ROSENBAUM, TJOFLAT, and ED CARNES Circuit Judges.

TJOFLAT, Circuit Judge:

Virgil Delano Presnell, Jr., appeals the District Court's decision denying his petition for writ of habeas corpus vacating the death sentence he received for a murder he committed in 1976. In a bifurcated trial held that year, a jury found him

guilty of the murder in the guilt phase and returned a death-sentence verdict in the sentencing phase. Subsequently, in a collateral proceeding brought in 1985, that verdict was vacated. In 1999, a retrial of the sentencing phase was held. The result was the same: a death sentence.

The issue in this appeal is whether the lawyers who represented Petitioner at the 1999 retrial deprived him of his constitutional right to the effective assistance of counsel in failing to attain and present mitigation evidence. In seeking mitigating evidence, one of the lawyers' investigators interviewed Petitioner's mother, who reported that she "did not drink except socially" while pregnant with Petitioner. In an affidavit submitted to the District Court in support of his habeas petition, though, his mother stated that she drank bourbon to excess throughout her pregnancy. Also submitted were the reports of two psychologists diagnosing Petitioner with fetal alcohol spectrum disorder, a diagnosis reached in large part on the basis of his mother's affidavit.

I.

The circumstances that gave rise to this habeas petition in this case harken back to 1976. On July 1 of that year, a grand jury indicted Petitioner, Virgil Delano Presnell, Jr., for four felonies he committed on May 4, 1976, after encountering two girls walking home from school, L.S., age eight, and A.F., age ten. Two of the felonies, malice murder, a capital offense, and kidnapping,

involved L.S. Two of the felonies, kidnapping with bodily injury and forcible rape, both capital offenses, involved A.F.[1] Petitioner stood trial in the Superior Court of Cobb County in August 1976. The jury found him guilty as charged at the conclusion of the guilt phase and imposed a death sentence for each capital offense in the penalty phase. On direct appeal, the Georgia Supreme Court described the jury's verdicts and the sentences imposed: "The jury imposed the penalty of death for the murder of [L.S.], the kidnapping with bodily injury of [A.F.], and the rape of [A.F.]. [Petitioner] was sentenced to twenty years in prison for the kidnapping of [L.S.]." *Presnell v. State* (*Presnell I*), 243 S.E.2d 496, 500 (Ga. 1978).

The procedural history that followed is long. The Georgia Supreme Court affirmed Petitioner's convictions and the death sentence imposed for the murder; it vacated the death sentences for kidnapping with bodily injury and forcible rape.[2]

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[1] The indictment also charged Petitioner with aggravated sodomy of A.F. The charge was dropped prior to Petitioner's trial.

[2] The U.S. Supreme Court recounted the Georgia Supreme Court's reasoning:

> [The first two death sentences] depended upon petitioner's having committed forcible rape, and the [Supreme Court of Georgia] determined that the jury had not properly convicted petitioner of that offense.
>
> In addition, the Supreme Court of Georgia held that the State could not rely upon sodomy as constituting the bodily injury associated with the kidnaping. Nonetheless, despite the fact that the jury had been instructed that the death penalty for murder depended upon a finding that it was committed while petitioner was engaged in "kidnapping with bodily harm, *aggravated sodomy*" (emphasis added), the Georgia Supreme Court upheld the third death penalty imposed by the jury. It did so on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record supported the conclusion that petitioner was guilty of that offense,

Id. at 500, 508. The United States Supreme Court, on certiorari review, reversed the conviction for kidnapping with bodily injury and the death sentence for the murder and remanded the case for further proceedings.[3] *Presnell v. Georgia*, 439 U.S. 14, 99 S. Ct. 235 (1978). On remand, the Georgia Supreme Court reinstated the death sentence for the murder and the conviction for kidnapping with bodily injury.[4] *Presnell v. State* (*Presnell II*), 252 S.E.2d 625, 626–27 (Ga. 1979). In addition, it reduced the forcible rape conviction to a conviction for statutory rape. *Id.*

The Georgia Supreme Court's decision in *Presnell II* brought an end to the appellate review of Petitioner's 1976 trial. Petitioner filed successive habeas corpus petitions in state and federal courts over the next twelve years. He sought to vacate his convictions and death sentence, contending that he had been convicted and sentenced to death in violation of the United States Constitution.[5]

> which in turn established the element of bodily harm necessary to make the kidnapping a sufficiently aggravating circumstance to justify the death sentence.

Presnell v. Georgia, 439 U.S. 14, 15–16, 99 S. Ct. 235, 236 (1978).

[3] The U.S. Supreme Court held that in the absence of a jury finding of forcible rape, a death sentence could not be upheld on the basis that evidence in the record supported a conclusion that Petitioner was guilty of forcible rape, which in turn established the element of bodily harm necessary to make kidnaping an aggravating circumstance. *Presnell v. Georgia*, 439 U.S. 14, 99 S. Ct. 235 (1978).

[4] The Court concluded that the death sentence was supported by the jury's "finding of kidnapping with bodily injury, aggravated sodomy of [A.F.]" and that aggravated sodomy "suppl[ied] the element of bodily injury required for the kidnapping [with bodily injury] offense." *Presnell II*, 252 S.E.2d at 627.

[5] Petitioner filed his first petition for habeas corpus on January 8, 1980. Petitioner petitioned the Superior Court of Butts County, Georgia, for a writ of habeas corpus. His

Petitioner prevailed in part when the United States District Court for the Northern District of Georgia issued a writ of habeas corpus vacating Petitioner's death sentence, which we affirmed.[6] *Presnell v. Zant* (*Presnell III*), 959 F.2d 1524 (11th Cir. 1992). The Court issued the writ because the prosecutor's argument to the

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amended petition contained twelve counts, numbered fifteen through twenty-six. Counts fifteen through seventeen challenged the validity of grand and traverse Cobb County juries that indicted and convicted him. Count eighteen alleged that his trial attorney was constitutionally ineffective in failing to timely challenge the validity of the respective juries. Counts nineteen through twenty-three challenged the selection and composition of Cobb County juries. Counts twenty-four and twenty-five alleged that Petitioner was tried while mentally incompetent. Count twenty-six alleged that Petitioner's attorneys provided ineffective assistance of counsel in failing to develop and present mitigating evidence at the penalty phase of his trial. On January 23, 1980, the Superior Court, following an evidentiary hearing, denied his petition; on March 19, 1980, the Georgia Supreme Court denied his application for a certificate of probable cause to appeal; and on October 6, 1980, the U.S. Supreme Court denied certiorari review. *Presnell v. Zant*, 449 U.S. 891, 101 S. Ct. 245 (1980).

On June 15, 1981, Petitioner petitioned the U.S. District Court for the Northern District of Georgia for habeas relief pursuant to 28 U.S.C. § 2254. The Court dismissed his petition on January 13, 1984, because he failed to exhaust his state remedies. So, he returned to the Superior Court of Butts County on January 26, 1984, filing a second habeas petition. On October 6, 1984, the Court denied the petition as successive, and the Georgia Supreme Court denied his application for a certificate of probable cause to appeal on November 16, 1984. *See Presnell v. Kemp*, 835 F.2d 1567 (11th Cir. 1988).

[6] On May 15, 1985, Petitioner filed a second petition for habeas corpus relief in the U.S. District Court for the Northern District of Georgia. The Court granted the petition in part, vacating Petitioner's death sentence on the ground that the trial court, in the penalty phase of his trial, gave the jury an improper burden shifting instruction. The State appealed, and this Court reversed the District Court's decision and remanded the case for further proceedings. *Presnell v. Kemp*, 835 F.2d 1567, *reh'g en banc denied*, 854 F.2d 1326 (11th Cir. 1988), *cert. denied*, 488 U.S. 1050, 109 S. Ct. 882 (1989). On remand, the District Court, on July 11, 1990, vacated Petitioner's death sentence again, which we explain in the accompanying text. *See Presnell v. Kemp*, 835 F.2d 1567 (11th Cir. 1988); *see also Presnell v. Hall*, No. 1:07-CV-1267-CC, 2013 WL 1213132 (N.D. Ga. Mar. 25, 2013).

jury at the close of the penalty phase of his trial was so egregious that it rendered the proceeding fundamentally unfair and thus a denial of due process of law.[7]

The District Court issued the writ of habeas corpus without prejudice to the State's right to retry the penalty phase of Petitioner's trial. The State waited until late 1997 to notify Petitioner that it had elected to retry the penalty phase. Shortly thereafter, the Superior Court of Cobb County reopened Petitioner's case. Since Petitioner was indigent, the Superior Court, in the first week of January 1998, appointed two attorneys to represent him, Stephen Schuster and Mitch Durham (we refer to Schuster and Durham collectively as Defense Counsel). Attorney Dianna McDaniel also represented Petitioner. Defense Counsel hired McDaniel with

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[7] In its closing argument during the sentencing phase of Petitioner's trial, the prosecutor quoted from *Eberhart v. Georgia*, 47 Ga. 598 (1873). The prosecutor said:

> We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon mercy [sic] to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deed [sic] occur. A stern, unbending, unflinching administration of the penal laws, without regard to position or sex, as it is the highest mark of our [sic] civilization, it [sic] is also the surest mode to prevent the commission of offenses.

Presnell III, 959 F.2d at 1528.

funds provided by the Cobb County Circuit Defender's Office pursuant to an order the Superior Court entered on September 11, 1998.

The penalty-phase retrial began on February 22, 1999, before a newly summoned jury. On March 16, the jury returned a death-sentence verdict, and the Superior Court sentenced Petitioner accordingly. On appeal, the Georgia Supreme Court affirmed Petitioner's sentence. *Presnell v. State*, 551 S.E.2d 723 (Ga. 2001), *cert. denied, Presnell v. Georgia*, 535 U.S. 1059, 101 S. Ct. 1921 (2002).

On October 16, 2002, Petitioner petitioned the Superior Court of Butts County for a writ of habeas corpus. His petition presented forty-three claims for relief, each asserting a violation of a state or federal constitutional right. Some of the claims sought the vacatur of his convictions. Others sought the vacatur of his death sentence on the theory that Defense Counsel denied Petitioner his Sixth Amendment right to the effective assistance of counsel, as explicated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984),[8] in preparing for and presenting Petitioner's defense at the retrial of the penalty phase. One of the ways in which Defense Counsel were allegedly derelict is that they failed to discover that Petitioner suffered from Fetal Alcohol Spectrum Disorder ("FASD")

[8] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Amendment has been 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).

which accounted for his behavior on May 4, 1976 (the "FASD" claim). On December 27, 2005, following an evidentiary hearing, the Superior Court denied the petition. And on November 6, 2006, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the Superior Court's judgment.

Having exhausted his state court remedies, Petitioner, on June 1, 2007, turned once more to the Northern District of Georgia for habeas corpus relief. His § 2254 petition presented forty claims; he attacked both his convictions and death sentence on multiple constitutional grounds. Petitioner presented several ineffective assistance claims, including the FASD claim, which the Superior Court of Butts County had denied. Petitioner argued that the Superior Court, in denying the claims, misapplied *Strickland v. Washington*. The District Court was not persuaded. It denied all of Petitioner's claims, including the ineffective assistance claims. Petitioner applied to the District Court for a certificate of appealability ("COA") so he could appeal its decision. *See* 28 U.S.C. § 2253(c). The Court granted his application but limited it to one issue: whether Defense Counsel were constitutionally ineffective in failing to discover that Petitioner suffered from FASD.

II.

A.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits the circumstances in which a federal court may grant a writ of habeas corpus setting aside a state court judgment adjudicating a claim alleging the denial of a constitutional right:

> 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)) (quotation marks omitted).

In this appeal, we ask whether the District Court erred in deciding that the Superior Court of Butts County's decision was not (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined" in *Strickland v. Washington*, *see* 28 U.S.C. § 2254(d)(1), or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the

state court proceeding," 28 U.S.C. § 2254(d)(2).[9] That is, we determine *de novo* whether the District Court erred in rendering either decision.

In answering these questions, we keep two principles 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, the state court's findings of fact are "presumed" to be correct. 28 U.S.C. § 2254(e)(1). Thus, if a petitioner challenges a state adjudication that rests on findings of fact, he must overcome two hurdles. He must rebut the presumption of correctness that attaches to the findings of fact, and he must do so with "clear and convincing evidence." *Id.* And he must overcome the deference that we give to the state court's adjudication under § 2254(d).

To prevail under *Strickland v. Washington*, a 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. He satisfies the second element only on showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

[9] These are the same questions the District Court answered in deciding whether the Superior Court's decision was deficient under 28 U.S.C. § 2254(d)(1) or (2).

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.

The District Court ruled on the same record on which the Superior Court of Butts County denied Petitioner's application for a writ of habeas corpus on December 27, 2005. The record includes a transcript of Petitioner's trial in August 1976; the record before the Georgia Supreme Court in Petitioner's appeal of his convictions and death sentences, and that Court's opinion affirming them; material parts of the proceedings the Superior Court of Butts County held on the habeas petition Petitioner filed on January 8, 1980;[10] the transcript of Petitioner's trial in February and March of 1999, the record before the Georgia Supreme Court in Petitioner's appeal of his death sentence, and that Court's opinion affirming the sentence; and the evidence the Superior Court received in the habeas proceedings in reaching its December 27, 2005 decision—specifically, the evidence bearing on

[10] *See* note 5, *supra*.

Defense Counsel's preparation for and presentation of Petitioner's defense at the penalty phase retrial, which, according to Petitioner, constituted deficient performance under *Strickland*.[11]

In part III.A below, we visit Petitioner's 1976 trial. We recite the facts on which the jury found Petitioner guilty as charged, the aggravating circumstances the State presented in seeking death sentence verdicts, and the testimony Petitioner's counsel presented in urging the jury to return life-sentence verdicts. The 1976 trial informed Defense Counsel of what the State would present at the penalty phase retrial and the task they faced in presenting a defense that would mitigate the State's case for a death sentence. In subsection B, we introduce Defense Counsel and the team they assembled, set out the investigatory steps they took in preparing for the retrial, and recount what their investigation revealed. Subsection C recounts what took place at the retrial.

Part IV focuses in subsection A on the litigation of Petitioner's ineffective assistance of counsel claim in the Superior Court of Butts County, specifically, the FASD claim; in subsection B on the District Court's decision under AEDPA not to

[11] The record in this appeal does not include the records of the habeas petition Petitioner filed in the Northern District of Georgia on June 15, 1981; the habeas proceedings brought in the Superior Court of Butts County on January 26, 1984; or the proceedings held in *Presnell III*. *See* notes 5 & 6, *supra*.

disturb the Superior Court's denial of that claim; and in subsection C on our conclusion that the District Court did not err.

III.

A.

1.

The Georgia Supreme Court, in its *Presnell I* opinion affirming the convictions and death sentences resulting from the 1976 jury trial, provided Defense Counsel with the facts the State would present in support of its quest for a death sentence. Here are the facts the State would present[12]:

> The defendant was seen the day before the crimes by a lady who was picking up her children from school. He was returning to his blue car which was parked a short distance away from the school. At [his] trial [on the July 1, 1976 indictment,] the defendant took the stand and explained that he had walked to the wooded area across from the school where he watched the little girls through binoculars while he played with himself. He testified that he had frequently visited adult bookstores and movies, and that he was reading a book entitled "He Warmed Her Young Body." He returned the next day . . . and saw two little girls walk from the school down a road beside the woods. The defendant was again seen by the same lady who had observed him the day before. The defendant testified that he had driven to the wooded area near the school where he again watched the little girls. He had brought a sleeping bag, a rug, a jar of lubricant and rope. He waited for the two children, one of whom he said reminded him of the girl in his book. The girls entered the wooded area on a path which led to their homes on the other side, a distance of less than five hundred yards. The older child was ten years old, the younger child was eight. The defendant grabbed them from behind, covered their mouths with his hand and told them he would use the gun in his pocket if they did not

[12] At the 1976 trial, George W. Darden, III, District Attorney for Cobb County, Georgia, represented the State. J. Milton Grubbs, Jr., William P. Holley, and Adele Platt, court-appointed attorneys, represented Petitioner.

do as told. He tied them but then untied them and took them to his car and drove away with them.

The mother of the younger child became concerned and drove to the school. Finding the lights out in her daughter's schoolroom, she walked the path through the wooded area. On the trail she found school books in which the older child's name had been written. She contacted the school principal, her husband, and the police. With neighbors and other volunteers the parents of the two children continued searching for them.

After stopping for gasoline at a self-service station, the defendant drove to an unpopulated wooded area. He testified that on the way and while he was driving, he had the older child place his sex organ in her mouth. At the secluded area, he took a blue rug and jar of lubricant from the car trunk and went into the wooded area with the children. He had the children remove their clothing and caused the older child to lie on the rug. He testified that he then removed his clothes and penetrated the older child. When he stopped she was bleeding. Her vagina was torn and required surgery for repair. He let the children dress. The older child was slower, so he took the younger child back toward the car first.

Along the way the younger child ran away from the trail. He chased her across a narrow, shallow creek. In his taped confession he said, "Well, when we got down to the creek, I don't really know why, but I just pushed her down into the creek and held her there. Well, she was kicking and trying to get out but I just held her there until she stopped kicking. Well, I figured she was dead and for some reason I didn't want to leave her in the creek and that is the reason I carried her out of the creek and layed her down." At trial the defendant testified that he accidentally fell on top of the fallen younger child who was still gasping for air as he pulled her to the creek bank and departed. The autopsy indicated that the cause of her death was drowning.

The defendant returned to the older child and took her towards a nearby section of the creek where he again had her place his sex organ in her mouth. Next, the defendant put the older child in the trunk of his car.

After driving some distance, a tire on the defendant's car lost air pressure. He left the older child in another wooded area near a service station and drove to his mother's nearby residence to repair the tire. The child found help at the service station. She told police that the man

> was driving a blue car and had had tire trouble. The defendant was found by police installing a tire on his car.
>
> During the course of his testimony at trial the defendant admitted acts showing commission of each of the crimes (except the murder) for which he was convicted. (In his confession to police he admitted facts showing murder.) He testified that because the children did not protest, he did not believe at the time of the crimes that his acts were wrong. The court's expert witness, who had supervised a court-ordered psychiatric examination of the defendant, testified that he had no reason to believe that the defendant did not know right from wrong.

Presnell I, 243 S.E.2d at 500–01.

As indicated in the passages quoted above, Petitioner testified in his defense during the guilt phase of his trial. Petitioner was the only witness counsel put on in his defense. The jury had already heard his confession; his testimony gave him an opportunity to explain it. His testimony supported the two-fold theory of his defense: (1) the drowning of L.S. was an accident, and (2) he did not understand that kidnapping and rape were wrong.

Petitioner explained that he had been acquiring pornographic books involving adult men and children for a long time. What he read and saw—in particular, depictions of men having sexual intercourse with young girls—gave him the urge to seek out young girls, according to Petitioner. Counsel's theory was that his consumption of pornographic media explained why he kidnapped the two girls, so counsel had him tell the jury about it. Counsel then asked Petitioner to describe what took place on May 4, 1976, and the day before.

Petitioner's response was consistent with what the State's evidence had portrayed. On May 3, the day before he abducted L.S. and A.F, he hid in the bushes across from their school[13] and, while "play[ing] with himself," watched with binoculars the children leaving school. He seized L.S. and A.F. the next day as they were walking through the woods. He said he did it because A.F. reminded him of a girl in one of his pornographic books. He did not think it would hurt her. When he realized that she was bleeding he stopped and asked A.F. and L.S., who he also had forced to undress, to put their clothes back on. While A.F. was dressing, L.S. ran away, and he gave chase. They came upon a creek, and she fell in. He stumbled and fell on top of her. He got up and pulled her out of the creek. She was gasping for air, so he compressed her chest and departed to look for A.F. He found her, put her in the trunk of his car, and drove to his mother's apartment to change out of his wet clothes. He left L.S. behind, assuming that she was alright and could leave the woods on her own. He did not intend to kill her.

On cross-examination, Petitioner acknowledged that his explanation of L.S.'s death conflicted with what he stated in his May 4 confession—that he pushed her down in the creek and held her there until she stopped moving. He

[13] The Richard B. Russell Elementary School in the City of Smyrna in Cobb County, Georgia.

explained the statement by saying that, at the time of his confession, he "really didn't care what happened to [him]."

On redirect examination, Petitioner said that he was unaware of the crime of kidnapping when he seized the two girls on May 4. He didn't know it was wrong to kidnap the two young girls because they were willing to go along with everything he told them to do—he didn't force anything.

In the end, the defense strategy did not persuade the jury, and it found Petitioner guilty as charged. After receiving the jury's verdicts, the Court convened the penalty phase.

2.

In the penalty phase of Petitioner's trial, the State contended that the following aggravating circumstances warranted the jury's imposition of three death sentences. Petitioner should be sentenced to death because (1) he murdered L.S. while engaged in the commission of kidnapping with bodily injury of A.F.; (2) he kidnapped with bodily injury A.F. while committing the rape of A.F.; and (3) he raped A.F. while committing the murder of L.S.[14] The State based its case for the imposition of these sentences on the evidence adduced in the guilt phase and the jury's verdicts.

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[14] *Presnell I*, 243 S.E.2d at 500.

3.

Petitioner's case for the imposition of concurrent life sentences consisted of the testimony of four witnesses: Harry Porter, M.D., a psychiatrist; Miguel A. Bosh, M.D., a psychiatrist; Rev. John T. Welch, a Baptist minister; and Lois Cole,[15] Petitioner's mother. Dr. Porter and Dr. Bosh had examined Petitioner following his indictment. Both made the same mental health diagnosis—pedophilia, a mental disorder—and testified that the disorder was curable. Dr. Porter added that he did not believe that Petitioner intended to harm his victims and characterized him as a very compliant individual who could function satisfactorily in a controlled environment. Reverend Welch, the pastor of Glenn Haven Baptist Church, had supervised Petitioner for a year at a mission for juvenile delinquents.[16] He testified that he had baptized Petitioner and described him as "easily swayed."

Lois spoke of her son's troubled childhood.[17] Lois married Petitioner's father, Virgil Delano Presnell ("Delano"), in March of 1953. She was seventeen at the time. She gave birth to Petitioner on December 29 of that year. She said that Petitioner was raised without the benefit of fatherly guidance for most of his youth,

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[15] In 1976, Petitioner's mother was named Lois Cole. In 1990, she married Willie Samples and became Lois Samples. For ease on the reader, we refer to her as Lois throughout this opinion.

[16] *See* note 29, *infra*.

[17] Lois was present in the courtroom throughout the trial.

and he had academic problems that caused him to fail "two or three different grades."

When Petitioner was about six months old, Lois, Delano and Petitioner moved to Pontiac, Michigan. A few months later, Lois and Petitioner returned to Atlanta and moved in with Lois' parents.[18] Shortly thereafter, she and Delano separated. Several years would pass before she saw him again. In the interim, she and Petitioner stayed with her parents. Lois got a job with the Mead Packaging Company, where she was still employed in 1976. When Petitioner was thirteen, Delano returned to Atlanta to live with Lois and Petitioner. But the arrangement did not last. In a year, they were divorced. She concluded her testimony by asking the jury to spare her son's life.

The parties' closing arguments focused on the issue of mercy. The District Attorney argued that Petitioner's troubled childhood was irrelevant. Defense counsel disagreed and pleaded for mercy throughout the argument.[19] Counsel's pleas for mercy failed to convince the jury. Finding that the State had established the aggravating circumstances required for the imposition of death sentences for

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[18] Lois's parents were Harry Cleo Edwards and Eula Louise Rebecca Rumph. Lois had six siblings. Mildred was the oldest. After Mildred came Lois, and after Lois came Sarah, James, Patricia (called Peggy), Lillian, and Brenda. Lois's siblings are referred to by their first names throughout this opinion.

[19] Counsel also alluded to the testimonies of Dr. Porter and Dr. Bosh, both of whom opined that Petitioner's pedophilia was curable.

the capital crimes Petitioner had committed, the jury rendered the verdicts the State sought.

B.[20]

On January 7, 1998, after Petitioner's death sentence had been set aside in *Presnell III* and the State opted to retry the penalty phase of his case, the Superior Court of Cobb County appointed Stephen Schuster to represent Petitioner. Schuster, who served as lead counsel, was admitted to the Georgia Bar in 1976. Following Schuster's admission to the bar, he worked as an assistant solicitor in Cobb County for two years then moved to the Cobb County District Attorney's Office where he worked for two years as an assistant district attorney. After that, he entered private practice, specializing in the representation of individuals charged with criminal offenses. Before undertaking Petitioner's representation, Schuster had defended an accused in at least four cases in which the State sought a death sentence.

At Schuster's request, the Superior Court, on January 9, 1998, appointed Mitch Durham to assist him as co-counsel. Durham was admitted to the Georgia Bar in 1986. He began his legal career as a law clerk for the Superior Court of

[20] The facts recited in this subpart are taken from the findings of fact made expressly or impliedly by the Superior Court of Butts County in its December 27, 2005 order denying the application for a writ of habeas corpus Petitioner filed on October 16, 2002. These findings of fact are "presumed to be correct." 28 U.S.C. § 2254(e)(1).

Cobb County. After his clerkship, Durham practiced with a criminal defense attorney for eight years and then entered private practice as a criminal defense attorney. Prior to his appointment in Petitioner's case, he had defended an accused in six murder trials in which the State sought a death sentence.

Defense Counsel obtained a wealth of information about Petitioner before they started preparing for the retrial. They obtained the transcripts of the guilt and penalty phases of Petitioner's 1976 trial and the files maintained by the lawyers who participated in that trial: J. Milton Grubbs, Jr., the lead defense counsel, and George W. Darden, III, the prosecutor.[21] Defense Counsel had the records of the habeas corpus proceedings held in the Superior Court of Butts County on the petition Petitioner filed in 1980. These records included the mental health evaluation of Petitioner made by Joel Norris, Ph.D., a psychologist, who testified in those proceedings. In addition, Defense Counsel conferred with attorneys John L. Taylor, Jr., and Millie Dunn, who obtained the vacation of Petitioner's death sentence in the federal habeas proceeding held in *Presnell III*. And from the time they were appointed until the retrial, Defense Counsel conferred with Petitioner at least ten times, in person at the Jackson County Correctional Institution, by phone, and in writing.

[21] *See* note 12, *supra*.

After Defense Counsel digested the information these sources provided, the Superior Court, on September 11, 1998, granted their motion for funds to employ Andrew Pennington, an investigator with death-penalty experience;[22] Toni Bovee, a mitigation specialist;[23] Robert D. Shaffer, Ph.D., a neuropsychologist; Patricia L. Maykuth, Ph.D., a jury composition expert;[24] Harry Porter, M.D., the psychiatrist who evaluated Petitioner following his indictment and testified in the penalty phase of his 1976 trial;[25] and Dianna McDaniel, an attorney.[26] We refer to Defense Counsel and these individuals collectively as the Defense Team.

Once assembled, the Defense Team set about the task of finding mitigating evidence. They obtained photographs depicting Petitioner's childhood; his school records;[27] his medical records, including those at Central State Hospital;[28] and the

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[22] Pennington had been recommended by Pam Leonard, a mitigation specialist with the Multi-County Public Defender's Office. He had conducted investigations in numerous capital cases in Georgia and California.

[23] Bovee was recommended by the Multi-County Public Defender's Office. She was a licensed private investigator in California and South Carolina, had over sixteen years of experience investigating mitigating evidence for defendants in capital cases, had worked in over 100 capital cases, and had attended thirty seminars focused on death-penalty mitigation.

[24] Maykuth had been a consultant in over seventy civil and criminal trials on issues including jury selection, jury profiling, perception, and memory.

[25] The Multi-County Public Defender's Office provided the funds needed to employ these experts along with Attorney Dianna McDaniel.

[26] Defense Counsel were assisted in the preparation of Petitioner's defense by the Multi-County Public Defender's Office, which provided them with an index to motions in capital cases and the names of experts in jury challenges and victim impact statements. Defense Counsel were also assisted by the Georgia Resource Center.

[27] The school records revealed, among other things, that Petitioner was a frequent truant indifferent to academic work and his statements that his parents thought he was "stupid" and "no good."

[28] Petitioner was at Central State Hospital from June 23, 1976 to July 1, 1976. He was sent to the hospital under Superior Court order for the purpose of psychiatric examination and

records pertaining to his incarceration in jails and prisons following his arrest on May 4, 1976. The Defense Team also delved into his criminal history and found that he had been imprisoned for multiple convictions for vehicular theft.[29]

Defense Counsel and other members of the Defense Team conducted several interviews. Pennington interviewed Petitioner; his former wife, Debra Gilliland;[30] his son, Brian Terry; his aunt, Peggy McQurter; his cousin, Marie Wilerson; and

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evaluation. The hospital records, which were maintained during his incarceration, indicated that Petitioner was of average intelligence, that the results of an electroencephalogram (EEG) were normal, and that he had undergone a full psychological evaluation and was diagnosed with an antisocial personality disorder and sexual deviation but was found to be functioning within the normal range. The records also revealed that Petitioner showed no signs of guilt regarding his assaults on L.S. and A.F. and that he admitted to intentionally drowning L.S. in the creek.

[29] Petitioner was convicted in the Superior Court of Fulton County, Georgia, on November 1, 1971, for a vehicular theft that occurred on June 20, 1971, and in the Superior Court of DeKalb County, Georgia, on July 16, 1973, on four counts for vehicular thefts that occurred on January 28 and March 14 (two thefts) and 27, 1973. For his November 1, 1971 conviction, he was sentenced to prison for five years. The sentence was suspended and he was placed on probation after spending a year at the Georgia Christian Rehabilitation Center in March 1972. For his July 16, 1973 convictions, he was sentenced to prison for three years. He was released on parole on July 25, 1974. Defense Counsel also learned that Petitioner had been incarcerated for breaking into a school and convicted for aiding in the delinquency of a minor—a charge of sexual battery had been reduced to that offense.

In addition to these convictions, Defense Counsel were aware of Petitioner's assaults on young girls. Defense Counsel obtained the transcription of an interview conducted by Detective Williams and Lieutenant Moss on May 6, 1976. In the interview Petitioner admitted that, as early as age fourteen, he had grabbed young girls and reached under their dresses. Two months before the assault on L.S. and A.F., he followed a young girl from school, seized her, took her to a secluded spot, had her undress, and inserted his penis between her legs and simulated sex, but did not penetrate her. A few days after that incident, he seized a young girl, took her to a secluded spot, but ran off when it appeared that she was going to scream. Two weeks or so before he assaulted L.S. and A.F., Petitioner followed a young girl, took her off her bike, forced her to a wooded area and inserted his penis between her legs and simulated sex, again without penetrating her.

[30] Gilliland said that Petitioner had never tried to molest her or any family member and that their divorce was his suggestion.

one of his former victims, A.H. Bovee interviewed Petitioner;[31] Lois; and two of his aunts, Lillian Shepard and Peggy McQurter.[32] Lois provided Bovee with a family history. Among other things, she told Bovee that Petitioner never had a positive male role model and was more comfortable with children. In discussing her pregnancy with Petitioner, she said that she smoked a pack of cigarettes a day and "did not drink except socially." After receiving Pennington's and Bovee's reports of these interviews, Schuster and/or Durham conferred with Lois, Gilliland, Terry and Lillian.

Dr. Shaffer compiled Petitioner's life history with the information provided by the Defense Team and his interviews with Petitioner, Lois and Lillian.[33] Dr. Shaffer's history reflected the following: Petitioner's father, Delano, came from a

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[31] In her interview with Petitioner, Bovee learned of his educational background, family life, criminal involvement, marriage, and employment history. He said that his uncle, James Edwards, was the prominent male figure in his life and that his father punched him in the face, beat him in the chest, and called him a sissy because he liked art and had no interest in sports.

[32] Like Lois, Lillian provided Bovee with Petitioner's life history, which included that Petitioner once lived in a house where five women slept in the same room; Petitioner slept with his mother until he was almost ten. Petitioner's aunt, Peggy McQurter, confirmed what Bovee heard from Lois and Lillian about the family living in close quarters.

[33] Dr. Shaffer spent fifteen to twenty hours interviewing Petitioner and submitting him to psychological and intelligence testing. His diagnosis was that Petitioner had a pedophilic disorder and minimal brain dysfunction.

Dr. Porter also diagnosed Petitioner with pedophilia. Petitioner told Dr. Porter that he went to a car race two days before he assaulted L.S. and A.F. and "got worked up seeing all the good looking girls there"; that he went to their school the day before the assaults to watch the girls with binoculars; and that he returned the following day, kidnapped L.S. and A.F. and committed the crimes of which he had been convicted. He realized what he had done was wrong and would be punished if caught. He "did not know why [he] held [L.S.] down in the water until [he] thought she had quit breathing."

Dr. Joel Norris agreed with Dr. Shaffer's and Dr. Porter's pedophilia diagnoses.

family of alcoholics. He was unfaithful to Petitioner's mother and, when he was around, he physically abused her and Petitioner. For most of his childhood, Petitioner lived with several adult women, where sexual boundaries were ambiguous and privacy was scarce. His mother's primary role was to make money rather than to raise Petitioner; Petitioner's grandmother and Aunt Lillian did the child rearing. He had no male role models.

The Defense Team's investigation did not reveal that Petitioner suffered from FASD. Thus, the disorder did not play a role in Defense Counsel's trial strategy. The strategy they chose was to create a lingering doubt in the jurors' minds as to whether L.S.'s killing was accidental, or was deliberate as the State contended, and to prompt the jurors to return a life-sentence verdict. As a fallback position, they urged the jury to return a life-sentence verdict as a matter of mercy.[34]

C.

The penalty-phase retrial took place from February 22 to March 16, 1999. District Attorney Patrick Head and Assistant District Attorneys Russell Parker and

[34] Mercy was the focus of the sentencing phase of Petitioner's 1976 trial. *Presnell III*, 959 F.2d at 1530. Indeed, the parties' "closing arguments . . . revolve[d] around the mercy issue." *Id.* We vacated Petitioner's death sentence because the State, drawing on comments a Justice of the Georgia Supreme Court made in *Eberhart v. State*, 47 Ga. 598 (1873)—comments this Court has condemned on several occasions—told the jury that it "must exclude any consideration of mercy from its sentencing decision [and] therefore in effect deprived petitioner of his only remaining plea for life," *Presnell III*, 959 F.2d at 1530, and denied him due process of law. *Presnell III* thus informed Defense Counsel that appealing to the jury's sense of mercy was a viable sentencing strategy.

Jack Mallard represented the State. Defense Counsel, assisted by Dianna McDaniel, represented Petitioner. The State called sixteen witnesses in its case in chief and three on rebuttal. Petitioner called six witnesses, including Lois.

1.

Parker made the State's opening statement to the jury. He began by explaining what happened on May 4, 1976. He described how A.F. was able to escape and help the police find Petitioner, who subsequently confessed and led the police to L.S.'s body. After that, he previewed the testimony of the Medical Examiner, Dr. Joseph Burton. Dr. Burton would say that L.S. drowned; that she had water and sand in her stomach; that her bronchial tubes leading to her lungs had plant matter in them; that she had superficial abrasions in her eyelid, the tip of her nose, lower lip, and chin; that she had marks around her throat, inner left forearm, and right forearm; and that she had bruising over her back.

Parker concluded by saying that the jury should return a death-sentence verdict because the evidence on which Petitioner's conviction for the murder of

L.S. was based established the following aggravating circumstances: (1) kidnapping with bodily injury,[35] (2) torture,[36] and (3) depravity of the mind.[37]

Schuster delivered the opening statement for Petitioner. He began by telling the jury that, after assaulting A.F. and L.S., Petitioner made no attempt to flee. He let A.F. go, knowing that she would be able to identify him and his car. Then, following his arrest, he told the police what he had done and helped them find L.S.'s body. Schuster focused on Petitioner's upbringing. His parents separated when he was a year old, and his mother moved in with her parents—Petitioner's grandparents—and her six siblings (five sisters and a brother). The family was dependent on welfare, living in housing projects and in cramped quarters. Sexual abuse was rampant, perpetrated by Petitioner's maternal uncle, James. When Petitioner was thirteen, his father returned and moved in with him and his mother. His father drank to excess and was physically abusive. He beat and belittled

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[35] O.C.G.A. § 17-10-30(b)(2). This subsection authorizes a jury to return a death-sentence verdict if the murder at issue was committed "while the offender was engaged in the commission of another capital felony," such as the offense of kidnapping with bodily injury. Although a death sentence could no longer be imposed for the offense of kidnapping with bodily injury, the Georgia Supreme Court classifies it as a capital offense when introduced as an aggravating circumstance for murder. *Cook v. State*, 251 S.E.2d 230, 230 (Ga. 1978).

[36] O.C.G.A. § 17-10-30(b)(7). This subsection authorizes a jury to return a death-sentence verdict if the murder at issue was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* The Georgia Supreme Court construes this subsection as disjunctive, creating three aggravating circumstances: an outrageously or wantonly vile, horrible, or inhuman murder that involved (1) torture, (2) depravity of the mind, or (3) an aggravated battery. *Ellington v. State*, 735 S.E.2d 736, 146 (Ga. 2012) (citing *Hance v. State*, 268 S.E.2d 339, 345 (Ga. 1980)).

[37] O.C.G.A. § 17-10-30(b)(7); *see* note 36, *supra*.

Petitioner for no apparent reason. As a result, Schuster argued, Petitioner hardly knew right from wrong. Schuster closed his remarks by saying that, in the years following 1976, Petitioner had become a productive member of his prison population. He obeyed the rules and even earned a GED.

2.

The State called sixteen witnesses in its case in chief. Together, they presented a case essentially identical to the case the State presented in 1976. A.F., then an adult woman, described how Petitioner abducted her, raped her, and then left her in the woods near a service station. On cross-examination, A.F. testified that she did not see Petitioner do anything to L.S. except tie her up and tape her mouth shut when he abducted her and L.S. and forced them into his car.

L.S.'s parents and A.F.'s mother testified. L.S. and A.F. were neighbors and good friends. L.S.'s father recalled that they often walked home from school together. In the evening of May 4, 1976, he identified his daughter's body at the hospital. L.S.'s mother said she was at home that day. When the girls did not come home from school on time, she looked for them and found A.F.'s books in the woods, which prompted her to call the school and the police. L.S.'s parents, her sister, and a cousin read victim impact statements to the jury.

A.F.'s mother met her daughter at the service station where A.F. went after running away from Petitioner. An ambulance was called, and A.F.'s mother

accompanied A.F. to the hospital. She waited there while A.F. underwent surgery to repair vaginal lacerations.

Vincent Giglio, a neighbor of L.S.'s and A.F.'s families, testified. He participated in a search for the girls. He found Petitioner's sleeping bag and rope in the woods.

Lee Moss, a lieutenant with the Cobb County Police Department in May 1976, testified. He and Detective Douglas Williams were the officers in charge of the case. He and Detective Williams met with A.F. at the hospital. She explained what had happened and where Petitioner had left her. With that information, Lieutenant Moss and Detective Williams were able to find Petitioner. Once they found him, Petitioner took the officers to L.S.'s body. The officers then placed Petitioner under arrest and brought him to the stationhouse where he gave a recorded confession, which was later transcribed. Moss read the entire confession into the record.[38] On cross-examination, he said that Petitioner confessed after waiving his rights to remain silent and have counsel present.[39]

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[38] Among other things, Petitioner confessed that he raped A.F. and then told the girls to get dressed. At that point, L.S. took off running. Petitioner chased her toward a creek. He said, "I didn't really know why, but I just pushed her down into the creek and held her there. Well, she was kicking and trying to get out but I just held her there until she stopped kicking. Well, I figured she was dead and for some reason I didn't want to leave her in the creek, and that is the reason I carried her out of the creek and layed [sic] her down."

[39] Detective Williams testified at Petitioner's 1976 trial. By 1999, he had left the Cobb County Sheriff's Office and no longer lived in Georgia.

Morris Toler, a Cobb County detective in 1976, testified that on May 6 he searched the area around the scene of the crime for additional evidence. He found clothing, books, shoes, and a lunch box behind the Chattahoochee Elementary School.[40] He searched Petitioner's car, which was parked at Lois' apartment complex, and recovered Petitioner's binoculars. He searched Lois' apartment and found three pornographic books and a firearm in the headboard in Petitioner's bedroom. On cross-examination, Detective Toler conceded that a May 7 report that he drafted indicated that he had found the firearm in Lois' headboard, not Petitioner's. While acknowledging the incongruity, Detective Toler insisted that he had found the firearm in Petitioner's headboard.

The State called two physicians. Dr. William Layne, who performed A.F.'s surgery on May 4, and Dr. Joseph Burton, who conducted L.S.'s autopsy. Dr. Layne opined that A.F.'s lacerations were caused when "something . . . rapidly expand[ed] the vagina." He testified that lacerations like the ones suffered by A.F. "sometimes [happen] when a baby's head is coming through the vagina and it's too big for the vagina. It will tear the same type of laceration." Dr. Layne opined that "[s]omething had been in [A.F.'s vagina] and caused it to expand and tear." On

[40] A.F. and L.S. were not students at the Chattahoochee Elementary School; they attended the Richard B. Russell Elementary School. *See* note 13, *supra*. Detective Toler explained that he was searching for evidence near the Chattahoochee Elementary School because it was located near the service station that A.F. had run to after escaping Petitioner.

cross-examination, he conceded that he could not determine what had been inserted into A.F.'s vagina to cause the lacerations.

Dr. Burton opined that L.S.'s body indicated that she died during daylight hours, that she likely did not fall, that she inhaled water mixed with plant and sand material, and that her pelvis was under water. He noted that L.S. was wearing jeans that "were unzipped and unsnapped in front" and she was wearing "no underpants." He said that bruising on her neck was consistent with someone applying pressure on the neck area. He concluded that L.S. died by drowning after putting up significant resistance. In Dr. Burton's opinion, the forensic evidence was consistent with what Petitioner described in his confession (i.e., that he intentionally held L.S.'s head under water).

On cross-examination, Dr. Burton agreed that the forensic evidence could be consistent with Petitioner's theory that he did not intend to kill L.S. by holding her head under water. Dr. Burton added, however, that he would expect more abrasions on L.S.'s face had she had been running and simply fallen. Further, he would expect to find that L.S. had suffered one or more broken ribs had Petitioner fallen on top of her.

The State called two witnesses who had encountered Petitioner prior to May 4, 1976: Linda Brawner, whose children went to school with L.S. and A.F., and A.H., whom Petitioner assaulted on April 23, 1976. Brawner testified that she

saw Petitioner near her children's school on May 3. He was watching the children from his parked car. She saw him again on May 4, standing in a yard across the street from the school.

A.H. attended B.C. Haynie Elementary in Clayton County. In 1976, she was ten years old. On April 23, 1976, she was walking home from school when Petitioner grabbed her, slapped her, and threatened her with a knife. A.H. escaped his grasp and ran. Petitioner took off in the opposite direction. This was not the first time she saw Petitioner. A couple of days before, A.H. saw Petitioner standing near the spot where he would later grab her.

A.H. reported the encounter to the Clayton County Sheriff's Office. Detective John Robbins, who conducted a photo lineup with A.H., testified that she identified Petitioner as her attacker. The State published a Superior Court of Clayton County judgment establishing that on October 18, 1976, Petitioner pled guilty to a charge of aggravated assault with intent to rape A.H. and was sentenced to ten year's imprisonment.

Greg Ballard, senior counselor at the Georgia Diagnostic Prison, testified last for the State. He was Petitioner's counselor between 1995 and 1997. He testified that in 1996, Petitioner complained because the mailroom staff rejected a

book he had ordered, *Radiant Identities*.[41] After the book was rejected, Petitioner asked to see the standard operating procedures regarding "printed materials that may or may not contain sexual, nonsexual photos, magazines, books with nudity of adults or children, the issue being natural photos of children that are not sexual or provocative." On cross-examination, Ballard said that Petitioner was a low-profile prisoner who stayed out of trouble. He also agreed that the prison's safety standards precluded children from entering the area where Petitioner was housed, implying that Petitioner would pose no future risk to children if given a life sentence.

During the presentation of its case in chief, the State introduced into evidence several photographs, including photographs of the crime scene, L.S.'s body, Petitioner's car, and his pornographic books. Also received in evidence were the rug Petitioner forced A.F. to lie on, maps of the area where the crimes were committed, certified copies of Petitioner's convictions for vehicular theft in the Superior Courts of Fulton County and DeKalb County, and a certified copy of his conviction in the Superior Court of Marion County for contributing to the

[41] Ballard testified that he had never seen a copy of *Radiant Identities*. Excerpts of the book submitted into evidence by the State show that it is a photography book containing images of children. A young girl is prominently pictured on the cover, a copy of which was submitted into evidence. Wearing only pants, the girl's body is exposed from the waist up. Another page of the book, which was submitted into evidence, contains an image of three children on a beach. Two are fully wrapped in beach towels. The third child, a young girl, is also wrapped in a beach towel, but she is holding her towel open and, clothed in a one-piece swimsuit, her body is exposed.

delinquency of a minor. Finally, in conjunction with Ballard's testimony, the State introduced the forms Petitioner used to order books, the form rejecting *Radiant Identities*, and the request he made for the standard operating procedures after the prison rejected *Radiant Identities*.

3.

In Petitioner's defense, Defense Counsel called six witnesses: Dulcie Shrider, Lillian Shepard, Lois and Willie Samples (Petitioner's stepfather),[42] Brian Terry (Petitioner's son), and Robert D. Shaffer, Ph.D.

Dulcie Shrider, the District Records Manager for the Atlanta Public School System, testified first. Pursuant to a subpoena, she produced Petitioner's school records and summarized what they disclosed. Petitioner attended at least five different schools, resided at several different addresses, and struggled to advance from one grade to the next, often spending multiple academic years in the same grade. Petitioner's intelligence test scores disclosed a verbal IQ score of seventy-four, a performance IQ score of ninety-six, and a full-scale IQ score of eighty-three.

Lillian, Petitioner's aunt, testified next. She said that she is seven years older than Petitioner. She said that when Lois gave birth to Petitioner (on December 29, 1953), she and Lois were living with their parents and four of their

[42] *See* note 15, *supra*.

five siblings—Sarah, James, Peggy, and Brenda—in a duplex "out in west end on Norcross Street."[43] Lois's husband, Delano, was in the Army, stationed in Japan. His tour there was short. When he returned to Atlanta from Japan, Petitioner was about six months old. Within a few days, he decided to take Lois and Petitioner to Michigan. Before the year was out, he and Lois separated, and she and Petitioner returned to Atlanta and moved in with Lois's parents. Lois's parents had a three-room apartment in Bankhead. Also living in the apartment were Sarah, Peggy, James, Brenda, and Lillian. Shortly after arriving in Atlanta, Lois got a job with a paper plant.

When Petitioner was two, Lois's parents, her siblings (except Mildred) and Petitioner moved to an apartment in another public housing complex in Atlanta. Lois could not move in with them because under the public housing rules, two families could not reside in the same apartment. So, Lois lived elsewhere, leaving Petitioner with her parents. She saw him on weekends.

Two years later, her parents and her siblings moved to a three-bedroom house, and Lois joined them. They stayed there for a year, then moved to an apartment in a public housing complex. Lois moved to an apartment near the paper plant, leaving Petitioner with her parents. Soon thereafter, the family was

[43] Mildred, the oldest sibling, was living elsewhere at the time.

evicted from their apartment and Petitioner went to live with Lois. He was seven years old.

In roughly 1954, James was in a serious car accident. After that, Lillian recalled, he became violent, and for five years he sexually assaulted her and her sisters. According to Lillian, James and Petitioner "palled around" while they were living in the same home.

Lillian described her father as immature and dependent on her mother. When asked who parented Petitioner, Lillian said she did. She took care of him. Neither her father nor her mother was involved.[44]

Willie Samples ("Willie") and Brian Terry followed Lillian to the stand. Willie testified that he had known Lois since 1956; he married her in 1990. Since their marriage, Willie explained, he began going with Lois to visit Petitioner monthly. Terry said that he visited and wrote to Petitioner as frequently as he could. Both Willie and Terry told the jury that they valued having Petitioner in their lives.

Lois was the last lay witness to testify. Her testimony, as it related to Petitioner's upbringing, echoed much of what Lillian had said.

[44] Lillian reported that her sister Brenda died in 1984 and that her sister Sarah died in 1996.

Lois was born on January 26, 1936, the second of her parents' seven children. She dropped out of school at sixteen with an eighth-grade education. In March 1953, she married Delano, who was in the Army. Petitioner was born on December 29, 1953, while Delano was stationed in Japan. At the time, Lois was living with her parents and four siblings in a three-room apartment.[45] Shortly after Delano returned from Japan, she moved with him to Michigan, taking Petitioner with them. Less than three months later, she left Delano because he was seeing a woman in Michigan. Taking Petitioner with her, Lois returned to Atlanta and to her parents' apartment. In time, she got a job at a paper factory[46] and rented a room a block from the plant.

Before he was a year old, Petitioner rolled off the bed and hit his head on the floor.[47] Lois testified that because of the fall, her mother deemed Lois unfit for parenthood and took over, leaving Lois to work and raise money. She said that her father was not a father figure to Petitioner. James and Delano were the only other males in Petitioner's life.

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[45] Lois testified that she and Petitioner shared a bed with Sarah. She also testified that she slept in the same bed as Petitioner until he was eight or nine years old.

[46] Lois worked ten and a half hours a day at the paper factory. She stayed employed there for almost forty-three years. At the time she was hired, the paper factory was called Atlanta Paper Company. When she testified in 1999, it was called Mead Inc.

[47] Lois told Bovee that Petitioner's fall happened when he was six weeks old. *See* part IV.A, *supra*.

Delano eventually came back into Lois's life; when Petitioner was thirteen, Lois and Delano remarried. Delano drank in excess and abused Lois and Petitioner repeatedly. Delano thought Petitioner was a sissy and would call him foul names. The remarriage failed and Delano departed.

Lois described Petitioner's school attendance and performance as poor. He dropped out of high school and soon was arrested for joy riding in a stolen car. Stealing cars, and consequent arrests, became habitual.

On cross-examination, Lois testified that her family had family reunions when Petitioner was very young. He attended them and seemed to enjoy himself.

Dr. Robert Daniel Shaffer testified last. He testified that in preparing to conduct a psychological evaluation of Petitioner, he compiled a summary of Petitioner's life history. In preparing the life history, he reviewed Petitioner's medical and education records and the data contained in the psychological tests he performed at the Jackson County Correctional Institution. He met with Petitioner at the Institution on three occasions for a total of fifteen to twenty hours. Petitioner's life history reflected the information Dr. Shaffer obtained from the investigators' reports and in interviewing Petitioner, his mother, and Lillian.

Dr. Shaffer presented Petitioner's life history in the context of four findings. First, Petitioner displayed signs of chronic brain syndrome or minimal brain dysfunction. Dr. Shaffer reached this diagnosis based on Petitioner's school

records. The elementary school records revealed that Petitioner repeated some grades more than once. Teachers suggested that he be placed in special classes for "mentally retarded" students. They also noticed a delay in his social and emotional development as opposed to an intelligence problem. He stayed in elementary school until he was fifteen.

Second, during his childhood, Petitioner lacked privacy and was exposed to confusing sexual boundaries. Most of the time he was living in close quarters with several family members where sexual misconduct took place and people spoke about sex freely. His uncle James molested at least three of James' sisters. Dr. Shaffer explained that James' later conviction for having sex with his two daughters and forcing his son to have sex with his son's own mother indicated the "gravity and severity of the disorder that was present in" James. Dr. Shaffer said that a possible explanation for Petitioner's aberrant behavior might be that it was caused by genetic factors—the same factors present in James' makeup.

The elementary school records indicated that teachers were concerned with Petitioner's knowledge and openness about sex. Petitioner told Dr. Shaffer that he had a confusing relationship with Lillian, who would often act like his mother. When his real mother would go to a dance and bring him and Lillian along, Lillian would act like his romantic partner.

Third, Petitioner's only male role models were either abusive or sexually deviant. James was molesting his sisters. Petitioner's father was the son of an alcoholic, habitually drank to excess, and physically and verbally abused Petitioner and his mother. Consequently, Petitioner learned that the only way to become a man was to assault his loved ones or commit sexually deviant acts.

Fourth, Petitioner was exposed to sexual and romantic fantasies while growing up. His maternal grandfather apparently kept pornographic material in the bathroom and expected Petitioner to view it. In time, Petitioner obtained from an adult bookstore pornographic books depicting adult men with young girls.

Dr. Shaffer also testified about the results of three psychological tests and two personality tests. The first psychological test, the Halstead-Reitan neuropsychological test, assessed whether Petitioner had sustained any significant brain injuries. Dr. Shaffer asked him to perform four tasks. He scored in the normal range on two. On the third task, his performance indicated that he had difficulty with comprehension and suffered from moderately severe brain impairment. On the fourth, Petitioner's score was consistent with mild brain impairment.

The second psychological test was the Wechsler Adult Intelligence Scale III test for intelligence. Petitioner's scores were in the borderline-to-low-average range of intellectual functioning but showed a significant discrepancy between

verbal processing and perceptual organization, which could mean brain dysfunction, hereditary factors, or some developmental issue.

The third psychological test, the Vineland Adaptive Behavior Scales test, determined Petitioner's ability to complete standard daily routines. His scores were equal to an average nine-year-old for communication, daily living, and socialization.

The two personality tests, the Dissociative Experiences Survey and the Rorschach Inkblot test, determine a person's awareness of reality. They revealed that Petitioner struggled with reality perception.

Considering Petitioner's life history and test results, Dr. Shaffer diagnosed Petitioner as having a pedophilic disorder. He also concluded that Petitioner suffered from minimal brain dysfunction, meaning that he had a developing nervous system that made him vulnerable to the environment in which he grew up—a deviant, hostile environment with blurred sexual boundaries.

On cross-examination, Dr. Shaffer described Petitioner's demeanor as immature and socially naive, albeit articulate. He agreed that Petitioner was not mentally retarded or below average intellectual functioning. Finally, Dr. Shaffer acknowledged that *Radiant Identities* was the type of book a pedophile would be attracted to.

During the presentation of Petitioner's defense, the Court had admitted into evidence a note Petitioner submitted requesting that his stepfather, Willie Samples, be added to his visitation list; multiple pictures of things he cross-stitched in prison; his marriage certificate; photographs of him as a child; court records related to James' child-molestation conviction; letters between Petitioner and his son, Brian Terry; and an article showing that Cobb County District Attorney Patrick Head opted not to block *Radiant Identities* from being sold at local bookstores. The Court also admitted several documents from Petitioner's school records, including his IQ test scores, report cards, letters sent home regarding discipline, a letter from the health department to a social worker recommending that he take special classes for the mentally retarded, and a psychological evaluation conducted while he was in eighth grade. Among other things, the evaluation indicated that Petitioner was functioning at the upper limits of the mentally defective level of intelligence and performing several years below his grade level academically.

The State, in rebuttal, called three witnesses. The first was Chuck Owen, the lead senior counselor at the Jackson County Correctional Institution where Petitioner was incarcerated from 1986 to 1990. Owen testified that he saw Petitioner frequently and described him as an articulate, personable, and normal adult. He recalled the scores Petitioner made on the Ebert test, a psychometric test that was routinely administered to Jackson inmates at the time. The Ebert test

measured IQ and behavioral patterns. Petitioner's scores were in the high range of normal. And Petitioner was able to earn a GED.

On cross-examination, Owen acknowledged that, while incarcerated, Petitioner tested at an eighth-grade reading level, a fourth-grade math level, and a sixth-grade writing level.

Robert Storms, Ph.D., a psychologist, followed Owen to the stand. Dr. Storms had evaluated Petitioner pursuant to a court order issued for the purpose of determining whether he was competent to stand the retrial of the penalty phase, whether he suffered from a mental illness, or whether he was "mentally retarded." He visited Petitioner in prison and reviewed documents related to his childhood, the police case file, and Dr. Shaffer's report. He noted that Petitioner had a troubled childhood and described him as coherent and rational.

Dr. Storms administered two tests: the MMPI-2 test and the Wechsler Adult Intelligence Scale III test. The MMPI-2 tested Petitioner's reality contact. Petitioner's score was perfect. The Wechsler test is an IQ test. Petitioner's verbal IQ score was seventy-eight and his performance IQ score was 109. According to Dr. Storms, an average on the test is anything from ninety to 100, and the seventy-eight to 109 disparity in verbal IQ and performance IQ signified an abnormality. He concluded that Petitioner suffered from Attention Deficit Disorder ("ADD"), which would have made it difficult for Petitioner to concentrate as a child.

Petitioner's school records were consistent with ADD, which, Dr. Storms explained, may have caused Petitioner to have a rich fantasy life.

Dr. Storms found nothing strange about Petitioner's speech, gait, or thought process. He found no evidence that Petitioner suffered any neurological damage from having fallen and hit his head as a child. He concluded that Petitioner was not psychotic, did not meet the threshold for "mental retardation," and was competent to stand trial.

On cross-examination, Dr. Storms said that he did not administer any tests relating to pedophilia or sexual deviance but agreed with Dr. Shaffer's diagnosis of pedophilic disorder.

Alisa Smith, M.D., a forensic psychiatrist, was the State's final rebuttal witness. Like Dr. Storms, she had evaluated Petitioner's competence to stand trial, mental illness, and "mental retardation" pursuant to a court order. She interviewed Petitioner for two hours. She prepared for the interview by reviewing records from the 1976 jury trial, Petitioner's school records, and Dr. Shaffer's report.

Petitioner presented no physical appearances outside the norm, was cooperative and non-threatening. Petitioner described an unexceptional childhood, although he performed poorly in school. Petitioner told Dr. Smith that he had many fond memories of his childhood, especially family get-togethers. He said that, in school, he got in trouble on purpose. He dropped out because

administrators told him he either had to stop cutting class or drop out. He struggled to hold a job and was arrested on multiple occasions for joy riding in stolen cars. Dr. Smith concluded that Petitioner's behavior was indicative of a conduct disorder.

The mental status exam showed that Petitioner's brain was functioning normally and that he had average intelligence. He evidenced no difficulty with reality, so Dr. Smith concluded that he was competent to stand trial. Her diagnosis was that Petitioner exhibited antisocial borderline personality traits, a personality disorder, which helped explain why he broke the rules and frequently made impulsive decisions as a child and young adult.

4.

With the evidence closed, the parties delivered their closing arguments to the jury. Parker spoke first for the State. He summarized the State's theory: Petitioner killed L.S. because she did not cooperate. He said that Petitioner's defense—that he was the product of bad genes and a bad environment—was not persuasive. The bad genes theory failed because Dr. Shaffer was not an expert in genetics. The bad environment theory failed because Petitioner had not endured any exceptional hardships, and everyone must endure some hardships in life. Parker dismissed the argument that Petitioner was only capable of functioning like a child by pointing to his sophistication in planning and carrying out the May 4, 1976 assaults. Petitioner

selected the elementary school, the victims, and wooded area where the assaults would take place; he stalked the victims; and he brought the items he needed to accomplish his objective. All of that, Parker said, showed that Petitioner was not functioning like a child when he committed the crimes.

Parker reminded the jury that it could not consider capital punishment unless it found an aggravating circumstance. He argued that the State proved three: (1) kidnapping with bodily injury, (2) torture, and (3) depravity of the mind. In short, Petitioner committed kidnapping with bodily injury when he sodomized A.F., torture when he killed L.S., and acted with depravity of the mind in forcing L.S. to watch him rape A.F. Last, he said that Petitioner's attempt to have *Radiant Identities* delivered to him while incarcerated showed that he had not changed; he was still a pedophile.

Head spoke next for the State. He called Petitioner a deceiver and argued that Petitioner tried to deceive others about L.S.'s death. The State's theory, he explained, was that L.S. did not die by accident. The marks on her body were the result of Petitioner's blows. L.S.'s zipper was undone and her pants were unbuttoned because Petitioner attempted to sexually assault her; she resisted, so Petitioner killed her.

Durham and Schuster delivered Petitioner's response. Their goal was to convince at least one juror to vote against a death sentence. Durham asked the

jurors to consider whether L.S.'s death was accidental and thus not susceptible to the death penalty. He drew their attention to Dr. Burton's testimony. Dr. Burton said that L.S.'s body showed no signs of sexual trauma. And the forensic evidence, taken as a whole, was consistent with an accidental drowning.

Durham addressed the State's burden to prove at least one of the three aggravating circumstances. He suggested that reasonable doubt existed as to the first aggravating circumstance, that Petitioner committed L.S.'s murder during the commission of kidnapping with bodily injury of A.F. Durham explained that the jury needed to decide whether the State proved, beyond a reasonable doubt, that A.F. suffered bodily injury as result of Petitioner's oral sodomy of A.F., and the jury could not consider bodily injury that resulted from Petitioner's rape of A.F.

Durham also suggested that a reasonable doubt existed as to the second and third aggravating circumstances, torture and depravity of mind. Urging against a finding of torture, Durham noted that L.S. put up a struggle and drowned in a relatively deep puddle of water, which would have sped up her drowning; that Dr. Burton's testimony showed that the forensic evidence was consistent with Petitioner's recitation of an accidental drowning; and that L.S. showed no signs of sexual trauma. Arguing against a finding of a depraved mind, Durham cited Dr. Smith's testimony that Petitioner suffered from a personality disorder that caused him to act impulsively, meaning L.S.'s drowning may have been an impulsive act

that Petitioner committed because things spun out of his control when L.S. ran away from him in the woods.

Schuster emphasized that Petitioner was diagnosed with pedophilia, a mental disorder, and that the disorder may have been caused by his genes. He pointed to James' sexual deviancy, said that it was in his genes, and argued that Petitioner may have inherited some of the same genes. Or his pedophilic disorder may have been the result of his environment—in particular, his exposure to James' sexual deviancy throughout his youth and his father's drunken rages. All of this explained Petitioner's behavior on May 4, 1976.

Schuster concluded his argument with a plea for mercy—on behalf of Lois and the other members of Petitioner's family.

5.

The Court charged the jury, including instructions on the three aggravating circumstances the State referred to in its opening statement, as well as mitigating circumstances. It instructed the jury that if the State established one of the aggravating circumstances beyond a reasonable doubt, it could return a death-sentence verdict after taking into account any mitigating circumstances the evidence disclosed. Absent an aggravating circumstance, its verdict would be life

imprisonment.[48] The Court also instructed the jury that, whether or not it found that the State proved one or more aggravating circumstances beyond a reasonable doubt, it would still be authorized to impose a life-sentence verdict instead of a death-sentence verdict.

The jury sent the Court four written questions during its deliberation. The jury asked the Court (1) to define aggravated sodomy, (2) to define bodily injury, (3) where it could find Petitioner's 1976 confession, and (4) whether parole would be an option for Petitioner if the jury imposed a life sentence.

At the conclusion of its deliberation, the jury found all three statutory aggravating circumstances beyond a reasonable doubt and returned a death-sentence verdict.

IV.

A.

After the Georgia Supreme Court affirmed his death sentence, *Presnell v. State*, 551 S.E.2d 723 (Ga. 2001), and the United States Supreme Court denied certiorari review, *Presnell v. Georgia*, 535 U.S. 1059, 122 S. Ct. 1921 (2002), Petitioner, on October 16, 2002, sought a writ of habeas corpus in the Superior

[48] Georgia's capital sentencing model does not require the jury to weigh the aggravating and mitigating circumstances in reaching its verdict whether to impose the death sentence or life imprisonment. *Zant v. Stephens*, 462 U.S. 862, 873–74, 103 S. Ct. 2733, 2741 (1983) ("In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." (footnote omitted)).

Court of Butts County. His petition presented forty-three claims for relief from his convictions and death sentence. One claim attacked the sentence on the ground that Defense Counsel's preparation for and presentation of his defense at the retrial failed to comply with the *Strickland v. Washington* performance standard in several ways. One was the FASD claim: Defense Counsel were deficient in failing to discover that Petitioner suffers from FASD. Petitioner presented the claim not in his petition but in a post-hearing brief. Petitioner has since framed his FASD claim thus:

> [Defense Counsel] provided ineffective assistance by conducting a deficient investigation that failed to reveal the readily-available evidence of [Petitioner's] Fetal Alcohol Spectrum Disorder ("FASD") – which, as his well-qualified experts testified, is a devastating condition that causes profound organic brain damage and cognitive deficits that manifest in impaired decision-making, compromised mental functioning (sometimes to the degree of intellectual disability), and enhanced risk for developing problematic and deviant behaviors.
> . . . .
> [Petitioner]'s FASD left him with severe physiological and psychological disabilities, permanently arresting the development of his mind, judgment, impulse control, and emotions at the equivalent of that of a child under the age of ten. These disabilities were exacerbated by his childhood exposures to poverty, physical abuse, sexual violation, and severe mental illness – a toxic combination of nature and nurture that caused him to develop the paraphilia that produced such tragic results in this case.

Defense Counsel failed to discover that Petitioner suffered from FASD because they

> missed the fact that his mother drank to excess while she was pregnant with him, causing [FASD], resulting in profound organic brain damage

> and cognitive deficits. . . . [H]ad trial counsel learned about Petitioner's FASD and presented that to the jury, he would not have received the death penalty.

(quotation marks omitted).

Petitioner's support for this allegation consisted of an affidavit his mother executed on March 9, 2004 ("Affidavit"). The Affidavit was one of twenty-one affidavits Petitioner's habeas counsel presented to the Superior Court at the hearing it held on June 2, 2004.[49] The Affidavit contains forty-two numbered paragraphs. Five paragraphs refer to Lois' alcohol consumption:

> 14: [Delano and I dated for about 6 months and then we were] married in March of 1953 in Dallas, GA by a Justice of the Peace. . . . Delano drank when we dated but *I never grew up around drinking so I did not know what it could do to you.*
>
> . . . .
>
> 16: I got pregnant . . . . In the evenings I would wait for Delano to come home but he was always out with his buddies drinking and meeting women. I would just have to sit at home, *while I was pregnant,* and *so I would have a few drinks by myself wondering whom my husband was with. I think sometimes I drank during this period just cause I was mad at Delano*. . . .
>
> 17: On some nights when Delano and I were at home *we would have a few drinks together too. Bourbon was my drink of choice. Although I did not drink the way Delano did, I was drinking during the entire time I was pregnant with Virgil.*

[49] In addition to the twenty-one affidavits, habeas counsel presented four investigative reports (including those of his experts on FASD, David Lisak, Ph.D., and Ricardo Weinstein, Ph.D.), and the trial court record and the District Attorney's file relating to the prosecution of *Presnell v. State*, Case No. 9-76-0603-28. One of the affiants, Petitioner, testified at the 1976 trial. Two testified at the 1999 retrial, Lois and Lillian.

> 18: One time *while I was still pregnant* Delano was out and I was real mad so I asked the neighbor to buy me a pint of bourbon. *I drank the whole pint of bourbon* and then the neighbor bought me another pint of bourbon. Delano came home and *he was upset that I had been drinking* and he started to jump on me. He was trying to get the bourbon bottle from me. I would not give him the bottle and I eventually threw the bottle in the middle of the street.
>
> 19: Delano and I were together for about five or six months and then he left for Japan. I had [Petitioner] on December 29, 1953. *I also smoked cigarettes while I was pregnant*. I smoked cigarettes from the age of 13 to 60. . . .

(emphasis added).

B.

During her investigation for mitigating evidence, mitigation specialist Bovee interviewed Lois in Atlanta on October 19 and 20, 1998.[50] She sent a memorandum about the interview to Durham, in which she said this about Lois's pregnancy and Petitioner's early childhood:

> Lois said she had a normal pregnancy. Virgil was her first and only child. Forceps were used and she slept most of the time during her labor. She went into labor at 9 am and Virgil was born at 3:35 am. Virgil was bottle-fed. Lois smoked a pack a day all *during her pregnancy*. She stated that *she did not drink except socially*. He was born headfirst and weighed 7lbs. 14 oz. He was 21" long. Virgil was born at Crawford Long Hospital. When Virgil was 6 weeks old he fell off a changing table and his face was flattened, Lois said. His nose bled. Lois' mother threatened to take Virgil away from Lois due to her carelessness. Virgil stayed with his grandmother most of the time when

[50] On October 20 and 21, Bovee interviewed Petitioner in prison. On October 22, 1998, Bovee informed Durham about her interviews with Petitioner and his mother and explained that she "had Virgil's mother prepared to talk to Bob Shaffer when he calls."

> he was little so Lois could work. She would come get him on the weekend.

(emphasis added).

The members of the Defense Team were aware of what Lois told Bovee, that she did not drink during her pregnancy except socially. But they did not know that she drank to excess "during the entire time [she] was pregnant with [Petitioner]." The Superior Court, in its order denying Petitioner's claims, did not comment on what the Defense Team may have known about Lois's drinking during her pregnancy beyond what Bovee reported in her memorandum. The Superior Court simply found that Defense Counsel's investigation for mitigating evidence squared with *Strickland*'s performance standard.[51]

The Superior Court found that Schuster and Durham were well qualified to handle the capital proceeding. They assembled an investigatory team that had extensive experience in gathering mitigating evidence. In compiling Petitioner's life history, Dr. Shaffer examined records of Petitioner's birth, his schooling, medical history, mental health evaluations and criminal record. He reviewed Bovee's reports of her interviews with Petitioner and his mother and spoke to Bovee about what she had learned. After that, he interviewed Petitioner, Lois, and Lillian. The information he gained in this way was reflected in the life history he

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[51] The Superior Court made the finding on the basis of the facts set out in part III.B, *supra*, which we recite in part in the following text.

assembled. Finally, Dr. Shaffer conferred with Defense Counsel as needed. In reaching his diagnosis that Petitioner had a pedophilic disorder and minimal brain disfunction, Dr. Shaffer focused on, among other things, complications during Lois's pregnancy and Petitioner's birth and parental alcoholism.

Turning to the affidavits Petitioner introduced as proof that Defense Counsel's performance in connection with the penalty phase retrial was deficient under *Strickland*, the Court said this:

> The Court has thoroughly reviewed the affidavits submitted by Petitioner. The Court finds that much of the information gathered and presented in this challenge to Petitioner's conviction is cumulative of the information counsel gathered for Petitioner's re-sentencing hearing. The information contained that is not cumulative does not rise to a level of Constitutional concern. This Court finds that Petitioner's counsel conducted sufficient investigation into, and presentation of, mitigating evidence at Petitioner's re-sentencing trial. This Court finds that counsel's conduct falls within the wide range of reasonable professional conduct, and that counsel's decisions were made in the exercise of reasonable professional judgment. Therefore, this Court concludes that Petitioner's claim that counsel failed to adequately investigate Petitioner's case is without merit.

The Superior Court denied Petitioner's habeas petition on December 27, 2005, and the Georgia Supreme Court denied his application for a certificate of probable cause to appeal on November 6, 2006.

C.

On June 1, 2007, Petitioner turned to the Northern District of Georgia for relief. He presented forty of the claims the Superior Court had denied, including

the FASD claim, and petitioned the District Court to set them aside under 28 U.S.C. § 2254(d)(1) and (2) on the grounds that the Superior Court's adjudications of the claims were either contrary to, or an unreasonable application of, United States Supreme Court decisions, including *Strickland v. Washington*, or based on an unreasonable determination of the facts presented. The District Court discerned no basis for disturbing the Superior Court's disposition of any of Petitioner's claims under § 2254(d) and accordingly denied his petition.

The District Court denied Petitioner's FASD claim after considering it *de novo*. It considered the claim *de novo* because the Superior Court, in adjudicating the claim, made no explicit reference to the claim (which Petitioner presented initially in his post-hearing brief). The District Court looked to the core of the claim: Defense Counsel should have discovered what Lois revealed in her March 9, 2004 affidavit—that she drank during the entire time she was pregnant.

Here is what the District Court found: "[T]rial counsel's investigator [Toni Bovee] asked about Petitioner's mother's alcohol consumption during her pregnancy and she told the investigator that 'she did not drink except socially.'" Dr. Shaffer, in "assembl[ing] a complete history of Petitioner," centered on "complications during pregnancy" and "parental alcoholism." He "had access to Petitioner's mother, and he asked her about her pregnancy and her consumption of alcohol." She did not tell Dr. Shaffer of the drinking she described in her Affidavit

and he attached no significance to her statement to Bovee, that "she did not drink except socially."[52]

Notably, in a fax transmission to Durham on July 22, 1998, Dr. Shaffer had told Durham what his "neuropsychological and personality evaluation" of Petitioner would cover. Among other things, he said he would look into Presnell's mother's "pregnancy and birth complications," if any, and any "alcoholism" his mother or father had exhibited. Dr. Shaffer interviewed Petitioner's mother *after* receiving Bovee's report of her interview with her.

Assuming that Petitioner's behavior on May 4, 1976, was affected by the FASD, the District Court found Defense Counsel blameless in not discovering that he was suffering from the disorder. Indeed,

> [t]o the degree that Petitioner actually suffers from FASD, trial counsel could reasonably rely on his psychological expert to make such a diagnosis, and Petitioner cannot pin a failed or missed psychological diagnosis on his lawyers when he was subject to an intensive evaluation by a competent mental health expert.

Moreover,

> [g]iven the fact that three different teams of lawyers investigated Petitioner's background and had Petitioner put through thorough expert mental health evaluations without anyone identifying FASD, Petitioner's sudden claim of a missed FASD diagnosis simply cannot be blamed on trial counsel that represented Petitioner at the resentencing. This Court thus concludes that Petitioner has failed to

[52] These findings are implicit in the District Court's adjudication of the FASD claim and are consistent with the Superior Court of Butts County's findings, which the District Court was obliged to accord a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1).

> establish a claim under [*Strickland v. Washington*] that his trial counsel was ineffective for failing to discover and present evidence regarding his purported FASD.[53]

After denying the Petitioner's claims in full, the District Court granted in part his application for a COA. It certified the FASD claim exactly as presented to the Superior Court of Butts County.

D.

Petitioner's argument on appeal is that the District Court misapplied the *Strickland* performance standard in rejecting his allegation that Defense Counsel were derelict in failing to inquire into what Lois meant when she told Bovee that "she did not drink except socially" while pregnant.[54]

In his brief on appeal, Petitioner argues:

> Given Lois's admission that she drank "socially" during her pregnancy, no reasonable counsel would fail to inquire further into the extent of [Petitioner's] prenatal exposure to alcohol. Had counsel conducted a reasonable investigation, they would have learned the scope of Lois's drinking—which, in turn, would have alerted their expert to the need to explore whether [Petitioner] suffered from FASD. That evidence

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[53] The Court was referring to the lawyers who represented Petitioner at his 1976 trial; the lawyers who prosecuted the habeas petition he filed in the Superior Court of Butts County on January 8, 1980, alleging that the 1976 trial counsel's handling of the mitigating evidence issue was constitutionally ineffective, *see* note 5, *supra*; the lawyers who filed the habeas petition in the Northern District of Georgia on May 15, 1985, *see* note 6, *supra*; and Defense Counsel who handled the 1999 retrial.

[54] Petitioner's brief on appeal presents an issue that was not included in the COA the District Court issued: Defense Counsel were ineffective for failing to object to statements Parker made on behalf of the State in his closing argument to the jury. We do not consider it. *See McClain v. Hall*, 552 F.3d 1245, 1254 (11th Cir. 2008) ("In an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the certificate of appealability." (alterations adopted) (quoting *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998))).

> would have allowed counsel and their expert to appreciate how [Petitioner's] organic brain damage amplified the impact of the sexual violence and deviance to which [he] had been exposed. So informed, they could have explained to the jury how his neurological development and background interacted to explain his crime, which would have given the jury the individualized picture of his culpability necessary to determine the proper sentence.[55]

As an initial matter, our analysis, like the District Court's, focuses on the Butts County Superior Court's decision even though it is not the last state-court

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[55] Lois's March 2004 Affidavit does not contain the admission that habeas counsel referred to in the excerpt above: that Lois drank socially during her pregnancy. Indeed, the Affidavit is to the contrary. It states that Lois met with Bovee and Defense Counsel on several occasions: once when Bovee came to Atlanta to interview Lois, then several times on the eve of trial when Lois met with Bovee and Defense Counsel at their law office or over dinner. Specifically, Lois said this in paragraph forty-one of her Affidavit, the penultimate paragraph:

> A woman named *Toni Bovee contacted me* prior to Virgil's last trial. She came to my house and *we talked about Virgil*. The next day I went up to her hotel and we talked again. I think we went out to lunch after we talked. *I saw her again at the lawyer's office with Lillian* right before the trial. Lillian, Willie Samples and I also had dinner together that night after I met Toni Bovee at the lawyer's office. *I met with the lawyers and Toni Bovee* right before the trial started. The lawyers would say, "If I asked you this what would you say?" and I would then answer what I said. This maybe took about a half an hour. *None of these people asked me* many questions about Virgil's problems in school, or *about how I drank while I was pregnant with him*. I would have been happy to answer any of their questions and testify in court about anything that I have said in this affidavit.

(emphasis added).

On none of these occasions, the Affidavit concludes, did Bovee or Defense Counsel ask her about her consumption of alcohol during pregnancy. Had they inquired, Lois claims, she would have told them what she said in her Affidavit: "I was drinking during the entire time I was pregnant with [Petitioner]."

Implicit in the Superior Court of Butts County's adjudication of the FASD claim is the finding that in 1998 Bovee did, indeed, ask Lois about prenatal alcohol consumption. The Superior Court of Butts County implicitly made this finding when it explained that Bovee interviewed Lois, collected a detailed family history from Lois, and learned that Lois smoked a pack of cigarettes a day and did not drink except socially during the time she was pregnant with Petitioner. We are obliged to afford that finding a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). A habeas petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* Under the circumstances here, Lois's statement that neither Bovee nor Defense Counsel asked her about her alcohol consumption does not qualify as clear and convincing rebuttal evidence.

adjudication on the merits. 28 U.S.C. § 2254(d). The Supreme Court of Georgia summarily denied Petitioner's application for a certificate of probable cause to appeal. That summary decision was the last state-court adjudication on the merits. Under *Wilson v. Sellers*, we "presume" that the summary denial adopted the same reasoning. 138 S. Ct. 1188, 1192 (2018). We thus "'look through' the unexplained decision" of the Supreme Court of Georgia and review the Butts County Superior Court's decision. *See id.*

To succeed on this appeal, Petitioner must establish that the Butts County Superior Court's decision was contrary to or involved an unreasonable application of *Strickland*. *Bell v. Cone*, 535 U.S. 685, 698–99, 122 S. Ct. 1843, 1852 (2002). Under *Strickland*, a petitioner must show that (1) his counsel's performance fell below the standard of objective reasonableness, and (2) his counsel's deficiency resulted in prejudice to the petitioner. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. When analyzing counsel's performance under *Strickland*, counsel is given broad deference. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007). There is a strong presumption that counsel's representation was reasonable. *Id.* Petitioner "must establish that no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc).

When a petitioner argues that his counsel was ineffective during the penalty phase, we determine "whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court." *Stewart*, 476 F.3d at 1209 (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006)). This test is objective and based on counsel's perspective at the time of the representation. "We must make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 904 (11th Cir. 2014) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. 2065).

Counsel must be reasonable, not perfect or unrelenting. Effective counsel "is not required to 'pursue every path until it bears fruit or until all hope withers.'" *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (quoting *Foster v. Dugger*, 823 F.2d 402, 405 (11th Cir. 1987)). "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S. Ct. 2456, 2463 (2005).

Whether an investigation is reasonable largely depends on what information the defendant and others provide to counsel. *See, e.g.*, *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1330 (11th Cir. 2013); *DeYoung v. Schofield*, 609 F.3d 1260, 1286

(11th Cir. 2010); *McClain v. Hall*, 552 F.3d 1245, 1251–52 (11th Cir. 2008); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1325 (11th Cir. 2002). For instance, a lawyer is not ineffective for failing to discover physical abuse when the lawyer asks petitioner and his family about abuse, and neither petitioner nor his family members mention physical abuse. *E.g.*, *Van Poyck*, 290 F.3d at 1325.

The prejudice element of *Strickland* is satisfied when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2068. *Strickland* is a conjunctive test, meaning that a petitioner must satisfy both prongs to succeed.

1.

We begin with the first prong of *Strickland*: Defense Counsel's objective reasonableness. Petitioner's case is analogous to *Nance v. Warden*, 922 F.3d 1298 (11th Cir. 2019). The petitioner's defense counsel in *Nance* consulted with the attorneys who represented petitioner at his original trial; reviewed all their files; hired multiple professionals to help with the mitigation investigation; interviewed witnesses about petitioner's childhood, mental health, and potential abuse; consulted with two mental health professionals; and reviewed school records, prison records, medical records, and more. *Id.* at 1301–02. On review, we

concluded that *Nance* "[was] as thorough an investigation into mitigating circumstances as we [had] ever seen." *Id.* at 1301.

Defense Counsel's investigation into mitigating evidence here, like the investigation we described in *Nance*, is about as thorough as any other investigation we have seen. Defense Counsel hired multiple professionals: a third attorney, McDaniel; an investigator, Pennington; a jury composition expert, Dr. Maykuth; and a mitigation specialist, Bovee. Defense Counsel hired two mental health professionals: a neuropsychologist, Dr. Shaffer, and a psychiatrist, Dr. Porter. Defense Counsel acquired and reviewed records from Petitioner's 1976 trial, maintained by the attorneys during the 1976 trial; records of the 1980 habeas corpus proceeding, including records of the mental health evaluations conducted for that proceeding; records associated with prior incarcerations and records related to Petitioner's incarceration following May 4, 1976, including records of mental health evaluations conducted at the prison; and school and medical records. Defense Counsel acquired and reviewed photos of Petitioner throughout his life. Defense Counsel consulted with attorneys who represented Petitioner in the *Presnell III* habeas corpus proceedings. Defense Team conducted several interviews; members of Defense Team interviewed Petitioner; Lois; Petitioner's former wife, Gilliland; Petitioner's son, Terry; Petitioner's aunts, Peggy and Lillian; Petitioner's cousin, Marie Wilerson; and one of Petitioner's former

victims, A.H. Finally, Defense Counsel had Dr. Shaffer and Dr. Porter evaluate Petitioner's intelligence and mental health.

We are not persuaded by Petitioner's contention that Defense Counsel was objectively unreasonable for failing to elicit from Lois that she was binge drinking during the entire time of her pregnancy with Petitioner. It took nearly twenty-eight years—from August of 1976 to March of 2004—for Lois's drinking to surface. As the District Court observed, "three different teams of lawyers investigated Petitioner's background and had Petitioner put through thorough expert mental health evaluations without anyone identifying FASD." Lois was there throughout. She was present in the courtroom for both trials, and she testified at both. She was interviewed prior to the 1976 trial by defense counsel and presumably his investigator; she said nothing about drinking throughout her pregnancy to habeas counsel in 1980, when they sought a writ from the Superior Court of Butts County on the theory that Petitioner's attorney had been ineffective in marshaling mitigating evidence for the penalty phase of the 1976 trial (which would have included the FASD); and she said nothing to investigators Pennington and Bovee, or Dr. Shaffer or Defense Counsel when they interviewed her in preparing for the retrial of the penalty phase.

We have confronted and rejected analogous arguments in the context of defense attorneys who have failed to discover and present childhood abuse as

mitigating evidence. *See, e.g.*, *Williams*, 185 F.3d at 1237. We have explained that "[a]n attorney does not render ineffective assistance by failing to discover and develop evidence of childhood abuse that his client does not mention to him." *Id.* Prenatal drinking, like childhood abuse, may be accompanied by shame and therefore kept secret. Thus, it may not be documented in medical or other records. Few likely know about the prenatal drinking. And it may be difficult to get an interview subject to admit to consuming alcohol in utero. As with childhood abuse, to hold counsel ineffective when counsel fails to elicit that his client's mother consumed alcohol while pregnant would present defense attorneys with an impossible task.

Even if we accept that Lois would have confessed to prenatal binge drinking if counsel asked what "socially" meant, Defense Counsel still acted reasonably. Defense Counsel and their experts had plenty of information with which to evaluate Petitioner. Not only did they have a wealth of information, Defense Counsel and their experts had access to Petitioner for further examination. Dr. Shaffer had Bovee's memorandum—the one indicating that Lois "did not drink except socially" while pregnant with Petitioner—before he examined Petitioner. Furthermore, Dr. Shaffer was invited to speak with Lois, and did speak with Lois, before he examined Petitioner. It was reasonable for Defense Counsel to rely on Dr. Shaffer to decide whether the Defense Team needed to inquire further about

Lois' "social" prenatal drinking. *See Rompilla*, 545 U.S. at 385, 125 S. Ct. 2463 ("[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."); *Williams*, 185 F.3d at 1237 ("[Effective counsel] is not required to 'pursue every path until it bears fruit or until all hope withers.'" (quoting *Foster*, 823 F.2d at 405)).

For the foregoing reasons, Petitioner fails the first prong of *Strickland*—counsel acted reasonably. "At the least, fair-minded jurists could so conclude, which is enough to satisfy AEDPA's highly deferential standards and preclude federal habeas relief." *Gissendaner*, 735 F.3d at 1330.

2.

We now turn to prejudice, the second prong of *Strickland*. Dr. Weinstein, one of Petitioner's expert witnesses,[56] diagnosed Petitioner with FASD. In reaching his diagnosis, Dr. Weinstein relied on what Lois said in her Affidavit, that she "drank alcohol for 'the whole time' that she was pregnant." Dr. Weinstein considered Lois a "binge drinker." According to his report: "[S]he was a binge-drinker, consuming large quantities of strong liquor in a very short period of time."

Had Defense Counsel uncovered Lois's prenatal binge drinking before Petitioner's 1999 penalty-phase retrial, they would have had to present testimony from Lois about her alcohol consumption in order to establish a predicate for Dr.

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[56] *See* note 49, *supra*.

Weinstein—or an equivalent expert—to give an FASD diagnosis in court. Furthermore, because the diagnosis would have to rely on Lois's confession that she consumed alcohol during the entire time she was pregnant with Petitioner, the credibility of the diagnosis would depend on Lois's credibility. For the reasons discussed below, a jury would have been unlikely to believe Lois's claim that she drank alcohol during her entire pregnancy, and Petitioner can therefore not show prejudice.

If Lois drank throughout her pregnancy, if she was a binge drinker, someone in her family would have known about it. Throughout her pregnancy, she and the rest of her family lived in a three-room apartment. It had a front room with two large beds, one bedroom and a kitchen. Eight members of her immediate family stayed there: her parents; four sisters (Sarah, Patricia, Lillian, and Brenda); a brother, James; and her. During the first four or five months of her pregnancy, Delano was there too, raising the number of occupants to nine.

Delano's affidavit described the situation in these words: "Lois and I married shortly after we met and we moved into an apartment together. A couple of weeks after we married I went to work and returned home and her whole family had moved into our one-bedroom apartment." Lois's Affidavit was to the same effect: "We had two big beds in the front room, a half bed in the kitchen where James slept and another bed in the bedroom." While she was pregnant, five slept

in the front room: she and Sarah in one bed, Peggy, Brenda, and Lillian in the other. What is more, in Lois's Affidavit, she said: "I never grew up around drinking." With the family's environment in mind, it would strain credulity to say that Lois—a "binge drinker" according to Dr. Weinstein—drank "the whole time" she was pregnant and no one noticed.

Lillian gave habeas counsel an affidavit on February 9, 2004; Delano executed one two days later, on February 11, 2004. Neither affidavit contains the words "alcohol," "drinking," "binge drinking," or "bourbon," Lois's "drink of choice." This may explain why neither Pennington nor Bovee nor Dr. Shaffer nor Defense Counsel heard anything from any members of Lois's family about alcohol consumption in their household. All they heard came from Lois—that she "did not drink during her pregnancy except socially."

Lois signed her Affidavit on March 9, 2004, twenty-seven days after Delano signed his and twenty-nine days after Lillian signed hers. The close proximity of the signing of the three affidavits raises the inference that Lillian and Delano were unable to corroborate Lois's claim that she drank throughout her pregnancy. Lois's alcohol consumption was the key to Petitioner's FASD claim; if Lillian and Delano could have corroborated Lois's claim, habeas Defense Counsel certainly would have them swear to its truth. By the same token, if Defense Counsel did not become aware of Lois's drinking until after February 11 (when Delano signed his

affidavit), they had time to obtain supplementary (or substitute) affidavits from Lillian and Delano. Defense Counsel did not, though. We therefore infer that given the extremely close living and sleeping arrangements in the three-room apartment on Norcross Street, if Lois was a "binge drinker" and drank bourbon (her alcohol of choice) "during the entire time [she] was pregnant," Lillian and Delano would have known of it. Lillian would have known about it because people did not drink alcohol in the Edwards household. As Lois put it, she "never grew up around drinking."

Had Defense Counsel put on testimony from Lois that she drank to excess during her pregnancy, followed by testimony from Dr. Weinstein that Petitioner suffers from FASD, the jury would have made the same connections we are making here. No one in Lois's family, who lived together in close quarters during the relevant time, can corroborate her alcohol consumption during pregnancy. If she were in fact drinking to excess at that time, the family would have known about it. The failure to produce any corroborating testimony destroys Lois's credibility.

* * *

On this record, we would be hard put to say that the District Court erred in rejecting Petitioner's FASD claim. Petitioner failed to demonstrate that Defense Counsel's conduct in connection with the retrial of the penalty phase fell below

Strickland's performance standard. As for its prejudice standard, a retrial of the penalty phase would result in the same verdict, a death sentence.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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September 16, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14322-P
Case Style: Virgil Presnell v. Warden
District Court Docket No: 1:07-cv-01267-WBH

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

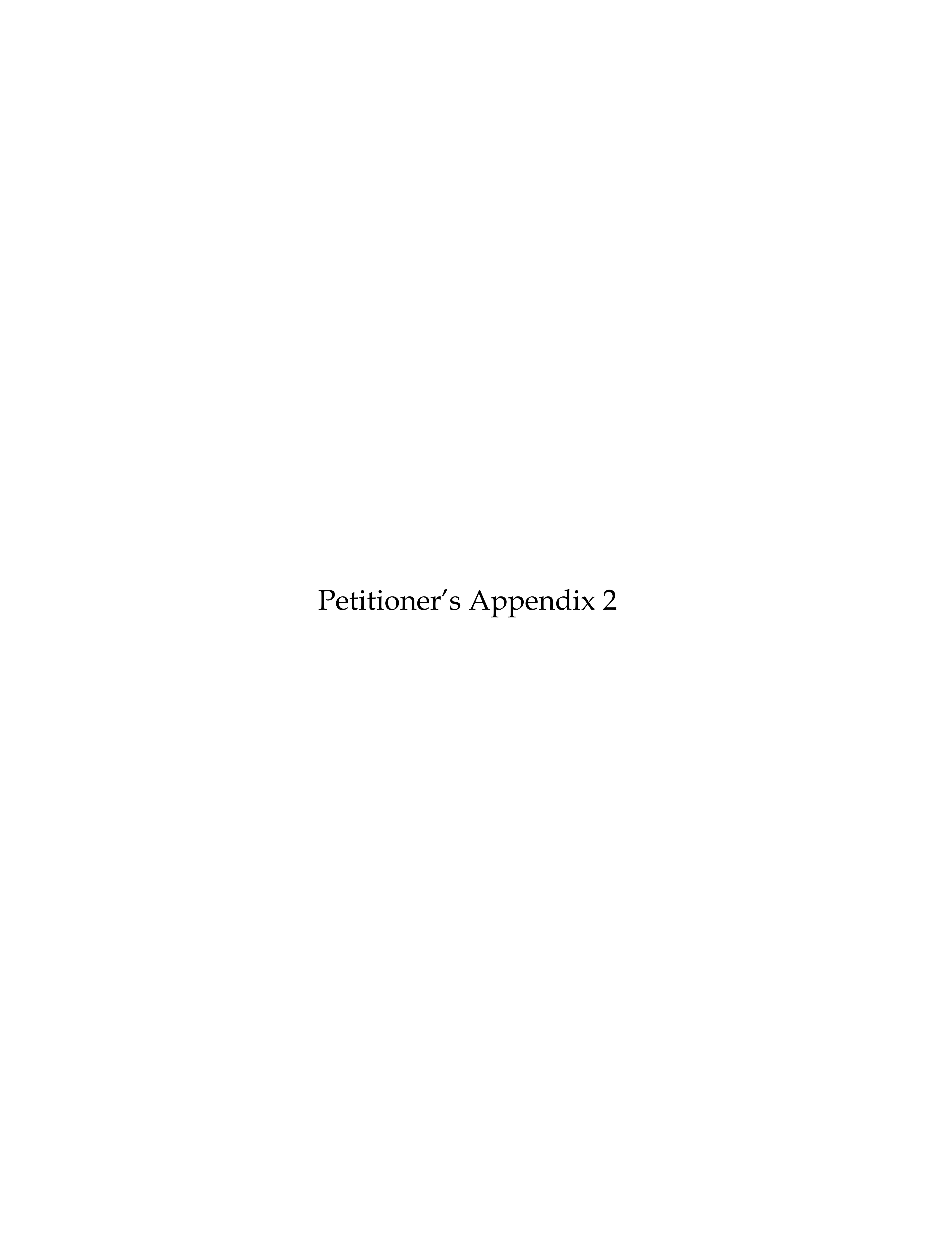
For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion



Petitioner's Appendix 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14322-P

VIRGIL DELANO PRESNELL,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee.

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

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

BEFORE: ROSENBAUM, TJOFLAT, and ED CARNES, Circuit Judges.

PER CURIAM:

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

ORD-46

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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December 01, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14322-P
Case Style: Virgil Presnell v. Warden
District Court Docket No: 1:07-cv-01267-WBH

The enclosed order has been entered on petition(s) for rehearing.

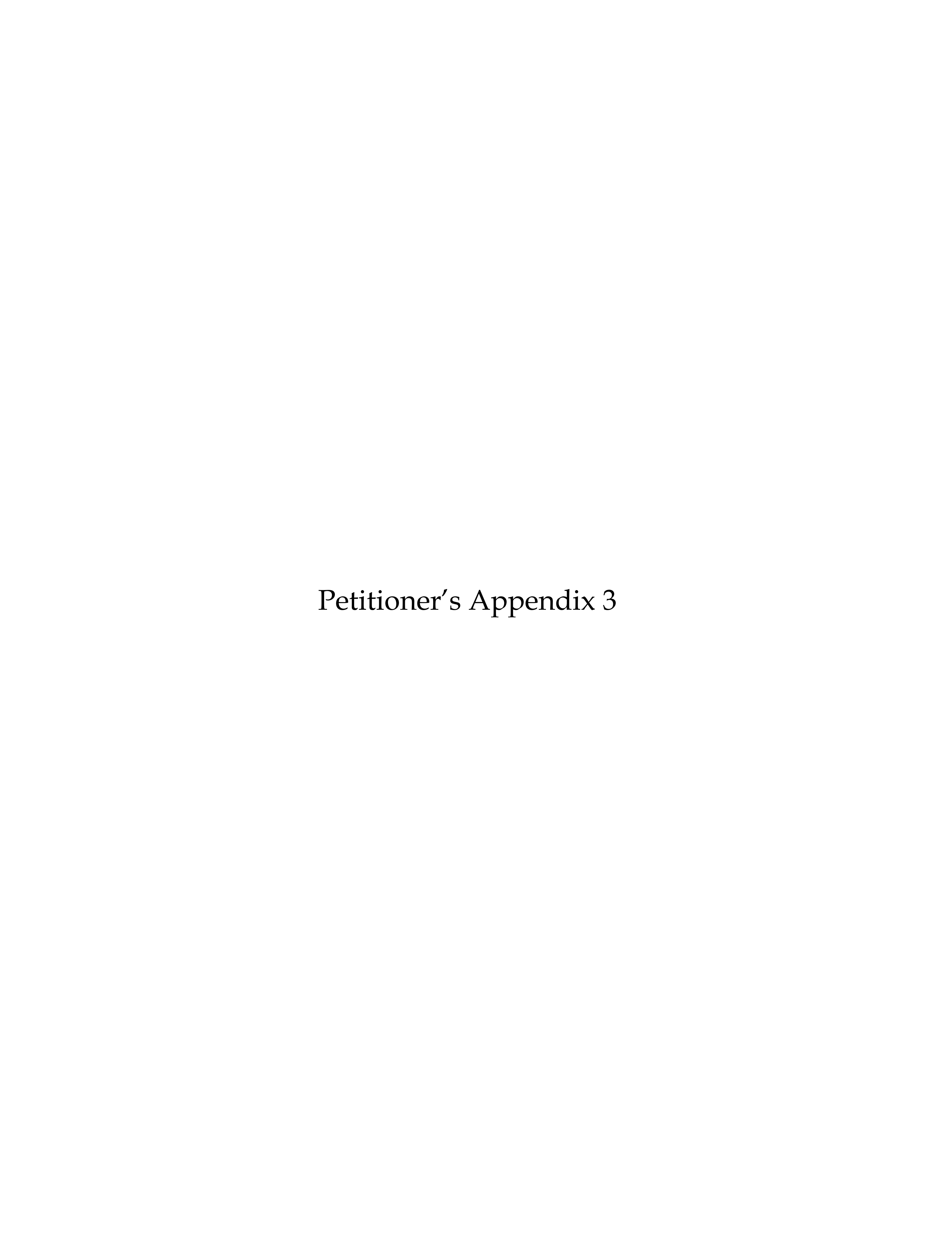
See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

REHG-1 Ltr Order Petition Rehearing



Petitioner's Appendix 3

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

VIRGIL DELANO PRESNELL, Petitioner,	:	CIVIL ACTION NO. 1:07-CV-1267-WBH
v.	:	
ERIC SELLERS, Respondent.	:	DEATH PENALTY HABEAS CORPUS

ORDER

Background and Factual Summary

This matter is now before the Court for consideration of the Parties' final briefs. Petitioner is a prisoner under a death sentence stemming from his 1976 convictions in Cobb County Superior Court. He has pending before this Court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

According to the Georgia Supreme Court,

> The evidence adduced at trial authorized the jury to find that on April 23, 1976, [Petitioner] attempted to abduct a ten-year-old girl in Clayton County as she was walking home from school on a wooded trail. Although he grabbed her and threatened her with a knife, the girl managed to break free and escape. On May 3, 1976, [Petitioner] staked out an elementary school in Cobb County and observed a ten-year-old girl walking home on a wooded trail. He returned the following day and waited on the trail. In his car, he had a rug and a jar of lubricant. When the ten-year-old girl came walking down the trail with her eight-year-old friend, Lori Ann Smith, [Petitioner] abducted both girls. He taped their mouths shut and threatened to kill them if they did not cooperate; he also said he had a gun. They got into [Petitioner]'s blue Plymouth Duster. While [Petitioner] was driving, he forced the older girl to orally sodomize

> him and inserted his finger into her vagina. They drove to a secluded area and [Petitioner] walked the children into the woods. He carried the rug and the jar of lubricant. He made both girls undress and he raped the older girl on the rug. Her vagina was torn during the rape and began bleeding. [Petitioner] then said that he was going to take Lori Ann back to his car and that the older girl should wait for him. On the way back to the car, Lori Ann tried to run away, but [Petitioner] caught her and forced her face underwater in a creek, drowning her. The medical examiner testified that there was water, sand and plant matter in her lungs and stomach and that it would have taken one to several minutes for her to die. She had bruises on her neck and a bruise on her back from where [Petitioner] apparently placed his knee. [Petitioner] returned to the older girl and again forced her to orally sodomize him. He then locked her in his car trunk and began driving, but a tire went flat so he dropped her off in another wooded area after forcing her to commit oral sodomy again. Although [Petitioner] told her he would return, the older girl heard the sound of a nearby gas station and walked there. She later gave police a description of [Petitioner] and his blue Duster and stated that his tire was flat. Shortly thereafter the police spotted [Petitioner] changing a tire on his blue Duster at his apartment complex not far from where he dropped off the older girl. [Petitioner] initially denied everything but later admitted that he knew the location of the missing girl and led the police to Lori Ann's body. He also confessed. A search of [Petitioner]'s bedroom uncovered a handgun and child pornography depicting young girls.

Presnell v. State, 551 S.E.2d 723, 728 (Ga. 2001).

The extensive procedural history of Petitioner's convictions, sentences, appeals, and habeas corpus proceedings is set forth in detail in this Court's order of March 15, 2013, [Doc. 28], and there is no reason to repeat that information here other than to note that Petitioner filed an earlier petition pursuant to § 2254 in this Court, and, on July 11, 1990, the Honorable Robert L. Vining, Jr., reversed Petitioner's death

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sentence due to an improper closing argument by the prosecutor in the penalty phase of Petitioner's trial. Judge Vining denied relief on all other grounds. After the Eleventh Circuit affirmed this Court's grant of relief with respect to the death sentence, Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992), a resentencing trial was held in Cobb County Superior Court resulting in another death sentence on March 16, 1999. The jury found the following statutory aggravating circumstances to impose the death penalty; (1) that the murder of Lori Ann Smith was committed by the defendant while the defendant was engaged in the commission of another capital felony, the aggravated sodomy of the older girl; and (2) that the murder of Lori Ann Smith was outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of mind. The Georgia Supreme Court affirmed this death sentence, the United States Supreme Court denied certiorari, and Petitioner did not prevail in his subsequent state habeas corpus proceedings.

Accordingly, because Petitioner's original convictions have already been subject to habeas corpus review before this Court, review in this case is limited to whether Petitioner's rights were violated in the resentencing in 1999.

In the instant case, this Court concluded by order of March 25, 2013, that Petitioner's Claims IV, VI, VII, XIX, XXIII, XXVII, XXVIII, XXIX, XXXI, XXXIII, XXXIV, XXXVI, as raised in the amended petition, [Doc. 13], are procedurally

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defaulted, without prejudice to Petitioner demonstrating cause and prejudice to overcome the default. [Doc. 28]. In the same order, this Court held that Petitioner's Claims V, XXXII, and XXXVII are also procedurally defaulted and that Petitioner had established cause to excuse the default so that those claims are deemed procedurally defaulted without prejudice to Petitioner demonstrating prejudice to excuse the default. Further, this Court concluded that the portion of Petitioner's Claim II based on mental illness and the entirety of Claims XVIII and XXX are procedurally defaulted and that there is no basis upon which to excuse the default. Accordingly, those claims were dismissed.

In his final brief, Petitioner addresses only his Claims I, II, III, IV, V, and XLII. Accordingly, because he failed to establish cause and prejudice for his Claims VI, VII, XIX, XXIII, XXVII, XXVIII, XXIX, XXXI, XXXIII, XXXIV, XXXVI, and he failed to establish prejudice for his claims XXXII, and XXXVII, relief as to those claims is hereby **DENIED**.

Habeas Corpus Standard of Review

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus in behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This

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power is limited, however, because a restriction applies to claims that have been "adjudicated on the merits in State court proceedings." § 2254(d). Under § 2254(d), a habeas corpus application "shall not be granted with respect to [such a] claim . . . unless the adjudication of the claim"

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This standard is "difficult to meet," Harrington v. Richter, 562 U.S. 86, 102 (2011), and "highly deferential" demanding "that state-court decisions be given the benefit of the doubt," Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (citation and internal quotation marks omitted), and requiring the petitioner to carry the burden of proof. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (citing Visciotti, 537 U.S. at 25. In Pinholster, the Supreme Court further held,

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

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

Moreover, any state court denial of a claim is presumed to be adjudicated on the merits, Harrington v. Richter, 562 U.S. 86, 99 (2011), and no explanation for the state court's denial of relief is required for the decision to fall within the scope of § 2254(d). Wright v. Sec'y for Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002); accord Harrington, 562 U.S. at 98 (§ 2254 applies even if the state court's decision is unaccompanied by an explanation or fails to say that it is adjudicating the claim "on the merits").

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

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judgment that the state court was incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law."). Habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 102 (2011) (internal quotation marks omitted); see Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1294 (11th Cir. 2015).

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

Discussion of Petitioner's Claims for Relief Discussed in his Final Brief

Claim I - Ineffective Assistance of Trial Counsel

Legal Standard

In his Claim I, Petitioner claims that his trial counsel was constitutionally ineffective. The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Smith v. Robbins, 528

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U.S. 259, 285 (2000) (applying Strickland standard to claims of ineffective assistance of appellate counsel). The analysis is two-pronged, and the court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address both components of the inquiry if the [petitioner] makes an insufficient showing on one.").

Petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Furthermore, "[s]trategic decisions will amount to ineffective assistance only if so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987).

In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been

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different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial Counsel's Investigation for and Presentation of the Case in Mitigation

In his first three claims of ineffective assistance, Petitioner contends that his trial counsel failed to properly prepare for and present his case in mitigation at his resentencing trial. Two claims relate to evidence that trial counsel supposedly missed regarding Petitioner's mental capacity and his predilection for having sex with underage girls, his implication being that had trial counsel presented this evidence at the resentencing trial, the jury would not have imposed the death penalty. Petitioner also asserts a claim that the evidence that trial counsel did present was inadequate. For a variety of reasons, this Court concludes that Petitioner has not, through these claims, established that his constitutional rights were violated.

In its final order, the state habeas corpus court provided a detailed and undisputed description of the high level of experience of trial counsel, as well as that of the investigator, jury composition expert, and mitigation specialist that trial counsel hired to work on Petitioner's behalf. [Res. Ex. 119 at 32-34]. This Court will not repeat that discussion here but notes that the state court's findings are fully supported in the record and that trial counsel and the various experts and investigators working

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for Petitioner were accomplished professionals with significant experience in death penalty cases. As such, the presumption that trial counsel acted effectively is even stronger. Lawrence v. Sec'y Fla. Dep't of Corr., 700 F.3d 464, 478 (11th Cir. 2012); Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000); Fugate v. Head, 261 F.3d 1206, 1216 (11th Cir. 2001); Williams v. Head, 185 F.3d 1223, 1228-29 (11th Cir. 1999).

This Court further stresses that, in addition to their own thorough investigation, trial counsel had the benefit of the investigations that trial counsel from the first trial had performed as well as the investigations from Petitioner's first round of habeas corpus proceedings. [See Resp. Exh. 119 at 34]. The state habeas corpus court provides a detailed description of the investigation undertaken by trial counsel, the investigator and the mitigation specialist, [id. at 34-38], as well as the mental health information that trial counsel reviewed from a psychologist they hired in addition to that of the psychiatrist that worked with Petitioner prior to the first trial and the mental health expert that worked with Petitioner in preparing for the first round of habeas corpus proceedings, [id. at 38-40]. Again, this Court will not repeat that information here, but it is clear that trial counsel conducted a thorough and sifting investigation into Petitioner's background and social history and fully reviewed the information collected in the prior investigations. As a result, it would be highly unlikely that trial

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counsel for the resentencing trial missed anything significant in Petitioner's background.

According to the Eleventh Circuit, "the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial." Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997). Further, "[i]t is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions." Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

This is not to say that it is impossible to prevail with a claim that trial counsel failed in the preparation or presentation of the defense at the penalty phase of a capital trial. For example in both Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court concluded, *inter alia*, that trial counsel had been ineffective in failing to present evidence of the death penalty defendants' extremely troubled childhood during the penalty phase of the trial. The facts presented

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in those cases depict an almost unfathomable level of deprivation. In Wiggins, there was evidence that

> [Wiggins'] mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner – an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, and, as petitioner explained to [a licensed social worker], the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

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

In Williams v. Taylor, Terry Williams' childhood was equally distressing. Williams' parents were severe alcoholics who were often so drunk that they were incapable of caring for the children. When social workers arrived at the Williams home on one occasion, conditions were not habitable, including human feces in several places on the floor. The social workers had to remove the children because, among other reasons, the children were drunk from consuming moonshine. Williams' parents were each charged with five counts of criminal neglect. Acquaintances of the family testified (1) that Williams' father would strip Williams naked, tie him to a bed post and

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whip him about the back and face with a belt, and (2) that Williams' parents engaged in repeated fist fights that terrorized the children. Williams' trial attorneys also ignored or failed to discover evidence of Williams' borderline retardation, organic brain damage caused by head injury, and Fetal Alcohol Syndrome. See generally, Williams v. Taylor, 1999 WL 459574 (Brief for Petitioner).

The evidence presented by Petitioner in this action pales in comparison to the horrific facts of Williams and Wiggins. Petitioner has presented scant evidence of physical abuse, and he denies that he was sexually abused. See Strickland, 466 U.S. at 691. There is further no evidence that Petitioner was deprived of food or minimally habitable living conditions. Neither Petitioner nor his siblings were removed from their home by the state because of neglect. Moreover, as is discussed below, Petitioner's claims are not about extreme deprivation that he suffered as a child, but about his mental/psychological issues – a difference that this Court concludes is significant to the resolution of his claims. This Court is not convinced that the jury would have been particularly swayed by testimony regarding Petitioner's mental impairments. Given his crimes, the jury likely already suspected that Petitioner suffered from some form of mental abnormality, and putting a label on that deficiency does not necessarily serve to mitigate the crimes that he committed. Indeed, the

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evidence that Petitioner suffered from irreversible brain damage may well have convinced the jury of his incorrigibility.

In response to Petitioner's contention that trial counsel was ineffective in failing to present a reasonable case in mitigation at the resentencing trial, this Court points to the state habeas corpus court's discussion of the evidence that trial counsel presented at the resentencing trial.

> At Petitioner's resentencing trial, Counsel's presentation focused on Petitioner's substandard upbringing in public housing and his lack of a male role model. Counsel elicited testimony regarding Petitioner's good behavior in prison; that Petitioner had been sexually assaulted while in prison; that Petitioner received a GED while in prison; and that Petitioner married while in prison. Counsel introduced information regarding Petitioner's school records, poor academic performance and constant moves. Counsel called various members of Petitioner's family to recount Petitioner's childhood to the jury. The testimony of these family members included descriptions of the poor, cramped conditions in which Petitioner lived and of the influence of Petitioner's father and uncle on Petitioner's early life; information about the relationships Petitioner developed while incarcerated; and information about the gifts Petitioner made to various family members while incarcerated. Counsel further introduced a number of photographs of Petitioner. Finally, counsel called Petitioner's mother, who testified at length about Petitioner's family history, including the lack of stability, poverty, lack of male role models and possible abuse Petitioner experienced early in life, and about the progress Petitioner had made since his arrest. Petitioner's mother asked the jury to spare Petitioner's life.
>
> Counsel also introduced the testimony of Dr. Shaffer, whose credentials were extensively discussed, which included a discussion of the "thorough history" of Petitioner's family assembled by Dr. Shaffer and of the sexual abuse Petitioner's uncle perpetrated upon members of Petitioner's family. Dr. Shaffer testified that Petitioner's family history may have influenced

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> Petitioner's behavior and thinking from an early age. Dr. Shaffer also presented results from a variety of psychological tests, which showed that Petitioner had abnormal knowledge of sexual behavior at the age of eight, that Petitioner functioned at the upper limits of the mentally defective range for intelligence and that Petitioner often retreated into a fantasy world to escape the abuse he suffered/experienced at home. Dr. Shaffer testified that Petitioner's relationships with his aunts confused his notions of sexual and gender relationships, as evidenced by Petitioner's habits of playing with dolls and dressing in girl's clothing when playing with his aunts. Moreover, Dr. Shaffer described test results that indicated high levels of schizophrenia and paranoia and said there were indications of a possible brain injury resulting in impairment of the frontal brain process affecting a person's spacial comprehension. Dr. Shaffer testified that on the basis of all of the information he had gathered, he had diagnosed Petitioner with pedophiliac disorder, and noted that pedophiliac disorder is recognized as a major mental illness, the treatment of which had increased since Petitioner's arrest.
>
> Petitioner's attorneys also presented the testimony of Chuck Owens, a former counselor at the prison, regarding Petitioner's progress since his incarceration. Chuck Owens' testimony included discussion of Petitioner's attainment of his GED and completion of correspondence classes, and Petitioner's then-recent IQ tests, which showed Petitioner to be borderline mentally retarded.
>
> Finally, counsel thoroughly prepared for the testimony of Dr. Joseph Burton, the State's forensic scientist. Dr. Burton had testified at Petitioner's first trial that Lori Smith's death could have been accidental. Counsel spoke with Dr. Burton a number of times before calling him as a witness. Counsel elicited testimony from Dr. Burton as to improvements in the state's procedures that could have revealed more evidence in Petitioner's original trial; that it would be possible for someone to struggle and drown without another person intentionally holding them down; and that the bruises and abrasions on Lori Ann Smith's body were not inconsistent with the defense's accident theory.

[Resp. Exh. 119 at 41-43 (citations to the internal record omitted)].

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The state habeas corpus court then concluded that Petitioner had failed to demonstrate either prong of the Strickland standard. [Id.]. While Petitioner may quibble with the choices that trial counsel made in presenting this evidence, he has failed to demonstrate that those choices were not reasonable strategic decisions. His only discussion of trial counsel's strategic decisions relates to the issue of whether Petitioner suffers from FASD (discussed below). Because this Court has found that trial counsel thoroughly investigated Petitioner's background, social history, education, and mental health, this Court must conclude that any decisions made by trial counsel regarding what evidence to present were reasonable, informed, and strategic decisions. See Chandler v. United States, 218 F.3d 1305, 1319 (11th Cir. 2000) ("Counsel is not required to present every nonfrivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy.").

Counsel was not Ineffective for Failing to Diagnose and Argue Fetal Alcohol Spectrum Disorder

Turning to Petitioner's next claim of mental deficiencies, he asserts that trial counsel missed the fact that his mother drank to excess while she was pregnant with him, causing Fetal Alcohol Spectrum Disorder (FASD), resulting in "profound organic

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brain damage and cognitive deficits." [Doc. 48 at 15.] Petitioner claims that his trial counsel failed to discover this fact and that had trial counsel learned about Petitioner's FASD and presented that information to the jury, he would not have received the death penalty.

As Respondent points out, however, trial counsel's investigator asked about Petitioner's mother's alcohol consumption during her pregnancy and she told the investigator that "she did not drink except socially." [Resp. Exh. 78 at Bates 176; see Resp. Exh. 119 at 37]. Moreover, in preparing their case in mitigation, trial counsel hired Dr. Robert D. Shaffer, a clinical psychologist with specialized training in neuropsychology. As described by the state habeas corpus court and not disputed by Petitioner:

> Dr. Shaffer assembled a complete history of Petitioner, which included Petitioner's educational history, birth history, medical history, early childhood educational experiences and mental health evaluations by speaking to Petitioner's mother and Aunt Lillian; reviewing [the trial mitigation specialist]'s reports and speaking with her about her interviews; and reviewing other information assembled by counsel. Dr. Shaffer focused on head injuries; complications during pregnancy and birth; verbal, physical or sexual abuse; parental alcoholism; and mental and emotional problems. Dr. Shaffer spent fifteen to twenty hours interviewing and testing Petitioner, during which Dr. Schaffer administered numerous psychological and intelligence tests. Dr. Shaffer diagnosed Petitioner with pedophilic disorder and minimal brain dysfunction. Prior to presenting Dr. Shaffer's testimony at Petitioner's resentencing trial, counsel thoroughly reviewed Dr. Shaffer's evaluation, met and spoke with Dr. Shaffer several times and independently researched Dr. Shaffer's diagnosis.

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[Resp. Exh. 119 at 39 (citations to the state court record omitted)].

Clearly, Dr. Shaffer had access to Petitioner's mother, and he asked her about her pregnancy and her consumption of alcohol. To the degree that Petitioner actually suffers from FASD, trial counsel could reasonably rely on his psychological expert to make such a diagnosis, and Petitioner cannot pin a failed or missed psychological diagnosis on his lawyers when he was subject to an intensive evaluation by a competent mental health expert.

In arguing that the state court's conclusions regarding this claim are not entitled to § 2254(d) deference, Petitioner first provides a detailed discussion on the duties of trial counsel in preparing for the sentencing portion of a death penalty trial. He then makes a few criticisms of the state court's analysis, first by arguing that the state habeas court cited the Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003), for the proposition that deficient performance for failure to investigate occurs only when trial counsel fails to investigate "'any of the facts of a petitioner's life and background despite their awareness of petitioner's misery as a youth.'" [Doc. 48 at 67 (quoting Resp. Exh. 119 at 43 (internal quotations, citations, and alterations omitted))]. Petitioner, however, has misrepresented what the state court said. When read in context, it is clear that the state habeas corpus court correctly identified the Strickland standard as it has evolved, and the court merely noted that the trial counsel in Wiggins

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had failed to investigate the petitioner's background. Contrary to Petitioner's argument, the state courts did not suggest "that any investigation at all will suffice to establish that counsel did not perform deficiently," [Doc. 48 at 69], but rather found – and found correctly – that trial counsel's investigation was sufficient to satisfy constitutional requirements.

Petitioner next faults the state habeas corpus court for noting that much of the evidence presented in that action was either "cumulative of the information counsel gathered for Petitioner's resentencing trial," or did not rise "to a level of Constitutional concern." [Id. (citing Resp. Exh. 119 at 44)]. Petitioner asserts that the state court was incorrect because his main contention is that he suffers from FASD, FASD was not presented at the resentencing trial, and that evidence would have likely changed the outcome of his resentencing. As is noted above, however, if Petitioner suffers from FASD, his trial counsel cannot be faulted for failing to discover it because Petitioner's mother did not tell anyone that she drank to excess during her pregnancy until after the trial and because trial counsel reasonably relied on the psychological expert to make that kind of diagnosis.

Contrary to Petitioner's arguments, this is not a case where trial counsel failed to investigate and present key mitigation evidence. The record is clear that trial counsel thoroughly and completely investigated Petitioner's background, and that

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investigation was performed in addition to and on top of two previous thorough investigations that were performed in prior phases of Petitioner's litigation odyssey and from which trial counsel obviously benefitted. Given the fact that three different teams of lawyers investigated Petitioner's background and had Petitioner put through thorough expert mental health evaluations without anyone identifying FASD, Petitioner's sudden claim of a missed FASD diagnosis simply cannot be blamed on trial counsel that represented Petitioner at the resentencing. This Court thus concludes that Petitioner has failed to establish a claim under Strickland that his trial counsel was ineffective for failing to discover and present evidence regarding his purported FASD.

Counsel's Purported Failure to Obtain the Services of an Expert in Sexual Predation

Petitioner next claims that trial counsel was constitutionally ineffective for failing to hire an expert in sexual predation. According to Petitioner, if trial counsel had hired an expert like the one that testified for him in the state habeas corpus proceedings, that expert would have provided evidence regarding Petitioner's pedophilia and why Petitioner became a pedophile that would have been sufficient to convince the jury not to impose a death penalty.

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This Court first notes that it is entirely unconvinced that a thorough explanation of Petitioner's pedophilia would, in the minds of a jury, sufficiently mitigate the fact that Petitioner sexually assaulted two young girls, killing one of them, for his sexual gratification. Moreover, this Court returns to the fact that trial counsel hired a mental health expert upon whom they reasonably relied. This Court has already noted that the fact that Petitioner now has a different expert who might provide more information or different information does not demonstrate ineffectiveness on the part of trial counsel. Davis v. Singletary, 119 F.3d at 1475.

Finally, it is clear from the record that trial counsel was well aware of Petitioner's pedophilia and that they researched the issue thoroughly as found by the state habeas corpus court, [Resp. Exh. 119 at 40], and Petitioner has failed to present evidence or argument sufficient for this Court to conclude that the state habeas corpus court's conclusion that trial counsel was not ineffective is not entitled to deference under § 2254(d).

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Counsel was not Ineffective for Failing to Object to the Prosecution's Closing Argument

Petitioner further claims that his trial counsel was ineffective in failing to object to a statement regarding Petitioner's future dangerousness made by the prosecutor during closing arguments at the resentencing trial. This claim relates to Petitioner's Claim IV, in which Petitioner claims that the statement itself violated his rights. As this Court discusses below, beginning at page 27, the challenged prosecutorial statement did not violate Petitioner's rights. Accordingly, Petitioner cannot demonstrate prejudice relating to his argument that trial counsel should have objected to the statement.

Counsel was not Ineffective for Failing to Hire a Pathologist

On page 78, footnote 33, of his final brief, Petitioner "incorporates by reference pages 64-70 of his amended petition, Doc. No. 13, which sets out in detail his claim that counsel provided ineffective assistance in failing to retain an independent pathologist." According to Petitioner, such an expert could have provided testimony to support Petitioner's contention that Lori Smith's murder was accidental.

At the guilt phase of his first trial, back in 1976, Petitioner testified that he had no intent to kill or even to harm Lori. Rather, he claimed that she "had drowned when

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he accidentally toppled over upon her into a creek bed filled with water." [Doc. 13 at 65]. As discussed above, however, trial counsel did prepare for the testimony of the state's forensic scientist, and elicited the testimony that it would be possible for someone to struggle and drown without another person intentionally holding them down and that the injuries on Lori's body were not inconsistent with Petitioner's accident theory. As such, the testimony of the forensic expert that Petitioner says trial counsel should have hired would have been cumulative of the evidence already before the jury.

Moreover, while Petitioner's accident theory is technically possible, it is not at all plausible. Common sense indicates that a mere dunking is not sufficient to cause someone to drown, there is no indication that Lori suffered a head injury sufficient to cause her to loose consciousness or other injuries that would cause her to be unable to breathe, and, because the water in the creek bed was no more than eight inches deep at the deepest point, [Resp. Exh. 2 at Bates 249], it cannot be said that Lori drowned because she could not swim. This Court also points out that Petitioner had admitted to the police in an earlier statement that, when he and Lori got to the creek, "I just pushed her down into the creek and held her there. Well, she was kicking and trying to get out but I just held her there until she stopped kicking. Well, I figured she was dead . . . ." [Resp. Exh. 2 at Bates 519]. Indeed, numerous aspects of Petitioner's trial

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testimony were simply not believable because they were contrary to clear evidence presented at the trial as well as Petitioner's prior statements. It is thus clear, trial counsel would not have been able to convince the jury that Petitioner had accidentally killed Lori even if they had presented the evidence that Petitioner now claims that they should have, and Petitioner cannot demonstrate prejudice from trial counsel's failure to present the testimony of a forensic scientist.

Claim II - Petitioner has Failed to Demonstrate that he is Mentally Retarded

In his Claim II, Petitioner claims that his poor intellectual functioning renders him ineligible for the death penalty under the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits executing the mentally retarded). In order to demonstrate that he is mentally retarded, Petitioner must show that (1) before the age of eighteen years (2) he suffered from significantly sub-average intellectual functioning which is accompanied by (3) significant limitations in adaptive functioning. See Atkins, 536 U.S. at 309 n.3 (discussing the diagnostic criteria promulgated by the American Association on Mental Retardation and the American Psychiatric Association). Significant sub-average intellectual functioning is loosely defined as an intelligence quotient of 70 or below. Hall v. Florida, 134 S. Ct. 1986, 1994 (2014)

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In denying relief on this claim, the state habeas corpus court noted that the psychologist who examined Petitioner in conjunction with his resentencing trial evaluated Petitioner's intellectual functioning and determined that he was not mentally retarded after scoring a 90 on an IQ test. [Resp. Exh. 119 at 46]. The court further recounted that

> At age 15, Petitioner's IQ was scored at 79, but the evaluator also noted that Petitioner's achievement should be higher than is indicated on these tests. In 1976, Petitioner was evaluated as working within the normal range of intelligence and found to have an IQ of 96 at Central State Hospital. In 1976, Dr. Porter found Petitioner to be of average or slightly below average intelligence. Petitioner obtained a GED while incarcerated and has completed correspondence courses through a junior college in drafting and finishing.

[Id.].

In his final brief, Petitioner discusses his cognitive functioning at length, but he entirely fails to provide any evidence that he suffered any limitations in adaptive functioning, and his evidence that he suffered from intellectual deficits before the age of eighteen is scant at best. Most significantly, even Petitioner's expert in the state habeas corpus proceeding could not diagnose him as mentally retarded based on how he performed in testing. In short, as Petitioner has failed to establish a claim under Atkins that he is retarded, and he has *never* been diagnosed as mentally retarded, this Court cannot grant him relief on this claim.

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Claim III - Petitioner's Claim that the Extended Time that he has Spent on Death Row is Excessive in Violation of the Eighth Amendment

Petitioner was first convicted and sentenced to death in 1976. Obviously, he has been under a death sentence for an extended period of time, and in his Claim III, Petitioner argues that executing him after he has been on death row for so long would constitute an Eighth Amendment violation. Ignoring the question of whether this claim is procedurally amenable to review under § 2254, this Court points out that it is bound by the Eleventh Circuit's decision in Thompson v. Sec'y for Dept. of Corr., 517 F.3d 1279, 1283-84 (11th Cir. 2008), in which that court discussed a similar claim as follows:

> Petitioner can identify no case in which the Supreme Court has held that prolonged confinement on death row violates a prisoner's constitutional rights. The only Supreme Court acts involving this issue are denials of petitions for writs of certiorari. See, e.g., Allen v. Ornoski, 546 U.S. 1136 (2006) (denying certiorari where the petitioner had been on death row for 23 years). The state circuit court, in denying Petitioner's motion for post-conviction relief, relied on Lackey v. Texas, 514 U.S. 1045 (1995), in which the Supreme Court denied a petition for writ of certiorari where the plaintiff alleged that a 17-year confinement on death row was a violation of his Eighth Amendment rights. The district court also noted that Petitioner cannot point to a decision of the Supreme Court that warrants relief.
>
> Especially given the total absence of Supreme Court precedent that a prolonged stay on death row violates the Eighth Amendment guarantee against cruel and unusual punishment, we conclude that execution following a 31-year term of imprisonment is not in itself a constitutional violation. As the Ninth Circuit noted, "Numerous other federal and state

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> courts have rejected Lackey claims." Allen v. Ornoski, 435 F.3d 946, 959 (9th Cir.2006) (citing cases); see, e.g., Chambers v. Bowersox, 157 F.3d 560, 568, 570 (8th Cir.1998) (noting that death row delays do not constitute cruel and unusual punishment because delay results from the "desire of our courts, state and federal, to get it right, to explore ... any argument that might save someone's life"); White v. Johnson, 79 F.3d 432, 439 (5th Cir.1996) ("The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards . . . . White has benefited [sic] from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.").

Id. (alteration in original).

Based on the foregoing, this Court concludes that Petitioner is not entitled to relief based on his Claim III.[1]

Claim IV - Petitioner's Claims Regarding Improper Closing Argument at the Penalty Trial

During his closing statement at Petitioner's resentencing trial, the prosecutor made the following argument:

[1] The undersigned, who received this case this past January, points out that Petitioner's death sentence was overturned in 1990 and the typically lengthy death penalty review process restarted anew after the 1999 resentencing. Accordingly, Petitioner's assertion that he has been languishing under a death sentence for over forty years is inaccurate. He has been subject to the current death sentence for eighteen years.

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> So, the next question is: How dangerous is [Petitioner]? How dangerous is he? I say to you, ladies and gentlemen, he's a chronic criminal who represents an ongoing escalating threat to children, the community, and to society. He's a walking time bomb.
>
> He exploded on April the 23rd, 1976, in Clayton County and he exploded again on May the 4th, 1976, in Cobb County. And he still has those same tendencies, and he'll explode again. He made the deliberate choice to kill Lori. And he did.

[Res. Ex. 33, pp. 97-98].

At the time of Petitioner's resentencing trial, Georgia law stated that "[n]o attorney in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency of any nature may be granted." O.C.G.A. § 17-8-76 (1995). According to Petitioner, the prosecutor's statement violated that statute because the only way that he could pose a threat to children is if he were released. Trial counsel did not object to this statement, and the Georgia Supreme Court deemed the claim procedurally defaulted.

In concluding that the claim brought under the statute was procedurally defaulted, the Georgia Supreme Court further found no cause and prejudice to lift the procedural bar, stating, "[b]ased upon our review of the argument, we find no error that overcomes this procedural default. It was not improper for the prosecutor to argue

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[Petitioner]'s future dangerousness, and this argument was too indirect to constitute a reference to parole, which was never mentioned." Presnell, 551 S.E.2d at 733.

Because the prohibition of mentioning parole and/or clemency during a trial is a matter of state statute and nothing in the Constitution prevents prosecutors from talking about parole, Simmons v. South Carolina, 512 U.S. 154, 168 (1994) ("[N]othing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release."), this Court is bound by the Georgia Supreme Court's interpretation of the statute and of what constitutes (and what does not constitute) a violation of the statute. As the state court concluded that there was no violation of the statute, Petitioner has no basis to complain about the prosecutor's comment under § 2254.

This Court further points out that the United States Supreme Court has held that comments relating to a death penalty defendant's future dangerousness are permissible during a sentencing trial. Simmons v. South Carolina, 512 U.S. 154, 162-63 (1994). As such, this Court finds that the Georgia Supreme Court's conclusion in response to this argument that "[i]t was not improper for the prosecutor to argue [Petitioner]'s future dangerousness," Presnell, 551 S.E.2d at 733 (citation omitted), to be a reasonable application of constitutional law entitled to § 2254(d) deference.

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Claim V - Petitioner's Contention that Georgia's Lethal Injection Protocol will Violate his Eighth Amendment Rights

In his Claim V, Petitioner asserts that Georgia's lethal injection protocols put him at serious risk of being subjected to cruel and unusual punishment in violation of the Eighth Amendment. However, this Court has repeatedly held that claims raising challenges to lethal injection procedures should be brought under 42 U.S.C. § 1983 rather than in a habeas corpus proceeding. See Tompkins v. Secretary, Dept. of Corrections, 557 F.3d 1257, 1261 (11th Cir. 2009). This is especially relevant in light of the well-documented problems that states, including Georgia, have encountered obtaining the drugs necessary for lethal injections and the changes that Georgia has made in its lethal injection protocol. See generally, Bill Rankin, et al., Death Penalty, Atl. J. Const., Feb. 17, 2014 at A1 (discussing the increasing reluctance of drug manufacturers and compounding pharmacies to supply drugs for executions); DeYoung v. Owens, 646 F.3d 1319, 1323 (11th Cir. 2011). It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court. This Court also points out that bringing this claim under § 1983 would likely work to Petitioner's substantial advantage because he will be able to conduct discovery without leave of court, and he will be more likely to have a hearing. Accordingly, Petitioner's challenge to Georgia's

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lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

Claim XLII - Cumulative Error

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

Claims Petitioner Failed to Address in his Final Brief

Claims Where Petitioner Failed to Make any Showing under § 2254(d) and Successive Claims

Petitioner did not discuss the remaining Claims that survive[2] in his final brief, and this Court has carefully reviewed those claims as raised in the amended petition.

[2] Those Claims are: portions of I, VIII through XVII, XX through XXII, XXIV through XXVI, XXXV and XXXVIII through XLI.

The majority of those claims (all except portions of Claim I and Claims XII, XXVI, XXXVIII, XXXIX, XL, and XLI) were raised before the Georgia Supreme Court in Petitioner's direct appeal. The state court reviewed those claims on their merits, and concluded that they were all unavailing. Given the exhaustion requirement mandated by § 2254(b)(1)(A), the § 2254(d) inquiry is the penultimate question in federal habeas corpus jurisprudence when a petitioner challenges a state court conviction. Despite that fact – and the fact that the heavy burden of § 2254(d) rests solely with Petitioner, see Woodford v. Visciotti, 537 U.S. 19, 25 (2002); Schwab v. Crosby, 451 F.3d 1308, 1329 (11th Cir. 2006); Hunter v. Secretary. Dep't of Corr., 395 F.3d 1196, 1203 (11th Cir. 2005) – Petitioner made no argument whatsoever that the state court's determinations were not entitled to deference under § 2254(d). Accordingly, this Court concludes that, with respect to his Claims VIII through XI, XIII through XVII, XX through XXII, XXIV through XXVI, and XXXV, Petitioner has failed to demonstrate that he is entitled to relief.

Petitioner's Claims XXXVIII and XXXIX are challenges to the grand jury that indicted Petitioner in 1976. In his Claims XL and XLI Petitioner claims that he did not attempt to or intend to kill the victim in this case and further alleges that he is actually innocent. All four of these claims relate to his conviction and could have been raised in his first habeas corpus petition in this Court. As such, the claims are successive.

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Pursuant to 28 U.S.C. § 2244(b)(3), before this Court may consider a second or successive § 2254 claim, Petitioner must first move in the Eleventh Circuit for an order authorizing this Court to consider it. Because Petitioner has obtained no such order, this Court may not consider these four claims. See Guenther v. Holt, 173 F.3d 1328, 1330 (11th Cir. 1999) (noting that § 2244(b)(3)(A) is either a jurisdictional bar or a condition precedent requiring appellate certification prior to review in the district court).

Remaining Claims

Remaining Portions of Claim I - Ineffective Assistance

In his amended petition, Petitioner sets forth a laundry list of approximately twenty purported instances of ineffective assistance of both trial and appellate counsel, [Doc. 13 at 75-80], that he did not mention in his final brief. With those claims, Petitioner seemingly accuses his lawyers of mishandling every single aspect of his case. These claims are, however, entirely conclusory in that they fail to provide even the most basic information or argument in support. Petitioner claims, for example, that "[t]rial counsel failed to file numerous pre-trial motions to preserve and protect [Petitioner]'s rights.," [id. at 77], but he makes no mention of what motions trial counsel should have filed, why counsel was unreasonable for failing to file them, and

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how that failure caused Petitioner prejudice. Accordingly, this Court concludes that those remaining portions of Claim I that were not discussed above do not entitle Petitioner to relief.

Claim XII - That Petitioner was Incompetent to Stand Trial

In his Claim XII, Petitioner claims that he was not mentally competent to stand trial. Although the state habeas corpus court concluded that this claim was procedurally defaulted, [Resp. Exh. 119 at 21], this Court held in the order of March 25, 2013, [Doc. 28 at 19], that a claim that a criminal defendant was tried while incompetent cannot be procedurally defaulted under Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). Accordingly, Petitioner is entitled to a merits review of the claim.

However, other than making the statement in his amended petition that Petitioner "suffered from a constellation of mental illnesses that left him unable 'to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subject to trial,'" [Doc. 13 at 141 quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)], Petitioner points to no evidence that might tend to support his contention that he was so incompetent at the time of his resentencing trial that he did not understand the nature of the proceedings

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against him or that he could not communicate with and assist his counsel. Accordingly, this Court must conclude that Petitioner has failed to establish an entitlement to relief based on his claim that he was too mentally incompetent to be tried.

Claim XXVI - That the State Court Improperly Applied Proportionality Review

In his Claim XXVI, Petitioner asserts that his rights were violated when the Georgia Supreme Court failed to properly conduct the proportionality review required by state law. In affirming Petitioner's sentence after his resentencing trial, the Georgia Supreme Court held that "the death sentence in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant." Presnell, 551 S.E.2d at 734 (listing cases that were comparable to Petitioner's). The court cited to O.C.G.A. § 17–10–35(c)(3) which requires the court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In approving Georgia's death penalty scheme, the Supreme Court cited favorably to the proportionality review requirement as a "provision to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976), and noted that "[i]t is

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apparent that the Supreme Court of Georgia has taken its [proportionality] review responsibilities seriously," id. at 205. The Court also noted that

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id. at 206.

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

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constitutional law that where, as here, state law requires [proportionality] review, courts must make an explicit, detailed account of their comparisons.").

In response to Petitioner's argument, the fact that the Georgia Supreme Court routinely cites to overturned cases in its death penalty proportionality review has been reported previously. Bill Rankin, et al., *High Court Botched Death Reviews*, ATL. J. CONST., Sept. 26, 2007 at A1. In rejecting a challenge by a capital defendant regarding the fact that some of the cases used in his proportionality review had been later reversed, the Georgia Supreme Court stressed that, with proportionality review, it is the "reaction of the sentencer to the evidence before it which concerns this court and which defines the limits which sentencers in past cases have tolerated." Davis v. Turpin, 539 S.E.2d 129, 131 (Ga. 2000). In other words, the proportionality review focuses on what is acceptable to jurors who impose the death penalty, and when "a reaction is substantially out of line with reactions of prior [juries], then this court must set aside the death penalty as excessive." Id. Accordingly, the fact that a death penalty is later overturned does not invalidate a proportionality review that cited to that death penalty case because the Georgia Supreme Court is not concerned with what happened after a person is initially sentenced by a jury. Id.

Conclusion

Having considered all of Petitioner's claims, this Court concludes that Petitioner has failed to establish any entitlement to relief under 28 U.S.C. § 2254. As such, his

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petition for a writ of habeas corpus is **DENIED** (except that Petitioner's Claim V, regarding Georgia's lethal injection protocol, is **DENIED** without prejudice to his raising the claim in a proceeding under 42 U.S.C. § 1983). This matter is hereby **DISMISSED**, and the Clerk is **DIRECTED** to **CLOSE** this action.

IT IS SO ORDERED, this 22nd day of May, 2017.

WILLIS B. HUNT, JR.
Judge, U. S. District Court

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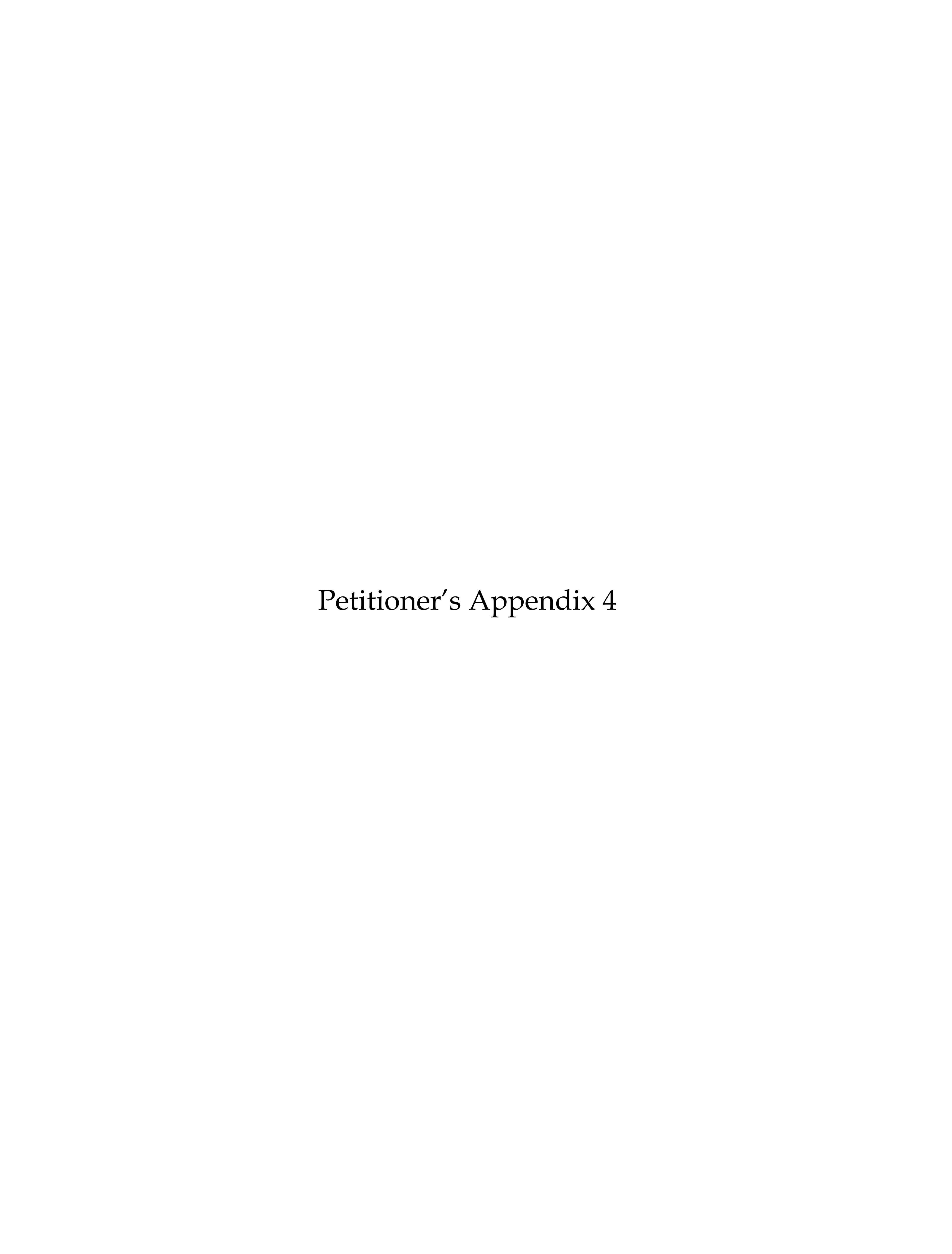

Petitioner's Appendix 4

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

VIRGIL DELANO PRESNELL Petitioner, v. DERRICK SCHOFIELD, Warden Georgia Diagnostic and Classification Prison, Respondent.	:	CASE NO.: 02-V-768 PETITION FOR WRIT OF HABEAS CORPUS

FINAL ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PURSUANT TO O.C.G.A. § 9-14-49

COMES NOW before the court Petitioner's Amended Petition for Writ of Habeas Corpus as to his conviction and sentence in the Superior Court of Cobb County on indictment number 9-76-0603-28. Having considered Petitioner's original and Amended Petition for Writ of Habeas Corpus (the "Amended Petition"), the Respondent's Answer and Amended Answer, relevant portions of the appellate record, evidence admitted at the hearing on this matter on June 2, 2004, the arguments of counsel and the post-hearing briefs, this Court makes the following findings of fact and conclusions of law as required by O.C.G.A. § 9-14-49 and denies the petition for writ of habeas corpus as to the conviction and sentence.

RESPONDENTS EXHIBIT NO 119
CASE NO. 1:07-CV-1267

Filed 12/30/2005 at 11:10 a.M.
Beth S. [signature]
Chief Deputy Clerk, Butts Superior Court

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I. PROCEDURAL HISTORY

A. Trial Proceedings in Cobb County Superior Court

Petitioner was convicted following a jury trial in 1976 of the kidnapping and murder of eight-year-old Lori Ann Smith and the kidnapping with bodily injury and forcible rape of ten-year-old Andrea Furlong. The jury sentenced Petitioner to death based on the following aggravating circumstances: that the murder of Lori Ann Smith was committed during the course of conduct during which the kidnapping with bodily injury of Andrea Furlong occurred; that the kidnapping with bodily injury of Andrea Furlong was committed during the course of conduct in which the rape of Andrea Furlong occurred; and that the rape of Andrea Furlong was committed during the course of conduct during which the murder of Lori Ann Smith occurred.

The Georgia Supreme Court summarized the **facts at trial** as follows:

> 1. The evidence adduced at trial authorized the jury to find that on April 23, 1976, Presnell attempted to abduct a ten-year-old girl in Clayton County as she was walking home from school on a wooded trail. Although he grabbed her and threatened her with a knife, the girl managed to break free and escape. On May 3, 1976, Presnell staked out an elementary school in Cobb County and observed a ten-year-old girl walking home on a wooded trail. He returned the following day and waited on the trail. In his car, he had a rug and a jar of lubricant. When the ten-year-old girl came walking down the trail with her eight-year-old friend, Lori Ann Smith, Presnell abducted both girls. He taped their mouths shut and threatened to kill them if they did not cooperate; he also said he had a gun. They got into Presnell's blue Plymouth Duster. While Presnell was driving, he forced the older girl to orally sodomize him and inserted his finger into her vagina. They drove to a secluded area and Presnell walked the children into the woods. He carried the rug and the jar of lubricant. He made both girls undress and he raped the older girl on the rug. Her vagina was torn during the rape and began bleeding. Presnell then said that he was going to take Lori Ann back to his car and that the older girl should wait for him. On the way back to the car, Lori Ann tried to run away, but Presnell caught her and forced her face underwater in a creek, drowning her. The medical examiner testified that there was water, sand

> and plant matter in her lungs and stomach and that it would have taken one to several minutes for her to die. She had bruises on her neck and a bruise on her back from where Presnell apparently placed his knee. Presnell returned to the older girl and again forced her to orally sodomize him. He then locked her in his car trunk and began driving, but a tire went flat so he dropped her off in another wooded area after forcing her to commit oral sodomy again. Although Presnell told her he would return, the older girl heard the sound of a nearby gas station and walked there. She later gave police a description of Presnell and his blue Duster and stated that his tire was flat. Shortly thereafter the police spotted Presnell changing a tire on his blue Duster at his apartment complex not far from where he dropped off the older girl. Presnell initially denied everything but later admitted that he knew the location of the missing girl and led the police to Lori Ann's body. He also confessed. A search of Presnell's bedroom uncovered a handgun and child pornography depicting young girls.

Presnell v. State, 274 Ga. 246, 247-248, 551 S.E.2d 723, 728 (2001).

B. Appeal to the Georgia Supreme Court

On direct appeal, the Georgia Supreme Court vacated Petitioner's conviction for forcible rape because the trial court had charged the jury on both statutory rape and forcible rape and the jury's verdict did not specify between the two. ***Presnell v. State***, 241 Ga. 49, 52, 243 S.E.2d 496 (1977). The Georgia Supreme Court directed the trial court to sentence Petitioner for the offense of statutory rape. ***Id.*** The Georgia Supreme Court went on to vacate Petitioner's death sentences for the rape and kidnapping with bodily injury because the forcible rape constituted the predicate bodily injury. Finally, the Georgia Supreme Court affirmed Petitioner's death sentence for the murder of Lori Ann Smith with the statutory aggravating factor of kidnapping with bodily injury, as well as Petitioner's convictions for kidnapping, murder and kidnapping with bodily injury. ***Presnell v. State***, 241 Ga. 49 at 63-64.

C. Appeal to the United States Supreme Court

The United States Supreme Court granted certiorari review of Petitioner's challenge to

his conviction for kidnapping with bodily injury and to the imposition of the death sentence. ***Presnell v. Georgia***, 439 U.S. 14, 17 (1978). The United States Supreme Court reversed Petitioner's death sentence for the murder of Lori Ann Smith. ***Presnell v. Georgia***, 439 U.S. at 16-17. The United States Supreme Court denied Petitioner's petition for certiorari in so far as it concerned Petitioner's convictions for murder, kidnapping and statutory rape. ***Presnell v. Georgia***, 439 U.S. at 17.

D. Remand Proceedings in the Georgia Supreme Court

On remand, the Georgia Supreme Court affirmed Petitioner's convictions for kidnapping with bodily injury, aggravated sodomy, and simple kidnapping. ***Presnell v. State***, 243 Ga. 131, 133, 252 S.E.2d 625 (1979). The Court also affirmed Petitioner's murder conviction and death sentence, stating that Petitioner's death sentence for murder was supported by the aggravating circumstance of kidnapping with bodily injury, wherein the aggravated sodomy committed against Andrea Furlong constituted the requisite bodily injury. Id.

E. Petition for Writ of Certiorari in the United States Supreme Court

Thereafter, the United States Supreme Court denied Petitioner's petition for writ of certiorari. ***Presnell v. Georgia***, 444 U.S. 885 (1979).

F. First State Habeas Corpus Petition

On January 8, 1980, Petitioner filed his first state habeas corpus petition in Butts County, Georgia. The petition was denied after an evidentiary hearing. On October 6, 1980, the United States Supreme Court denied Petitioner's petition for writ of certiorari. ***Presnell v. Zant***, 449 U.S. 891 (1980).

G. First Federal Habeas Corpus Petition

Petitioner next filed a habeas corpus petition with unexhausted claims in the United States District Court for the Northern District of Georgia, which petition was dismissed without prejudice.

H. Second State Habeas Corpus Petition

Petitioner next filed a second state habeas corpus petition, which was dismissed as successive. The Georgia Supreme Court denied Petitioner's application of probable cause for appeal on November 16, 1984.

I. Second Federal Habeas Corpus Petition

Thereafter, the United States District Court for the Northern District of Georgia granted Petitioner's application for Federal habeas corpus relief as to Petitioner's death sentence, citing an improper closing argument by the prosecutor in the sentencing phase of the trial, but affirmed Petitioner's convictions. The Eleventh Circuit Court of Appeals upheld the district court's vacation of Petitioner's death sentence. ***Presnell v. Zant***, 959 F.2d 1524 (11th Cir. 1992).

J. Re-sentencing Trial in Cobb County Superior Court

After Petitioner's resentencing trial in the Superior Court of Cobb County on March 16, 1999, a jury found the following statutory aggravating circumstances and sentenced Petitioner to death: (1) The murder of Lori Ann Smith was committed by the defendant while the defendant was engaged in the commission of another capital felony – the aggravated sodomy of Andrea Furlong; (2) The murder of Lori Ann Smith was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of the mind.

K. Appeal to the Georgia Supreme Court from the Petitioner's Re-sentencing

The Georgia Supreme Court affirmed Petitioner's resentencing on July 16, 2001. ***Presnell v. State***, 274 Ga. 246, 551 S.E.2d 723 (2001).

L. Petition for Writ of Certiorari in the United States Supreme Court

Petitioner's petition for writ of certiorari was denied May 13, 2002 by the United States Supreme Court. ***Presnell v. Georgia***, 535 U.S. 1059 (2002).

M. The Instant State Habeas Corpus Petition

On October 16, 2002, Petitioner filed the instant state habeas corpus petition. The Warden/Respondent filed an Answer joining issue with Petitioner's contentions, and this matter came before the Court for an evidentiary hearing on June 2, 2004, at which Manubir S. Arora represented Petitioner and Assistant Attorney General Beth A. Burton represented the Warden/Respondent.

II. SUMMARY OF RULINGS ON PETITIONER'S CLAIMS FOR HABEAS CORPUS RELIEF

Petitioner's Amended Petition enumerates forty-three (43) grounds for relief. As is stated in further detail below, this Court finds: (1) some grounds asserted by Petitioner are procedurally barred due to the fact that they were litigated on direct appeal; (2) some grounds are procedurally defaulted, as Petitioner failed to timely raise the alleged errors and failed to satisfy the cause and prejudice test or the miscarriage of justice exception; (3) some grounds are successive, as they were raised at Petitioner's prior state habeas corpus proceeding; (4) some grounds are non-

cognizable; and (5) some grounds are neither procedurally barred nor procedurally defaulted and are therefore properly before this Court for habeas review. Each ground asserted is listed separately, and is followed by this Court's finding as to that ground.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Claims That Are Barred

Many of Petitioner's grounds for relief in the instant action were rejected by the Georgia Supreme Court on direct appeal. Issues raised and litigated on direct appeal will not be reviewed in a habeas corpus proceeding. ***Elrod v. Ault***, 231 Ga. 750, 204 S.E.2d 176 (1974); ***Gunter v. Hickman***, 256 Ga. 315, 348 S.E.2d 644 (1986); ***Roulain v. Martin***, 266 Ga. 353, 466 S.E.2d 837 (1996).

This Court finds that the following claims raised in the instant petition were litigated adversely to Petitioner on direct appeal in either *Presnell v. State*, 241 Ga. 49, 243 S.E.2d. 496 (1990), ***Presnell v. State***, 243 Ga. 131, 252 S.E.2d. 625 (1990), **or following the re-sentencing trial in *Presnell v. State***, 274 Ga. 246, 551 S.E.2d. 723 (2001), **and may not be raised in this habeas corpus proceeding:**

1. Ground 12 alleges "The Trial Court Erroneously Required Jurors to Take an Oath By Swearing on the Bible and Committing to a True Verdict Pursuant to the Dictates of God." Petitioner claims that he was denied his right to effective assistance of counsel, due process, a fair trial, equal protection, and a reliable sentencing proceeding, by the trial court's having required all jurors to take an oath with their hand on the Bible which effectively forced jurors to

follow God's law rather than the law of the State of Georgia,

Finding As To Ground 12: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 252.

2. Ground 15 alleges "The Petitioner's Sentence of Death is Disproportionate When Compared to Others Who Have Committed Similar Crimes." Cases similar to Petitioner's in all respects, including the age, prior record, life and character of the accused, have resulted in lesser punishment than death.

Finding As To Ground 15: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 256-257. See also ***Presnell v. State***, 241Ga. at 64.

3. Ground 17 alleges "The Trial Court Erroneously Refused to Grant a Mistrial When a Member of the Public Tampered with the Jury By Yelling "Fry Him" in the Presence of the Entire Jury." But for the court's refusal to grant a mistrial, the outcome would have been different at all stages in violation of Petitioner's rights.

Finding As To Ground 17: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 254-255.

4. Ground 19 alleges "The Introduction of Prejudicial and Inflammatory Evidence at Trial Violated Petitioner's Rights to a Fair Trial." The trial court erred in admitting bloody and prejudicial photographs taken of the crime scene and of the victim, including during and post-autopsy photographs. None of these photographs–deliberately chosen by the prosecutor to appeal to the passions and prejudice of the jury–served to illuminate the jury's understanding of the victim's death.

Finding As To Ground 19: This claim was raised and decided adversely to Petitioner on

direct appeal. ***Presnell v. State***, 274 Ga. at 253-254.

5. Ground 20 alleges "The Application of Georgia Aggravating Circumstances of O.C.G.A. § 17-10-30(b)(2) and (b)(7) Was Unconstitutionally Vague and Arbitrary, and In this Case Violated Double Jeopardy, Res Judicata, and Law of the Case." The prosecutor's reliance upon the (b)(7) aggravator in particular violated Petitioner's rights not to be twice put in jeopardy, as the Georgia Supreme Court had previously held that such factor was not applicable in this case due to the evidence. The trial court's refusal to preclude such aggravator from use in the case thus violated principles of res judicata and law of the case as well.

Finding As To Ground 20: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 251-252.

6. Ground 22 alleges "By Not Removing Jurors for Cause or Bias, Either Because They Were Clearly Biased Against Petitioner Directly, or Because They Were Incapable of Giving Proper Consideration to a Sentence Other Than Death and/or to Mitigating Evidence, the Trial Judge Violated Petitioner's Right to a Fair Trial." The trial court refused to strike for cause many jurors who were clearly biased against Petitioner, and/or were incapable to giving proper consideration to mitigating evidence and/or to a sentence less than death. Petitioner's rights were violated when several venire members were not dismissed for cause or bias even though they showed a clear bias against Petitioner.

Finding As To Ground 22: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 250-251.

7. A portion of Ground 23 alleges "The Cobb County jury commission that selected the grand jurors in the petitioner's case was unconstitutionally composed."[1]

Finding As To Ground 23: Those portions of Ground 23 dealing with the composition of the Cobb County jury commission were raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 248-50.

8. Ground 24 alleges "The Instructions Given to the Jury Failed to Channel Their Deliberations." Despite various requests to charge on specific examples of applicable mitigating circumstances, the trial court simply gave a general charge that failed to inform the jury of the true nature of evidence in mitigation. Because the jurors did not understand the meaning of the term "mitigating," the trial court's general charge was constitutionally insufficient to inform the jury of its function in considering mitigating and aggravating evidence.

Finding As To Ground 24: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 256.

9. Ground 25 alleges "The Trial Court Failed to Instruct the Jury That Unanimity Was Not Required to Impose a Life Sentence." Although the jury could have reached a unanimous verdict of life imprisonment, unanimity was not required for the jury to decide on a life sentence. If even one juror had decided against death and in favor of life imprisonment, then the sentencing verdict would have been life imprisonment. In its instructions to the jury, the trial court incorrectly instructed the jury that unanimity was required both for a decision to impose the death sentence and for a decision to impose a sentence of life imprisonment. The penalty phase charge of the

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1 A portion of Ground 23 is also found to be successive. See page 31, *infra*.

court limited the jury's consideration of mitigating evidence to only those they found unanimously.

Finding As To Ground 25: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 256.

10. Ground 26 alleges "The Petitioner Was Denied His Right to a Fair and Reliable Proceeding When the Trial Court Refused to Give a Jury Charge Regarding the Meaning of a Life Sentence and Allowed the Jury to Speculate Arbitrarily about Parole." Given the trial court's failure to give a jury charge on the meaning of a life sentence, even after the jury asked a question regarding the issue of parole eligibility, the jury was allowed to unreliably and inaccurately speculate that the Petitioner would be released on parole should they impose a life sentence. Had they been told the actual truth about parole eligibility in Georgia for the crime for which he was convicted, the jury would never have voted for a death sentence. The Petitioner was not allowed to challenge the mis-perceptions of the jurors that he would be paroled within a short period of time if he was sentenced to life.

Finding As To Ground 26: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 256.

11. Ground 32 alleges "The Trial Court Erroneously Permitted the Prosecution to Rely Upon Both Unadjudicated Bad Act Evidence, as Well the Indictments and Witness Testimony from Prior Adjudicated Offenses." The State introduced evidence of Petitioner's criminal history, including unadjudicated crimes allegedly committed by Petitioner, in support of its aggravation case without proving beyond a reasonable doubt that Petitioner committed those crimes. It also wrongfully utilized bad indictments as substantive evidence, as well as evidence from witnesses

when properly certified copies of criminal adjudications could not be located.

Finding As To Ground 32: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 253.

12. Ground 34 alleges "Trial Court Erroneously Permitted the State to Introduce Into Evidence a Copy of a Book Entitled Radiant Identities, Denying to the Petitioner his Right to a Fair Trial." The Petitioner was denied his right to the effective assistance of counsel, due process, a fair trial, equal protection, and a reliable sentencing proceeding, by the trial court's admission into evidence of the book Radiant Identities.

Finding As To Ground 34: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 253.

13. Ground 35 alleges, "The Trial Court's Instruction on Reasonable Doubt Violated the Petitioner's Rights." At the re-sentencing trial, the court instructed the jury on reasonable doubt. As part of the reasonable doubt charge, the court erroneously instructed the jury all that was required was proof to a moral and reasonable certainty.

Finding As To Ground 35: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 256.

14. Ground 36 alleges "The Trial Court Erroneously Refused to Suppress Evidence Seized From the Petitioner's Car and Home Shortly After His Arrest." The trial court erroneously refused to suppress evidence seized from the Petitioner's car the day after his arrest, despite the fact that the magistrate issuing the search warrant had been paid to issue the warrant, which denied him his right to the effective assistance of counsel, due process, a fair trial, equal protection, and a reliable sentencing proceeding.

Finding As To Ground 36: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 252.

15. Ground 40 alleges "The Trial Court Erroneously Permitted the Prosecution to Introduce Substantial Inflammatory and Prejudicial So-Called "Victim Impact" Testimony." The prosecution's reliance upon evidence through repeated references to characteristics of the victims in opening and closing arguments violated the Petitioner's rights.

Finding As To Ground 40: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 254.

16. Ground 41 alleges "The Trial Court's Restrictions on Voir Dire Deprived the Petitioner of His Rights to a Fair and Impartial Jury, Effective Assistance of Counsel, Due Process, and Equal Protection." Prior to voir dire, the trial court struck a number of potential questions proposed by defense counsel. The questions struck by the court were appropriate and unobjectionable. The court's rulings refusing to allow defense counsel the opportunity to ask such questions violated the Petitioner's rights.

Finding As To Ground 41: This claim was raised and decided adversely to Petitioner on direct appeal. ***Presnell v. State***, 274 Ga. at 251.

17. Ground 42 alleges "The Trial Court Violated the Petitioner's Rights by Excusing for Cause Jurors Whose Views on the Death Penalty Were Not Extreme Enough to Warrant Exclusion." The trial court's ruling on voir dire with respect to excusing or not excusing potential jurors for cause based on their views on the death penalty denied the Petitioner his rights.

Finding As To Ground 42: This claim was raised and decided adversely to Petitioner on

direct appeal. ***Presnell v. State***, 274 Ga. at 248-251.

Summary of Findings - Claims That Are Barred

This Court is bound by the decisions of the Georgia Supreme Court as to the claims represented by **Grounds 12, 15, 17, 19, 20, 22, 23, 24, 25, 26, 32, 34, 35, 36, 40, 41, and 42,** and habeas corpus relief is denied as to each of those claims.

B. Claims That Are Procedurally Defaulted

A number of Petitioner's grounds are procedurally barred from this Court's review. Claims Petitioner failed to raise on direct appeal are procedurally defaulted absent a showing of cause and actual prejudice, except where their review is necessary to avoid a miscarriage of justice and substantial denial of constitutional rights. *See* ***Black v. Hardin***, 255 Ga. 239, 336 S.E.2d 754 (1985); ***Valenzuela v. Newsome***, 253 Ga. 793, 325 S.E.2d 370 (1985); O.C.G.A. § 9-14-48 (d); ***White v. Kelso***, 261 Ga. 32, 401 S.E.2d 733 (1991). Petitioner's failure to enumerate alleged errors at trial or on appeal operates as a waiver and bars consideration of those errors in habeas corpus proceedings. *See* ***Earp v. Angel***, 257 Ga. 333, 357 S.E.2d 596 (1987); ***Black v. Hardin***, 255 Ga. 239, 336 S.E.2d 754 (1985); ***Valenzuela v. Newsome***, 253 Ga. 793, 325 S.E.2d 370 (1985). *See also* ***Zant v. Gaddis***, 247 Ga. 717, 279 S.E.2d 219 (1981) (holding that ineffective assistance of counsel can constitute cause under O.C.G.A. § 9-14-48(d)); ***Turpin v. Todd***, 268 Ga. 820, 493 S.E.2d 900 (1997)(A procedural bar to habeas corpus review may be overcome if Petitioner shows adequate cause for failing to raise an issue at trial or on direct appeal and actual prejudice resulting from the alleged error or errors. A habeas petitioner who meets both prongs of the standard enunciated in ***Strickland v. Washington***, 466 U.S. 668 (1984),

has established cause and prejudice sufficient to overcome the procedural bar of O.C.G.A. § 9-14-48(d)).

Upon review of Petitioner's claims, this Court finds that Petitioner failed to raise **Grounds 1 [2], 2, 3, 7, 8, 9, 11, 13, 16, 18, 20, 21, 22, 23, 27, 28 [3], 30, 31, 33 [4], 37, 38, and 39** on appeal, and those claims are procedurally barred from consideration in this habeas corpus proceeding. This Court further finds that Petitioner has failed to demonstrate the necessary cause and prejudice sufficient to overcome the procedural bar. This Court also finds that Petitioner's representation by trial counsel Mitchell D. Durham and Stephen J. Schuster and appellate counsel John D. Greco was constitutionally effective.

This Court concludes that the following grounds for habeas relief, which were not raised by Petitioner at trial or on direct appeal, have been procedurally defaulted, and that this Court is barred from considering any of these claims on their merits due to the fact that Petitioner has failed to demonstrate cause and prejudice sufficient to excuse his failure to raise these grounds:

1. Ground 1 alleges "The Petitioner Cannot Be Subjected to Lethal Injection Because To Do So Would Be Cruel and Unusual Punishment, in Violation of Article I of the Constitution of the

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[2] O.C.G.A. § 17-10-38, which became effective May 1, 2000, declared lethal injection the method of execution for persons sentenced to death in capital cases before May 1, 2000. The brief in the Petitioner's direct appeal from his 1999 resentencing was filed February 12, 2001, thus the Petitioner could have raised this issue on direct appeal.

[3] Execution of the mentally ill is not unconstitutional. *See* ***Colwell v. State***, 273 Ga. 634, 544 S.E.2d 120 (2001).

[4] *See* ***Presnell***, 274 Ga. at 255 (the Georgia Supreme Court held that defense counsel's failure to object to any portion of the prosecutor's closing argument as improper waived any claims as to improper arguments by the prosecutor because Presnell failed to show a reasonable probability that the improper arguments changed the result of Presnell's trial.)"

State of Georgia and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." The Petitioner cannot be subjected to lethal injection because the process in Georgia is cruel and unusual and violates basic notions of decency, fairness, and humanity.

Finding As To Ground 1: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

2. Ground 2 alleges "To Subject the Petitioner to Death by Lethal Injection Would Subject the Petitioner to Punishment under a Law Which is Ex Post Facto. The Petitioner's death sentence was imposed pursuant to O.C.G.A. § 17-10-38(a) (1985 amend.) in effect at the time of the Petitioner's crimes, trial, and sentencing, providing for death by electrocution for one convicted of a capital crime and so sentenced by a jury. That sentence cannot lawfully or constitutionally be carried out by virtue of the Georgia Supreme Court's holding that execution by electrocution is in violation of the cruel and unusual punishment provision of the Georgia Constitution. O.C.G.A. § 17-10-38 was amended in 2000 to substitute execution by lethal injection for execution by electrocution. To subject the Petitioner to execution by lethal injection would be an unconstitutional application of an *ex post facto* law.

Finding As To Ground 2: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

3. Ground 3 alleges "The Petitioner Was Sentenced to Death under a Statute Which Has Now Been Declared Unconstitutional; Hence, His Death Sentence is Null and Void and May Not Be Carried Out Without Violating His Constitutional and Legal Rights." The death sentencing

statute under which the Petitioner was sentenced to death, O.C.G.A. § 17-10-38, requiring that a death sentence be carried out by means of electrocution, was declared unconstitutional by the Georgia Supreme Court. Because the jury that sentenced the Petitioner to death, and the judge that imposed the sentence, sentenced him to death by electrocution, which sentence has now been declared unconstitutional, this sentence cannot now be carried out consistent with the state and federal constitutions.

Finding As To Ground 3: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

4. Ground 7 alleges "Petitioner Was Denied a Speedy Trial. The indictment in this case was returned by the Cobb County Grand Jury in May, 1976." The Petitioner was originally tried and convicted on said indictment later that year. In 1991, pursuant to habeas corpus proceedings, the United States District Court for the Northern District of Georgia entered an Order granting the Petitioner's habeas corpus application unless the State of Georgia re-sentenced the Petitioner within 120 days. The District Court based its ruling on an erroneous prosecutorial argument at the sentencing phase of trial, and the U.S. Court of Appeals affirmed the judgment. The Petitioner did not receive a second sentencing for more than 8 years, until February, 1999.

Finding As To Ground 7: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

5. Ground 8 alleges "The Petitioner's Right to Be Free from Double Jeopardy Was Violated by the Re-sentencing Trial." The Petitioner has been forced to undergo multiple trials relating to

the same offense and has thereby been severely prejudiced.

Finding As To Ground 8: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

6. Ground 9 alleges "The Prosecution Violated Double Jeopardy and Petitioner's Rights to Due Process, a Fair Trial, and a Reliable Sentencing Determination, by Introducing Additional Statutory and Non-statutory Aggravating Circumstances at Petitioner's Re-sentencing." At the Petitioner's original sentencing, the State listed and offered proof as to certain statutory and non-statutory aggravating circumstances in support of its request that the death penalty be imposed. On appeal, one statutory aggravating factor was found invalid as inapplicable under the facts of the Petitioner's case. At Petitioner's re-sentencing, the prosecution nevertheless listed and offered proof as to the very statutory aggravating circumstance found inapplicable by the Georgia Supreme Court, as well as non-statutory aggravating circumstances not presented at Petitioner's first trial, in support of its request that the death penalty be imposed, thereby employing aggravating circumstances that were not listed and proved during the original sentencing.

Finding As To Ground 9: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

7. Ground 11 alleges "The State Used Peremptory Challenges in a Discriminatory Manner. The prosecutor impermissibly struck a disproportionate number of jurors based on racial and/or gender bias."

Finding As To Ground 11: This claim is procedurally defaulted, Petitioner having failed

to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

8. Ground 13 alleges "The Prosecutor Suppressed Material Exculpatory Evidence." The prosecution failed to disclose material and favorable evidence to Petitioner and his counsel.

Finding As To Ground 13: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

9. Ground 16 alleges "The State Destroyed Potentially Exculpatory Evidence. The State failed to preserve critical physical evidence that would have played a significant role in the Petitioner's defense, as it "possessed an exculpatory value that was apparent before the evidence was destroyed, and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Finding As To Ground 16: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

10. Ground 18 alleges "The Trial Court Failed to Provide the Petitioner with the Necessary Assistance of Competent and Independent Experts." The Petitioner was not provided with the necessary assistance of competent, independent, experts at his trial, which not only prejudiced his defense, but also his attorneys' abilities to develop and present his defense effectively at all phases of trial.

Finding As To Ground 18: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test

or the miscarriage of justice exception.

11. Ground 20 alleges "The Application of Georgia Aggravating Circumstances of O.C.G.A. § 17-10-30 (b)(2) and (B)(7) Was Unconstitutionally Vague and Arbitrary, and In this Case Violated Double Jeopardy, Res Judicata, and Law of the Case." The prosecutor's reliance upon the (b)(7) in particular violated Petitioner's rights not to be twice put in jeopardy, as the Georgia Supreme Court had previously held that such factor was not applicable in this case due to the evidence. The trial court's refusal to preclude such aggravator from use in the case thus violated principles of res judicata and law of the case as well.

Finding As To Ground 20: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

12. Ground 21 alleges "The Petitioner Was Tried While Incompetent." At the time of both the original trial and the re-sentencing trial, the Petitioner suffered from a constellation of mental illnesses that prevented him from "rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands."

Finding As To Ground 21: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

13. Ground 22 alleges "By Not Removing Jurors for Cause or Bias, Either Because They Were Clearly Biased Against Petitioner Directly, or Because They Were Incapable of Giving Proper Consideration to a Sentence Other Than Death and/or to Mitigating Evidence, the Trial Judge Violated Petitioner's Right to a Fair Trial." The trial court refused to strike for cause many

jurors who were clearly biased against Petitioner, and/or were incapable to giving proper consideration to mitigating evidence and/or to a sentence less than death. The Petitioner's rights were violated when several venire members were not dismissed for cause or bias even though they showed a clear bias against the Petitioner.

Finding As To Ground 22: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

14. Ground 23 alleges "The Jury Pools from Which Petitioner's Grand, Original Traverse, and Re-sentencing Traverse Juries Were Drawn Were Composed in Violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Analogous Provisions of the Georgia Constitution."

Finding As To Ground 23: A portion of Ground 23 is procedurally barred. *See* page 11, *infra*. The remaining portions of Ground 23 are procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

15. Ground 27 alleges "The Jury Committed Misconduct Throughout All Phases of the Trial, from Jury Selection Itself Through Trial and During and after Deliberations, and was Infected with Bias." Jurors and/or venirepersons and/or alternate jurors were tainted and/or affected by and/or relied upon outside, extraneous and/or unlawful influences, facts, factors, sources of fact and/or law, persons, officials, etc., throughout the jury selection process, and continuing through all phases of the pre-trial, trial, jury deliberations at trial, and even post-trial proceedings, both inside and outside the courthouse.

Finding As To Ground 27: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

16. Ground 28 alleges "Because the Petitioner Suffers From a Combination of Mental Illness and Disabilities, Including Severe Brain Damage, His Execution Would Violate "His Rights". The Petitioner's disabilities and mental illnesses are the functional, moral, legal and constitutional equivalent of mental retardation, and as such his execution would violate his rights."

Finding As To Ground 28: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

17. Ground 30 alleges "The State Presented Testimony it Knew or Reasonably Should Have Known Was Perjured. During the Petitioner's capital trial and sentencing, the prosecution presented testimony it knew or reasonably should have known was perjured."

Finding As To Ground 30: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

18. Ground 31 alleges "The Petitioner Was Denied Due Process and the Right to Be Present at All Proceedings. The Petitioner was either constructively or actually absent from proceedings at which critical issues were determined and his absence was not after a knowing, intelligent, and voluntary waiver of his constitutional rights."

Finding As To Ground 31: This claim is procedurally defaulted, Petitioner having failed

to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

19. Ground 33 alleges "The Prosecution Engaged in Repeated Misconduct Throughout All Phases of the Pre-trial, Trial, and Post-trial Proceedings." The prosecution and/or its agents, officials, assigns, employees, including but not limited to all personnel, both current and those personnel employed as of April, 1976, and at any intervening time period, in the Office of the District Attorney of Cobb County, Georgia, the Cobb County Police Department, the Cobb County Sheriff's Department, all other police departments and/or sheriffs departments in the greater Atlanta metropolitan area, the Clayton County District Attorney, the Clayton County Sheriff and Police Departments, the Georgia Bureau of Investigation, the Cobb County Medical Examiner's Office, failed to disclose relevant, material exculpatory files, materials, information, documents, and/or evidence, during all phases of the pre-trial, trial, and appellate proceedings, and continues at this time to fail to disclose all such files, materials, information, documents, and/or evidence.

Finding As To Ground 33: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

20. Ground 37 alleges "The Application of the Unified Appeal Against the Petitioner Deprived Him of His Rights. The Unified Appeal Procedure set forth at O.C.G.A. § 17-10-36 ("Unified Appeal") was applied to Petitioner's 1999 re-sentencing trial over Petitioner's objection. On its face and as applied to the Petitioner's case, the Unified Appeal denied the Petitioner's rights."

Finding As To Ground 37: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

21. Ground 38 alleges "The Lack of a Uniform Standard for Seeking the Death Penalty Across Georgia Renders the Petitioner's Death Sentence Unconstitutional." The Petitioner moved to preclude the prosecution from seeking the death penalty due to the standard-less and arbitrary manner in which it is sought in Cobb County and in the State of Georgia. The trial court quashed the Petitioner's subpoena for evidence, thereby denying him a full and fair hearing. Moreover, it was established that no state standards are set forth either by the Attorney General or any other state body. The purported standards of the District Attorney's office in effect at the time are not standards at all.

Finding As To Ground 38: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

22. Ground 39 alleges "The Verdict Form Was Fatally Vague and Deprived the Petitioner of His Rights." The verdict returned by the jury was too vague and failed to demonstrate that any aggravating circumstance was found unanimously by the jury beyond a reasonable doubt.

Finding As To Ground 39: This claim is procedurally defaulted, Petitioner having failed to raise the alleged errors timely and having further failed to satisfy the cause and prejudice test or the miscarriage of justice exception.

Summary of Findings – Defaulted Claims

Grounds 1 , 2, 3, 7, 8, 9, 11, 13, 16, 18, 20, 21, 22, 23, 27, 28, 30, 31, 33, 37, 38 and 39 provide Petitioner with no basis for relief.

C. Non-cognizable Grounds

1. In Ground 4, Petitioner asserts "The Petitioner Did Not Kill, Attempt to Kill, or Intend to Kill, and Both His Death Sentence and Continued Incarceration is a Violation of the Petitioner's Rights." Petitioner contends that he is innocent of malice murder and that his execution would violate fundamental fairness and all notions of common decency and civility.

Finding as to Ground 4: Petitioner's contention of actual innocence is not a proper claim for this Court's review. "It is not the function of the writ of habeas corpus to determine the guilt or innocence of one accused of a crime." ***Deyton v. Wanzer***, 240 Ga. 509, 510, 241 S.E.2d 228 (1978). *See also* ***Coleman v. Caldwell,*** 229 Ga. 656, 193 S.E.2d 846 (1972); ***Fryer v. Stynchcombe***, 228 Ga. 576, 186 S.E.2d 885 (1971). Petitioner's claims in Ground 4 raise no constitutional violation. Therefore, this Court finds Ground 4 provides Petitioner no basis for relief.

2. Ground 43 alleges "Any Sub-Set of the Claims Contained in This Petition and/or in Any Further Petition to Be Filed, and/or All Such Claims Combined Resulted In A Trial and Appeal that Was Fundamentally Unfair, . . ." The Petitioner's re-sentencing trial was fraught with legal and constitutional error.

Finding as to Ground 43: Petitioner's allegation in Ground 43 concerning the aggregate effect of all the alleged errors is not a proper claim for this court's review. Georgia does not

recognize the cumulative error rule. ***Head v. Taylor***, 273 Ga. 69, 70, 538 S.E.2d 416 (2000). Therefore, this Court finds that Petitioner's claims in Ground 43 fail to raise a valid constitutional violation and concludes that Ground 43 provides Petitioner no basis for relief.

Summary of Findings – Non-cognizable Claims

The claims represented in **Grounds 4 and 43** are not proper claims for this Court's review and provide Petitioner no basis for relief.

D. Successive Grounds

All grounds for habeas corpus relief must be raised in the original or amended petition. O.C.G.A. § 9-14-51; ***Smith v. Zant***, 205 Ga. 645, 301 S.E.2d 32 (1983). Any ground not raised in either the original or amended petition is waived, except where the United States Constitution or the Georgia Constitution require otherwise, or where the judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petitions, or finds the ground constitutionally unwaivable. ***Id.*** *See* ***Stevens v. Kemp***, 254 Ga. 228, 327 S.E.2d 185 (1985).

This Court finds that the following claims raised by Petitioner are successive and cannot properly be reviewed by this Court:

1. Ground 5 alleges, "The Grand Jury and the Grand Jury Foreman Were Discriminatorily Selected, and the Pools From Which the Petitioner's Grand Jury was Drawn Underrepresented Cognizable Groups in the Community. The grand jury violations in this case denied to the Petitioner the effective assistance of counsel, a fair trial by a fair and impartial jury, due process, equal protection, and a fair and reliable capital sentencing proceeding throughout all stages of his

pre-trial, trial, post-trial and appellate proceedings."

Finding as to Ground 5: Ground 5 was raised or reasonably could have been raised in Petitioner's previous state habeas corpus action, and does not raise issues that are constitutionally unwaivable. *See **Presnell v. Zant***, 959 F.2d 1524, 1535 (1992). Thus, this Court finds the claims in Ground 5 have been waived.

2. Ground 6 alleges, "The Grand Jury Which Returned the Indictment Against Petitioner Engaged in Misconduct and Was Subject to Undue Influence. The grand jury which indicted the Petitioner in 1976 committed misconduct in a manner that denied Petitioner the effective assistance of counsel, a fair trial by a fair and impartial jury, due process, equal protection, and a fair and reliable capital sentencing proceeding throughout all stages."

Finding as to Ground 6: Ground 6 was raised or reasonably could have been raised in Petitioner's previous state habeas corpus action, and does not raise issues that are constitutionally unwaivable. Thus, this Court finds the claims in Ground 6 have been waived.

3. Ground 14 alleges, "To Exact a Sentence of Death upon the Petitioner after More than Two Decades of Punishment Constitutes Cruel and Unusual Punishment. To hold the Petitioner on death row for in excess of 26 years, then retry him, and then hold him for a further indefinite period of time prior to actual execution is cruel and unusual punishment."

Finding as to Ground 14: Ground 14 was raised or reasonably could have been raised in Petitioner's previous state habeas corpus action, and does not raise issues that are constitutionally unwaivable. Thus, this Court finds the claims in Ground 14 have been waived. *See **Blankenship v. Head***, No. 93-V-213 (Butts Super. Ct. Sep. 8, 2003).

In addition, this Court finds that even were the claim raised in Ground 14 not waived, it

would not warrant relief based on its merits. This court is unaware of any state or federal case which holds that executing a prisoner following more than two decades of incarceration constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

As the United States Court of Appeals for the Fifth Circuit stated in ***White v. Johnson***, 79 F.3d 432 at 439 (5th Cir. 1996), "…there are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners… to challenge their convictions for years."

As was the case in ***White***, Petitioner alleges no extraordinary facts or unusual conditions beyond the inevitable anxiety of waiting for an execution date which cannot be avoided in a system of capital punishment.

Accordingly, this Court concludes that Petitioner's Eighth Amendment claim would not entitle him to habeas corpus relief even if it was not waived due to the fact that it is successive.

4. A portion of Ground 23 alleges, "The grand jury, original traverse jury, and re-sentencing traverse jury in petitioner's case were unconstitutionally composed, were the result of unconstitutional practices and procedures, and consequently denied Petitioner his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth and Analogous Provisions of the Georgia Constitution."

Finding as to Ground 23: Those portions of Ground 23 dealing with the composition of Petitioner's grand jury, original traverse jury, or re-sentencing traverse jury were raised or

reasonably could have been raised in Petitioner's previous state habeas corpus action, and do not raise issues that are constitutionally unwaivable. Thus, this Court finds those claims have been waived.

Summary of Findings – Claims that are Successive

This Court finds the claims represented by **Grounds 5, 6 and 14, and the above-referenced portions of Ground 23** have been waived, and thus provide Petitioner no basis for relief.

E. Claims Proper For Habeas Review

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Ground 10 alleges "The Petitioner Was Denied His Right to the Effective Assistance of Counsel at All Phases. The Petitioner's trial counsel failed to adequately investigate the facts of the case, the crime, and all other bad acts and uncharged offenses which were presented by the prosecution to the jury."

Petitioner raises a broad claim of ineffective assistance of counsel in Ground 10. Petitioner's main contention appears to be that the investigation and presentation of mitigating evidence prior to and during Petitioner's resentencing trial were ineffective.

a. Legal Standard

In ***Strickland v. Washington***, the United States Supreme Court adopted a two-pronged approach to reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires the defendant showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant

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

Strickland v. Washington, 466 U.S. at 687. *See also* ***Smith v. Francis,*** 253 Ga. 782, 325 S.E.2d 362 (1985). The U. S. Supreme Court has stated that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." ***Strickland***, 466 U.S. at 689 (citations omitted). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** at 690. *See also* ***Zant v. Moon,*** 264 Ga. 93, 97, 440 S.E.2d 657 (1994).

The Georgia Supreme Court adopted the framework set forth in ***Strickland*** and its progeny in considering ineffective assistance of counsel claims and stated that such claims must "address not what is prudent or appropriate, but only what is constitutionally compelled." ***Zant v. Moon***, 264 Ga. at 97-98 (*quoting* ***Burger v. Kemp***, 483 U.S. 776, 780, 107 S. Ct. 3114 (1987)). In ***Jefferson v. Zant***, the Georgia Supreme Court stated:

> The test for reasonable attorney performance has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial...

Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993) (citation omitted).

In recent years, the United States Supreme Court has focused heavily on counsel's duty to investigate in death penalty cases. *See* ***Wiggins v. Smith***, 539 U.S. 510 (2003); ***Williams v.***

Taylor, 120 S. Ct. 1495 (2000).

b. Qualifications of the Defense Team

Petitioner was represented at his re-sentencing trial by his appointed counsel, Steve Schuster and Mitch Durham. (Res. Ex. 187, HT 1771; HT 133). Petitioner's counsel were assisted in the preparation of his case by an expert mitigation specialist with experience in death penalty cases, a psychologist, a psychiatrist and an investigator.

Mr. Schuster was appointed to represent Petitioner in January of 1998, and served as lead counsel. (Res. Ex. 187, HT 1771; HT 133). Mr. Schuster became a member of the Georgia Bar in June 1976. (HT 133). Mr. Schuster worked as an assistant solicitor in the Cobb County Solicitor's Office from 1976 until 1978. (HT 131). From 1978 to 1980, Mr. Schuster worked as an Assistant District Attorney in the Cobb County District Attorney's Office. (HT 131). After 1980, Mr. Schuster entered private practice, where his practice focused on criminal law. (HT 131). Prior to Petitioner's case, Mr. Schuster had been involved in four or five death penalty cases. One of his clients received the death penalty. (HT 131; HT 152).

Mr. Durham joined Petitioner's defense team at Mr. Schuster's request. (HT 14, HT 133). Mr. Durham has been a member of the Georgia Bar since 1986. (HT 9). Mr. Durham began his career as a law clerk for the Superior Court of Cobb County. (HT 9). Following his clerkship, Mr. Durham worked with criminal defense attorney Jimmy Berry for about eight years before starting his own practice. (HT 9). Mr. Durham has focused on criminal law throughout his career. Prior to representing Petitioner, Mr. Durham participated in approximately six murder trials, including the Cobb County death penalty trial of Jack Potts. (HT 9). Mr Durham had also participated in six other death penalty cases in which defendants pled guilty prior to trial. (HT

9).

Counsel were assisted in the preparation of Petitioner's case by the Multi-County Public Defender's Office, which provided counsel with an index to death penalty motions and information concerning experts, jury challenges, adequate compensation and victim impact evidence, and by the Georgia Resource Center. (HT 17; Res. Ex. 37, HT 312, 313, 314; Res. Ex. 187, HT 1773, 1774; Res. Ex. 188, HT 1788-1790, 1794; HT 27; Res. Ex. 3, HT 335). Petitioner's counsel were granted funds to hire a law student to assist in "organizing, researching, and preparing the case for trial." (Res. Ex. 65, HT 448; Res. Ex. 72, HT 507). Counsel instead used these funds to retain the services of another lawyer, Dianna McDaniel, who received her degree from Louisiana State University in 1983. (Res. Ex. 73, HT 510).

Counsel were granted funds to hire licensed private investigator Andrew Pennington, who was recommended by Pam Leonard, a mitigation specialist at the Multi-County Public Defender's Office. (Res. Ex. 70, HT 491; Res. Ex. 15, HT 231; HT 19; HT 144; Res. Ex. 40, HT 345). Investigator Pennington had conducted investigations for numerous death penalty cases in Georgia and California. (HT 19; Res. Ex. 15, Res. Ex. 232). Counsel requested and were granted the services of jury composition expert Dr. Patricia L. Maykuth (Res. Ex. 71, HT 499). Dr. Maykuth had served as a consultant in over seventy civil and criminal trials on issues including statistics, jury selection, jury profiling, employment practices, and perception and memory prior to her involvement in Petitioner's case. (Res. Ex. 69, HT 487). Counsel also received $10,000 to hire mitigation specialist Toni Bovee, who was recommended by the Multi-County Public Defender's Office (Res. Ex. 65, HT 445; Res. Ex. 67, HT 457; Res. Ex. 40, HT 345). At the time of Petitioner's re-sentencing trial, Ms. Bovee was a licensed private

investigator in California and South Carolina, had served as a death penalty mitigation specialist in California, Georgia, North Carolina, and South Carolina; had over 16 years of experience investigating mitigating evidence for death penalty cases; had worked on over 100 death penalty cases, had attended 30 seminars concerning death penalty mitigation and jury selection; and had taught seminars on this subject. (HT 56; Res. Ex. 20, HT 239; HT 55; Res. Ex. 20, HT 239; Res. Ex. 20, HT 240).

c. Reasonableness of Defense

Petitioner's counsel at his resentencing trial had a wealth of information about Petitioner's mental health and background even before they undertook their independent investigation. Counsel received Petitioner's trial transcript from the Cobb County District Attorney's Office during April of 1998. (HT 20-21, HT 100-101; Res. Ex. 28, Res. Ex. 134-135). Counsel obtained the files of Petitioner's trial attorney, Milton Grubbs. (HT 24-25). Counsel met with Petitioner's habeas corpus attorneys, Millie Geckler Dunn and John Taylor, and obtained Petitioner's federal habeas corpus records. (HT 20-21. HT 24-25, HT 135; Res. Ex. 157; Res. Ex. 190-198). Counsel subsequently reviewed these materials in preparation for Petitioner's resentencing trial. (HT 21, HT 135). Further, counsel summarized the trial testimony of the major witnesses, highlighted important parts of the record and planned follow-up investigation as required. (HT 23-24, HT 29; Res. Ex. 104, Res. Ex. 137, Res. Ex. 139-143, Res. Ex. 145, Res. Ex. 149, Res. Ex. 166, Res. Ex. 168-177, Res. Ex. 212). Counsel also reviewed the District Attorney's file and the Cobb County Clerk of Court's remaining files on Petitioner's original trial. (HT 100-101).

Counsel then undertook an independent investigation. Counsel obtained Petitioner's

medical records, prison records (including Petitioner's prison medical file), school records, convictions record and Central State Hospital records. (HT 51, HT 69-71, HT 73-74; Res. Ex. 50, Res. Ex. 58-61, Res. Ex. 96, Res. Ex. 113, Res. Ex. 129-132, Res. Ex. 185; Res. Ex. 22, p. 252).

Counsel summarized Petitioner's criminal history, noting his prior arrests and incarcerations. (Res. Ex. 100, HT 704-705). This included periods of incarceration for breaking into a school and for stealing cars in 1971 and 1973, as well as a conviction for aiding in the delinquency of a minor, which charge was reduced from sexual battery. (Res. Ex. 100, HT 704-705, Res. Ex. 132, HT 877).

Counsel were aware of Petitioner's experiences with young girls. Petitioner admitted to counsel that, as early as age 14, he had grabbed young girls he did not know and reached under their dresses. (Res. Ex. 98, HT 694). Moreover, counsel were aware that "a couple of months before" the events with Lori Ann Smith and Andrea Furlong, Petitioner followed a young girl from a school, grabbed her, took her to a "bushy area," had her take off her underwear and had "sex between her legs - not in the vagina." (Res. Ex. 98, HT 670). Counsel were also aware that Petitioner grabbed another young girl in an apartment complex "shortly after" the incident above, took her to a bushy area with the intent "to feel her privates," but upon deciding that she was going to scream, ran off. (Res. Ex. 98, HT 670). Counsel were also aware that a "couple of weeks" prior to the incident with Lori Ann Smith and Andrea Furlong, Petitioner followed another young girl, grabbed her off her bike, forced her down into a wooded area and "had sex between her legs." (Res. Ex. 98, HT 670).

Counsel reviewed the records of Central State Hospital. (HT 21, HT 135). These records

revealed that Petitioner was reportedly of average intelligence and was given an EEG, the results of which were normal. (Res. Ex. 165, HT 633; Res. Ex. 165, HT 657). Upon review of these records, counsel were aware that Petitioner had undergone a full psychological evaluation and was diagnosed with antisocial personality disorder and sexual deviation, but was found to be functioning within the normal range. (Res. Ex. 165, HT 1182, HT 1196-1197). Counsel were also aware that the hospital records showed that Petitioner "showed no signs of guilt" with regard to his crimes, and that Petitioner had admitted to intentionally drowning Lori Ann Smith in the creek. (Res. Ex. 165, HT 1184; Res. Ex. 165, HT 1195).

Counsel also prepared a summary of Petitioner's school records, noting Petitioner's poor school performance, his psychological evaluations during school and his poor adjustment. (Res. Ex. 12, HT 210; Res. Ex. 99, HT 701). These records revealed that Petitioner's low grades could be attributed to his constant moving, his truancy and his indifference to school work, and it was noted that Petitioner's achievement should have been somewhat higher than was indicated by test scores. (Res. Ex. 113, HT 753, HT 767, HT 756, HT 785). Petitioner's school records included various IQ scores, Petitioner's statements that his parents thought he was "stupid" and "no good," that his home life was dominated by females, that he had no masculine group with which to identify and that he giggled at inappropriate times. (Res. Ex. 113, HT 764, HT 770, HT 776, HT 777, HT 786, HT 771).

In an attempt to get a life sentence for Petitioner, counsel attempted to show that the death of Lori Ann Smith was accidental; to argue that Petitioner was cooperative with law enforcement; and to show that poverty, a dysfunctional family life and Petitioner's possible molestation by an uncle mitigated Petitioner's guilt and should mitigate his punishment. (HT 32-

33, HT 44, HT 61-62, HT 23-24).

Counsel remained in contact with Petitioner and obtained Petitioner's social history through interviews of Petitioner conducted by counsel, Investigator Pennington and Toni Bovee. (HT 20, HT 143; Res. Ex. 37, Res. Ex. 187-188; HT 47; Res. Ex. 42-44; Res. Ex. 186). Petitioner discussed his educational background, "criminal career," home and family life, mental abuse, physical abuse, marriage, employment history, and attempt to assist people who had been injured in a car accident in 1972 or 1973 with Toni Bovee. (Res. Ex. 22). The interview revealed that Petitioner's uncle, James Edwards, who was subsequently convicted of child molestation with incest, was the sole male figure Petitioner could recall; that Petitioner's father had physically punished him on one occasion by punching him in the face and beating him on the chest; that Petitioner's father had called him a "sissy" due to his lack of interest in sports and his interest in art; and that Harry Blondheim, who was in charge of the Dekalb County Youth Center where Petitioner was incarcerated for stealing cars, was either arrested or had to leave the center because he was molesting boys at the center. (Res. Ex. 22).

Counsel and Investigator Pennington also interviewed Petitioner's mother, stepfather, aunts, son and ex-wife. (HT 45-46, HT 108, HT 134, HT 136).

Ms. Bovee also interviewed various members of Petitioner's family, including Petitioner's mother, from whom she collected a detailed family history. (Res. Ex. 1). Toni Bovee's report to trial counsel following these interviews included detailed histories of Petitioner and his various family members. (Res. Ex. 1). Ms. Bovee learned that Petitioner's mother smoked a pack of cigarettes a day and "did not drink except socially" during the time she was pregnant with Petitioner; that Petitioner always appeared to be more comfortable with young

children; and that Petitioner had never had a positive male role model. (Res. Ex. 1, HT 176; Res. Ex. 1, HT 178). Ms. Bovee also interviewed Lillian Shepard, Petitioner's aunt. (Res. Ex. 2). Ms. Bovee learned many things about Petitioner's life and family history from Ms. Shepard, including the fact that Petitioner once lived in a home where five women slept in the same room with him; that Petitioner and his mother slept in the same bed until he was ten years old; and that Petitioner once took Ms. Shepard's then-three-year-old daughter into the basement of the building where they lived and instructed her to pull her pants down. (Res. Ex. 2, HT 182; Res. Ex. 2, HT 181). Ms. Bovee also spoke with another of Petitioner's aunts, Peggy McQurter, and confirmed many details of the family history. (Res. Ex. 9). Counsel reviewed all the reports prepared by Ms. Bovee as a result of the interviews she conducted, obtained a certified copy of the 1985 child molestation conviction of Petitioner's uncle, James Samuel Edwards, and acquired childhood photographs of Petitioner. (HT 108; HT 53-54; HT 74; Res. Ex. 32, Res. Ex. 146).

Investigator Pennington also interviewed several persons, including Peggy McQurter, Petitioner's son, Petitioner's ex-wife, and Petitioner's cousins, Marie Wilerson and Donald and Robert Tweed. (Res. Ex. 32, HT 302). Petitioner's ex-wife noted that Petitioner had never tried to molest her or any family members, and that they had divorced at Petitioner's suggestion. (Res. Ex. 32, HT 302). Brian Presnell had little contact with Petitioner, but told the investigator that he still loved his father and was supportive. (Res. Ex. 32, p. 301).

On the recommendation of the Multi-County Public Defender's Office, counsel requested and received funds to hire Dr. Robert D. Shaffer, a clinical psychologist with specialized training in neuropsychology. (Res. Ex. 68; Res. Ex. 7, HT 200; Res. Ex. 32, p 300). Dr. Shaffer had

been employed by the United States Department of Justice for six years as a psychologist and had maintained a private practice for thirteen years. (Res. Ex. 7, HT 199). He had testified as an expert witness in Georgia approximately 40 to 50 times and had prior experience in death penalty cases, having previously evaluated at least three other death penalty defendants. (Res. Ex. 7, HT 199; Res. Ex. 7, HT 197; Sent. Tr., Vol. V, PP. 196-199). Dr. Shaffer assembled a complete history of Petitioner, which included Petitioner's educational history, birth history, medical history, early childhood educational experiences and mental health evaluations by speaking to Petitioner's mother and Aunt Lillian; reviewing Ms. Bovee's reports and speaking with her about her interviews; and reviewing other information assembled by counsel. (Sent. Tr., Vol. V, pp. 70-71, 133; Res. Ex. 14; Res. Ex. 5; Res. Ex. 161; Res. Ex. 1). Dr. Shaffer focused on head injuries; complications during pregnancy and birth; verbal, physical or sexual abuse; parental alcoholism; and mental and emotional problems. (Res. Ex. 7, HT 197-198). Dr. Schaffer spent fifteen to twenty hours interviewing and testing Petitioner, during which Dr. Schaffer administered numerous psychological and intelligence tests. (Sent. Tr.; Vol. V, p. 107; Res. Ex. 14). Dr. Shaffer diagnosed Petitioner with pedophilic disorder and minimal brain dysfunction. (Sent. Tr., Vol. V, p. 121; Res. Ex. 14). Prior to presenting Dr. Shaffer's testimony at Petitioner's resentencing trial, counsel thoroughly reviewed Dr. Shaffer's evaluation, met and spoke with Dr. Shaffer several times and independently researched Dr. Shaffer's diagnosis. (Res. Ex. 37, HT 317-319; Res. Ex. 124; Res. Ex. 187, HT 1779; HT 1783-1784; Res. Ex. 188, HT 1790, HT 1791, HT 1793-1795; Res. Ex. 41, HT 347-349).

Counsel reviewed the testimony and findings of Dr. Harry Porter, the psychiatrist who evaluated Petitioner before Petitioner's original trial, and retained Dr. Porter as an expert witness.

(Res. Ex. 98; Res. Ex. 64; Res. Ex. 52). As part of his investigation for Petitioner's original trial, Dr. Porter had interviewed Petitioner and learned many of the same facts later confirmed by Petitioner's resentencing counsel. (Res. Ex. 64; Res. Ex. 52). Petitioner told Dr. Porter that he went to a car race two days before the murder and "got worked up seeing all the goodlooking (sic) girls there," that he had gone to the school one day before the murder to watch the girls with binoculars, and that he had returned the following day, kidnapped Lori Ann Smith and Andrea Furlong and committed the crimes for which he was convicted. (Res. Ex. 98, HT 697). In his original pretrial report, Dr. Porter noted that Petitioner realized that his behavior was wrong and that "he would be arrested and punished if caught." (Res. Ex. 98, HT 666). Dr. Porter had found that, at the time of the crime, Petitioner was focused on sexual satisfaction with the girls but did not intend to harm the girls. Dr. Porter did find that Petitioner intentionally drowned Lori Ann Smith, however. (Res. Ex. 98, HT 666; Res. Ex. 149, HT 1039, HT 1041). In fact, Petitioner originally stated to Dr. Porter "I don't know why but I held her down in the water until I thought she had quit breathing." (Res. Ex. 98, HT 672). Dr. Porter diagnosed Petitioner with pedophilia. (Res. Ex. 98; Res. Ex. 149, HT 1038). Counsel met with Dr. Porter several times to prepare Dr. Porter to testify at Petitioner's resentencing trial. (Res. Ex. 18, Res. Ex. 37, Res. Ex. 115, Res. Ex. 148, Res. Ex. 187 - 188, Res. Ex. 211).

Counsel also reviewed the diagnosis of Petitioner as a pedophile and the testimony of Dr. Joel Norris from Petitioner's 1980 state habeas proceeding. (Res. Ex. 167). Counsel independently researched pedophilia and child sexual abuse. (Res. Ex. 144; Res. Ex. 185, HT 1446). Counsel prepared Petitioner's family to testify at Petitioner's resentencing trial. (HT 65-66).

At Petitioner's resentencing trial, Counsel's presentation focused on Petitioner's substandard upbringing in public housing and his lack of a male role model. (Sent. Tr., Vol. II, Vol. III). Counsel elicited testimony regarding Petitioner's good behavior in prison; that Petitioner had been sexually assaulted while in prison; that Petitioner received a GED while in prison; and that Petitioner married while in prison. (Sent. Tr., Vol. III, pp 52-54). Counsel introduced information regarding Petitioner's school records, poor academic performance and constant moves. (Sent. Tr. Vol. IV, pp. 82-85). Counsel called various members of Petitioner's family to recount Petitioner's childhood to the jury. The testimony of these family members included descriptions of the poor, cramped conditions in which Petitioner lived and of the influence of Petitioner's father and uncle on Petitioner's early life; information about the relationships Petitioner developed while incarcerated; and information about the gifts Petitioner made to various family members while incarcerated. (Sent. Tr., Vol. IV, pp. 134-135, 137, 141-148, 190, 193, 200, 201-210). Counsel further introduced a number of photographs of Petitioner. (Sent. Tr., Vol. IV, p. 130-132). Finally, counsel called Petitioner's mother, who testified at length about Petitioner's family history, including the lack of stability, poverty, lack of male role models and possible abuse Petitioner experienced early in life, and about the progress Petitioner had made since his arrest. (Sent. Tr., Vol. V). Petitioner's mother asked the jury to spare Petitioner's life. (Sent. Tr., Vol. V).

Counsel also introduced the testimony of Dr. Shaffer, whose credentials were extensively discussed, which included a discussion of the "thorough history" of Petitioner's family assembled by Dr. Shaffer and of the sexual abuse Petitioner's uncle perpetrated upon members of Petitioner's family. (Sent. Tr., Vol. V, p. 72-74, 77-78). Dr. Shaffer testified that Petitioner's

family history may have influenced Petitioner's behavior and thinking from an early age. (Sent. Tr., Vol. V, p. 78-79). Dr. Shaffer also presented results from a variety of psychological tests, which showed that Petitioner had abnormal knowledge of sexual behavior at the age of eight, that Petitioner functioned at the upper limits of the mentally defective range for intelligence and that Petitioner often retreated into a fantasy world to escape the abuse he suffered/experienced at home. (Sent. Tr., Vol. V, p. 86, 87-88). Dr. Shaffer testified that Petitioner's relationships with his aunts confused his notions of sexual and gender relationships, as evidenced by Petitioner's habits of playing with dolls and dressing in girl's clothing when playing with his aunts. (Sent. Tr., Vol. V, p. 99). Moreover, Dr. Shaffer described test results that indicated high levels of schizophrenia and paranoia and said there were indications of a possible brain injury resulting in impairment of the frontal brain process affecting a person's spacial comprehension. (Sent. Tr., Vol. V, pp. 111-114). Dr. Shaffer testified that on the basis of all of the information he had gathered, he had diagnosed Petitioner with pedophiliac disorder, and noted that pedophiliac disorder is recognized as a major mental illness, the treatment of which had increased since Petitioner's arrest. (Sent. Tr., Vol. V, p. 121, 124-125).

Petitioner's attorneys also presented the testimony of Chuck Owens, a former counselor at the prison, regarding Petitioner's progress since his incarceration. (Sent. Tr., Vol. VI, pp. 19-25). Chuck Owens' testimony included discussion of Petitioner's attainment of his GED and completion of correspondence classes, and Petitioner's then-recent IQ tests, which showed Petitioner to be borderline mentally retarded. (Sent. Tr., Vol. VI, pp. 19-25).

Finally, counsel thoroughly prepared for the testimony of Dr. Joseph Burton, the State's forensic scientist. (Res. Ex. 104). Dr. Burton had testified at Petitioner's first trial that Lori

Smith's death could have been accidental. (HT 38, HT 41; Res. Ex. 104, HT 719). Counsel spoke with Dr. Burton a number of times before calling him as a witness. (Res. Ex. 37, HT 313, HT 317-318, HT 384; Res. Ex. 111; Res. Ex. 123; Res. Ex. 162; Res. Ex. 187; Res. Ex. 188). Counsel elicited testimony from Dr. Burton as to improvements in the state's procedures that could have revealed more evidence in Petitioner's original trial; that it would be possible for someone to struggle and drown without another person intentionally holding them down; and that the bruises and abrasions on Lori Ann Smith's body were not inconsistent with the defense's accident theory. (Sent. Tr., Vol. III, pp. 53-54, 57-58).

Finding As To Ground 10: The United States Supreme Court, in ***Wiggins v. Smith***, 539 U.S. 510 at 523-524 (2003), found that counsel's performance was deficient where counsel failed to investigate *any* of the facts of Wiggins' life and background despite their awareness of Wiggins' "misery as a youth." This Court finds that counsel in Petitioner's case investigated Petitioner's background and marshaled the facts of that background in arguing Petitioner's mental health and mitigation theory.

The Court notes that three mental health experts independently diagnosed Petitioner with pedophilia, and that counsel presented a lengthy and detailed social history at Petitioner's re-sentencing trial. This Court has carefully examined the performance of Petitioner's attorneys during the sentencing phase and finds that Petitioner has failed to satisfy either prong of the ***Strickland*** standard.

The Court has thoroughly reviewed the affidavits submitted by Petitioner. The Court finds that much of the information gathered and presented in this challenge to Petitioner's conviction is cumulative of the information counsel gathered for Petitioner's re-sentencing

hearing. The information contained that is not cumulative does not rise to a level of Constitutional concern. This Court finds that Petitioner's counsel conducted sufficient investigation into, and presentation of, mitigating evidence at Petitioner's re-sentencing trial. This Court finds that counsel's conduct falls within the wide range of reasonable professional conduct, and that counsel's decisions were made in the exercise of reasonable professional judgment. Therefore, this Court concludes that Petitioner's claim that counsel failed to adequately investigate Petitioner's case is without merit. This Court also concludes that Petitioner has failed to establish that the outcome would have been different had counsel advanced any of the theories Petitioner now raises. Consequently, Petitioner's claims fail to provide Petitioner any basis for relief.

With regard to the remainder of Petitioner's allegations of ineffective assistance of counsel, this Court notes that Georgia does not recognize the cumulative error doctrine. *See* ***Bridges v. State,*** 268 Ga. 700, 492 S.E.2d 877 (1997). Each of Petitioner's claims of ineffective assistance of counsel must be evaluated independently. This Court further finds that Petitioner's claims of ineffective assistance of counsel not arising from Petitioner's re-sentencing trial are procedurally defaulted and/or successive. Therefore, the Court concludes that Ground 10 provides Petitioner no basis for relief.

2. PETITIONER'S MENTAL HANDICAP

Ground 29 alleges "The Petitioner is Mentally Retarded and Therefore Ineligible for the Death Penalty. Because the Petitioner is mentally retarded, the death penalty is an excessive and disproportionate penalty in violation of his rights." "The execution of mentally retarded offenders violates the Georgia constitutional guarantee against cruel and unusual punishment."

Petitioner has raised a claim in Ground 29 that he is mentally retarded and thus ineligible for the death penalty. O.C.G.A. § 17-7-131(c)(3) provides that defendants who establish their mental retardation beyond a reasonable doubt may not be sentenced to death. The Georgia Supreme Court has ruled that, for the purposes of O.C.G.A. § 17-7-131(c)(3), the definition of mental retardation shall be consistent with the American Psychiatric Associations's Diagnostic and Statistical Manual of Mental Disorders. Thus, the relevant definition of "mentally retarded" is:

> The essential features of the mental retardation are (I) significantly subaverage intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of the impairment during the developmental period. O.C.G.A. § 17-7-131(a)(3). "Significant subaverage intellectual functioning" is generally defined as an IQ of 70 or below. However, an IQ test of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as being mentally retarded if there "are no significant deficits or impairment in adaptive functioning."

Stripling v. State, 261 Ga. 1, 4, 401 S.E.2d 500 (1991) (citations omitted). Execution of the mentally ill is not unconstitutional where the defendant is capable of understanding the nature and object of the proceedings and is capable of assisting in his defense. ***Colwell v. State***, 273 Ga. 634 (2001).

Petitioner was evaluated for mental retardation at counsel's request prior to his re-sentencing trial, and counsel researched law on that topic. (Res. Ex. 49, HT 363). Dr. Schaffer testified at Petitioner's re-sentencing trial that counsel specifically requested that he look for signs of mental retardation. (Res. Ex. 49, HT 363). Dr. Shaffer testified that it was very obvious upon the completion of Petitioner's testing that Petitioner was not mentally retarded, noting "I

never suspected this patient of having mental retardation." (Sent. Tr., Vil. V, p. 142). Dr. Schaffer found that Petitioner scored in the "borderline to low average range of intellectual functioning," had a "good vocabulary" and was "articulate" but socially immature. (Sent. Tr., Vol. V, p. 115, Sent. Tr., Vol. V, p. 165; Res. Ex. 14). Prior to his re-sentencing trial, Petitioner's IQ was scored at 90. (Res. Ex. 124, HT 837). At age 12, Petitioner's IQ was scored at 83. (Res. Ex. 113, HT 764). At age 15, Petitioner's IQ was scored at 79, but the evaluator also noted that Petitioner's "achievement" "should be higher than is indicated on these tests." (Res. Ex. 113, HT 770, HT 776). In 1976, Petitioner was evaluated as "working within the normal range of intelligence" and found to have an IQ of 96 at Central State Hospital. (Res. Ex. 165, HT 1174; Res. Ex. 165, HT 1181). In 1976, Dr. Porter found Petitioner to be of "average or slightly below average intelligence." (Res. Ex. 98, HT 697). Petitioner obtained a GED while incarcerated and has completed correspondence courses through a junior college in drafting and finishing. (Res. Ex. 22, p 254).

In Ground 29 specifically, and in other grounds of the amended Petition, reference is made to problems involving a psychological examination and evaluation of Petitioner. The Court is aware that counsel for Petitioner requested and arranged for, and the Court permitted, such an examination by Ricardo Weinstein, Ph.D. Subsequently, the Court became aware that there had been problems with the completion of such examination and evaluation, and following a telephone conference between counsel for Petitioner and Respondent and the Court, such examination and evaluation was rescheduled. The Court was never made aware of any further problem in connection with such examination and evaluation. The Court notes that the report of Dr. Weinstein, together with the attachments thereto, consist of approximately forty-two pages,

and the Court finds no reference in Dr. Weinstein's report which suggests any problems in connection with the examination and evaluation of Petitioner. In Dr. Weinstein's affidavit in Petitioner's Exhibit 1, Dr. Weinstein states that he conducted a full evaluation of Petitioner, including a full battery of neuropsychological testing, as well as a QEEG report, and that his report contained the facts which he learned from a complete evaluation of Petitioner.

Finding As To Ground 29: Due to the fact that Petitioner's IQ tests repeatedly place him within the normal range of intelligence; that experts have repeatedly found that Petitioner functioned within the normal range of intelligence; and that Petitioner has not been diagnosed as mentally retarded, the Court finds that Petitioner is not mentally retarded for the purposes of O.C.G.A. § 17-7-131(a)(3). Furthermore, as a psychiatric examination requested by Petitioner's re-sentencing counsel revealed that Petitioner was not mentally retarded before Petitioner's re-sentencing trial, this Court finds that Petitioner's counsel were not ineffective in refusing to present this argument to the court. Thus, the Court concludes Petitioner's sentence does not violate the Eighth Amendment's prohibition of cruel and unusual punishment and that Ground 29 provides Petitioner no basis for relief.

The affidavits filed by Petitioner as to Petitioner's mental health problems are found to be cumulative of the evidence presented at the resentencing trial of this case. Petitioner additionally failed to show that the testimony of the mental health experts by way of affidavit would have in reasonable probability changed the result of the case. See Head v. Carr, 273 Ga. 613, 626, 544 S.E. 2d 409 (2001). The Court therefore finds that the affidavits of mental health experts filed by Petitioner are insufficient to warrant granting the habeas corpus relief sought by Petitioner.

IV. ADDITIONAL CONCERNS

Finally, Petitioner makes arguments concerning his lack of access to materials, documents, files, and/or evidence, the deprivation of counsel paid by the State of Georgia, and the press of litigation experienced by Petitioner's counsel. Petitioner also argues he was prevented from developing all relevant facts and arguments in support of his claims due to the fact that Petitioner's amended petition was filed pursuant to the Court's scheduling order and that Petitioner had problems obtaining a full and thorough psychological examination and evaluation by Petitioner's hired neuropsychologist.

The Court notes that throughout these proceedings, Petitioner's counsel sought and was granted reasonable extensions of time, including extensions for time granted in order to avoid conflicts with the litigation schedule of Petitioner's counsel.5

While Petitioner's counsel did experience difficulties in having Petitioner examined and evaluated by Petitioner's hired neuropsychologist, all problems made known to the Court were resolved, and the examination and evaluation were successfully completed.

Throughout his grounds, Petitioner reserved the right to amend his claim, add additional claims, amend the witness list, seek additional discovery, and file affidavits. However, no amendments were filed after the filing of Petitioner's amended petition.6

---

[5]Originally, Petitioner's discovery was to end and the Petitioner's Amended Petition was to be filed on August 15, 2003. The Court extended these deadlines to January 15, 2004. Subsequently, the Court extended these deadlines to March 15, 2004. Additionally, the Court extended the time for filing affidavits from Petitioner's mental health experts to April 16, 2004. The Court also granted extensions of time for Petitioner to file his post-hearing brief.

[6]On March 14, 2003, in a hearing before this Court, the Petitioner and Respondent agreed to submit a consent order resolving Petitioner's Motion requiring Respondent to disclose information pursuant to Brady v. Marylandand Kyles v. Whitley. In the alternative, the parties were to inform the Court that they could not reach an agreement. The

V. DISPOSITION

After considering the allegations made in Petitioner's original and amended petitions for writ of habeas corpus, Respondent's original and amended answers, relevant portions of the appellate record, the evidence admitted in the hearing held on this matter on June 2, 2004, the arguments of counsel and the post-hearing briefs, this Court concludes Petitioner has failed to demonstrate that any of Petitioner's constitutional rights were denied.

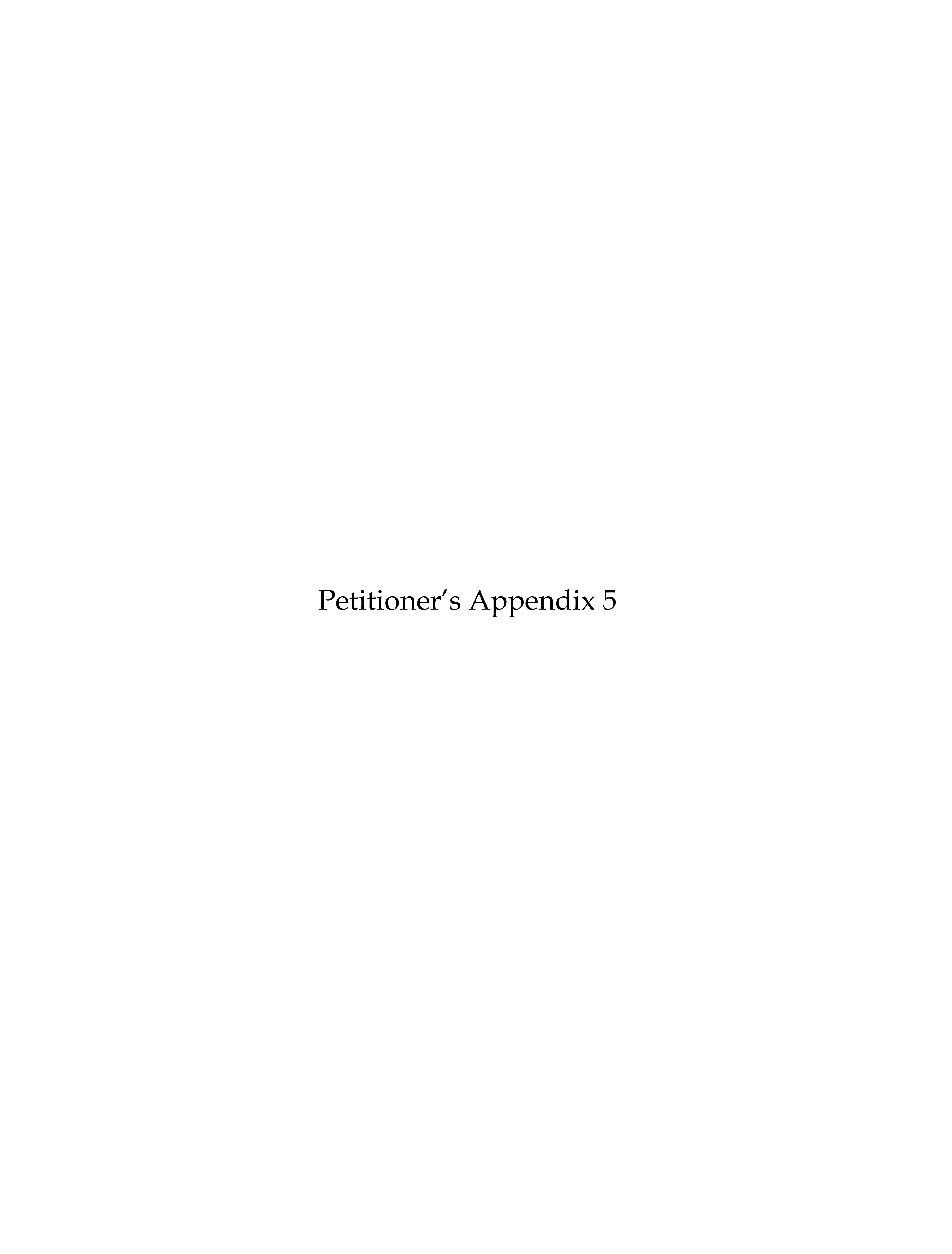
THEREFORE, it is the **JUDGMENT** of this Court that Petitioner's Petition for Writ of Habeas Corpus is hereby **DENIED,** and that Petitioner be remanded to the custody of the Warden so that Petitioner's sentence can be carried out.

The Clerk of this Court is hereby directed to provide a filed copy of this order to counsel for Petitioner, counsel for Respondent and the Hon. J. Richard Porter, III.

SO ORDERED, this 27 day of Dec., 2005.

JR Porter
Hon. J. Richard Porter, III
Superior Court of Butts County
Sitting by Designation

Court has received no such proposed order or in fact any further information from the parties regarding this issue. Accordingly, Petitioner's Motion is hereby denied.



Petitioner's Appendix 5

SUPREME COURT OF GEORGIA

Case No. S06E1249 Atlanta, November 06, 2006

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

VIRGIL DELANO PRESNELL v. DERRICK SCHOFIELD, WARDEN

From the Superior Court of Butts County.

Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

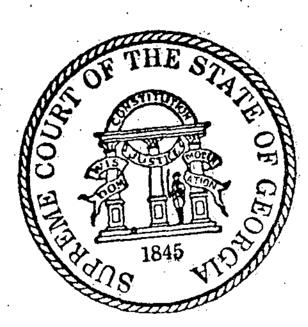
02V768

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

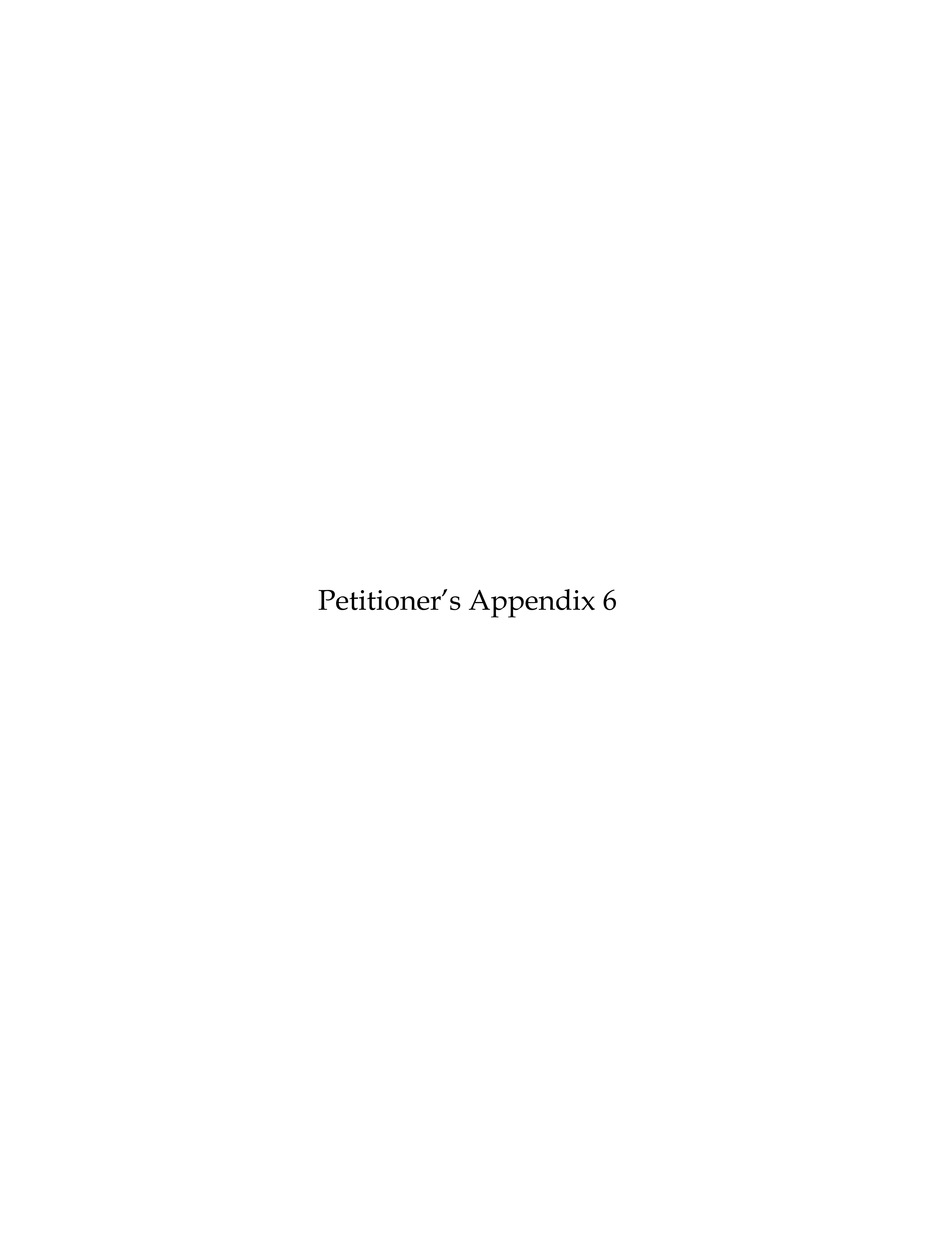
I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.



Jeanette Edson Deputy Clerk.

Respondent's Exhibit No. 125
Case No. 1:07-CV-1267



Petitioner's Appendix 6

Source: Legal > / . . . / > **GA State Cases, Combined**
Terms: name(presnell and state) (Edit Search | Suggest Terms for My Search)
Focus: **death penalty** (Exit FOCUS™)

Select for FOCUS™ or Delivery

*274 Ga. 246, *; 551 S.E.2d 723, **;*
*2001 Ga. LEXIS 574, ***; 2001 Fulton County D. Rep. 2230*

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PRESNELL v. THE STATE.

S01P0590.

SUPREME COURT OF GEORGIA

274 Ga. 246; 551 S.E.2d 723; 2001 Ga. LEXIS 574; 2001 Fulton County D. Rep. 2230

July 16, 2001, Decided

SUBSEQUENT HISTORY: [*1]** Reconsideration Denied September 19, 2001. Certiorari Denied May 13, 2002, Reported at: 2002 U.S. LEXIS 3310.

PRIOR HISTORY: Murder. Cobb County Superior. Trial Judge: Hon. Mary Staley. Date of Judgment Appealed: 11-03-00. Notice of Appeal Date: 11-30-00. Lower Ct # :7690603.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant's death sentence for murder was vacated during federal habeas corpus proceedings. The Cobb County Superior Court, Georgia, held a re-sentencing trial, the jury recommended death after finding the murder was committed in a kidnapping with bodily injury and that it was outrageously or wantonly vile, horrible, or inhuman in that it involved torture and depravity of mind. Ga. Code Ann. § 17-10-30(b)(2), (7). Defendant appealed.

OVERVIEW: Defendant led police to the body of a missing girl and confessed. Search of his bedroom uncovered a handgun and pornography depicting young girls. Evidence at trial showed he stalked elementary school children; planned his crimes; abducted the eight-year-old victim as she was walking home from school; taped her mouth shut; threatened to kill her; took her to a remote area; made her strip naked; forced her to watch as he raped and forced other sex acts on her friend; chased her as she tried to escape; and held her head underwater where she struggled for several minutes before dying. He was resentenced to die. The Georgia Supreme Court held that the trial court had properly found that Cobb County had promulgated a rule which was not repealed requiring only five jury commissioners, which Ga. Code Ann. § 15-12-20(c) permitted. The trial court handling of the venire in regard to its members' death or life-sentencing abilities was proper. Defendant's mother had consented to the search. The State's use of a pedophile-type book at trial, which defendant had ordered in prison, was proper. The prosecutor showed psychological abuse of the victim without making a "golden rule" argument.

OUTCOME: The judgment was affirmed.

Respondent's Exhibit No. 42
Case No. 1:07-CV-1267

CORE TERMS: juror, girl, prospective jurors, death sentence, older, death penalty, prosecutor's, sentence, murder, parole, rape, aggravating circumstances, life sentence, bedroom, depravity, reversible error, victim-impact, convicted, torture, walking, prison, child pornography, substantially impaired, closing arguments, re-sentencing, indictment, mitigating, surviving, malice, raped

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN1 Psychological abuse inflicted by a defendant on a victim where it is shown to have resulted in severe mental anguish in anticipation of physical harm may amount to torture and depravity of mind. The young age of the victim is relevant to a consideration of torture and depravity of mind. More Like This Headnote

Criminal Law & Procedure > Juries & Jurors > Size of Jury > General Overview
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
Governments > Courts > Judges

HN2 Reversible error requires a showing of such disregard of the essential and substantial provisions of Ga. Code Ann. § 15-12-20 as would vitiate the jury arrays. The provisions of the statute are merely directory and were not intended to vest procedural rights in criminal defendants. Ga. Code Ann. § 15-12-20(c) allows for each county to establish a lesser number of jury commissioners by local rule. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Jurors > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors

HN3 The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A juror's bias for or against the **death penalty** does not need to be proved with unmistakable clarity; the relevant inquiry on appeal is whether the trial court's finding that a prospective juror is disqualified is supported by the record as a whole. Often the trial court must resolve equivocal and contradictory answers by the prospective juror in determining whether his views would substantially impair his ability to consider all possible sentences. For this reason, an appellate court must pay deference to the trial court's finding that a particular prospective juror is qualified or not qualified to serve on the jury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Juries & Jurors > Challenges for Cause > General Overview

HN4 Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Trials > Jury Trials > Jurors > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

HN5 Although a prospective juror is not disqualified for merely leaning for or against the **death penalty,** the trial court is authorized to find from the totality of a prospective juror's responses that he would be substantially impaired in the

performance of his duties as a juror because he could not vote for a death sentence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Trials > Jury Trials > Jurors > Selection > Voir Dire
Criminal Law & Procedure > Juries & Jurors > Voir Dire > Judicial Discretion

HN6 The scope of voir dire is largely left to the trial court's discretion. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Reversible Errors
Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object

HN7 Failure to object at trial precludes a finding of reversible error on appeal. More Like This Headnote

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Failure to Object
Legal Ethics > Prosecutorial Conduct

HN8 Where an appellant contends the prosecutor's closing argument was improper, but failed to object to any part of the argument, he can obtain appellate relief only if he can show that the allegedly improper argument in reasonable probability changed the result of his trial. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Torts > Wrongful Death & Survival Actions > Remedies > Compensatory Damages > Pain & Suffering

HN9 Psychological abuse inflicted on a victim before death is relevant to a consideration of a defendant's depravity of mind. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > General Overview
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN10 The trial court is not required to instruct the jury on residual doubt or any other specific mitigating circumstance as long as it charged on mitigating evidence in general. More Like This Headnote

COUNSEL: Marc D. Cella, Marietta, GA, John R. Greco, Atlanta, GA, Mitchell D. Durham, Marietta, GA, Charlotta Norby, MultiCounty Public Defender, Atlanta, GA, Michael Mears, for appellant.

Patrick H. Head, District Attorney, Marietta, GA, Maria B. Golick, Dana J. Norman, Russell J. Parker, Jack E. Mallard, Assistant District Attorneys, Marietta, GA, Thurbert E. Baker, Attorney General, Department of Law, Atlanta, GA, Susan V. Boleyn, Senior Assistant Attorney General, Department of Law, Atlanta, GA, Beth A. Burton, Assistant Attorney General, Department of Law, Atlanta, GA, for appellee.

JUDGES: Hunstein, Justice. All the Justices concur.

OPINION BY: Hunstein

OPINION

[*246] [727] Hunstein,** Justice.

Virgil Delano Presnell, Jr. was convicted in 1976 of malice murder, kidnapping with bodily **[***2]** injury and other crimes and was sentenced to death for the murder. *Presnell v. State*, 241 Ga. 49 (243 S.E.2d 496) (1978), reversed and remanded as to sentence, *Presnell v. Georgia*, 439 U.S. 14 (99 S. Ct. 235, 58 L. Ed. 2d 207) (1978), opinion vacated in part and death sentence upheld, *Presnell v. State*, 243 Ga. 131 (252 S.E.2d 625) (1979). In 1992, Presnell's death sentence was vacated during Federal habeas corpus proceedings. *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992). A re-sentencing trial was held in 1999 and the jury recommended a death sentence after finding beyond a reasonable doubt that Presnell committed the murder while engaged in the commission of kidnapping with bodily injury and that the murder was outrageously **[**728]** or wantonly vile, horrible, or inhuman in that it involved torture and depravity of mind. O.C.G.A. § 17-10-30 (b) (2), (7). **[*247]** Presnell appeals from the re-sentencing verdict. [1]

FOOTNOTES

1 Voir dire in the re-sentencing trial commenced February 22, 1999 and the jury, selected March 8, fixed its sentence at death on March 16, 1999. Presnell's motion for a new trial, filed April 1, 1999 and amended June 20, 1999, was denied by the trial court on November 3, 2000. Presnell filed a notice of appeal on November 30, 2000, and the case was docketed to this Court on January 9, 2001. It was orally argued on April 16, 2001.

[*3]** 1. The evidence adduced at trial authorized the jury to find that on April 23, 1976, Presnell attempted to abduct a ten-year-old girl in Clayton County as she was walking home from school on a wooded trail. Although he grabbed her and threatened her with a knife, the girl managed to break free and escape. On May 3, 1976, Presnell staked out an elementary school in Cobb County and observed a ten-year-old girl walking home on a wooded trail. He returned the following day and waited on the trail. In his car, he had a rug and a jar of lubricant. When the ten-year-old girl came walking down the trail with her eight-year-old friend, Lori Ann Smith, Presnell abducted both girls. He taped their mouths shut and threatened to kill them if they did not cooperate; he also said he had a gun. They got into Presnell's blue Plymouth Duster. While Presnell was driving, he forced the older girl to orally sodomize him and inserted his finger into her vagina. They drove to a secluded area and Presnell walked the children into the woods. He carried the rug and the jar of lubricant. He made both girls undress and he raped the older girl on the rug. Her vagina was torn during the rape and began bleeding. **[***4]** Presnell then said that he was going to take Lori Ann back to his car and that the older girl should wait for him. On the way back to the car, Lori Ann tried to run away, but Presnell caught her and forced her face underwater in a creek, drowning her. The medical examiner testified that there was water, sand and plant matter in her lungs and stomach and that it would have taken one to several minutes for her to die. She had bruises on her neck and a bruise on her back from where Presnell apparently placed his knee. Presnell returned to the older girl and again forced her to orally sodomize him. He then locked her in his car trunk and began driving, but a tire went flat so he dropped her off in another wooded area after forcing her to commit oral sodomy again. Although Presnell told her he would return, the older girl heard the sound of a nearby gas station and walked there. She later gave police a description of Presnell and his blue Duster and stated that his tire was flat. Shortly thereafter the police spotted Presnell changing a tire on his blue Duster at his apartment complex not far from where he dropped off the older girl. Presnell initially denied everything but later admitted **[***5]** that he knew the location of the missing girl and led the police to Lori Ann's body. He also confessed. A search of Presnell's bedroom uncovered a handgun and child pornography **[*248]** depicting young girls.

We find that the evidence presented at Presnell's re-sentencing trial was sufficient to enable

any rational trier of fact to find the existence of the statutory aggravating circumstances beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979). See also O.C.G.A. § 17-10-35 (c) (2). Contrary to Presnell's contention, the evidence was sufficient to authorize the jury to find beyond a reasonable doubt the two subparts of the (b) (7) aggravating circumstance, torture and depravity of mind. Presnell stalked elementary school children; planned his crimes; abducted the victim, an eight-year-old child, as she was walking home from school; taped her mouth shut; threatened to kill her; took her to a remote area; made her strip naked; forced her to watch as he raped and forced other sex acts on her friend; chased her as she tried to escape; and held her head underwater where she struggled for several minutes **[***6]** before dying. See *Hance v. State*, 245 Ga. 856, 861 (3) (268 S.E.2d 339) (1980) (*HN1*psychological abuse inflicted by the defendant on the victim where it is shown to have resulted in severe mental anguish in anticipation of physical harm may amount to torture and depravity of mind); *Thomas v. State*, 245 Ga. 688 (7) (266 S.E.2d 499) (1980) (the young **[**729]** age of the victim is relevant to a consideration of torture and depravity of mind).

2. Presnell challenged the composition of the Cobb County Board of Jury Commissioners, which authorized Presnell's jury pool, on the basis that the board was composed of only five members instead of the six members required by O.C.G.A. § 15-12-20. Presnell has failed to show reversible error in the five-member composition of the board. See *Pope v. State*, 256 Ga. 195 (1) (c) (345 S.E.2d 831) (1986) (*HN2*requiring a showing of such disregard of the essential and substantial provisions of O.C.G.A. § 15-12-20 as would vitiate the jury arrays); *Dillard v. State*, 177 Ga. App. 805 (4) (341 S.E.2d 310) (1986) (provisions of statute are merely directory **[***7]** and were not intended to vest procedural rights in criminal defendants). Moreover, O.C.G.A. § 15-12-20 (c) allows for each county to establish a lesser number of jury commissioners by local rule, and the trial court found that Cobb County had indeed promulgated such a rule requiring only five jury commissioners which, contrary to Presnell's contention, was not repealed or otherwise set aside.

3. Presnell complains that the trial court erroneously excused several prospective jurors for cause.

(a) Prospective jurors Brennan, Kidwell, Chun, Green, Fuller, and Allen were excused by the trial court due to their inability to vote for the **death penalty** as a possible sentence.

*HN3*The proper standard for determining the disqualification of **[*249]** a prospective juror based upon his views on capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [Cit.]

Greene v. State, 268 Ga. 47, 48 (485 S.E.2d 741) (1997). A juror's bias for or against the **death penalty** does not need to be proved with unmistakable clarity; the relevant inquiry **[***8]** on appeal is whether the trial court's finding that a prospective juror is disqualified is supported by the record as a whole. Id. at 48-49. Often the trial court must resolve equivocal and contradictory answers by the prospective juror in determining whether his views would substantially impair his ability to consider all possible sentences. Id. at 49. For this reason, an appellate court must pay deference to the trial court's finding that a particular prospective juror is qualified or not qualified to serve on the jury. Id. *HN4*"Whether to strike a juror for cause is within the discretion of the trial court and the trial court's rulings are proper absent some manifest abuse of discretion. [Cit.]" Id. at 50.

Prospective jurors Brennan, Chun, Green, Fuller, and Allen unequivocally stated that they could never vote to impose a death sentence under any circumstances. The trial court correctly found that they were disqualified. *Greene*, supra, 268 Ga. at 48-50; *Wainwright v. Witt*, 469 U.S. 412 (II) (105 S. Ct. 844, 83 L. Ed. 2d 841) (1985). Prospective juror Kidwell

initially stated that he did not "weigh strongly either **[***9]** way," but he then stated that he would pick life if given the choice between life or death and that he was "swaying" toward a conscientious objection to the **death penalty** as voir dire progressed. He reiterated that he would always pick life, then stated that he could perhaps vote for the **death penalty** for Adolf Hitler, but immediately reconsidered and stated that he could never vote for the **death penalty** in any fact situation that he could think of. *HN5*Although Presnell correctly argues that a prospective juror is not disqualified for merely leaning for or against the **death penalty**, Mize v. State, 269 Ga. 646 (6) (d) (501 S.E.2d 219) (1998), the trial court was authorized to find from the totality of prospective juror Kidwell's responses that he would be substantially impaired in the performance of his duties as a juror because he could not vote for a death sentence. See Greene, 268 Ga. at 48-50. The trial court did not abuse its discretion by excusing him. Id. at 50.

(b) Prospective juror Morton initially stated that she would be uncomfortable voting for death and was "probably" substantially impaired in her ability to vote for a death sentence. **[***10]** She then responded to a question about whether she could follow the judge's **[**730]** instructions by stating that she did not think she could put her beliefs aside in a **death penalty** situation and she said, "I don't know **[*250]** that I could follow [the instructions] exclusively." She said she would not always vote for life, but she would vote for life more often; she also said she had a higher standard of what constitutes an aggravating circumstance. She thought her views might impair her ability to give the State a fair trial. She then stated that she could be convinced to vote for a death sentence for a serial murderer, but she then reconsidered and stated that she was not sure she could vote for the **death penalty** even in that kind of a case. She said, "That may be so," when asked if she could never vote for the **death penalty** even though she may support it philosophically. She said she was substantially impaired and added, "but I tend to be fairly wishy-washy. Somebody could come along and switch me back the other way." In response to the trial court's question about whether she could follow the law given to her by the judge, she replied that she would have a hard time following the law laid out **[***11]** for her and that "when someone's life is at stake, [she would not] be able to exclude [her] own set of parameters." The trial court granted the State's motion to excuse prospective juror Morton for cause after finding that she was substantially impaired in her ability to perform her juror duties because she had stated that she would follow her own criteria instead of the law as she was instructed. Based on the totality of prospective juror Morton's responses, the trial court was authorized to excuse her for cause for this reason. See Greene, supra, 268 Ga. at 52; Crowe v. State, 265 Ga. 582 (10) (458 S.E.2d 799) (1995).

(c) Prospective juror Vakilzadeh stated that he could not decide the case because the case was 23 years old and he "wasn't here at the beginning of the process." He said he had no knowledge of the evidence at the first trial and therefore could not agree with the prior verdict of guilty even though Presnell entered the trial already found guilty. Despite being told by the prosecutor that he would be presented with substantial evidence from 15 to 20 witnesses about the crimes for which Presnell had been convicted, prospective juror **[***12]** Vakilzadeh insisted, "I cannot judge because I do not have evidence from everything from A to Z." He repeatedly and unequivocally stated that he could not sit as a juror because he had not heard the evidence from the original trial. He said that, if he was selected as a juror, heard the case, and was sent to the jury room to deliberate, he would refuse to deliberate and would request more information. The trial court was authorized to excuse him for cause. See generally Rucker v. State, 270 Ga. 431 (2) (510 S.E.2d 816) (1999) (decision to excuse a potential juror for cause lies within sound discretion of trial court); Garland v. State, 263 Ga. 495 (1) (435 S.E.2d 431) (1993).

4. Presnell complains that the trial court erred by refusing to excuse for cause ten prospective jurors, Fowler, Feusting, Stanek, Croft, Kropacek, Cole, Payne, Sharp, Adair, and Gaines, due to their **[*251]** alleged inability to consider a life sentence. See Nance v. State, 272 Ga. 217 (6) (526 S.E.2d 560) (2000); Greene, supra, 268 Ga. at 48. The record

shows that prospective juror Fowler could vote to impose a life sentence and that she could set aside **[***13]** her past life experience when deliberating Presnell's sentence. See *Pace v. State*, 271 Ga. 829 (7), (8) (524 S.E.2d 490) (1999); *Cromartie v. State*, 270 Ga. 780 (9) (b) (514 S.E.2d 205) (1999). Although they leaned in favor of returning a death sentence, prospective jurors Feusting, Stanek, Croft, Kropacek, Cole, Payne and Sharp also indicated that they could vote for a life sentence. Therefore, based on the totality of their responses, the trial court was authorized to find that they were qualified to serve on the jury. See *Mize*, supra, 269 Ga. at 646 (6) (d). Prospective juror Adair stated that she believed a death sentence was the only appropriate punishment for the death of a child, but she also stated several times that she could vote for a life sentence. She later said that she would keep an "open mind" about the sentence for someone who had caused the death of a child. The trial court did not abuse its discretion by finding that she was qualified. See *Pace*, 271 Ga. at 833-34 (7). Lastly, prospective juror Gaines stated that she could vote **[**731]** for a life sentence only if it was life without parole. After **[***14]** it was explained to her that a death sentence and a life sentence would be her two sentencing options, without reference to parole, Gaines said that she could set aside her reservations about parole and consider both possible sentences as instructed by the trial court. While the questioning of this prospective juror engendered much confusion and equivocation, we cannot conclude the trial court abused its discretion by finding that she was qualified to serve. See *Pace*, supra; *Greene*, 268 Ga. at 48-50.

5. Because life without parole was not a sentencing option for Presnell, the trial court did not err by refusing to allow him to question prospective jurors about their opinions regarding parole. *Burgess v. State*, 264 Ga. 777 (3) (450 S.E.2d 680) (1994); *Davis v. State*, 263 Ga. 5 (7) (426 S.E.2d 844) (1993). Compare *Zellmer v. State*, 272 Ga. 735 (1) (534 S.E.2d 802) (2000) (setting forth standard applicable in cases where juries are required to consider parole eligibility pursuant to O.C.G.A. § 17-10-31.1).

6. *HN6*"The scope of voir dire is largely left to the trial court's **[***15]** discretion, and the voir dire in this case was broad enough to ascertain the fairness and impartiality of the prospective jurors." (Footnote omitted.) *Barnes v. State*, 269 Ga. 345, 351-352 (10) (496 S.E.2d 674) (1998). We find no error with the jury selection.

7. The trial court did not err by denying Presnell's motion in limine regarding the State's use of the O.C.G.A. § 17-10-30 (b) (7) aggravating circumstance on the basis that it is unconstitutionally vague. *Taylor v. State*, 261 Ga. 287 (13) (a) (404 S.E.2d 255) (1991); **[*252]** *Hance*, supra, 245 Ga. at 860 (3).

8. Presnell contends the trial court erred by denying his motion to suppress the gun and books of child pornography found in his bedroom. Presnell lived with his mother in an apartment. Two days after his arrest and confession, the police went to the apartment to look for the gun Presnell said he had possessed and that the older girl had noticed in his Duster when he dropped her off. Although they did not have a search warrant, police witnesses testified that Presnell's mother consented to a search of Presnell's bedroom and that she showed them the **[***16]** handgun, which she apparently owned but to which Presnell had access, in Presnell's headboard/bookcase. It was at that time that the police also noticed and seized the child pornography books. There was no evidence that Presnell's bedroom was locked or that he paid rent.

At trial, Presnell's mother corroborated the police testimony by admitting that she consented to a search of the bedroom. Although Presnell argues that his mother did not have authority to consent to a search of his bedroom, the evidence was sufficient to authorize the trial court to find that his mother had common control and authority over his bedroom and that she could therefore consent to a search of that area. See *United States v. Matlock*, 415 U.S. 164, 171 (II) (94 S. Ct. 988, 39 L. Ed. 2d 242) (1974); *Smith v. State*, 264 Ga. 87 (2) (441 S.E.2d 241) (1994); *State v. West*, 237 Ga. App. 185 (514 S.E.2d 257) (1999). The trial

court did not err by admitting the gun and the child pornography books into evidence.

9. There is no evidence to support Presnell's assertion that the magistrate who issued the search warrant for his Duster in 1976 was not neutral and detached **[***17]** because he had a pecuniary interest in issuing the warrant. See *Connally v. Georgia*, 429 U.S. 245 (97 S. Ct. 546, 50 L. Ed. 2d 444) (1977). The record shows that the search warrant was facially valid and supported by probable cause. See *DeYoung v. State*, 268 Ga. 780 (7) (493 S.E.2d 157) (1997). Therefore, the evidence seized from his car was properly admitted.

10. Presnell claims that the trial court erred by having the jurors place their left hands on the Bible while being sworn in as jurors. However, Presnell did not object and thus has waived this argument on appeal. See *Pye v. State*, 269 Ga. 779, 787 (14) (505 S.E.2d 4) (1998) (HN7failure to object at trial precludes a finding of reversible error on appeal). Furthermore, there was no reference to divine law or the contents of the **[**732]** Bible during the trial. Compare *Carruthers v. State*, 272 Ga. 306 (2) (528 S.E.2d 217) (2000); *Jones v. Kemp*, 706 F. Supp. 1534 (IV) (A) (N.D. Ga. 1989).

11. The State was entitled to allege and prove the O.C.G.A. § 17-10-30 (b) (7) aggravating circumstance at the 1999 trial, even if it was not alleged **[***18]** at the 1976 trial. See *Zant v. Redd*, 249 Ga. 211 (2) (290 **[*253]** S.E.2d 36) (1982).

12. Presnell contends the trial court committed reversible error by allowing the State to use at trial a book, entitled *Radiant Identities* by author Jock Sturges which contained photographs of nude children, that the State claimed Presnell had ordered in 1996 from his prison cell. Pretermitting the issue whether the admission of the book was error because of the State's failure to authenticate it, we find that no reversible error occurred because the State established by independent evidence the facts sought to be proved by the book itself. The State's evidence properly established that Presnell was upset about the rejection of a book entitled *Radiant Identities* and, as a consequence, sent a letter to the warden requesting the prison rules and guidelines governing the receipt of materials containing pictures of nude children. Although Presnell claims that the admission of the book was highly inflammatory, the defense did not dispute that Presnell continued to be a pedophile and that *Radiant Identities* was the type of book to which a pedophile would be attracted.

13. (a) Presnell **[***19]** asserts that the trial court erroneously allowed the State to introduce improper evidence regarding his 1976 Florida conviction for contributing to the delinquency of a minor and his numerous Georgia arrests and convictions for motor vehicle thefts in the early 1970s. However, the record shows that the documentary evidence of these convictions and indictments was not presented to the jury but only placed in the record so the State could demonstrate it had a good faith basis for asking Presnell's mitigation witnesses on cross-examination about their knowledge of Presnell's criminal history. See *Medlock v. State*, 264 Ga. 697 (449 S.E.2d 596) (1994); *Christenson v. State*, 261 Ga. 80 (8) (c) (402 S.E.2d 41) (1991). These documents were sufficient to establish that the State had a good faith basis for its cross-examination questions about Presnell's arrests, convictions, and other bad acts. See *Medlock*, 264 Ga. at 698-99.

(b) We find meritless Presnell's argument that the indictment arising out of his crimes against Lori Ann Smith and the surviving victim should have been redacted to remove the rape charge because he was convicted of only **[***20]** statutory rape. The 1976 jury convicted Presnell of rape without specifying whether it was forcible rape or statutory rape, and this Court affirmed that conviction "with direction that the defendant be sentenced by the trial court for the crime of statutory rape." *Presnell*, supra, 243 Ga. at 133. Furthermore, because the jury heard abundant evidence that Presnell raped the older girl and his guilt or innocence on this charge was not in issue, Presnell can show no harm from the introduction of the indictment reflecting the rape charge.

14. The crime scene and pre-autopsy photographs of the murder victim were properly admitted. See *Taylor v. State*, 271 Ga. 629 (2) **[*254]** (523 S.E.2d 322) (1999); *Bright v. State*, 265 Ga. 265 (16) (455 S.E.2d 37) (1995).

15. Presnell asserts error in the State's introduction of his prison records at trial without first having them declassified as confidential and privileged state secrets in accordance with O.C.G.A. § 42-5-36. However, the prosecutor stated that he had subpoenaed the records from the Department of Corrections in compliance with O.C.G.A. § 42-5-36 (c), **[***21]** which allows for the release of these files upon subpoena. In addition, the record contains a sworn certificate authenticating the prison records, signed by the assistant director of legal services for the Department of Corrections and stating that O.C.G.A. § 42-5-36 had been complied with. See O.C.G.A. § 42-5-36 (d). We conclude that the release of the prison records for use at Presnell's trial was not improper.

16. Presnell contends the trial court erred by allowing the State to present impermissible victim-impact evidence from **[**733]** several witnesses. However, three of the witnesses about whom he complains, the surviving victim, her mother, and the doctor who treated the surviving victim's vaginal injuries, were not victim-impact witnesses. They testified solely as fact witnesses about the crimes, the search for the missing girls, and the injuries to the older girl. As such, their testimony was relevant and admissible. The State did present four victim-impact witnesses [2] whose proposed victim-impact testimony had been reviewed before trial and whose testimony at trial while reading their prepared statements did not exceed the acceptable **[***22]** boundaries for this kind of testimony. See *Pickren v. State*, 269 Ga. 453 (1) (500 S.E.2d 566) (1998); *Turner v. State*, 268 Ga. 213 (2) (486 S.E.2d 839) (1997). We find no error.

FOOTNOTES

2 Those witnesses were the victim's mother, father, sister and cousin. Since the State did not introduce at trial the victim-impact statement prepared by the surviving victim, we find meritless Presnell's assertion that the trial court committed reversible error by approving its use.

17. As mitigation evidence, Presnell presented the testimony of his aunt, who was only seven years older than Presnell and who had grown up with him. She testified about the poverty and rootlessness experienced by Presnell's family and their difficult childhood. On cross-examination, the State was properly permitted to question her about her lack of a criminal history as well as the lack of a criminal history among members of her family who had experienced similar conditions as Presnell. See *Pye, supra*, 269 Ga. at 788 **[***23]** (17). See generally O.C.G.A. § 24-9-64.

18. As the jury was returning to their hotel the night before closing arguments, a man walking past them in the hotel lobby said "Fry him" to some of the jurors. The bailiff accompanying the jurors, **[*255]** Major Palmer, immediately detained the man and questioned him. Major Palmer determined, inter alia, that the man was visiting Atlanta from Nevada, that he was completely unfamiliar with Presnell's case, and that he did not know the jury was involved with a **death penalty** case. The man had simply seen their juror badges and thought it would be humorous to make such a remark. The next day, Major Palmer presented his report to the court and the trial judge questioned each juror individually and determined that none of the jurors would be affected by this remark during their deliberations. Presnell did not object to this procedure or move for a mistrial. We commend Major Palmer for the conscientious manner in which he executed his duties and find no error with the trial court's handling of this situation. See *Pruitt v. State*, 270 Ga. 745 at 755 (22) (514 S.E.2d 639). See also *Byrd v. State*, 262 Ga. 426 (1) (420 S.E.2d 748) (1992).

[*24]**

19. HN8 Although Presnell contends the prosecutor's closing argument was improper, he failed to object to any part of the argument. Thus, he can obtain appellate relief only if he can show that the allegedly improper argument in reasonable probability changed the result of his trial. *Whatley v. State*, 270 Ga. 296 (15) (509 S.E.2d 45) (1998). Based upon our review of the argument, we find no error that overcomes this procedural default. It was not improper for the prosecutor to argue Presnell's future dangerousness, *Jones v. State*, 273 Ga. 231 (4) (539 S.E.2d 154) (2000), and this argument was too indirect to constitute a reference to parole, which was never mentioned. On several occasions, the prosecutor also asked the jury to consider what was going through Lori Ann's mind when she was abducted, when she was made to undress, when she watched her friend being raped, and when she was being chased and drowned. The prosecutor was careful to cast this argument in terms of the mental pain and torture that would be experienced by an eight-year-old child in these circumstances, and he specifically tied her mental state to Presnell's depravity of mind. HN9 Psychological **[***25]** abuse inflicted on a victim before death is relevant to a consideration of a defendant's depravity of mind. See *Hance*, supra, 245 Ga. at 860 (3). We therefore conclude that this argument was not a "golden rule" argument that invited the jury to place themselves in the victim's position. See *McClain v. State*, 267 Ga. 378 at 383 (3) (a) 477 S.E.2d 814. The prosecutor's analogy of how a plastic cup will split if you try to push a can through it was a relevant illustration **[**734]** of the injuries sustained by the older girl during the rape. See generally *Conner v. State*, 251 Ga. 113 (6) (303 S.E.2d 266) (1983) (the range of discussion and choice of illustrations during closing argument are very wide). It was also not improper for the prosecutor to argue that Presnell showed no mercy to the victims in this case and did not display any remorse while committing the crimes or during his confession. See *Crowe*, supra, 265 **[*256]** Ga. at 592 (18) (c); *Ledford v. State*, 264 Ga. 60 (18) (b) (439 S.E.2d 917) (1994). Presnell's arguments regarding the prosecutor's reference to the *Radiant Identities* book, the indictment, crime photographs, and the **[***26]** malice murder charge are controlled adversely to him by our rulings in Divisions 12, 13 (b), and 14, supra and Division 21, infra. Accordingly, we find no error with the prosecutor's closing argument.

20. There was no error with the jury charge. HN10 The trial court was not required to instruct the jury on residual doubt or any other specific mitigating circumstance as long as it charged on mitigating evidence in general. See *Carruthers*, supra, 272 Ga. at 317 (18); *Terrell v. State*, 271 Ga. 783 (11) (523 S.E.2d 294) (1999). The trial court also did not err by refusing to charge on electrocution as Georgia's method of execution, see *Hill v. State*, 263 Ga. 37 (20) (427 S.E.2d 770) (1993); on life without parole when this was not a possible sentence for Presnell, *McMichen v. State*, 265 Ga. 598 (21) (458 S.E.2d 833) (1995); and that the jury did not have to find mitigating circumstances before it could consider them. See *Terrell*, supra. The trial court properly instructed the jury that it could return a life sentence regardless of the existence or non-existence of any mitigating circumstances. Id. [3]

FOOTNOTES

3 Appended to Presnell's enumeration regarding the refused jury charges is his one-sentence contention that O.C.G.A. § 17-10-16, which provides that a jury may consider a sentence of life without parole upon agreement by the State, is unconstitutional. This argument is controlled adversely to Presnell by *Freeman v. State*, 264 Ga. 27 (2) (a) (440 S.E.2d 181) (1994).

[*27]** 21. The trial court did not err by correctly charging the jury on the elements of malice murder because Presnell had already been convicted of malice murder and murder was an element of the statutory aggravating circumstances. The jury charge on the O.C.G.A.

§ 17-10-30 (b) (7) aggravating circumstance was not improper. See *Holiday v. State*, 258 Ga. 393 (19) (b) (369 S.E.2d 241) (1988); *West v. State*, 252 Ga. 156, 161-62 (313 S.E.2d 67) (1984).

22. Presnell's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. O.C.G.A. § 17-10-35 (c) (1). As we held in 1978, *Presnell*, supra, 241 Ga. at 64, the death sentence in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. O.C.G.A. § 17-10-35 (c) (3). The similar cases listed in the Appendix support the imposition of the **death penalty** in this case in that they all involve a murder during a kidnapping with bodily injury or the O.C.G.A. § 17-10-30 (b) (7) **[***28]** aggravating circumstance.

Judgment affirmed. All the Justices concur.

[*257] Appendix.

Johnson v. State, 271 Ga. 375 (519 S.E.2d 221) (1999); *Gulley v. State*, 271 Ga. 337 (519 S.E.2d 655) (1999); *Pruitt v. State*, 270 Ga. 745 (514 S.E.2d 639) (1999); *Pye v. State*, 269 Ga. 779 (505 S.E.2d 4) (1998); *Wellons v. State*, 266 Ga. 77 (463 S.E.2d 868) (1995); *Hall v. State*, 261 Ga. 778 (415 S.E.2d 158) (1991); *Pruitt v. State*, 258 Ga. 583 (373 S.E.2d 192) (1988); *Williams v. State*, 258 Ga. 281 (368 S.E.2d 742) (1988); *Parker v. State*, 256 Ga. 543 (350 S.E.2d 570) (1986); *Devier v. State*, 253 Ga. 604 (323 S.E.2d 150) (1984); *Felker v. State*, 252 Ga. 351 (314 S.E.2d 621) (1984); *Waters v. State*, 248 Ga. 355 (283 S.E.2d 238) (1981); *Messer v. State*, 247 Ga. 316 (276 S.E.2d 15) (1981).

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