No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

LYNDON FITZGERALD PACE,

Petitioner,

v.

SHAWN EMMONS, Warden,
Georgia Diagnostic and Classification Prison,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

2023 WL 3376683
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United States Court of Appeals, Eleventh Circuit.

Lyndon Fitzgerald PACE, Petitioner-Appellant,
v.
WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent-Appellee.

No. 16-10868
|
Filed: 05/11/2023

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:09-cv-00467-WBH

Attorneys and Law Firms

Gerald Wesley King, Jr., Federal Public Defender, Charlotte, NC, Gretchen Stork, Federal Defender Program, Atlanta, GA, for Petitioner-Appellant.

Sabrina Graham, Clint Christopher Malcolm, Beth Attaway Burton, Georgia Department of Law Attorney General's Office, Atlanta, GA, for Respondent-Appellee.

Before Wilson, Rosenbaum, and Luck, Circuit Judges.

Opinion

Luck, Circuit Judge:

***1** In seven months, Lyndon Pace raped and strangled to death four women, three of whom were more than seventy-eight years old. He was convicted and sentenced to death for the murders. He now appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. section 2254.

Pace makes five arguments on appeal. First, he contends that the Georgia Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in denying his claim that his trial counsel were ineffective because they failed to investigate and present available mitigation evidence. Second, he argues that the Georgia Supreme Court either failed to apply or unreasonably applied *Darden v. Wainwright*, 477 U.S. 168 (1986), in denying his claim that the prosecutor's sentencing phase closing argument violated his right to a reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Third, he asserts that the Georgia Supreme Court unreasonably applied *Strickland* in denying his claim that his trial counsel were ineffective for failing to object to parts of the prosecutor's sentencing phase closing argument. Fourth, he argues that the Georgia Supreme Court unreasonably applied clearly established federal law in concluding that the state trial court's admission of evidence that he burglarized Coretta Scott King, the widow of Dr. Martin Luther King, Jr., did not violate his right to a reliable sentencing. And fifth, he contends that the Georgia Supreme Court unreasonably applied *Simmons v. South Carolina*, 512 U.S. 154 (1994), in concluding that the state trial court's refusal to inform the jury about his eligibility for parole did not violate his right to a reliable sentencing. After careful review of the briefs and the record, and with the benefit of oral argument, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Murders

On August 28, 1988, Lula Bell McAfee, age eighty-six, was found dead in her home in Atlanta. She was naked and lying face down on her bed, with a pillow underneath her stomach that pushed her pelvis up, exposing her vaginal and rectal areas. Blood was pouring out of her mouth and her bra and a strip of cloth were tangled around her neck. Her bathroom window was open and the window screen had been removed and left lying on the ground. Her bedroom was "completely ransacked" and a briefcase, car keys, and money were missing. Ms. McAfee's autopsy established that she had been strangled to death. The presence of lubricant on her vaginal and rectal areas suggested that she had been sexually assaulted. Swabs from her breasts revealed the presence of saliva, and vaginal and rectal swabs revealed the presence of sperm. Ms. McAfee had known Pace "since he was a baby."

On September 10, 1988, Mattie Mae McClendon, age seventy-eight, was found dead in her home in the Vine City area of Atlanta. She was lying in her bed with bloodstained sheets pulled over her body. Her bathroom window was open, the window screen had been torn apart from the outside, and a tree limb just outside the window was broken. Ms. McClendon's autopsy showed that she had been strangled to death and suffered "a very large" vaginal laceration "with a large amount of hemorrhage coming from it." Rectal swabs taken from her body revealed the presence of sperm.

***2** On February 4, 1989, Johnnie Mae Martin, age seventy-nine, was found dead in her home in the Vine City area of Atlanta. She was lying on her bed with a pillow over her head. Her bloodstained nightgown was pulled up around her breasts, a shoelace was wrapped around her neck, and the rest of her body was naked with her legs spread open. A side window was open, the window screen had been pushed back, and a ladder was just under the window on the outside of the house. The house was "ransacked." Ms. Martin's autopsy established that she had been strangled to death and suffered a vaginal laceration and other injuries in her vaginal area. Rectal swabs taken from her body revealed the presence of sperm.

On March 4, 1989, Annie Kate Britt, age forty-two, was found dead in her home in Atlanta. Ms. Britt was lying naked in her bed with a sock knotted tightly around her neck. Someone had pried open a back window, the window screen was lying on the ground, and a pipe underneath the outside of the window was loose and detached from the wall. The house was "ransacked." Ms. Britt's autopsy established that she had been strangled to death, and a broken fingernail, bruises, and scrapes on her body were "consistent with her fighting with her attacker at the time that she was strangled." Her autopsy revealed multiple tears in her anus that appeared as if they had occurred after she died, and rectal and vaginal swabs revealed the presence of sperm.

More than three years later, on September 24, 1992, Sarah Grogan, age sixty-nine, woke up to find that someone had broken into her home in the Vine City area of Atlanta. Ms. Grogan left her bedroom and found a man in her kitchen. As the man chased her back to her bedroom, Ms. Grogan slammed the bedroom door in the man's face. Ms. Grogan got her gun and shot through the door, but the man wasn't there when she opened it to see if her shot had hit him. As she left the bedroom, the man "took a shot at [her]," but she "r[a]n to the front door and got out." Police discovered that the burglar had broken into Ms. Grogan's house through a rear kitchen window where the screen had been ripped from its frame. Investigators took fingerprints from the rear window and from other items that the man touched.

Less than a week later, on September 30, 1992, Susie Sublett, an elderly woman living in the Vine City area of Atlanta, woke up to find a man in her bedroom searching through her purse. The man had broken into her home through a side window. Ms. Sublett confronted the man, and he threatened to "blow [her] brains out." Ms. Sublett fought the man and chased him out of the window he had broken in through. Ms. Sublett's phone lines had been cut and so had her neighbors', so she called the police from another neighbor's house. When the police arrived, they found that the side window's screen had been removed and that there was a milk crate on the ground below the window. Police took fingerprints from the window screen and from other items that the man touched.

The fingerprints taken from Ms. Grogan's and Ms. Sublett's homes matched Pace's, which were on file from an earlier conviction. Police obtained a warrant and arrested Pace. Pace agreed to give the police samples of his hair and blood. Pace's pubic hair matched hair samples taken from Ms. Martin's and Ms. Britt's murders. And the sperm found in each of the murder victims matched Pace's DNA.

A grand jury in Fulton County, Georgia, charged Pace with four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy. The state sought a death sentence for each of the four malice murders. Under Georgia's death-sentencing statute, the case was set for a bifurcated jury trial with a guilt phase and a sentencing phase. *See* O.C.G.A. § 17-10-2(c). The jury had to find at least one statutory aggravating circumstance at the sentencing phase to recommend a death sentence. *See id.* § 17-10-30(c). At the sentencing phase, Pace had the right to present any mitigation evidence weighing against the imposition of the death penalty. *See, e.g.*, *Crowder v. State*, 491 S.E.2d 323, 325 (Ga. 1997) ("Under Georgia's statutory death-penalty statute, any evidence that relates to the defendant's character, prior record, or the circumstances of the offense is admissible as mitigating evidence.").

Trial Counsel's Investigation of Mitigation Evidence

***3** Three attorneys were appointed to represent Pace. Two of the attorneys, Michael Mears and Nancy Mau, were from the Office of the Multi-County Public Defender, a law office dedicated to handling death penalty trials statewide. The third, Bruce Harvey, was a criminal defense attorney in private practice. Mr. Mears served as lead counsel. Ms. Mau "assumed responsibility for the majority of the actual workup of the case" and Mr. Harvey's role "was solely to handle scientific evidence in the guilt [and] innocence phase, namely the DNA evidence."

Trial counsel's "focus ... all along was reasonable doubt of ... Pace's guilt." They sought to establish reasonable doubt at the guilt phase by highlighting an "overzealous prosecution" and showing that the procedures used to match Pace's DNA to the DNA collected from the murder victims were unreliable. If Pace was convicted, trial counsel's strategy for the sentencing phase was to establish "residual doubt" [1] and to show that Pace's family was "pleading for mercy." In preparation for their mitigation defense, Pace's trial counsel interviewed Pace, his family, a former girlfriend, friends, and teachers, gathered Pace's background records, hired a "mitigation specialist and investigator" to assist with their investigation, and retained a mental health expert to examine Pace.

Trial counsel interviewed witnesses
and gathered Pace's records

Ms. Mau was assigned responsibility for the sentencing phase of Pace's trial. To prepare a mitigation strategy, Ms. Mau first spoke with Pace's mother and several of his siblings. Pace's mother mentioned that Pace had a "particularly bad" head injury as a child and that she thought it might have affected his performance at school. The injury required medical treatment and, after the injury, Pace "had headaches and [was] vomiting" for a "long time." In response, Ms. Mau explained to Pace's mother that it would be important to know if Pace had "learning problems" because "then the [s]tate might not be able to even have a [death penalty] trial." Pace's mother "seemed to understand," "talked more liberally" about Pace's head injuries, and "even ventured to say that [Pace] ha[d] always been a 'slow learner.' "

Ms. Mau also reached out to some of Pace's siblings. One sister, Lisa, said that Pace was "not a drug user." Ms. Mau believed that Lisa was "close enough to [Pace] to know whether he was using drugs or not when he was arrested" for the murders. Lisa also told Ms. Mau that there were several character witnesses from Pace's neighborhood who would testify that he cared for them and wouldn't be capable of committing the crimes he was charged with.

At the same time, Ms. Mau sought Pace's medical and school records. Despite repeated attempts, trial counsel weren't able to get Pace's childhood medical records because they hadn't been kept by the hospital. Trial counsel did, however, get Pace's school records, which were "disastrous." The records showed that Pace "did extremely poorly in school, was absent far more than he attended, repeated third grade three times and was socially promoted several times, and that he was reading on a first grade level at the age of [twelve]." Pace's family wasn't helpful in explaining his problems at school, "although they did relate that he was clumsy, fell down a lot, suffered terrible headaches, and had suffered at least one very severe head injury as a child." They dismissed Pace's poor performance at school by saying that he "had headaches or didn't want to go to school."

***4** Ms. Mau interviewed Pace to learn about his upbringing. Pace said that his parents separated when he was a teenager, but he didn't understand why because "he never knew anything was wrong" and they "never argued in front of" him or his siblings. Pace had eight siblings, and his father had "lots of children of his own." There were "no hard feelings" between Pace's family and his father's "new wife and family." Pace described growing up in a big family: "fun, exciting, family life, BBQ's, always someone around." He said his father was a "good" man and that both of his parents were strict and punished him when he misbehaved. Pace said that he had "lots of close friends" and knew "mostly everyone in his neighborhood."

Pace confirmed that he dropped out of school in the seventh grade and said it was because the schools where he grew up "weren't that good" and "didn't really inspire the children to learn." The bad schools, "coupled with his home life and bad neighborhood, made attendance in elementary school or any school seem less significant than having a job earning money." Pace added that he might have been in a "special class as a kid" and that a teacher said he was "slow" or a "remedial reader." Pace told Ms. Mau that he had started writing poetry in jail, but Ms. Mau was skeptical whether Pace could even read.

Pace said that he "got in with the wrong crowd" after he left school and that he started selling alcohol and drugs. He "got in trouble for the first time" when he was sixteen or seventeen years old for trespassing and was put on probation. He had a few odd jobs and moved around a lot, but when he wasn't working, he "hung around the streets" and sold drugs —"mostly cocaine and marijuana"—to support himself. Pace admitted he snorted cocaine but denied ever using or selling crack. He also said that he almost lost his life over a bad drug deal where he was "struck in the head with a pipe and left for dead." Pace mentioned that he had been incarcerated for other convictions as well.

Pace also recounted the same head injury described by his mother, explaining that it happened when he jumped out of a parked car as a young child. And he said that he sustained other head injuries, too. Pace noted that he sometimes suffered from headaches and dizziness and that, although his eyesight was generally okay, it "used to sort of 'black-out' and then come back on."

Along with Ms. Mau's interview with him, Pace wrote trial counsel a letter summarizing his life, noting that it consisted of "accidents, pain, [and] mistakes" but also "joy, happ[i]ness, and love." He wrote that he used to have "a lot of accidents" and referenced the same head injury he mentioned to Ms. Mau. He also recalled an incident where he was playing on a swing and knocked himself unconscious for three days but wasn't hospitalized. After that, Pace had "nothing but constant bad headaches on the left side of [his] head" and used to "throw-up a lot." He "couldn't stand loud noises," and the only thing he could do to stop the pain was go somewhere quiet and sleep.

Pace also said that he "wasn't a stupid child." He noted his resourcefulness with electronics, explaining that at age fourteen he fixed a broken television his mother had planned to throw away. And he said that he dropped out of school because he "got real frustrated with the situation and quit." Mr. Mears wrote back to Pace and asked him to share as much information as he could about the two accidents he described where he injured his head and to make a list of names and addresses of potential character witnesses.

Trial counsel hired an investigator
to assist in their investigation

Trial counsel hired a "mitigation specialist and investigator," Pam Leonard, to assist with Pace's case. Investigator Leonard met with Pace "to begin work on [his] social history." She noted that Pace was "pleasant, cooperative[,] and attentive throughout [their] discussion."

***5** Pace told Investigator Leonard that his family was "constantly moving around" when he was young, but he didn't know why. Pace said that he was "always having accidents" as a child and "constantly hit his head." Pace also said he never felt sad for a prolonged period until he was twenty-seven years old and broke up with his girlfriend, Trina Todd. At that time, he was "so depressed that he even considered suicide."

Pace detailed his history of alcohol and drug use. He said he first tried alcohol when he was five or six years old and didn't try it again until he was fourteen. By the time he was sixteen, he was "drinking beer like water" and "needed a perpetual buzz" to "keep away the pressures." When he was twenty-seven, he was drinking "a couple of six packs of beer" every weekend and was "only trying to get relaxed and didn't drink to get drunk." He denied ever being dependent on alcohol and said he could have stopped whenever he wanted.

Pace first used drugs when he was fifteen or sixteen years old. At the time, he "smoked a lot of weed" every day. He eventually "cut back to being a weekend user after a couple of years of everyday use of drugs and alcohol." He started selling and using cocaine when he was seventeen or eighteen. Pace said he used cocaine "to push the pain away," but he stopped using it after it nearly gave him a heart attack. He kept smoking marijuana, though, and by the time he was twenty-seven he was "smoking a nickel bag ... each weekend." He explained that selling drugs was "the way of life" in the neighborhoods where he grew up, and he said that "[t]hings were not available to [him] and there was no way out."

Investigator Leonard also interviewed three of Pace's former teachers, only one of whom—Doris Grissom—claimed to remember Pace. Ms. Grissom thought that Pace "probably was not evaluated for special ed[ucation] due to his extreme absenteeism combined with the long wait for evaluations." She said that Pace "came from a family where the children fended for themselves[,] and he often did not have clean clothes or sufficient food." According to Ms. Grissom, Pace's mother never came to school when asked, and "there was no one to enforce the attendance rules." Ms. Grissom also knew that Pace lived in a "terrible place" known as "little Vietnam" where "[u]nattended small children roamed around at all hours while older kids sniffed glue and smoked pot in plain view." Investigator Leonard wasn't convinced that Ms. Grissom remembered Pace and instead suspected that Ms. Grissom remembered "a composite of the many kids like him at her school, which ha[d] a high population of poor kids." Pace was never assigned to Ms. Grissom's class, and she had taught at the school for thirty-two years.

Ms. Mau spoke with Trina Todd, Pace's former girlfriend. Ms. Todd said she dated Pace "during the time some of the[ ] killings occurred" and that "she never saw any indication that anything was wrong." Ms. Todd had known Pace and his family for a long time and thought that the crimes Pace

was charged with were "out of character for him." She said Pace "was not capable" of committing the crimes he had been charged with.

Investigator Leonard also interviewed Ms. Todd. Ms. Todd told Investigator Leonard that she had known Pace's family for about ten years and first started dating Pace in 1982, during her senior year of high school. They broke up and didn't start dating again until the early 1990s. Ms. Todd "emphatically" said that Pace's charges "didn't click" with her because Pace was such a "quiet" person and "was particularly respectful toward the elderly."

***6** Ms. Todd also said that Pace had an "overwhelming need for her" while they were dating because he didn't have a car or "stable residence," had a criminal record, and was "barely literate." Ms. Todd was never afraid of Pace because he didn't hit her, but he kept calling her even after they broke up, so she filed harassment charges against him "just to scare him a little." Ms. Todd was aware of Pace's drug use, but he never used drugs in front of her or "let it get out of control while they were together."

Ms. Mau and Investigator Leonard interviewed several of Pace's family members and family friends. Before the individual interviews, Ms. Mau, Investigator Leonard, and Mr. Mears met as a group with Pace's mother, his sister Lisa, his brother Garry, and Garry's wife, Penny. During the meeting, trial counsel "described the scope and purpose of mitigation evidence in a bifurcated trial." In response to the family's questions about the state's charges against Pace, Ms. Mau "point[ed] out the problems in the [s]tate's case" but "emphasized that [Pace] [was] in a lot of trouble" and so they "need[ed] to plan for a sentencing phase." Pace's family members seemed "more interested in proving [Pace's] innocence" but "listened respectfully" and "seemed to understand the benefit of mitigation." Pace's mother provided trial counsel with the names and contact information for each of Pace's siblings and "several people who kn[e]w [Pace] and the Pace family."

After the group meeting, Ms. Mau and Investigator Leonard began their individual interviews. Pace's brother Darrell said he knew Pace "was doing some drugs" and Darrell had tried to persuade Pace to stop smoking marijuana. Darrell described Pace as "easy going" and said that Pace would "joke[ ] all the time." He explained that Pace's "nieces and nephews loved him and he got along with everybody." Darrell said, "There's no way [Pace] could have done it." Darrell also "credit[ed] [Pace] with saving his life" because Pace "once pulled [him] out of a swimming pool because he was drowning."

Pace's brother Garry—a recently retired Army sergeant—explained that "[j]ust because you're raised in that neighborhood doesn't mean you'll be a hoodlum." Garry knew that Pace "was involved in drugs" and "repeatedly warned [him] about the cycle of lawbreaking that goes with drug addiction." Both Garry and his wife Penny "rejected the idea of [Pace] being slow." They noted "his teaching himself to play the guitar by ear, teaching himself to drive[,] and his ability to dismantle mechanical objects as examples of above average traits." They couldn't explain Pace's poor performance at school. To them, "the only unusual thing about [Pace] [was] his tendency to have severe headaches." Garry had "never seen any abnormal behavior in [Pace]" and said that Pace was "not capable of committing these murders." Penny thought that Pace "might have been a thief" but insisted that he was "not a violent person" and "wouldn't harm an old woman." Even after Ms. Mau told them about the state's evidence against Pace, including the matching fingerprints and DNA, Garry and Penny "steadfastly maintained their disbelief that [Pace] committed four murders."

Pace's brother Gregory—an Army veteran like Garry—said he lived with Pace in the early 1990s and that Pace "was using drugs rather carelessly." But Gregory maintained that Pace "remained even tempered," and he "seriously and unequivocally" said that Pace was "not capable of these murders." After interviewing Garry, Penny, and Gregory, Investigator Leonard thought that they would "be very good mitigation witnesses" because "[t]hey [were] hard working, attractive[,] and articulate people who understand the theatrical qualities of a trial and [she] believe[d] they w[ould] hold steadfast to their proclamation that [Pace was] not capable of committing these murders."

***7** Pace's sister Jennifer said that Pace's drug problem got "pretty bad" in 1992 when, despite being "characteristically wellgroomed," Pace started appearing "unkempt." And Pace's sister Patty said that she thought Pace "got into drugs and petty crime because he couldn't read." But she thought that Pace "was doing quite well" at the time he was arrested. Patty also mentioned that Pace's parents "drank a little and argued often," sometimes getting into physical fights. Patty even had to intervene in one of her parents' fights by threatening to hit them with a pressure cooker lid. She also noted that Pace's father later went to prison for kidnapping his common-law wife. Patty was "adamant that [Pace] could not have

committed the crimes ... because he respected older people and often ran errands for them and watched out for them."

Pace's mother said that she ended her marriage with Pace's father because he was spending money on other women and let their house get repossessed. She tried not to fight in front of her children while they were together, but it was hard not to. Their fights occasionally got physical, and one time she had to get the police involved. After they split up, Pace's mother relied on public assistance for several years.

Pace's mother also described the head injury Pace suffered as a young child, noting that his skin didn't break and that she treated his head with rubbing alcohol. She started to worry about a week after the injury "because [Pace] couldn't stand for anybody to shake him," so she took him to the hospital where he received medical treatment. The hospital "lanced [his injury] to get all th[e] dried blood out and packed it with gauze so it could drain." Pace's mother was concerned about "long term problems" he may have suffered from the accident.

Mary Ann Booker, a longtime family friend, said that she had known Pace's mother since the 1970s. Ms. Booker said that "[t]he Pace family stuck together" and that Pace was "one of them likeable little guys." "[S]he was totally shocked to learn" that Pace had been arrested for the murders.

Ida Turner, another longtime family friend, said that she "watched [Pace] grow up and [she'd] never known him to be violent." Ms. Turner said Pace was "gentle, quiet, mannerable[,] and respectful." Ms. Turner "believe[d] they ha[d] the wrong man."

Together with the interviews, Ms. Mau and Investigator Leonard sought Pace's and his parents' background records. They tried to get Pace's and his parents' birth certificates, medical records, school records, social security records, employment records, and criminal and civil court records. Trial counsel compiled the information from the interviews and the background records they obtained into a detailed "social history chronology" of Pace's family dating to 1875.

Trial counsel retained a mental health expert to examine Pace

Trial counsel also arranged for Pace to be evaluated by Dr. Dennis Herendeen, a clinical psychologist. The purpose of the evaluation was to screen for "mental retardation" and "organic brain damage." Investigator Leonard met with Pace twice to prepare him for the evaluation and to explain what was happening. Investigator Leonard also sent Dr. Herendeen a set of memoranda she had prepared while interviewing Pace and his family and the social history chronology that trial counsel had prepared. Investigator Leonard told Dr. Herendeen about Pace's "tendency to fall and hit his head," his "significant head injury around age six," his "poor school performance ... and low reading level," and his "severe persistent headaches."

Dr. Herendeen met with Investigator Leonard at the jail to evaluate Pace. While they waited for Pace to arrive, Investigator Leonard "talk[ed] at length with [Dr. Herendeen] about the evils" of the Minnesota Multiphasic Personality Inventory (MMPI), a psychological test common in forensic settings. Investigator Leonard explained that trial counsel considered the MMPI to be "a sensationalizing blunt instrument of the state" that could be used against Pace. Investigator Leonard "d[idn't] expect [Pace] to do well on any personality test" and thought it "ma[de] little sense ... to administer a psychological test" that they'd have to "rebut in an attempt to rehabilitate our client, who is usually charged with being a malingering sociopath." So she "press[ed Dr. Herendeen] to take a measured approach to psychological testing by doing some initial screening [and] then looking for correlates in the literature ... for guidance on what additional tests to administer." Dr. Herendeen "agreed fully with th[at] approach."

***8** To screen for mental disability, Dr. Herendeen administered a "Shipley Institute of Living Scale." Pace's estimated IQ from the Shipley test was 78, which Dr. Herendeen didn't consider to be "promising" for a mental disability defense. To screen for academic achievement, Dr. Herendeen administered the reading section of the "Wide Range Achievement Test, Third Revision." That test showed that Pace read at approximately a fifth grade level, which was consistent with his IQ score.

Dr. Herendeen also administered the "Personality Assessment Inventory," which was a personality scale similar to the MMPI. The test covered a variety of mental health issues including paranoia, mania, anxiety-related disorders, schizophrenia, and drug problems. Pace "had significant elevation on the paranoia scale, and was markedly elevated on the mania scale, notably in feelings of grandiosity which could reach the level of delusional belief." His schizophrenia scale was also "somewhat elevated." The overall results

of the Personality Assessment Inventory suggested to Dr. Herendeen that he should rule out a diagnosis of "organicity" or "bipolar disorder."

Finally, Dr. Herendeen reviewed a "Neuropsychological Symptoms Checklist" with Pace and administered the "Trail Making Test" to him. Pace's responses to the checklist suggested that he "heard unusual sounds," experienced periods where he forgot where he was, and had problems communicating. Pace "performed extremely poorly on [the Trail Making Test], clearly indicating organic impairment and frontal lobe damage."

Dr. Herendeen told Investigator Leonard that his evaluation "showed ... Pace to have borderline intelligence and organic brain damage." They discussed "which full scale test should be administered to follow up on the mental retardation issue," and Dr. Herendeen also told Investigator Leonard that "the results of the other testing indicated further evaluation should be pursued." But trial counsel decided not to pursue further testing or have Dr. Herendeen testify at trial. According to Mr. Mears, Dr. Herendeen's evaluation "did not turn up anything to change our approach."

The Trial

Pace's trial took place from January to March 1996. After the guilt phase of the trial, the jury convicted Pace for the four murders. The trial then moved to the sentencing phase, which took place over three days.

The state's presentation of aggravating evidence

During the sentencing phase, the state introduced evidence of other burglaries Pace had committed, including the 1990 burglary of Coretta Scott King's home. A detective with the Atlanta Police Department who investigated the burglary of Mrs. King's home testified that Pace's fingerprints matched fingerprints "found on the window ledge on the inside of the house" and that she found items that had been stolen from Mrs. King's home in Pace's apartment. And a technician with the Atlanta Police Department testified that he determined that the fingerprints he took from Mrs. King's window ledge matched Pace's.

Trial counsel's presentation of mitigation evidence

Pace's trial counsel called eleven witnesses to plead for mercy on his behalf and to establish residual doubt of his guilt.

Ms. Booker testified that she had known Pace's family since 1978, when she became friends with his mother. Pace's mother raised her kids by herself, but Ms. Booker thought she was a "good mother" who did the best she could. Pace was a young and "real likeable" child when Ms. Booker met him. Ms. Booker described Pace as "just like any other normal child," "a good kid," and an "easy" and "caring" person who wouldn't harm anyone. Ms. Booker never saw Pace acting in a mean or disrespectful manner to anyone. Pace treated his family "very well," and they always seemed to be "a big happy family." Ms. Booker explained that her grandson had problems with juvenile delinquency and that Pace had "a real big impact" in motivating her grandson to stay in school by telling him about life in jail. Ms. Booker asked the jury to have mercy on Pace and said that she thought he was innocent. On cross-examination, Ms. Booker conceded that Pace was "just a child" when she "knew him growing up" and that she didn't know him as an adult.

***9** Ms. Turner testified that Pace's mother was her best friend. Ms. Turner had known Pace since he was about three years old and continued to see him as he grew up and became a teenager. Pace was "always quiet, kind, very respectful," and had a "very loving" nature. Ms. Turner never saw Pace act disrespectfully toward anyone. He had a "very loving" home, and Ms. Turner never saw Pace's mother mistreat him. Ms. Turner asked the jury to "have mercy" on Pace because she believed he was innocent. She felt that Pace was the type of person who deserved to live rather than be executed. On cross-examination, Ms. Turner conceded that she "just kn[e]w [Pace] as a child and as a teenager" and did not know Pace as an adult.

Pace's brother Garry testified that he and Pace lived in housing projects, moved around a lot, and had a low income. But he said they weren't "the average run-of-the-mill family from where [they] grew up." They had a "very close-knit family" and didn't have any fights. Garry said that Pace was "an easy-going, quiet person" who never got into trouble or had arguments. He was "even-tempered" and didn't hate anyone. Garry testified that their mother did her best to discipline her eight children and to keep them out of trouble. Garry said that he thought Pace was innocent because he knew "the kind of

person that" Pace was. He asked the jury to "take it in their hearts" and to have mercy on Pace.

Pace's brother Darrell testified that Pace was always a quiet person, didn't get into too much trouble, and never got into fights. Darrell told the jury about how, when Pace was fifteen or sixteen years old, he saved Darrell from drowning by pulling him out of a pool and giving him CPR. Darrell said that he "d[id]n't think [Pace] did it" and asked the jury to "have compassion" for Pace's mother and the rest of his family by sparing Pace's life.

Pace's sister Jennifer testified that she could always count on Pace to take care of her when she couldn't care for herself. Jennifer also said that she knew Pace had a "drug problem" and that she encouraged him to "beat it" by avoiding the people who were negatively influencing him. Jennifer asked the jury "to have mercy for [her] brother" and said that if the jury were to sentence him to death it would "would leave ... a deep scar" in her family. She said that she "d[id]n't think [her] brother did it."

Pace's brother Gregory testified that he never saw Pace treat anyone disrespectfully and that Pace "g[a]ve respect to his elders." Pace often helped their sick aunt and elderly neighbors with errands. Pace even sat with an elderly neighbor who wanted company while taking a nap. Gregory said that he knew Pace was "the type of person that cares for elderly people." Gregory asked the jury to have mercy on Pace. Gregory said that if Pace "ha[d]n't admit[ted] to it, he ha[d]n't done it."

Ms. Todd testified that she and Pace had been "boyfriend and girlfriend" and also "best friends" but explained that they were now "separated as friends." She described Pace as a "very quiet," "very kind, very supportive, very loving," and polite person who would give up his seat for someone else on the bus. Ms. Todd also said that Pace always encouraged her to continue her education even though he dropped out of school early and didn't read well. Pace was never disrespectful, violent, or hateful toward her. Ms. Todd asked the jury to have mercy on Pace because of how painful it would be for her and Pace's family to lose him.

Joe Beasley testified that he was the human resource director for the Antioch Baptist Church North. The church had a congregation of about 7,000 people, a third of whom came from the Vine City area where most of the murders took place. Mr. Beasley said that the members of his congregation and local community opposed the death penalty because it was "an African American community, poor community, and we know how the death penalty has been used." He also said that the death penalty "runs counter to Christian values." For these reasons, Mr. Beasley thought that "most people" in the Vine City community were "opposed" to executing Pace.

***10** Pace's older sister Gwendolyn said that Pace had always been a "real important part of [her] life." Gwendolyn shared pictures of Pace's family with the jury, including pictures of Pace with her children. She asked the jury to have mercy on Pace because he was almost like a son to her.

Pace's sister-in-law Penny testified that her uncle had been shot in the head during a robbery and that her family opposed sentencing her uncle's murderer to death. Penny's family thought that a death sentence would be an "easy way out" for her uncle's murderer and that it wouldn't bring her uncle back. Penny asked the jury to have mercy on Pace, noting that if he was found innocent after his execution then there would be no way to bring him back.

Finally, Pace's mother "beg[ged]" the jury to have mercy on Pace so that she could "at least ... talk to him sometimes." She said that if he were to be sentenced to death, "part of [her would] be gone."

The prosecutor's closing argument

Before closing arguments, Pace's trial counsel objected to a cartoon that the prosecutor intended to display to the jury during its closing argument. The cartoon depicted a jury returning a verdict of "not guilty by virtue of insanity, ethnic rage, sexual abuse and you name it." Pace's trial counsel argued that the cartoon was inappropriate because it "interject[ed]" racial issues and "social status" into the case, "talk[ed] about insanity when that is not an issue in this case," and because "allow[ing] a cartoon to be used as a factor" during the sentencing phase of a death penalty trial was "inappropriate, totally." The prosecutor responded that he intended to use the cartoon to rebut Pace's mitigation defense that he was "born in the ghetto or the poor side of town and growing up under those conditions" and to rebut Mr. Beasley's testimony about "racial discrimination in terms of seeking the death penalty." The state trial court overruled the objection.

Seven parts of the prosecutor's closing argument are relevant to Pace's appeal. First, the prosecutor compared Pace to

infamous serial killers Jeffrey Dahmer, Ted Bundy, and John Wayne Gacy. The prosecutor said that, like Pace's family, those serial killers' families would have also "come to court and t[old] you good things about [them] when [they] were growing up." The prosecutor emphasized that the juries in those cases still "gave [them] justice for what [they] did." Pace's trial counsel immediately moved for a mistrial or a curative instruction. The state trial court denied the motion for a mistrial and instead instructed the jury that they "should not concern [them]selves with the verdicts in those other cases" because "[the prosecutor's] point was about the family of those particular individuals and how we might imagine they would come to court and testify."

Second, the prosecutor showed the jury the cartoon. The prosecutor read what the cartoon said about "find[ing] the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it," and argued "that's basically what [Pace was] trying to tell you when he talk[ed] about his upbringing[;] [t]hat it[was] everybody else's fault that he turned into a serial killer but his own."

Third, the prosecutor invited the jury to "come with [him] to th[e] scene of the crime," "imagine that night" and to "imagine what Ms. McAfee thought and felt" as she was "being strangled before [she] los[t] consciousness." The prosecutor asked the jury to "come with [him] again" to the scene of Ms. McClendon's murder and to ask themselves "how would you feel in Ms. McClendon's situation ... to wake up with some man standing up over you choking the life out of you and pulling on your clothes." And the prosecutor asked the jury to "come with [him]" to the scenes of Ms. Martin's and Ms. Britt's murders and to ask themselves "what do you think went through [Ms. Martin's] mind as she was brutally awakened with someone choking the life out of her?" and to "imagine [Ms. Britt's] frame of mind as she fought for her life for the few minutes that she was trying to preserve her life."

***11** Fourth, the prosecutor asked the jury if "sending [Pace] to prison would be punishment" when he would "g[et] free room and board, color TV." The prosecutor asserted: "[i]f anal sodomy is your thing, prison isn't a bad place to be."

Fifth, the prosecutor told the jury that they were "the conscience of the community" because they "decide[d] what standards of right and wrong [were] allowed in this community." The prosecutor said that the jury needed to "send a message" by sentencing Pace to death because the jury would otherwise be "saying that these victims' lives didn't matter." Pace's trial counsel moved for a mistrial based on this portion of the prosecutor's closing argument, but the state trial court denied the motion.

Sixth, the prosecutor noted Pace's "remorseless, soulless" demeanor in the courtroom and "ask[ed] [the jury] to think back to ... [w]hen Jesus was put on the cross." The prosecutor told the jury that "there were two thieves with [Jesus]": one of the thieves "said to Jesus, in essence, Lord, remember me when you come into your kingdom," while the other thief "never repented." The prosecutor said that "Jesus forgave" the thief that repented but that the unrepentant thief "wasn't taken into Jesus' kingdom" and that the prosecutor "d[id]n't know where [that thief] went." The prosecutor said that "[Pace], too, ha[d] never repented" and "hadn't said one time I'm sorry." Pace's trial counsel objected and moved for a mistrial because the prosecutor had "impermissibl[y] comment[ed] on [Pace's] right to remain silent." The state trial court "th[ought] it[was] very close to the line, but ... d[id]n't find that it" crossed the line and denied the motion. The state trial court said it would give curative instructions, but neither Pace's trial counsel nor the state trial court could "think of any" to give.

Finally, the prosecutor took out a "Georgia law book," which he told the jury "ha[d] the punishments and the crimes in it." The prosecutor argued that, "[i]f based on the evidence in this case you don't return a death penalty verdict, you have snatched that section of the book about the death penalty out." Pace's trial counsel objected because "[t]he law provide[d] for very specific reasons how and why the death penalty should or should not be imposed" and "the court will charge the jury on that." Before the trial court could rule on the objection, the prosecutor told the jury that his "point to [them was] simply this[:] [i]f your verdict is anything other than death, what we need to do is take this book" and simulated tearing out a section from the book.

Mr. Mears's closing argument

In his closing argument, Mr. Mears "begg[ed] for the life of Lyndon Fitzgerald Pace." Mr. Mears "remind[ed] [the jury], as best [he] c[ould], that whatever [they] d[id] to [Pace], whatever [they] d[id] to this man [was] going to stay with [them] for the rest of [their] li[ves]." Mr. Mears said that he was "arguing for mercy in this case" and for the jury "to inspect [their] own feelings before [they] ma[d]e this decision."

Mr. Mears explained that "we didn't come in here and say [Pace was] insane" or "try to insult your intelligence by putting up witnesses to say that [Pace] had a deprived family." Instead, he argued, "[w]e did just the opposite" because "it would have been hypocritical for us to argue as we did and strongly ... that the evidence didn't prove him ... guilty" and then "come and say, well, you found him [guilty] ... but he is crazy anyway" or that the jury shouldn't "sentence him to death because he was poor." What Pace's trial counsel had tried to do, Mr. Mears explained, was "give you the truth about as best we could as to who [Pace] was and what his family was like." And Mr. Mears said he, Mr. Harvey, and Ms. Mau did not "expect" a death sentence and reiterated that he was "telling you, [he] d[idn]'t expect it[; he was] not expecting it of you."

***12** Mr. Mears also addressed the testimony the jury had heard from Pace's family members, asking the jury to

> understand family members when they come and they testify, and they say things, and they tell you that they don't agree with your verdict. Please don't hold that against them. That's a natural human thing. They were not arguing with you.
>
> How many of you have ever known someone who has been convicted of a crime or someone has been accused and you just say I just can't believe that because you know them? You love them. Please don't think the family members were thinking less of you or arguing with you. They were simply expressing their sadness in the only way they knew how.

The state trial court's instructions to the jury and Pace's death sentences

Once the jury convicted Pace of the murders, Georgia law allowed only two sentencing options: death or life with the possibility of parole. *See Pace v. State*, 524 S.E.2d 490, 507 (Ga. 1999). If the jury sentenced Pace to life imprisonment, Pace would've served at least thirty years in prison before becoming parole eligible. *See* O.C.G.A. § 42-9-39(c). The state trial court denied Pace's pretrial motions to allow him "to question all potential jurors with regard to their ... knowledge ... [of] parole issues" and "to present evidence on the issue of his parole status."

During its deliberations, the jury sent a note to the state trial court that asked, "Is it possible for a life sentence to be given eliminating any possibility of parole?" The state trial court responded in writing:

> You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whichever it may be, will be carried out.
>
> Under our law, life imprisonment means that the defendant will be sentenced to incarceration for the remainder of his natural life.

The jury unanimously found nineteen statutory aggravating circumstances [2] and recommended the death penalty for each of the four murders. The state trial court sentenced Pace to death consistent with the jury's recommendation.

Pace's Direct Appeal

***13** The Georgia Supreme Court affirmed Pace's convictions and death sentences on direct appeal. *See Pace*, 524 S.E.2d at 507. Three of the issues Pace raised on direct appeal are relevant here. First, Pace argued that the state trial court's admission of evidence of his prior burglary convictions, including his burglary of Coretta Scott King, violated his Eighth Amendment right to a reliable sentencing because the "convictions ... were obtained in violation of [his] rights" because the "pleas in the [other burglary] cases were not knowingly and voluntarily entered." Second, Pace contended that the prosecutor's sentencing phase closing argument "undermined the reliability of the jury's decision at the sentencing phase." And third, Pace asserted that the state trial court violated his right to reliable sentencing by "fail[ing] to allow accurate information to go to the jury concerning [his] parole eligibility."

The Georgia Supreme Court rejected Pace's argument that the state trial court erred in admitting evidence of his prior burglary convictions. *See id.* at 505. The state trial court did not err, the Georgia Supreme Court concluded, because "[t]he [s]tate presented reliable evidence about the[ ] offenses and there [was] no requirement that other crime evidence in the sentencing phase be proven beyond a reasonable doubt." *Id.*

The Georgia Supreme Court also rejected Pace's argument about the prosecutor's closing argument because: (1) the state trial court's curative instructions "cured any error that

could result from" the prosecutor's comparison of Pace to infamous serial killers; (2) the prosecutor's use of the cartoon "did not exceed the permissible range of argument"; (3) the prosecutor's golden rule argument ("come with [him] to th[e] scene[s] of the crime" to "imagine that night") was "improper" but, "given the amount of evidence in aggravation, ... this argument [did not] change[ ] the result of the sentencing phase"; (4) the prosecutor's comment that "Pace should not be spared so he could get free room and board and a television in prison [was] not improper"; (5) the prosecutor's "gratuitous remark" about anal sodomy in prison was "unprofessional," but "Pace did not object to this comment and there is no reasonable probability that this improper, isolated comment changed the result of the sentencing phase"; (6) the prosecutor's religious references "did not change the jury's exercise of discretion from life imprisonment to a death sentence"; and (7) the prosecutor's "[s]imulated tearing of a Georgia law book" was not improper because "[v]iewed in context," "the prosecutor's argument [could not] be reasonably construed as 'reading the law' " and "[i]t [was] not improper for the [s]tate to argue that [Pace] deserve[d] the harshest penalty." *Id.* at 505–07. The Georgia Supreme Court concluded that, despite the prosecutor's "several improper comments during closing argument," Pace's death sentences "were not imposed under the influence of passion, prejudice, or any other arbitrary factor" "given the overwhelming evidence of Pace's guilt and the enormous amount of evidence in aggravation." *Id.* at 507.

Finally, because "[l]ife imprisonment without parole was not a sentencing option at Pace's trial," the Georgia Supreme Court concluded that the state trial court did not err in preventing Pace "from asking questions about parole during voir dire," "deny[ing] argument or the presentation of evidence about Pace's parole eligibility," or in responding to the jury's note about whether a sentence of life without parole was possible. *Id.* The Georgia Supreme Court determined that the state trial court's response to the jury was "appropriate" and "correct." *Id.*

State Habeas Relief

After the Georgia Supreme Court affirmed Pace's death sentences on direct appeal, Pace petitioned for a writ of habeas corpus in state court. Pace asserted four claims that are relevant to his appeal: (1) trial counsel were ineffective for failing to investigate and present evidence of Pace's history of mental illness and his underprivileged childhood as mitigation at the sentencing phase; (2) trial counsel were ineffective for failing to object to the prosecutor's improper closing arguments at the sentencing phase; (3) the state trial court violated Pace's right to a reliable sentencing by admitting evidence that he burglarized Coretta Scott King; and (4) the state trial court violated Pace's right to a reliable sentencing by not instructing the jury about Pace's eligibility for parole. The state habeas court held an evidentiary hearing on December 2, 2003.

Pace's state habeas evidence

***14** Pace didn't present live testimony. Instead, he submitted documentary evidence, including his prison medical records, affidavits and deposition testimony from mental health experts, his trial counsel's affidavits, deposition testimony, and case files, and more than twenty affidavits and letters from witnesses familiar with Pace's background.

1. Mental health evidence

Pace's postconviction prison medical records included a March 9, 2001, psychiatric evaluation. The record showed that the warden had requested "an immediate mental health evaluation of [Pace] because several letters had apparently been sent out indicating that he believe[d] that there [was] something going on that might lead to his harm." Dr. Paul Beecham, a prison psychiatrist, examined Pace. Dr. Beecham described Pace as "alert, well-oriented, calm, cooperative[,] and appropriate," showing "no indication of any agitation." Dr. Beecham's "diagnostic impression" was that Pace had a "delusional disorder, persecutory type" but Dr. Beecham thought that "the situation w[ould] have to worsen in terms of the intensity and extent of his delusional system before [they] c[ould] intervene."

Pace submitted affidavits from Dr. Richard Dudley, a forensic psychiatrist, Dr. Paul Nestor, a neuropsychologist, and Dr. Herendeen, the psychologist who had examined Pace before trial. Dr. Dudley examined Pace in November 2002 and March 2003, reviewed Pace's school, prison, and medical records, reviewed the other affidavits submitted on Pace's behalf to the state habeas court, and interviewed Pace's mother and his sister Jennifer. Based on his examination of Pace and his review of Pace's medical and social history, Dr. Dudley concluded that Pace "suffer[ed] from a major mental illness, [s]chizophrenia, which ha[d] been present for many

years, including the time of the crimes of which he [was] convicted and during his trial on these charges." Dr. Dudley also concluded that Pace "showed clear evidence of acute symptoms of schizophrenia at the time of the offenses for which he [was] now sentenced to death." Dr. Dudley wrote that Pace "manifested symptoms" of schizophrenia when he was evaluated by Dr. Herendeen before Pace's trial.

Dr. Dudley disagreed with Dr. Beecham—the prison psychiatrist's—postconviction diagnosis of Pace as having delusional disorder. Dr. Dudley averred that "schizophrenia was the more accurate diagnosis" for "a number of reasons," including that Pace had "schizophrenic negative symptoms" and "abundant evidence of ... positive symptoms and thought disorder not present in a delusional disorder," and "clearly show[ed] evidence of neuropsychological impairment, which almost invariably accompanie[d] schizophrenia, but not delusional disorders." In Dr. Dudley's opinion, "[t]he minimal social demands of [Pace's] current incarceration likely help[ed] to mask the profound effects that schizophrenia exert[ed] on his judgment, behavior, and capacity to meet the ordinary demands of life."

Dr. Nestor interviewed Pace around the same time, in January 2003, and administered "intelligence and achievement tests to determine [Pace's] cognitive functioning" and "to determine whether [Pace] show[ed] signs and symptoms of schizophrenia." He also reviewed Pace's school, prison, and medical records. Dr. Nestor concluded that there was "an extremely strong, if not incontrovertible, evidentiary basis for a diagnosis of schizophrenia." Dr. Nestor noted that Dr. Herendeen's pretrial psychological testing results were "consistent with" and "fulfill[ed]" the "criteria for schizophrenia." Like Dr. Dudley, Dr. Nestor disagreed with Dr. Beecham's diagnosis of delusion disorder because Pace "clearly showed evidence of neuropsychological impairment, which invariably accompanie[d] schizophrenia, but not delusional disorders."

***15** Dr. Herendeen wrote that Pace's state habeas counsel had told him that Pace had been "diagnosed as suffering from schizophrenia and organic brain damage" and had given him "records and affidavits recounting [Pace's] family history." According to Dr. Herendeen, "[t]hese records [were] far more comprehensive than those [he] was provided in 1995." Dr. Herendeen noted that "[t]he results of [Pace's] current neuropsychological testing showing organicity [were] consistent with [his pretrial] screening tests and what [he] reported to [Investigator] Leonard." Dr. Herendeen also "concur[red] with the diagnosis of schizophrenia and believe[d] it would have been an available and appropriate diagnosis at the time [he] evaluated [Pace], had [he] been provided the background and historical materials on [Pace] and his family and been given the opportunity to further evaluate [Pace], as [he] recommended."

2. Trial counsel's and Investigator Leonard's testimony

Pace submitted affidavits and deposition testimony from Mr. Mears, Ms. Mau, and Investigator Leonard. In his affidavit, Mr. Mears explained that Ms. Mau had planned to examine Pace's mitigation witnesses during the sentencing phase of trial but she "became rattled" during her opening statement and was "unable to effectively continue." So Mr. Mears "took over the presentation" of the sentencing phase. Mr. Mears had met Pace's mother and "several" of Pace's siblings before trial and used Ms. Mau's interview notes during his examination. Mr. Mears thought that Pace's mother and Ms. Todd "were productive witnesses" but that "[t]he other siblings were belligerent" and "did not give the sincere testimonials regarding [Pace's] gentle nature and good character, with heartfelt pleas for mercy, that we were [counting] on." Mr. Mears explained that "it [was] his understanding that experts [now] believe[d Pace] was suffering from schizophrenia at the time of the crimes and was psychotic at that time" and that "if we had this information it [was] certainly something we would have considered using" as mitigation. And Mr. Mears said that his failure to object to the "religious references" that the state made in its closing argument "was not a deliberate omission."

Mr. Mears explained that trial counsel "were attempting to present a defense that was consistent with [Pace's] plea of not guilty" and Pace's "consistent ... assertions that he was innocent of the charges against him." Mr. Mears said that "[t]he [s]tate's case got stronger as it went on" because "a lot of things that started off looking good insofar as being able to attack the credibility of the [s]tate's case wasn't quite as good as we thought it was or hoped it would have been by the time we got to trial." But Mr. Mears thought that "there was nothing that we had in the way of a traditional defense other than he didn't do it, and sometimes that's the only defense you have and you try to ... convince the jurors that the [s]tate ha[d]n't proven its case beyond a reasonable doubt."

Mr. Mears also explained that it was important for trial counsel's presentation during the guilt phase to be consistent with their presentation during the sentencing phase:

> [O]nce you've raised that type of defense during the guilt/innocence phase, you have to be very careful during the sentencing phase not to do a 180-degree turn in front of the jury and say, oh, you got us, now don't sentence him to death. Because the jurors resent, in my opinion, jurors resent the defense attorneys who for two or three weeks say my client is innocent, he didn't do it, you don't have enough evidence, and then you come back in the sentencing phase, well, he did it so let's be merciful.
>
> You have to be consistent in the defense that you raise at guilt/innocence with the way you present mitigation. One of the ways that you do that in a not guilty, my client didn't do it, is to continue to argue residual doubt as a possible mitigating factor, and residual doubt being, look, there might have been enough evidence beyond a reasonable doubt and you the jurors have found that, but is that enough proof to sentence this person to death.
>
> ***16** And I think that was part of what we were doing in [Pace's] case was to try to continue the residual doubt, along with the other mitigating evidence that we attempted to present.

Mr. Mears was experienced in trying death penalty cases and estimated that "probably [eighty] percent of them ... had some aspect of mental health as an issue for the defense." It was "common practice, in [his] opinion, in death penalty cases for counsel to have ... a client evaluated to determine whether or not there[were] any flags that [were] raised with regard to possible mental health issues." Mr. Mears explained that it was his decision not to present Dr. Herendeen at Pace's trial and that he "would be very reluctant to put a doctor up to say my client suffer[red] from an antisocial personality disorder" because he thought the diagnosis "tend[ed] to come across exactly as the name [was]" and would therefore not be mitigating. Mr. Mears had been aware "that [Pace] suffered from ... severe headaches" and had heard "reports of [Pace's] drug use." But if Pace had "some underlying mental illness," Mr. Mears conceded that it was something "that [he] just missed."

Ms. Mau testified that "[Pace's] family believed strongly in [his] innocence, and it was difficult to get them focused on anything else" during her initial interviews with them. When Ms. Mau met with Pace's siblings a few weeks before trial, "[t]hey remained convinced [Pace] was innocent" and Ms. Mau was "concerned that despite our efforts, they would not be conciliatory before the jury." Ms. Mau also thought that Ms. Todd and Pace's mother "were the only people who gave the testimony we had envisioned" and that Pace's siblings' testimony was not "the testimony we had hoped for" because they "were defensive, and the prosecutor was able to prod them into being argumentative and unsympathetic."

As to Pace's mental health, Ms. Mau said that "Dr. Herendeen's assessment showed [Pace] to be slow but not much more," so "we did not go any further with this issue." Ms. Mau wrote that Pace's state habeas counsel had informed her "that [Pace] ha[d] been diagnosed with schizophrenia" and explained that "we would have tried to develop and use" Pace's schizophrenia diagnosis "if this was something we had known about at the time of trial."

Investigator Leonard said that "[i]t immediately became apparent" during her interviews "that [Pace's family] had a tendency to be combative and having them testify would entail some risk." She thought that "[t]he family witnesses did not perform as we had hoped" at trial because "[t]hey argued that [Pace] could not be guilty and had in essence been framed, which allowed the [s]tate to ask pointed questions about the DNA evidence." But she thought Ms. Todd "delivered good character evidence we requested without mentioning the problems she had with [Pace]."

As to Pace's mental health, Investigator Leonard had "been informed" by Pace's state habeas counsel that Pace had "been diagnosed as suffering from [s]chizophrenia, and that the experts believe[d] he was suffering from schizophrenia at the time of the crimes and was in fact actively psychotic then." Investigator Leonard explained that trial counsel's "preliminary evaluation of [Pace] was not directed at determining this type of mental illness" but thought that Pace's schizophrenia "would have come to light" if "further testing [had] been done by Dr. Herendeen" and that "we certainly would have considered using" Pace's schizophrenia diagnosis "[h]ad we had this information."

3. Testimony about Pace's background

***17** Pace submitted affidavits from witnesses who painted a negative picture of his upbringing and mental health. The affiants included witnesses who Pace's trial counsel had interviewed during their pretrial investigation and witnesses

who testified at the sentencing phase of Pace's trial. For example, Pace's older brother Darrell averred that their dad "hit" their mother "when he drank" and "got mean." Darrell thought he "was the only one who knew when we were kids that [Pace] couldn't read" because Pace "was embarrassed about it" and "asked [Darrell] not to tell anyone else." He also said that Pace started "sniffing paint" when he was ten years old.

Jennifer, Pace's younger sister, wrote that their father "was always violent with [their mom]" and that Pace "hated to see it" and "always tried to stop it." When Pace stayed with her after his first stint in prison, Jennifer noticed that "something was wrong": Pace "would get agitated by things [she] said, and he'd get upset" and "just couldn't seem to control his reactions."

Pace's mother swore that her children "sometimes saw some of [her and Pace's father's] physical fights." She said that Pace "had a tendency to fall down a lot" and often "ended up hitting his head," including the time he "fell out of a parked car and landed on his head." She knew that Pace "really seemed not to like" school, but didn't know that Pace couldn't read or write "until he was grown."

Ms. Todd, Pace's former girlfriend, averred that she hadn't seen or heard from Pace for "a good six or seven years" before he called her "out of the blue" sometime in late 1990. She "found out very quickly that [Pace] was no longer the same person [she'd] dated the first time around." He "was much more intense than he'd been before" and "was like dealing with a child." She thought Pace "was just getting more strange each day" and "had become a man who lived in filth and didn't even notice." She described several incidents where Pace "was so incomprehensible [that she] knew something was seriously wrong with him." One night, for example, Ms. Todd came home to find "someone lying in [her] den." It turned out to be Pace. When Ms. Todd woke him up, Pace "looked terrible," "was completely incoherent," and "was moving his hands around his head ... like he was pointing at or describing what was going on inside his head, like he was hearing something in there."

Ms. Todd remembered speaking with Ms. Mau and Investigator Leonard before Pace's trial, but said that Investigator Leonard "didn't seem to want to know anything of substance about [Pace], only 'good' anecdotes." Ms. Todd "was frustrated that [she] wasn't being allowed to tell the full story that [she] knew about [Pace]." At Pace's trial, Ms. Todd "just answered the questions that were asked of [her]" but would have testified about Pace's strange behavior "[i]f [she] had been asked."

Ms. Grissom, the teacher who Investigator Leonard interviewed before Pace's trial, also submitted an affidavit. Ms. Grissom clarified that she knew Pace "not because he was in [her] class, but because he came from a family familiar to everyone at the school." She said that Pace "was poor," "came from a family known for its neglect," lived in a bad apartment complex, and "had trouble learning." She also said that Pace had been placed in a class for children with "special education needs" but explained that "it[was] not a great surprise that with [Pace's] history of absenteeism he never got the kind of help or attention he needed."

The affiants also included witnesses who Pace's trial counsel had not interviewed during their pretrial investigation or who had not testified during the sentencing phase of Pace's trial. For example, Jerry Johnson, a man who lived with Pace at an Atlanta boarding house in 1991, said that he and Pace were in a romantic relationship while Pace was dating Ms. Todd. Pace and Mr. Johnson hid their relationship from Ms. Todd and Pace's family. Mr. Johnson described how Pace stopped "taking care of himself" and had to be reminded "to take a bath because he smelled so bad." Mr. Johnson said that Pace "was talking to himself all the time." After Mr. Johnson asked Pace to leave an apartment they had moved into together, someone—Mr. Johnson suspected it was Pace—"broke[ ] into and trashed" the apartment and vandalized his car.

***18** Witnesses who had spent time in jail with Pace after the murders also submitted affidavits. They wrote that Pace "seem[ed] to be kind of 'nuts,' " would "talk to himself pretty constantly," "had delusions of grandeur," and "rubbed people the wrong way."

Other members of Pace's family, including Pace's father and Pace's father's former common-law wife, and members of the McDaniel family—close friends who Pace's family considered family—submitted affidavits. Pace's father swore that Pace "was always falling down and hitting his head when he was little," would "complain[ ] about headaches a lot," "had a bad habit of sniffing paint," and was "pretty much a loner."

Pace's father's former common-law wife, Mary Ann Hill Goree, said that she met Pace's father when he was thirty-seven years old and she was thirteen years old. When they

met, Ms. Goree lived in Birmingham, Alabama, and she had "vivid memories" of Pace's father "forcibly rap[ing her] frequently when he came to town." Ms. Goree was fifteen years old when Pace's mother left Pace's father and Pace's father moved to Birmingham. Ms. Goree soon "realized [she] was pregnant by [Pace's father]." They moved in together, and Pace's father "was always rough with [her], and violent" and "continued to rape [her] on a daily basis." Ms. Goree left Pace's father when she was twenty-seven years old, but Pace's father found her and attacked her, "held a knife to [her] throat," "pulled out a gun and held it to [her] head," threatened to "blow [her] brains out," and "raped [her] vaginally and anally." After Pace's father assaulted and raped her again the next day, Ms. Goree called the police and Pace's father was arrested. Ms. Goree had "only recently learned the details of" Pace's case and said that "they reminded [her] of [Pace's father]."

Members of the McDaniel family painted a negative picture of Pace's family's home life and of Pace's mental health. Marian McDaniel wrote that "[t]he places [Pace's mother] lived were places you wouldn't want your dog living in" because "[t]hey were always filthy." Sandra McDaniel said that Pace's family "never had enough to eat, and their utilities would always get cut off because [Pace's mother] hadn't paid the bills, and the places they lived were filthy, roach-infested, and cluttered, with everything thrown all over." Sandra McDaniel thought that Pace's mother "never seemed all that interested" in her children and that "those kids didn't really have any adult guidance or care." And Sandra McDaniel remembered that Pace "just looked disturbed," "kept saying that someone was after him," and "was alone all the time."

The state's state habeas evidence

At the evidentiary hearing in the state habeas case, the state called Mr. Johnson and Renae Shaw to testify.

1. Mr. Johnson

Mr. Johnson, Pace's former roommate at the boarding house, testified for the state at the evidentiary hearing. Mr. Johnson testified that Pace broke into his house and stole some vases even though Mr. Johnson "had burglar bars on [his] house." He said that he and Pace would "occasionally" use crack cocaine on the weekends.

2. Ms. Shaw

Ms. Shaw, a paralegal with the capital litigation section of the Georgia Attorney General's office, testified that she attended the state's interview of Mr. Johnson. Ms. Shaw said that Mr. Johnson "stated he and also [Pace] used crack at times" and that "while [Mr. Johnson] was out of the house, [Pace] also used crack." Ms. Shaw said that Mr. Johnson said that "[h]e just assumed that Pace was doing a lot of burglaries" because Mr. Johnson would come home to find that "Pace had all this stuff that he had gotten" but "never said where he got it from."

The state habeas court denied Pace's habeas petition

***19** On July 30, 2007, the state habeas court denied Pace's habeas petition. Applying *Strickland*, the state habeas court denied Pace's claims that his trial counsel were ineffective because "[t]he decisions of [trial] counsel throughout the guilt-innocence phase and the sentencing phase were strategic and sound," "trial counsel provided more than adequate representation," and "Pace did not suffer prejudice from any alleged ineffectiveness."

As to Pace's claim that trial counsel were ineffective for failing to investigate and present evidence of Pace's history of mental illness and underprivileged childhood as mitigation at the sentencing phase, the state habeas court determined that trial counsel performed adequately in investigating and presenting mitigation evidence because: (1) their "investigation spanned a wide range of information, including Pace's mental health"; (2) they "chose the trial strategies after reasonable efforts to investigate other, alternative strategies"; (3) they "effectively utilized the available information and resources and [were] not unreasonable in choosing to present a reasonable doubt defense during the guilt-innocence phase ... [or] in maintaining a consistent defense of residual doubt" during the sentencing phase; (4) "[b]ased on extensive research," they prepared and "called [eleven] mitigation witnesses who testified about the good character of Pace, his quiet nature, and their belief that he was innocent"; and (5) Mr. Mears's "closing argument was consistent with Pace's theory of defense."

The state habeas court also concluded that, even if ineffective, there was no reasonable probability that the mitigating evidence would have resulted in a different outcome at sentencing because: (1) neither Dr. Dudley nor

Dr. Nestor "acknowledged the difficulty of conducting a retrospective evaluation spanning back to 1988, the year of the first murder" and "their findings conflict with the mental health experts at the [prison]"; (2) "[m]uch" of the habeas testimony from Pace's family and friends was "cumulative of testimony presented at trial, and all the information contained in the affidavits was known to [trial] counsel"; (3) the affidavits Pace submitted "contain[ed] information both helpful and damaging" to Pace's mitigation case; (4) Mr. Johnson's testimony would have "seriously undermined defense counsel['s] efforts" because it "would have demonstrated Pace's deceitfulness with his girlfriend, Trina Todd," and because Mr. Johnson swore in his affidavit that Pace burglarized and vandalized his apartment, testified that Pace regularly used crack cocaine, and admitted to Ms. Shaw that he assumed that Pace burglarized other homes; and (5) "the evidence of Pace's guilt was overwhelming."

The state habeas court denied Pace's claim that trial counsel were ineffective for failing to object to the state's improper closing arguments at the sentencing phase because Pace couldn't "show prejudice." The state habeas court noted that "[t]he transcript show[ed] that [Mr.] Mears made several objections to the prosecutor's closing argument, some of which were sustained or cured with instructions." And, the state habeas court reasoned, the "Georgia Supreme Court has held that wide latitude is given to prosecutors in closing argument" and that, in affirming Pace's death sentences on direct appeal, the Georgia Supreme Court "examined the prosecutor's argument and found no reasonable probability that the alleged improprieties changed the outcome of the sentence."

***20** The state habeas court also denied Pace's claim that the state trial court's admission of evidence that Pace burglarized Coretta Scott King violated his right to a reliable sentencing as "barred by res judicata" because the Georgia Supreme Court "affirmed the admission of the King burglary, concluding that the [s]tate presented reliable evidence about the offenses." And Pace's claim that the state trial court's failure to instruct the jury about Pace's eligibility for parole was also "res judicata," the state habeas court concluded, because the Georgia Supreme Court "h[eld] that ... the [state] trial court's response to the jury note regarding parole was appropriate."

The Georgia Supreme Court denied Pace's application for a certificate of probable cause to appeal the denial of habeas corpus

Pace applied to the Georgia Supreme Court for a certificate of probable cause to appeal. The Georgia Supreme Court denied Pace's application after "independently reviewing the trial record and the habeas record."

As to the state habeas court's denial of Pace's claim that his trial counsel were ineffective in investigating and presenting mitigation evidence during the sentencing phase, the Georgia Supreme Court

> conclude[d] that, while the [state] habeas court erred in some instances in considering the effect of counsel's alleged sentencing phase deficiencies on the jury's finding of guilt rather than its selection of a sentence in determining whether [Pace] ha[d] shown the necessary prejudice to constitute ineffective assistance at the sentencing phase of trial, ... the [state] habeas court did not err in finding that [Pace] ha[d] failed to show that counsel's sentencing phase performance in those instances was deficient under constitutional standards and there [was] no arguable merit to [Pace's] ineffective assistance of counsel claims.

The Georgia Supreme Court summarily denied the rest of Pace's application for a certificate of probable cause to appeal in its entirety, stating: "[i]n light of the foregoing and upon consideration of the entirety of the [a]pplication for [a] [c]ertificate of [p]robable [c]ause to appeal the denial of habeas corpus, it is hereby denied."

Federal Habeas Proceedings

Pace filed a section 2254 petition for writ of habeas corpus in the Northern District of Georgia. Five of his

claims are relevant to his appeal. First, Pace argued that the state habeas court unreasonably applied *Strickland* in denying his claim that trial counsel were ineffective in investigating and presenting mitigation evidence at the sentencing phase. Second, Pace contended that the state habeas court unreasonably applied *Darden* in denying his claim that the prosecutor's sentencing phase closing argument violated his right to a reliable sentencing. Third, Pace asserted that the state habeas court unreasonably applied *Strickland* in denying his claim that trial counsel were ineffective for failing to object during the closing argument to the state's "unconstitutional injection of religious argument in favor of the death penalty" and "unconstitutional arguments that jurors should put themselves in the victim's shoes." Fourth, Pace maintained that the state habeas court unreasonably applied clearly established federal law in denying his claim that the state trial court's admission of evidence that he burglarized Coretta Scott King violated his right to a reliable sentencing because "Mrs. King's iconic standing ... rendered the admission of this evidence so inflammatory and prejudicial as to violate [Pace's] constitutional rights." And fifth, Pace argued that the state habeas court unreasonably applied *Simmons* in denying his claim that the state trial court violated his right to a reliable sentencing by refusing to instruct the jury about Pace's eligibility for parole.

***21** The district court denied Pace's section 2254 petition. First, the district court denied Pace's claim that his trial counsel were ineffective in their investigation and presentation of mitigation evidence at the sentencing phase. The district court concluded that the state habeas court reasonably determined that trial counsel's performance was reasonable because "the record demonstrate[d] that counsel and the mitigation specialist mounted an exhaustive investigation effort to uncover evidence for the sentencing phase of [Pace's] trial" and "had a psychologist interview and evaluate" Pace. The district court also concluded that the state habeas court didn't unreasonably determine that Pace wasn't prejudiced by any deficiency in trial counsel's performance because "the truly horrific nature of [Pace's] crimes overc[a]me the mitigating nature of any evidence that trial counsel could have presented."

Second, the district court denied Pace's claim that the state's improper sentencing phase closing arguments violated his right to a reliable sentencing. The district court concluded that "it [was] evident from the [Georgia Supreme Court's] repeated conclusions that the various arguments did not change the result of the penalty phase or change the jury's direction" and that "the weight of the aggravating evidence against" Pace meant that the district court's "confidence in the outcome of the sentencing phase of [Pace's] trial [was] not shaken by the prosecution's closing argument."

Third, the district court denied Pace's claim that his trial counsel were ineffective for failing to object to the state's improper sentencing phase closing arguments. The district court concluded that Pace "failed to present argument that might tend to establish that it [was] more likely that the trial court would have granted a mistrial or that the Georgia Supreme Court would have viewed the trial court's refusal to grant a mistrial as reversible error."

Fourth, the district court denied Pace's claim that the state trial court's admission of evidence that he burglarized Coretta Scott King violated his right to a reliable sentencing, concluding that the claim was procedurally defaulted. The district court explained that Pace's claim that the state trial court's admission of evidence that Pace burglarized Coretta Scott King violated his right to a reliable sentencing "differ[ed] from the claim that he raised on [direct] appeal regarding the burglaries" because Pace's claim on direct appeal was that "the [state] trial court erred in allowing the [prior burglary] conviction[ ] into evidence at trial as it was not a voluntary plea based on the alleged ineffectiveness of trial counsel." Thus, the district court concluded that the state habeas court incorrectly "denied the claim as res judicata" and "should have concluded that the claim was procedurally defaulted because [Pace] had never raised it before." And even if Pace's state appellate counsel was ineffective in failing to raise the claim on direct appeal, that would not "constitute[ ] cause and prejudice to lift the procedural bar," the district court explained, because "the claim [was] without merit, and ... thus [Pace could not] demonstrate prejudice." Pace wasn't prejudiced, the district court concluded, because: (1) Pace "did, in fact, burglarize Coretta Scott King's home, and that fact [was] clearly the type of information that a sentencing tribunal should take into consideration when weighing the appropriate sentence to impose"; and (2) his "burglary of [Coretta Scott King's] home was minor" when compared to "the utter brutality and depravity" of Pace's crimes against Ms. McAfee, Ms. McClendon, Ms. Martin, and Ms. Britt.

Finally, the district court denied Pace's claim that the state trial court's refusal to inform the jury about Pace's eligibility for parole violated his constitutional rights because he "was, in fact, parole eligible, and where that [was] the case, the

Constitution d[id] not require that the jury be told anything about parole."

***22** The district court granted Pace a certificate of appealability on his claims that: (1) "trial counsel was ineffective in investigating and presenting mitigation evidence during the penalty phase"; (2) "the prosecution made improper closing argument during the penalty phase"; (3) "trial counsel was ineffective for failing to object to the prosecutor's improper closing arguments during the penalty phase"; (4) "the penalty phase of the trial was rendered unfair because of the admission of evidence regarding the burglary of the residence of Coretta Scott King"; and (5) "the trial court erred in limiting evidence regarding [Pace's] eligibility for parole." We denied Pace's motion to expand the certificate of appealability.

STANDARD OF REVIEW

"We review de novo the district court's denial of a 28 U.S.C. [section] 2254 petition." *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1336 (11th Cir. 2019). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal courts may not grant a section 2254 petition on any claim that was adjudicated on the merits in state court unless the state court's adjudication was (1) "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d). "[W]e must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1266 (11th Cir. 2014) (citing 28 U.S.C. § 2254(e)(1)); *see Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1287 (11th Cir. 2012) ("[O]ur review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review." (quotation omitted)).

Our focus under section 2254(d) is on the "last reasoned" state court decision. *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1261 n.12 (11th Cir. 2009). The question is not whether we believe that decision was "incorrect" but whether the decision "was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). A state court's decision is not unreasonable "so long as fairminded jurists could disagree on the correctness of the ... decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation omitted). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (quotation omitted). To obtain relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

DISCUSSION

We consider only the five issues in Pace's certificate of appealability. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998) ("[I]n an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the [certificate of appealability]."). First, we explain why the Georgia Supreme Court did not unreasonably apply *Strickland* in denying Pace's claim that his trial counsel were ineffective in investigating and presenting mitigation evidence during the sentencing phase. Second, we address why the Georgia Supreme Court did not unreasonably apply *Darden* in concluding that the state's improper sentencing phase closing arguments did not violate Pace's right to a reliable sentencing. Third, we review why the Georgia Supreme Court did not unreasonably apply *Strickland* in denying Pace's claim that his trial counsel were ineffective for failing to object to statements the prosecutor made during the sentencing phase closing arguments. Fourth, we discuss why the district court correctly concluded that Pace's claim that the admission of evidence that Pace burglarized Coretta Scott King violated his right to a reliable sentencing is procedurally defaulted and, even if it weren't, the claim would fail on de novo review. And fifth, we show why the Georgia Supreme Court did not unreasonably apply *Simmons* in concluding that excluding evidence of Pace's parole eligibility did not deny Pace a reliable sentencing.

Pace's Claim That Trial Counsel Were Ineffective in Investigating and Presenting Mitigation Evidence During the Sentencing Phase

***23** The Georgia Supreme Court denied Pace's claim that his trial counsel were ineffective in investigating and presenting mitigating evidence during the sentencing phase of the trial because Pace "failed to show that counsel's sentencing phase performance ... was deficient under constitutional standards." "In applying AEDPA, we must determine whether any fairminded jurist could agree with that assessment." *See McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1365 (11th Cir. 2021). We conclude that fairminded jurists could agree with the Georgia Supreme Court's application of *Strickland*.

Strickland

Under *Strickland*, "[a] petitioner asserting a claim of ineffective assistance of counsel must demonstrate both deficient performance and prejudice—that counsel's performance 'fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 485 (11th Cir. 2014) (quoting *Strickland*, 466 U.S. at 687–88). "Because the failure to demonstrate either deficient performance or prejudice is dispositive of the claim against the petitioner, 'there is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one.' " *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1248 (11th Cir. 2009) (cleaned up) (quoting *Strickland*, 466 U.S. at 697).

The performance inquiry is "highly deferential," and courts must not succumb to the "all too tempting" impulse "to conclude that a particular act or omission of counsel was unreasonable" after counsel's defense "has proved unsuccessful." *Strickland*, 466 U.S. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. "No absolute rules dictate what is reasonable performance for lawyers." *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) (citing *Strickland*, 466 U.S. at 688–89). Instead, "the performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*." *Strickland*, 466 U.S. at 688 (emphasis added). In other words, if a reasonably competent attorney in counsel's shoes could—but not necessarily would—have performed the same, then the representation was adequate. *See White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."); *see also Harrington*, 562 U.S. at 110 ("*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." (quotation omitted)); *Rompilla v. Beard*, 545 U.S. 374, 381 (2005) (referring to "[a] standard of reasonableness applied as if one stood in counsel's shoes").

In reviewing a state court's determination that an attorney's performance was not unreasonable, we decide only whether the state court's conclusion about the reasonableness of counsel's performance was *itself* reasonable. *See* 28 U.S.C. § 2254(d)(1). We therefore give "both the state court and the defense attorney the benefit of the doubt." *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (quotation omitted). In other words, "because the standards created by *Strickland* and [section] 2254(d) are both highly deferential," our review is "doubly" deferential "when the two apply in tandem." *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1265 (11th Cir. 2020) (cleaned up).

***24** As to *Strickland*'s second prong, the prejudice inquiry doesn't ask whether "the errors had some conceivable effect on the outcome of the proceeding." *See Strickland*, 466 U.S. at 693. Instead, where a defendant challenges a death sentence, "the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Hitchcock*, 745 F.3d at 485 (quoting *Strickland*, 466 U.S. at 695).

The Georgia Supreme Court did not unreasonably apply *Strick-land*'s performance prong

The Georgia Supreme Court determined that "the [state] habeas court did not err in finding that [Pace] ha[d] failed to show that [trial] counsel's sentencing phase performance ... was deficient under constitutional standards." Pace argues that the Georgia Supreme Court unreasonably applied *Strickland*'s performance prong. He asserts that "it was per se unreasonable [for trial counsel] not to conduct a complete investigation of [Pace's] background and social history *before* deciding to rely upon doubt about guilt at sentencing." But we can't say that the Georgia Supreme Court unreasonably applied *Strickland* in affirming the state habeas court's determination that trial counsel performed a reasonable investigation that was sufficient to enable an informed decision to pursue a residual doubt defense during the sentencing phase.

1. Trial counsel's investigation of mitigation evidence was reasonable

The state habeas court determined that Pace's trial counsel performed reasonably in investigating and presenting mitigating evidence because they investigated "a wide range of information, including Pace's mental health," and made "reasonable efforts to investigate other, alternative strategies." The state habeas court's determination was not unreasonable.

A. Investigation of Pace's background

The state habeas court's determination that trial counsel reasonably investigated Pace's background was not unreasonable. The record shows that trial counsel hired Investigator Leonard to help investigate Pace's background and that they interviewed Pace to learn about his upbringing, history of head injuries, drug use, and academic difficulties. Trial counsel and Investigator Leonard also met as a group with Pace's mother, his sister Lisa, his brother Garry, and Garry's wife, Penny. At that meeting, trial counsel and Investigator Leonard "described the scope and purpose of mitigation evidence in a bifurcated trial," "emphasized that [Pace] [was] in a lot of trouble and [they] need[ed] to plan for a sentencing phase," and got names and contact information for each of Pace's siblings and "several people who kn[e]w [Pace] and the Pace family."

After the group meeting with Pace's family, trial counsel and Investigator Leonard interviewed Pace's mother, siblings, former girlfriend, former teachers, and longtime family friends about Pace's background. They also sought Pace's and his parents' birth certificates, medical records, school records, social security records, employment records, and criminal and civil court records. And they compiled the information from their interviews and the records they obtained into a "social history chronology" of Pace's family dating back to 1875.

In short, trial counsel's investigation of Pace's background was comprehensive and thorough. Trial counsel hired a professional to help with the mitigation investigation, interviewed witnesses about Pace's childhood, mental health, drug and alcohol use, and potential physical abuse, and reviewed school records, medical records, employment records, criminal records, and more. "We have previously determined that an attorney performed a reasonable investigation of his client's background after the attorney performed only some of the actions that [Pace's trial counsel] performed." *See Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255, 1280–81 (11th Cir. 2013) (collecting cases). The state habeas court's determination that trial counsel performed a reasonable background investigation was not objectively unreasonable.

***25** Pace argues that his trial counsel were constitutionally ineffective because they failed to investigate his "chaotic childhood of neglect, poverty and dysfunction, a serious head injury that went mistreated, family violence, and an environment of rampant drug use." But trial counsel investigated what Pace and his family and friends disclosed during their interviews. Pace's trial counsel investigated the "serious head injury" that Pace and his mother mentioned and told Dr. Herendeen about it. Trial counsel also investigated Pace's childhood and learned from Pace's siblings that his parents "drank a little[,] argued often," and sometimes got into physical fights, and that Pace grew up in a "bad neighborhood," "dr[ank] beer like water," and "smoked a lot of weed" as a teenager.

Thus, Pace's trial counsel did investigate Pace's childhood and his history of poverty, head injuries, family violence, and drug use. Trial counsel were not ineffective for "failing to discover and develop" more powerful mitigating evidence of a chaotic childhood that Pace and his family members "d[id] not mention," *see Puiatti*, 732 F.3d at 1281 (quotation omitted); *see, e.g.*, *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (concluding that trial counsel were not ineffective for failing to find evidence of the petitioner's childhood abuse and mistreatment where the petitioner "gave

[trial counsel] no reason to suspect abuse and mistreatment" and where trial counsel spoke to the petitioner's mother and "got nothing from her about [the petitioner] having been abused or mistreated"), and the records trial counsel requested did not indicate a chaotic childhood, *see* *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

Pace also argues that trial counsel's background investigation was deficient because "they did not speak with any members of the McDaniel family," they didn't follow up with Ms. Grissom, and they "did not know about [Mr.] Johnson because they did not investigate." We disagree. As to the McDaniels family, Pace argues that, if trial counsel had interviewed them, trial counsel "would have gotten a vastly different picture of life in the Pace household." But, as we've already explained, the state habeas court did not unreasonably conclude that trial counsel's investigation was reasonable and "spanned a wide range of information."

Trial counsel interviewed, for example, Pace and several of his family members, including Pace's mother, his sister Lisa, his brother Garry, his brother Gregory, his brother Darrell, his sister Jennifer, and his sister-in-law Penny. They also interviewed three of his former teachers and spoke to two close family friends, Ms. Booker and Ms. Turner. Based on their investigation, Pace's trial counsel later called eleven mitigation witnesses to testify on behalf of Pace at sentencing. *Strickland* required a reasonable investigation under the circumstances, and that's what trial counsel did.

Once trial counsel learned about Pace's background from his and his parents' records and their many interviews with Pace, his family, close family friends, and teachers—in other words, after they conducted a reasonable investigation under the circumstances—trial counsel were not deficient for not interviewing the McDaniels family. "The right to counsel does not require that a criminal defense attorney leave no stone unturned and no witness unpursued." *Raulerson v. Warden*, 928 F.3d 987, 997 (11th Cir. 2019) (quotation omitted) (holding that the state habeas court reasonably found that trial counsel's investigation was adequate where trial counsel interviewed the petitioner's "mother, father, brother, and an uncle" but not certain "extended family members, teachers, and acquaintances"); *see also Gissendaner v. Seaboldt*, 735 F.3d 1311, 1330 (11th Cir. 2013) ("[T]here comes a point ... at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive of more important duties." (quotation omitted)).

***26** As to Ms. Grissom, Investigator Leonard interviewed her. And the information about Pace's background that Investigator Leonard got from Ms. Grissom—his absenteeism, his parents' neglect, and his bad neighborhood—wasn't substantially different from what Ms. Grissom wrote in her state habeas affidavit. Trial counsel were not ineffective for not following up with Ms. Grissom because her "account [was] otherwise fairly known to defense counsel." *See* *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) (quoting *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc)). And, after interviewing Ms. Grissom, Investigator Leonard wasn't sure that she remembered Pace—he had never been in her class—and thought that she may have "simply remember[ed] a composite of the many kids like him at her school, which ha[d] a high population of poor kids." Based on Investigator Leonard's doubts about Ms. Grissom's memory of Pace, it wasn't unreasonable for trial counsel to direct their limited time and investigative resources elsewhere. *See* *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir. 1994) (explaining "the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources").

And Pace doesn't explain how trial counsel could have reasonably been expected to find out about Mr. Johnson during their investigation. Pace never told them about Mr. Johnson, and Mr. Johnson explained that he and Pace hid their relationship from Ms. Todd and Pace's family. *Strickland* does not require Pace's trial counsel to "scour the globe on the off chance" they'd come across Pace's secret romantic partner. *See Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1249–50 (11th Cir. 2015) ("[A] defense attorney preparing for the sentencing phase of a capital trial is not required 'to scour the globe on the off chance something will turn up.' " (quoting *Rompilla*, 545 U.S. at 383)).

"The question under *Strickland* is whether [Pace's] trial counsel conducted an adequate background investigation or reasonably decided to end the background investigation when they did." *See* *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1351 (11th Cir. 2011) (cleaned up). The record shows that trial counsel conducted a thorough background investigation. Contrary to Pace's contentions, "[t]his is not a case in which the defendant's attorneys failed to act while

potentially powerful mitigating evidence stared them in the face." *See* *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). "Given the many witnesses trial counsel or [Investigator Leonard] interviewed, the mere fact that additional family and social history witnesses have now been discovered does not make trial ... counsel ineffective." *See* *DeYoung v. Schofield*, 609 F.3d 1260, 1288 (11th Cir. 2010). Under our "doubly" deferential standard of review, the Georgia Supreme Court did not unreasonably conclude that Pace's trial counsel's performance in investigating mitigation evidence was reasonable under the circumstances. *See* *Jenkins*, 963 F.3d at 1265 (quotation omitted).

B. Investigation of Pace's mental health

A fairminded jurist could also agree with the state habeas court's assessment that trial counsel's investigation into Pace's mental health was reasonable. Trial counsel interviewed Pace along with his family, friends, and teachers, and questioned them about Pace's mental health. Trial counsel also sought Pace's medical and school records. After learning about Pace's head injuries and academic difficulties, trial counsel retained Dr. Herendeen to screen Pace for intellectual disability and "organic brain damage." Investigator Leonard prepared Pace for the evaluation; told Dr. Herendeen about Pace's history of head injuries, severe headaches, and poor academic performance; and gave Dr. Herendeen both the memoranda she had prepared from her interviews of Pace and his family and the social history chronology of Pace's family that trial counsel had prepared.

The state habeas court did not unreasonably apply clearly established federal law in concluding that this investigation into Pace's mental health was sufficient. We've held as much when faced with similar—or less extensive—mental health investigations. *See, e.g.*, *Gissendaner*, 735 F.3d at 1331 ("The state habeas court's finding of no deficient performance was also reasonable with respect to trial counsel's mental health investigation, which included obtaining [the petitioner's] mental health records and consulting with [a mental health expert]."); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1241 (11th Cir. 2010) (concluding that the state habeas court reasonably found no deficient performance where trial counsel "obtained considerable potential mitigation evidence," "had a thorough [mental health] evaluation of [the petitioner] conducted," and gave the mental health expert "a significant quantity of hospital and medical records"); *Callahan v. Campbell*, 427 F.3d 897, 934 (11th Cir. 2005) (explaining that, when a defendant "does not display strong evidence of mental problems," trial counsel is not even "required to seek an independent [mental health] evaluation" (quoting *Holladay v. Haley*, 209 F.3d 1243, 1250 (11th Cir. 2000))).

***27** Against this, Pace argues that trial counsel unreasonably ended their investigation into his mental health when they did. Dr. Herendeen's evaluation showed that Pace had "borderline intelligence and organic brain damage," that his "paranoia scale" was "significant[ly] elevat[ed]," that his mania scale was "markedly elevated" with "feelings of grandiosity which could reach the level of delusional belief," that his schizophrenia scale was "somewhat elevated," but that Pace's IQ score wasn't "promising" for a mental disability defense. Dr. Herendeen told Investigator Leonard that Pace's results "indicated further evaluation should be pursued." Pace argues that trial counsel were ineffective because they decided not to conduct a further evaluation.

Pace is right that, "[i]n evaluating the reasonableness of counsel's investigation, courts must consider both the quantum of evidence already known to counsel and whether that evidence would lead a reasonable attorney to investigate further." *Gissendaner*, 735 F.3d at 1323 (quotation omitted). The question, in other words, is "whether the known evidence would lead a reasonable attorney to investigate further." *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010) (quoting *Wiggins v. Smith*, 539 U.S. 510, 527 (2003)). In assessing this question, however, courts must keep in mind that "counsel's duty to investigate does not necessarily require counsel to investigate every evidentiary lead." *Raheem v. GDCP Warden*, 995 F.3d 895, 909 (11th Cir. 2021) (quotation omitted). We must also afford a "heavy measure of deference to counsel's judgments," mindful of the "reality that lawyers do not enjoy the benefit of endless time, energy or financial resources." *Williams*, 185 F.3d at 1236–37 (quotation omitted).

We can't say that the state habeas court's conclusion that trial counsel reasonably investigated Pace's mental health was contrary to or an unreasonable application of clearly established federal law. First, the state habeas court was not unreasonable in concluding that trial counsel already had enough information from their investigation to make a reasonable call not to pursue a mental health defense. While

trial counsel "must gather enough knowledge of the potential mitigation evidence to arrive at an informed judgment in making that decision," *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (quotation omitted), Pace "has not ... shown that there was more [that trial counsel] needed to know from a further mental evaluation" before making an informed decision about their trial strategy. *Wood v. Allen*, 542 F.3d 1281, 1308 (11th Cir. 2008), *aff'd*, 558 U.S. 290 (2010).

After conducting interviews, obtaining Pace's records, and putting together a family history, trial counsel obtained a report from Dr. Herendeen. That report explained that Pace had "borderline intelligence and organic brain damage," that his "paranoia scale" was "significant[ly] elevat[ed]," that his mania scale was "markedly elevated" with "feelings of grandiosity," and that his schizophrenia scale was "somewhat elevated." Pace now presents evidence—consistent with Dr. Herendeen's findings—that two doctors have since diagnosed him with schizophrenia. But Pace's trial counsel already had information that his schizophrenia scale was elevated. They were already aware that Pace may have had borderline intelligence and organic brain damage, and they knew that there were signs of paranoia, grandiosity, and schizophrenia.

Pace's trial counsel had this information and chose to pursue a different strategy. Pace has failed to show that there was further information that trial counsel failed to discover that rendered their investigation unreasonable. *See Haliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1244 (11th Cir. 2003) ("[W]e conclude that [trial counsel] knew enough to make an informed, strategic decision not to present such mitigating evidence and that his strategic decision was reasonable."); *see also Reed*, 593 F.3d at 1242 (finding that the state habeas court reasonably found no ineffective assistance of counsel where the petitioner's post-conviction "mitigation testimony largely just recounted, in somewhat more detailed form, the factual background that [trial counsel had] already obtained").

***28** Second, even if the information Pace now points to was materially different from what trial counsel already knew, we can't say that the state habeas court was unreasonable in concluding that trial counsel's decision not to delve further into Pace's mental health was itself a reasonable strategic decision. "*Strickland* indicates clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable." *Rogers*, 13 F.3d at 387. And "[b]y its nature, 'strategy' can include a decision not to investigate." *Id.* Attorneys can also make "reasonable decision[s] that make[ ] particular investigations unnecessary." *Strickland*, 466 U.S. at 691.

Here, trial counsel explained that they "d[idn]'t expect [Pace] to do well on any personality test" and knew that Pace's personality test results could be used against him as "a sensationalizing blunt instrument of the state." So trial counsel took a "measured approach to psychological testing" because it made "little sense" for Dr. Herendeen to give Pace tests that they'd have to "rebut in an attempt to rehabilitate [their] client." As Mr. Mears explained, he'd be "very reluctant to put a doctor up to say my client suffers from an antisocial personality disorder" because the diagnosis "tends to come across exactly as the name is." We've said the same thing. *See Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1332 (11th Cir. 2013) (explaining that "antisocial personality disorder ... is a trait most jurors tend to look disfavorably upon, that is not mitigating but damaging").

Beyond their strategic decision to avoid evidence that may have been aggravating, not mitigating, Mr. Mears also explained that trial counsel "were attempting to present a defense that was consistent with [Pace's] plea of not guilty." Trial counsel were wary of "do[ing] a 180-degree turn in front of the jury" and shifting from their innocence defense. After completing a thorough investigation into the defenses they could raise at sentencing, trial counsel still felt that this was the best strategy. We can't say that the state habeas court's conclusion that trial counsel reasonably decided not to obtain further mental health evaluations was contrary to or an unreasonable application of clearly established federal law. *See Ward v. Hall*, 592 F.3d 1144, 1170 (11th Cir. 2010) ("Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing." (cleaned up)).

Pace analogizes this case to *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011), where we concluded that the mental health investigation fell below *Strickland*'s standards. But there's simply no comparison. In *Ferrell*, the petitioner had "obvious mental disabilities" and suffered a seizure "during the trial itself," which "caus[ed] him to fall onto the floor, shake[,] and speak gibberish." *Id.* at 1228. The petitioner's first lawyer "strongly suspected that [the petitioner] suffered from mental health problems that were 'overt and fairly apparent to anyone who cared to look closely.' " *Id.* at 1227–28. Trial counsel hired an investigator who also believed that the

petitioner "had some kind of mental disorder" partly because the petitioner "had a strange demeanor at trial, laughing and smiling inappropriately throughout the proceedings." *Id.* at 1228. But despite these "obvious indicators that should have led counsel to pursue a more comprehensive mental health investigation," trial counsel: (1) did not "ask any of [the petitioner's] family ... about any topics related to [the petitioner's] mental health"; (2) did not ask their mental health expert "to look for evidence of brain damage" and instead limited their mental health expert's inquiry to whether the defendant was "mentally retarded" or "suffered from any problems that may have affected his ... ability to understand his constitutional rights"; and (3) "provided *no* material" to the mental health expert "other than school records." *Id.* at 1227–28.

***29** Our case is different. Unlike trial counsel in *Ferrell*, there's no evidence that, during trial counsel's investigation, Pace exhibited mental health issues that were "overt and fairly apparent to anyone who cared to look closely." *See id.* at 1228. The opposite is true: trial counsel's interviews with Pace, his family, and his former girlfriend didn't suggest that there were significant mental health issues worth pursuing. Investigator Leonard, for example, described Pace as "pleasant, cooperative[,] and attentive throughout" her initial interview with him. Ms. Todd told trial counsel that she dated Pace "during the time some of the[ ] killings occurred" and that she "never saw any indication that anything was wrong." And Pace's brother Garry said that he had "never seen any abnormal behavior in [Pace]."

Even in the face of little evidence of mental health issues, Pace's trial counsel did all of the things trial counsel didn't do in *Ferrell*. Unlike trial counsel in *Ferrell*, for example, Pace's trial counsel questioned Pace and his family members about his mental health; asked Dr. Herendeen to evaluate Pace for brain damage; and gave Dr. Herendeen information about Pace's history of head injuries, severe headaches, and poor academic performance, memoranda from interviews of Pace and his family, and the 120-year social history chronology of Pace's family that trial counsel had prepared. *Ferrell* doesn't support Pace's claim.

2. Trial counsel's mitigation presentation was reasonable

The state habeas court determined that trial counsel "effectively utilized the available information and resources and [were] not unreasonable in choosing to present a reasonable doubt defense during the guilt-innocence phase ... [or] in maintaining a consistent defense of residual doubt" during the sentencing phase. The state habeas court's determination was not unreasonable because "[i]t is especially difficult to succeed with an ineffective assistance claim questioning the strategic decisions of trial counsel who were informed of the available evidence." *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1302 (11th Cir. 2019). Trial counsel's thorough investigation of Pace's background and mental health means that their strategic choice to pursue a residual doubt defense is "virtually unchallengeable." *See id.* (quoting *Strickland*, 466 U.S. at 690).

A. Residual doubt

Pace's trial counsel made a strategic decision to present a "residual doubt" defense at sentencing and to show that Pace's family was "pleading for mercy." As Mr. Mears explained, trial counsel "were attempting to present a defense that was consistent with [Pace's] plea of not guilty" and Pace's "consistent ... assertions that he was innocent of the charges against him." Trial counsel recognized that "there was nothing that [they] had in the way of a traditional defense other than he didn't do it, and sometimes that's the only defense you have." Because Pace denied his guilt, residual doubt was a reasonable strategy. *See Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 787–88 (11th Cir. 2003); *Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1154 (11th Cir. 2009) ("We have noted in our circuit that this lingering doubt or residual doubt theory is very effective in some cases.").

Mr. Mears recognized that he'd lose credibility with the jury if he wasn't "very careful during the sentencing phase not to do a 180-degree turn" after maintaining Pace's innocence during the guilt phase. As he explained:

> [J]urors resent the defense attorneys who for two or three weeks say my client is innocent, he didn't do it, you don't have enough evidence, and then you come back in the sentencing phase, well, he did it so let's be merciful.
>
> You have to be consistent in the defense that you raise at guilt/innocence with the way you present mitigation. One of the ways that you do that in a not guilty, my client didn't do it, is to continue to argue residual doubt as a possible mitigating factor....

> ***30** And I think that was part of what we were doing in [Pace's] case was to try to continue the residual doubt, along with the other mitigating evidence that we attempted to present.

Trial counsel could've undermined their efforts to get Pace a life sentence if they pulled "a 180-degree turn" at sentencing by blaming his crimes on his mental health or troubled background. *See Franks v. GDCP Warden*, 975 F.3d 1165, 1184 (11th Cir. 2020) ("[E]vidence of [the petitioner's] drug use, difficult childhood[,] and learning disability, in addition to being weak mitigating evidence, may have eroded any residual doubt if trial counsel had focused on those issues." (quotation omitted)); *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1304 (11th Cir. 2013) ("While an intoxication-mitigation strategy attempts to lessen the defendant's culpability for an act he concededly committed, a residual-doubt strategy depends on the defendant maintaining his innocence. That [petitioner's] intoxication evidence could have blunted the force of his residual-doubt argument is merely another way in which the new mitigating evidence could have hurt [the petitioner] as easily as it could have helped him.").

Pace argues that trial counsel's decision to pursue a residual doubt mitigation defense at sentencing was "[n]ot a strategy but a post hoc justification for failing to present mitigating evidence" because trial counsel were "not aware of the evidence that might have been available upon further investigation, so they could not make a reasonable strategic choice not to present it." But Mr. Mears testified that trial counsel's decision to present a residual doubt defense was a strategic one, and, for the reasons we've already explained, trial counsel's investigation of Pace's background and mental health was sufficient to allow them to make an informed decision to present a residual doubt defense during the sentencing phase. Trial counsel hired an investigator; talked with Pace, his family, his friends, his neighbors, and his teachers; got his school and medical records; put together a 120-year family social history; shared all of this information with a mental health expert; and received a comprehensive report from the expert. Trial counsel, in other words, "investigated different lines of mitigation and then made a strategic choice to employ residual doubt and family plea for mercy approaches in the penalty phase." *DeYoung*, 609 F.3d at 1286. The state habeas court did not unreasonably conclude that, in doing so, trial counsel's "choices, and their investigation, fell well within 'the wide range of professionally competent assistance.' " *Id.* (quoting *Strickland*, 466 U.S. at 690).

Pace asserts that trial counsel's residual doubt strategy was unreasonable considering the "overwhelming evidence of guilt" in the form of DNA evidence. But "overwhelming evidence" of a "brutal and aggravated" crime doesn't make a residual doubt defense an unreasonable strategy. *See Franks*, 975 F.3d at 1177 (noting that "the brutal and aggravated nature of [the petitioner's] crime ... could [have led] a reasonable attorney to conclude that without residual doubt, a life sentence would [have] be[en] difficult to sustain," even where there was "overwhelming evidence of [the petitioner's] guilt"); *Stewart*, 877 F.2d at 855–56 (concluding that trial counsel was not ineffective for adopting a "lingering doubt" strategy where "[t]he physical evidence available to the state ... was overwhelming" and the petitioner "confessed to police"). And it was not uncommon at the time of Pace's trial for defendants to challenge the reliability of the procedures used by the government to match DNA. *See, e.g.*, *United States v. Bonds*, 12 F.3d 540, 558 (6th Cir. 1993) (addressing the defendants' challenge to the scientific validity of forensic DNA evidence). Indeed, Pace continued to challenge the reliability of the state's DNA evidence in his state habeas petition. Pace's "[t]rial counsel cannot be faulted for attempting to make the best of a bad situation." *See Stewart*, 877 F.2d at 856.

B. Presentation of witnesses

***31** The state habeas court determined that trial counsel's mitigation presentation of a residual doubt defense was reasonable because, "[b]ased on extensive research, [trial] counsel called [eleven] mitigation witnesses who testified about the good character of Pace, his quiet nature, and their belief that he was innocent" and "[trial] [c]ounsel spoke to each witness prior to taking the stand to explain the purpose of mitigation testimony." The state habeas court's determination was not unreasonable.

Before trial, trial counsel met with Pace's family, Ms. Booker, Ms. Turner, and Ms. Todd to discuss their testimony. During one meeting with Pace's mother, sister Lisa, brother Garry, and sister-in-law Penny, Ms. Mau "described the scope and purpose of mitigation evidence in a bifurcated trial." Trial counsel also met with Pace's siblings again a few weeks before trial to discuss their testimony.

At the sentencing phase, the witnesses testified about Pace's good character and their disbelief that Pace was capable of committing the crimes and asked the jury to have mercy on Pace. Ms. Booker told the jury that Pace had "a real big impact" in motivating her grandson to stay in school and out of jail, and she and Ms. Turner testified that Pace was "very loving," "a good kid," and an "easy" and "caring" person who wouldn't harm anyone. Pace's brother Darrell told the jury about how Pace saved him from drowning. Pace's brother Gregory testified that Pace "g[a]ve respect to" and "care[d] for" the elderly by running errands for them and keeping them company. And Ms. Todd told the jury about how Pace encouraged her to continue her education despite his academic difficulties and described him as a "very quiet," "very kind, very supportive, very loving," and polite person who would give up his seat for someone else on the bus. "All of this good character evidence supported residual doubt: [Pace] had never been known to be violent and each account of his decency was designed to sow more doubt in the jurors' minds" that Pace was capable of murder. *See Franks*, 975 F.3d at 1174.

Pace contends that it was unreasonable for his trial counsel to "focus upon residual doubt at sentencing" to the exclusion of presenting Dr. Herendeen's findings about his organic brain damage and borderline intellectual functioning and evidence of his impoverished and neglected upbringing. According to Pace, "[n]one of the information regarding [his] mental health or his background would have been inconsistent with a penalty phase strategy of residual doubt." But trial counsel presented evidence of Pace's troubled upbringing and borderline intellectual functioning: Garry testified that he and Pace lived in housing projects, moved around a lot, and grew up poor, Mr. Beasley testified that the Vine City area was a "very poor" community, and Ms. Todd told the jury that Pace dropped out of school and struggled to read. Indeed, in responding to Pace's trial counsel's objection to his use of the cartoon in his closing argument, the prosecutor argued that it would be used to rebut Pace's mitigation defense that he was "born in the ghetto or the poor side of town and growing up under those conditions."

The state habeas court did not unreasonably determine that trial counsel made a reasonable strategic decision not to place more focus on Pace's background and mental health at the risk of losing credibility with the jury. The decision not to call Dr. Herendeen at sentencing because it would be an abrupt "180-degree turn in front of the jury" "is the epitome of a strategic decision" that we will not "second guess." *See Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) ("Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."); *DeYoung*, 609 F.3d at 1289 (rejecting the petitioner's "improper attempt to second-guess a reasonable strategic choice of trial counsel"). And trial counsel could have reasonably decided to limit their presentation of mitigating evidence about Pace's background based on their concern that the jury would share Pace's brother Garry's belief that "[j]ust because you're raised in that neighborhood doesn't mean you'll be a hoodlum." *See Blankenship v. Hall*, 542 F.3d 1253, 1280 (11th Cir. 2008) ("In this case, counsel was faced with a brutal rape and murder of an elderly woman. In light of the gruesome facts, ... reasonably competent counsel could have decided the best chance for sparing [the petitioner's] life was to convince the jury some residual doubt existed. Counsel could have concluded the inclusion of extensive mitigating evidence addressing [the petitioner's] life history might cloud the jury from focusing on the question of residual doubt, or would simply have been unpersuasive in light of the gruesome nature of the crime.").

***32** Pace also argues that his trial counsel's sentencing phase presentation of witnesses was "affirmatively aggravating" for two reasons. First, Pace argues that Ms. Booker's and Ms. Turner's descriptions of Pace as a child and teenager were not mitigating because both women conceded that they only knew Pace during his childhood and teenage years. Second, his family members' testimony was aggravating, Pace says, because they testified that he was "normal," "could point to almost no examples of good character to bolster their beliefs that [Pace] was innocent," and "blind[ly] insiste[d] that [Pace] had been framed."

Pace's focus on Ms. Booker's and Ms. Turner's testimony ignores that trial counsel also called Ms. Todd, who Pace concedes "gave the most mitigating evidence" by testifying about Pace's support as she pursued a college education despite his difficulty reading. But even putting Ms. Todd's testimony aside, we can't say that the state habeas court unreasonably determined that trial counsel performed reasonably by calling Ms. Booker and Ms. Turner—two longtime friends of Pace's family—to "relay[ ] anecdotes of [Pace's] helpfulness" and to testify about "his quiet nature, and their belief that he was innocent." And contrary to Pace's assertion that Ms. Booker didn't testify about more recent examples of Pace's good character, she testified about Pace's

helpfulness during his adulthood, when he had a "real big impact" in motivating her grandson to stay in school by telling her grandson about life in jail.

The same is true of Pace's family members' testimony. Pace's siblings described him as an "easy-going, quiet person" who "g[a]ve respect to his elders," helped elderly neighbors, and who had even saved his brother from drowning. And his family insisted that Pace's crimes went against his character. This presentation of "good character evidence supported residual doubt." *See Franks*, 975 F.3d at 1174.

Although Pace's family members' testimony wasn't as helpful as trial counsel "were planning on," we are not permitted "to second-guess an attorney with the benefit of our hindsight." *Jenkins*, 963 F.3d at 1270. While trial counsel knew from their interviews that Pace's family members "had a tendency to be combative and having them testify would entail some risk," trial counsel also thought they had the potential to "be very good mitigation witnesses." Fairminded jurists could agree with the Georgia Supreme Court that trial counsel reasonably decided that the potential benefit of Pace's family members' testimony outweighed the risks. *See Waters*, 46 F.3d at 1512.

C. Closing argument

The state habeas court determined that Mr. Mears's closing argument "was adequate" because it "was consistent with Pace's theory of defense." Pace argues that Mr. Mears's closing argument was constitutionally deficient because Mr. Mears "disavowed" any attempt to present mitigating evidence of Pace's troubled background, "essentially threw away any residual doubt argument" by asking the jury to understand that Pace's family members weren't arguing with the verdict by insisting on Pace's innocence, and "browbeat[ ] jurors about their value systems[ ] and impl[ied] that they [were] immoral if they g[a]ve a death sentence."

Pace's criticisms of Mr. Mears's closing argument are misplaced. Pace argues that Mr. Mears "disavowed" mitigating evidence of Pace's background when he told the jury that he did not "try to insult [their] intelligence by putting up witnesses to say that [Pace] had a deprived family" because "it would have been hypocritical for us to argue as we did and strongly ... that the evidence didn't prove him ... guilty" and then "come and say, well, you found him [guilty]" but don't "sentence him to death because he was poor." But Mr. Mears's closing argument was consistent with his belief that he would've undermined his efforts to get Pace a life sentence by making "a 180-degree turn" at sentencing by blaming Pace's crimes on his troubled background. *See Franks*, 975 F.3d at 1184.

***33** Nor, as Pace contends, did Mr. Mears "essentially thr[o]w away any residual doubt argument" by asking the jury to understand Pace's family members' disagreement with the jury's verdict. Mr. Mears told the jury that he "d[id]n't expect" them to impose a death sentence, reminded the jury that trial counsel had "strongly" argued "that the evidence didn't prove [Pace] ... guilty," and explained that trial counsel had "give[n] you the truth about as best we could as to who [Pace] was and what his family was like." Mr. Mears never abandoned the residual doubt defense. *See Jenkins*, 963 F.3d at 1269 ("[A] strategy of 'focusing on obtaining an acquittal and then, at sentencing, on lingering doubt' is reasonable, even if counsel does not use the words 'lingering doubt' or 'residual doubt.' " (quoting *Chandler*, 218 F.3d at 1320 & n.6)). And trial counsel's challenges to the reliability of the state's evidence during the guilt phase from only a few days before the sentencing phase closing arguments "would have been fresh on the minds of the jury."[3] *Id.*

Pace's reliance on *Ferrell* and the dissent in *Jefferson v. Hall*, 570 F.3d 1283 (11th Cir. 2009), *vacated by Jefferson v. Upton*, 560 U.S. 284 (2010), misses the mark. In *Ferrell*, we concluded that defense counsel's residual doubt defense "was powerfully undercut by the very nature of the closing argument defense counsel made at the penalty phase." 640 F.3d at 1231. We explained that defense counsel's statements in closing argument were not "consonant with a residual doubt claim" because defense counsel told the jury that: (1) the defendant's testimony about what happened was " 'absurd,' 'hard to swallow,' 'hard to believe,' 'wild,' and 'ludicrous' "; (2) the jury had "unquestionably" already found one aggravating circumstance and could therefore "legitimately sentence [the defendant] to death"; (3) he "had the 'unpleasant duty' of arguing that two deaths 'by execution' did not warrant the death penalty"; (4) "all the circumstances pointed toward [the defendant's] guilt"; and (5) "[n]o rational jury would have found otherwise in the guilt-innocence phase because of the ludicrousness of [the defendant's] story" and noted that "[*y*]*ou could try this case a thousand times before a*

thousand juries and you'd get the same result; *we've all known that from day one.*" *Id.* at 1207, 1231–32.

And in *Jefferson*, we reviewed the petitioner's habeas petition de novo because the habeas petition was filed before the effective date of AEDPA. 570 F.3d at 1300. The court concluded that trial counsel performed adequately during the sentencing phase by presenting a residual doubt defense because, among other things, trial counsel "reference[d]" their "innocence defense at the guilt phase" by "emphasizing during closing argument that there were no eye witnesses to the crime, no guilty plea, and 'no evidence of any consciousness of guilt.' " *Id.* at 1305–07. The dissent, in contrast, believed that defense counsel's closing argument was "inconsistent with a residual doubt strategy." *Id.* at 1318 (Ed Carnes, J., dissenting). The dissent explained that trial counsel's closing argument "concede[d] that [the defendant] killed the victim" and "[a] residual doubt strategy that concedes the defendant murdered the defenseless victim is not a strategy at all." *Id.* at 1318–19.

Here, unlike the trial counsel in *Ferrell*, Mr. Mears didn't concede Pace's guilt but instead told the jury that he did not "expect" them to sentence Pace to death, reminded the jury that trial counsel had "strongly" argued that Pace was innocent during the guilt phase, and explained that trial counsel had "give[n] you the truth about as best we could as to who [Pace] was and what his family was like" during the sentencing phase. Trial counsel never suggested that "the circumstances pointed toward [Pace's] guilt" or that Pace's story was "ludicrous[ ]." *Ferrell*, 640 F.3d at 1207, 1231–32. Instead, like trial counsel in *Jefferson*, Mr. Mears's closing argument "reference[d]," *see* 570 F.3d at 1305, Pace's "strong[ ]" argument in the guilt phase "that the evidence didn't prove him ... guilty." Mr. Mears did not, as the dissent in *Jefferson* concluded trial counsel had done, "concede[ ] that [Pace] had committed the murder." *See id.* at 1319 (Ed Carnes, J., dissenting). The state habeas court's determination that Mr. Mears's closing was consistent with a residual doubt defense was not unreasonable—particularly when viewed through AEDPA's "doubly" deferential lens. *See Jenkins*, 963 F.3d at 1271.

***34** Finally, Mr. Mears's effort to ask the jury for their understanding of Pace's family members' argumentative demeanor wasn't an unreasonable strategic decision. After Pace's family members' "belligerent," "argumentative," and "unsympathetic" testimony proved not to be what trial counsel were counting on, we can't say that the Georgia Supreme Court unreasonably concluded that Mr. Mears's attempt to reestablish credibility with the jury during his closing argument was reasonable. *See Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) ("This [c]ircuit reviews a lawyer's conduct under the 'performance' prong with considerable deference, giving lawyers the benefit of the doubt for 'heat of the battle' tactical decisions."); *see also Schlager v. Washington*, 113 F.3d 763, 769 (7th Cir. 1997) ("[S]ometimes trials take unpredictable twists. To meet those twists, a plan at the start of a trial sometimes must be adjusted to meet changed circumstances. That's what happened here, and we can't say [trial counsel] made the wrong call....").

Pace's Claim That the Prosecutor's Sentencing Phase Closing Argument Violated His Right to a Reliable Sentencing

In affirming Pace's death sentences on direct appeal, the Georgia Supreme Court concluded:

> Although the prosecutor made several improper comments during closing argument in both phases of the trial, we conclude, given the overwhelming evidence of Pace's guilt and the enormous amount of evidence in aggravation, that the death sentences in his case were not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Pace, 524 S.E.2d at 507. Pace contends that the prosecutor's "improper [closing] argument ... rendered the sentencing phase fundamentally unfair." He argues that when measured against the Supreme Court's decisions in *Darden*, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Berger v. United States*, 295 U.S. 78 (1935), the Georgia Supreme Court unreasonably concluded that the prosecutor's closing argument did not amount to a violation of due process.

The prosecutor's closing argument "deserves the condemnation it has received." *See* *Darden*, 477 U.S. at 179; *Pace*, 524 S.E.2d at 505–07 (describing the prosecutor's closing argument as "improper," "gratuitous," and "unprofessional"). But the Supreme Court has instructed that it's "not enough that the prosecutors' remarks were undesirable or even universally condemned." *See* *Darden*, 477 U.S. at 181 (quotation omitted).

For two reasons, none of the cases Pace has pointed to —*Darden*, *Donnelly*, and *Berger*—clearly establish that his trial fell short of what due process requires. First, "it is not an unreasonable application of clearly established [f]ederal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]." *Reese*, 675 F.3d at 1288 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). "The Supreme Court has reiterated, time and again, that, in the absence of a clear answer—that is, a holding by the Supreme Court—about an issue of federal law, we cannot say that a decision of a state court about that unsettled issue was an unreasonable application of clearly established federal law." *Id.* [4]

As in *Reese*, there's no Supreme Court holding that placed the Georgia Supreme Court's ruling beyond fairminded debate. There, we held that *Darden* and *Donnelly* did not clearly establish that a prosecutor's closing argument rendered a trial unfair because "[o]nly a holding of the Supreme Court can clearly establish federal law" and in both cases the Supreme Court "held that the prosecutor's argument ... *did not* deprive the petitioner of a fair trial." *Id.* at 1289 (emphasis added). In *Darden*, the Court held that a prosecutor's closing "did not deprive [the] petitioner of a fair trial" even though the prosecutor called the petitioner a "vicious animal," said he should be on a "leash," and told the jury he "wish[ed]" someone had "blown [the petitioner's] head off." *Darden*, 477 U.S. at 180 n.12, 181. And, in *Donnelly*, the Court found no "denial of due process" where a prosecutor told the jury during closing that he "sincerely believe[d] that there [was] no doubt" about the petitioner's guilt and that he suspected that the petitioner stood trial not because he was innocent but because he "hope[d] that you find him guilty of something a little less than first-degree murder." *Donnelly*, 416 U.S. at 640 & n.6, 643. Our holding in *Reese* controls here: because neither *Darden* nor *Donnelly* held that a prosecutor's closing argument violated due process, we can't say that the state court's ruling here "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Reese*, 675 F.3d at 1287, 1290 (quotation omitted) (finding no unreasonable application of clearly established law where the prosecutor "compared" the defendant to a "vicious dog" and "told the jury" that the victim's experience was "every woman's wors[t] nightmare").

***35** The Supreme Court's ruling in *Berger* doesn't help either. There, the Court did not hold that a prosecutor's closing argument deprived the petitioner of a fair trial. Rather, the Court held that the "cumulative effect" on the jury of the prosecutor's "pronounced and persistent" misconduct at trial —including "misstating the facts in his cross-examination of witnesses," "putting into the mouths of ... witnesses things which they had not said," "suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered," "pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis," "assuming prejudicial facts not in evidence," "bullying and arguing with witnesses," "conducting himself in a thoroughly and indecorous and improper manner," and making "improper insinuations and assertions calculated to mislead the jury"—was so prejudicial as to warrant a new trial. *Berger*, 295 U.S. at 84–85, 89. In other words, *Berger* didn't hold that the prosecutor's closing argument alone violated due process, so the Georgia Supreme Court did not unreasonably apply that decision to the prosecutor's closing argument in this case.

In short, "the Supreme Court has never held that a prosecutor's closing arguments," in a vacuum, "were so unfair as to violate the right of a defendant to due process." *Reese*, 675 F.3d at 1287. So we can't say that the Georgia Supreme Court unreasonably determined that the prosecutor's closing argument didn't render Pace's sentencing "so unfair as to violate [his right] to due process." *Id.*; *see also Greene v. Upton*, 644 F.3d 1145, 1158–59 (11th Cir. 2011) (concluding that the Georgia Supreme Court did not unreasonably apply *Darden* in affirming the defendant's conviction and death sentence where the prosecutor's closing arguments included "comments that placed jurors in a victim's position" and "references to the Bible" because the petitioner "fail[ed] to cite any clearly established precedent from the Supreme Court of the United States that the Supreme Court of Georgia contravened or applied unreasonably"). "[W]e cannot say that [the Georgia Supreme Court's decision] about [this] unsettled

issue was an unreasonable application of clearly established federal law." *See Reese*, 675 F.3d at 1288.

Second, even if *Darden* could lead to a violation of clearly established law, the Georgia Supreme Court did not unreasonably determine that the prosecutor's closing argument did not render Pace's trial unfair. We consider the prosecution's closing argument "in the context of the entire proceeding, including ... the weight of aggravating and mitigating factors." *See* *Land v. Allen*, 573 F.3d 1211, 1219–20 (11th Cir. 2009). The jury heard and saw evidence that Pace brutally raped, sodomized, and strangled to death Ms. McAfee, an eighty-six-year-old woman who Pace had known "since he was a baby." The jury heard and saw evidence that Pace brutally raped, sodomized, and strangled to death Ms. McClendon, a seventy-eight-year-old woman. The jury heard and saw evidence that Pace brutally raped, sodomized, and strangled to death Ms. Martin, a seventy-nine-year-old woman. The jury heard and saw evidence that Pace brutally raped and strangled Ms. Britt and sodomized her dead body. And the jury learned about Pace's attempts to inflict the same horrible fate on Ms. Grogan and Ms. Sublett, two elderly women who escaped only because they fought back. Based on this evidence, the jury found *nineteen* statutory aggravating circumstances.

As the Georgia Supreme Court found, the amount of evidence in aggravation was "enormous." *See Pace*, 524 S.E.2d at 507; *cf. Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 656 (11th Cir. 2014) (describing a murder with seven aggravating circumstances as "unquestionably one of the most aggravated murders—not just as compared to all other murders, but as compared to all death penalty cases" (quotation omitted)). The Georgia Supreme Court's due-process determination wasn't beyond fairminded disagreement given the number of aggravating circumstances that grossly outweighed the mitigating circumstances and the "heinous nature of the offense[s]." *See Ray v. Ala. Dep't of Corr.*, 809 F.3d 1202, 1210 (11th Cir. 2016) ("We find ourselves in a situation that warrants deference to the state court's determination. Though the extent of mitigating evidence presented during the post-conviction proceedings was both profound and compelling, so too was the heinous nature of the offense...."); *Grayson v. Thompson*, 257 F.3d 1194, 1230 (11th Cir. 2001) ("[W]e are confident that [the petitioner's] sentence would have been the same despite the presentation of mitigating circumstances in light of the brutality of the crime against an elderly widow who had been nothing but nice to him.").

***36** Pace argues that we shouldn't apply AEDPA deference to the Georgia Supreme Court's conclusion that the closing statement did not violate his due process rights because it "failed to apply clearly established federal law," emphasizing that the Georgia Supreme Court only cited *Donnelly* "a single time" and didn't "mention[ ]" *Darden* or *Berger* in its opinion. But whether a state court "failed to apply" or "mention" established Supreme Court law is not the standard under section 2254. *See* *Early v. Packer*, 537 U.S. 3, 8, 10 (2002). Instead, section 2254(d)(1) imposes the "more demanding requirement" that the state court's decision be " 'contrary to' clearly established Supreme Court law" before we may grant habeas relief. *See* *id.* at 7–8, 10. Section 2254(d)(1) does not "require citation of [the Supreme Court's] cases—indeed, it does not even require *awareness* of [the Supreme Court's] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* at 8; *see Greene*, 644 F.3d at 1157 ("[A] decision receives AEDPA deference even if the state court fails to cite—or is not even aware of—relevant Supreme Court precedent." (quotation omitted)).

Alternatively (and somewhat inconsistently), Pace argues that the Georgia Supreme Court "unreasonably applied ...*Darden*." More specifically, he contends that the Georgia Supreme Court "failed to analyze the cumulative effect" of the prosecutor's improper comments. But, even if *Darden* could clearly establish federal law on this point, the Georgia Supreme Court *did* analyze the cumulative effect of the prosecutor's statements. After individually considering each of the challenged statements from closing argument, the Georgia Supreme Court considered them collectively, noting that, "[a]lthough the prosecutor made *several* improper comments during closing argument ..., we conclude, given ... the enormous amount of evidence in aggravation, that the death sentences in his case were not imposed under the influence of passion, prejudice, or any other arbitrary factor." *Pace*, 524 S.E.2d at 507 (emphasis added). The Georgia Supreme Court, in other words, did consider the cumulative effect of the prosecutor's "several" statements.

Even if it weren't obvious from the face of its opinion that the Georgia Supreme Court considered the cumulative effect of the prosecutor's statements, Pace raised a claim on direct appeal about the cumulative effect of the prosecutor's improper comments, and the Georgia Supreme Court rejected it. *See Pace*, 524 S.E.2d at 507. "Although [Pace] contends that the [Georgia Supreme Court] failed even to consider

his claim of cumulative prejudicial effect, we must presume otherwise." *See Greene*, 644 F.3d at 1159–60. And Pace "fails to explain how the decision of the [Georgia Supreme Court] about no cumulative error is contrary to, or an unreasonable application of, clearly established federal law." *See id.* at 1160.

Pace's Claim That Trial Counsel Were Ineffective in Failing to Object to Improper Prosecutorial Comments

The Georgia Supreme Court summarily denied Pace's claim that trial counsel were ineffective in failing to object to the prosecutor's improper comments during closing argument. We therefore " 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "then presume that the unexplained decision adopted the same reasoning." *See* *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The state habeas court rejected Pace's claim that trial counsel were ineffective for failing to object to the prosecutor's improper closing arguments because it found that Pace failed to establish prejudice. Thus, we presume that the Georgia Supreme Court adopted the state habeas court's prejudice determination. *See id.*

Pace argues that "[t]rial counsel provided ineffective assistance by neglecting to object to the prosecution's [g]olden [r]ule arguments and religious references abjuring mercy." He claims that "the trial court would have granted a mistrial or, alternatively, the Georgia Supreme Court would have overturned [Pace's] convictions and sentences on direct appeal" if trial counsel had timely objected because the lack of an objection meant that "the Georgia Supreme Court applied a more rigorous standard when reviewing these claims." But this argument—that Pace's trial or appeal would've come out differently had his trial counsel objected—is unavailing.

***37** First, Pace has not shown a reasonable probability that the state trial court would have granted a mistrial had trial counsel made a timely objection. Under Georgia law, "[w]hether to grant a mistrial for improper argument is a matter largely within the trial court's discretion. The trial court has other options, including the rebuke of counsel and providing curative instructions." *Lloyd v. State*, 625 S.E.2d 771, 776 (Ga. 2006). There is no indication in the record that the trial court would have exercised its discretion to grant a mistrial had trial counsel objected to the prosecutor's golden rule arguments and religious references. Rather, every indication is to the contrary. When trial counsel objected to other parts of the prosecutor's closing argument, the state trial court either overruled the objection or gave curative instructions.

Second, whether the result of Pace's direct appeal would have been different does not affect our analysis under *Strickland*. *Strickland*'s prejudice prong requires a petitioner to show "a reasonable probability that the outcome *in his sentencing* would have been different but for the failure to object." *Thomas v. Att'y Gen.*, 992 F.3d 1162, 1192 (11th Cir. 2021) (emphasis added); *see* *Purvis v. Crosby*, 451 F.3d 734, 739 (11th Cir. 2006) ("The Supreme Court in *Strickland* told us that when the claimed error of counsel occurred at the guilt stage of a trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal."); *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("[C]ounsel's failure to object certainly diminished [the petitioner's] possibility of reversal on direct appeal. However, the focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the petitioner] a fair trial."). And Pace hasn't shown that. The state habeas court did not unreasonably apply *Strickland* in finding no prejudice.

Pace's Claim That Admission of Evidence of the Burglary of Coretta Scott King Violated His Right to a Reliable Sentencing

The state habeas court denied Pace's claim that the admission of evidence that he burglarized Coretta Scott King violated his right to a reliable sentencing, concluding that the claim was "barred by res judicata." The district court concluded that this claim was procedurally defaulted because Pace didn't raise it on direct appeal. We agree with the district court that Pace's claim is procedurally defaulted because he did not present it to the Georgia Supreme Court on direct appeal.

"A claim is procedurally defaulted for the purposes of federal habeas review where 'the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Henderson v. Campbell*, 353 F.3d 880, 898–99 (11th Cir. 2003) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)); *see* 28 U.S.C. § 2254(b)(1)(A) ("An

application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the [s]tate[.]").

To satisfy the exhaustion requirement, the federal claim "must be fairly presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 275 (1971). To be "fairly presented," a petitioner must "present the state courts with the same claim he urges upon the federal courts." *Id.* at 276. The petitioner must present his claims to the state courts "such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelly v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344–45 (11th Cir. 2004). In other words, the petitioner must "afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005) (quotation omitted). "[W]hen it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless 'judicial ping-pong' and just treat those claims now barred by state law as no basis for federal habeas relief." *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998).

***38** Pace did not exhaust his claim that the admission of evidence that he burglarized Coretta Scott King violated his right to a reliable sentencing because it is different from the issue he raised on direct appeal. "In order to preserve an issue for collateral review under Georgia law, a timely objection must be made at trial and raised on appeal in accordance with Georgia procedural rules." *Devier v. Zant*, 3 F.3d 1445, 1454 (11th Cir. 1993); *accord* *Waldrip v. Head*, 620 S.E.2d 829, 835 (Ga. 2005) ("Claims not raised on direct appeal are barred by procedural default[.]"). On direct appeal, Pace argued that the admission of evidence that he burglarized Coretta Scott King violated his right to a reliable sentencing because the "conviction[was] obtained in violation of [Pace's] rights." Pace explained:

> During the sentencing phase, the state introduced into evidence the defendant's pleas of guilty and sentencing in the King and Monroe cases. At the time [Pace] entered these pleas, he was represented by a Mr. James S. Purvis. Mr. Purvis did not render effective assistance of counsel and [Pace's] pleas in the King and Monroe cases were not knowingly and voluntarily entered. The trial court thus erred by admitting the plea and sentencing documents in those cases.

The Georgia Supreme Court concluded that "the admission of non-statutory aggravating evidence about several previous burglaries ... was not error" because "[t]he [s]tate presented reliable evidence about these offenses and there [was] no requirement that other crime evidence in the sentencing phase be proven beyond a reasonable doubt." *Pace*, 524 S.E.2d at 505.

As the district court explained, and as Pace acknowledges, Pace's claim in his section 2254 petition is different from the claim that he raised on direct appeal. Pace argued on direct appeal that the admission of evidence that he burglarized Mrs. King violated his right to a reliable sentencing because his guilty plea was "not knowingly and voluntarily entered." But, in his section 2254 petition, Pace claims that the admission of evidence that he burglarized Mrs. King violated his right to a reliable sentencing because "Mrs. King's iconic standing ... rendered the admission of this evidence so inflammatory and prejudicial as to violate [Pace's] constitutional rights." The "reasonable reader" wouldn't understand the issue Pace raised about the reliability of the evidence of his prior burglary convictions on direct appeal to have the same "particular legal basis and specific factual foundation" as Pace's claim about the evidence's prejudicial effect. *See Kelly*, 377 F.3d at 1344–45. That's why the Georgia Supreme Court ruled that "[t]he [s]tate presented reliable evidence about these offenses" and didn't address whether the evidence was unconstitutionally prejudicial. *Pace*, 524 S.E.2d at 505.

Because the issue he raised on direct appeal—whether the reliability of his burglary conviction violated his right to a reliable sentencing—is not the "same claim" as the claim he made in his section 2254 petition—whether the evidence that Pace burglarized Mrs. King was "so inflammatory and prejudicial" as to violate Pace's right to a reliable sentencing—it was not "fairly presented" to the Georgia Supreme Court. *See* *Picard*, 404 U.S. at 275–76. And because he did not raise the claim on direct appeal, the Georgia

Supreme Court would find it "barred by procedural default." *See* *Waldrip*, 620 S.E.2d at 835. Thus, Pace's claim "is procedurally defaulted for the purposes of federal habeas review." *See Henderson*, 353 F.3d at 898–99.

Although Pace's claim is procedurally defaulted, "[a] petitioner may obtain federal review of a procedurally defaulted claim if he can show both cause for the default and actual prejudice resulting from the default." *Jones v. Campbell*, 436 F.3d 1285, 1304 (11th Cir. 2006). "Additionally, in extraordinary cases, a federal court may grant a habeas petition without a showing of cause and prejudice to correct a fundamental miscarriage of justice." *Id.* But Pace "has not attempted to meet either exception" and is therefore "not entitled to relief on this claim." *See id.* at 1304–05.

***39** Alternatively, we conclude that Pace's claim would fail even if it weren't procedurally defaulted. "As we have said many times and as the Supreme Court has held, a federal court may skip over the procedural default analysis if a claim would fail on the merits in any event." *Dallas v. Warden*, 964 F.3d 1285, 1307 (11th Cir. 2020). When we take this route, we "approach and analyze the claim de novo." *Id.*

The state trial court's admission of evidence that Pace burglarized Mrs. King did not deny Pace a reliable sentencing. "Under Georgia law, the [s]tate is permitted to prove nonstatutory aggravating circumstances, so long as it proves at least one statutory aggravating circumstance." *Devier*, 3 F.3d at 1464 n.63 (citing O.C.G.A. §§ 17-10-2, 17-10-30(b)). Here, the state proved nineteen statutory aggravating circumstances—including that Pace murdered Ms. McAfee, Ms. McClendon, Ms. Martin, and Ms. Britt during the commission of a burglary—so the jury could consider "any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his predisposition to commit other crimes.' " *Id.* at 1466 (cleaned up); *see also* *Gregg v. Georgia*, 428 U.S. 153, 203 (1976) (plurality opinion) ("We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at [the sentencing phase] and to approve open and far-ranging argument.... We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."). Evidence that Pace burglarized another elderly woman tended to show, at the very least, Pace's general moral character and his predisposition to commit other crimes. Thus, there was no constitutional error in the state trial court's admission of evidence that Pace burglarized Mrs. King. *See* *Moore v. Zant*, 722 F.2d 640, 643–44 (11th Cir. 1983) (finding "no constitutional error" in the trial court's admission of evidence of nonstatutory aggravating circumstances which "included evidence of previous convictions for two unrelated burglaries").

Pace's argument that this evidence "was so inflammatory and prejudicial as to violate [his] right to a fair and reliable sentencing" fails. "We will not grant federal habeas corpus relief based on an evidentiary ruling unless the ruling affects the fundamental fairness of the trial." *Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998). "Habeas relief will only be granted if the state trial error was material as regards to a critical, highly significant factor." *Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir. 1995) (cleaned up); *see* *Williams v. Kemp*, 846 F.2d 1276, 1281 (11th Cir. 1988) ("To constitute a denial of fundamental fairness, the evidence must have been not only erroneously admitted at trial, but also must be material in the sense of a crucial, critical, highly significant factor in the conviction." (quotation omitted)).

The evidence that Pace burglarized Mrs. King was not "a crucial, critical, highly significant factor" in the jury sentencing Pace to death. We agree with Pace that Mrs. King "was recognized as a civil rights leader in her own right." But we also agree with the district court that Pace's "burglary of M[r]s. King's home was minor when compared to his crimes against Lula Bell McAfee, Mattie Mae McClendon, Johnnie Mae Martin, and Annie Kate Britt" and that Pace's contention that his burglary of Mrs. King's home "would tip the balance in a juror's mind toward execution strains credulity." In other words, Pace has not shown that his death sentences "ultimately could not have been imposed on a reasonable basis" without evidence that he burglarized Mrs. King. *See* *Cape v. Francis*, 741 F.2d 1287, 1299 (11th Cir. 1984) (concluding that the admission of testimony didn't "prejudice[ ] [the defendant] in a constitutional sense" where "[t]he remarks were not critically material to the jury's deliberations"). The district court did not err in denying this claim.

Pace's Claim That Limiting Evidence of His Eligibility for Parole Violated His Right to a Reliable Sentencing

***40** The state trial court denied Pace's requests to inform the jury about his eligibility for parole and responded to the jury's question about the possibility of a life sentence without parole by instructing the jury that it "shall not consider the question of parole." On direct appeal, the Georgia Supreme Court concluded that, because "[l]ife imprisonment without parole was not a sentencing option at Pace's trial," the state trial court didn't err in preventing Pace from informing the jury about his parole eligibility and that "[t]he trial court's response to [the] jury note" was "correct," "appropriate[,] and not error." *Pace*, 524 S.E.2d at 845.

Pace argues that the Georgia Supreme Court "applied no federal law in adjudicating [this] claim[ ]."[5] But, as the district court concluded, that's because there is no clearly established federal law that requires that the jury be told that a defendant is eligible for parole. In *Simmons*, the Supreme Court held that, "where the defendant's future dangerousness is at issue, and state law *prohibits* the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole *ineligible*." 512 U.S. at 156 (plurality opinion) (emphasis added); *see also* *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1301, 1302 (11th Cir. 2014) ("*Simmons* requires that a sentencing jury be informed of a defendant's parole *ineligibility* only where the defendant is, as a matter of state law, *absolutely ineligible* for parole and the [s]tate places his future dangerousness at issue." (emphasis added)).

But the Supreme Court has never said that the jury must be informed of the defendant's parole eligibility where, as here, the defendant is parole *eligible*. *See* *Ramdass v. Angelone*, 530 U.S. 156, 159 (2000) ("*Simmons* is inapplicable to [the] petitioner since he was *not* parole ineligible when the jury considered his case[.]" (emphasis added)); *see also* *Bates*, 768 F.3d at 1301 ("Since *Simmons* was decided, the Supreme Court has declined to extend its holding to cases where parole ineligibility has not been conclusively established as a matter of state law."). Because Pace was *eligible* for parole, he cannot show that the Georgia Supreme Court's conclusion—that he was not entitled to present that eligibility to a jury—was contrary to or an unreasonable application of clearly established federal law. *See Reese*, 675 F.3d at 1288 ("[I]t is not an unreasonable application of clearly established federal law for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court." (cleaned up)).

CONCLUSION

The district court did not err in rejecting the five claims listed in Pace's certificate of appealability. We therefore affirm the district court's denial of Pace's section 2254 petition.

AFFIRMED.

Rosenbaum, Circuit Judge, Concurring:

***41** I agree with the Majority Opinion that the Antiterrorism and Effective Death Penalty Act of 1996 and our precedent require us to affirm the district court's denial of Lyndon Pace's 28 U.S.C. § 2254 petition. That said, I do not agree with everything in the Majority Opinion's analysis. Rather than nitpick, though, I simply concur in part and separately in the judgment only.

I also want to underscore my disgust at how outrageous the prosecution's conduct in closing argument was. The prosecutor's antics have no place in our system of justice. To recap just a couple of the prosecutor's egregious remarks, he urged the jurors to impose the death penalty rather than send Pace to prison for life because "if anal sodomy is your thing, prison isn't a bad place to be." The despicable nature of this comment speaks for itself. Not satisfied with that, the prosecutor also told the jury to sentence Pace to death because if it did not, it would be "saying that these victims' lives didn't matter." It goes without saying that it is never appropriate or even permissible to attempt to guilt a jury into a death verdict. These tactics aren't close to the line or justifiable. They are squarely and obviously improper.

But when prosecutorial misconduct doesn't render a trial "fundamentally unfair" in "context of the whole trial," we must affirm. *See* *Darden v. Wainwright*, 477 U.S. 168, 183 (1986); *Reese v. Sec'y, Fla. Dept' of Corr.*, 675 F.3d 1277, 1288 (11th Cir. 2012). That is the case here. So I concur in the judgment because the law requires it.

But that does not make prosecutorial misconduct somehow acceptable. Almost a hundred years ago, Justice Southerland stated the obvious: a prosecutor "is not at liberty to strike foul" blows. *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper

methods" he wrote, "as it is to use every legitimate means to bring about a just one." *Id.*

The prosecutor here had been a member of the Georgia Bar for over twenty years at the time of trial. Yet he struck many glaringly foul blows. He certainly should have known better.

Capital cases like this one, where prosecutors have acted improperly, unprofessionally, and unbecomingly, continue to come before us. Unfortunately, there is little we can do about this kind of behavior in these cases. Referring offending prosecutors to the relevant Bar is a meaningless gesture because, given that the professional misconduct in these cases generally has occurred decades earlier, the Bar cannot or will not discipline the attorneys. Similarly, by the time we get the case, the offending prosecutor has often left the prosecuting office, and the responsible supervising attorney is likewise gone from the office, so the prosecuting authority cannot take action against the prosecutor or her supervisor. In other words, rogue prosecutors face no repercussions for their actions in these kinds of cases.

This type of unprofessional and improper behavior will stop only if the state refuses to accept it in real time. The state must train its prosecutors to act within the limits of the law and professionalism, and it must hold its prosecutors responsible if they fail to do so.

The state has a tremendous amount of power in a criminal prosecution. And after it secures a guilty verdict in a capital case, it enjoys the wind at its back through the penalty phase. A state's advantage is even greater on habeas review. If the facts warrant imposition of the death penalty, the state's advantages generally ensure that any competent prosecutor can fairly and squarely secure a death verdict. I'd hope that the finality of the death penalty would make every prosecutor want to know that she has followed the letter, spirit, and purpose of the rules.

***42** But for those who don't, make no mistake: a prosecutor who resorts to dirty tricks, cheating, and bullying in pursuing a death verdict—though it may not change the result and thereby amount to a constitutional violation in a given case—stains not just her own name but those of the state who employs her and of our system of justice. Wielding the power of the state in the service of convincing twelve people to put a person to death carries heavy responsibilities. It's well past time that state prosecuting authorities, in real time, require their attorneys to act like it.

All Citations

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Footnotes

1 "A residual doubt theory during mitigation essentially asks the jury to consider as mitigating any lingering doubt that they might still have as to the defendant's guilt." *Moore v. Mitchell*, 708 F.3d 760, 785 n.12 (6th Cir. 2013) (applying Ohio law); *accord Wade v. State*, 401 S.E.2d 701, 705 n.3 (Ga. 1991) (Hunt, J., concurring) ("[A] *residual* doubt [is] a doubt *leftover* from the finding of guilt."). "It operates in the space between certainty 'beyond a reasonable doubt' and 'absolute certainty.' " *Moore*, 708 F.3d at 785 n.12; *see Stewart v. Dugger*, 877 F.2d 851, 856 (11th Cir. 1989) (describing trial counsel's "lingering doubt" defense as creating "some seed of doubt, even if insufficient to constitute reasonable doubt").

2 The aggravating circumstances were: (1) Pace murdered Ms. McAfee during the commission of a capital felony (rape); (2) Pace murdered Ms. McAfee during the commission of a burglary; (3) Pace murdered Ms. McAfee during the commission of an aggravated battery; (4) the murder of Ms. McAfee was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery upon her; (5) the rape of Ms. McAfee was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravating battery upon her; (6) Pace murdered Ms. McClendon during the commission of a capital felony (rape); (7) Pace murdered Ms. McClendon during the commission of a burglary; (8) Pace murdered Ms. McClendon during the commission of an aggravated battery; (9) the murder of Ms.

McClendon was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery upon her; (10) the rape of Ms. McClendon was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravating battery upon her; (11) Pace murdered Ms. Martin during the commission of a capital felony (rape); (12) Pace murdered Ms. Martin during the commission of a burglary; (13) Pace murdered Ms. Martin during the commission of an aggravated battery; (14) the murder of Ms. Martin was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery upon her; (15) the rape of Ms. Martin was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravating battery upon her; (16) Pace murdered Ms. Britt during the commission of a capital felony (rape); (17) Pace murdered Ms. Britt during the commission of a burglary; (18) the murder of Ms. Britt was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery upon her; and (19) the rape of Ms. Britt was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravating battery upon her.

3 At the beginning of the sentencing phase, the state trial court instructed the jury that it was "authorized to consider ... [what it] already heard in the guilt or innocence stage."

4 Pace "would have us consider our own precedents, and those of other [c]ircuits, in our analysis. [But] [s]ection 2254(d) forbids this practice." *See Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 807 n.5 (11th Cir. 2014).

5 Pace also argues that the state trial court "violated [his] rights by responding sua sponte and in the absence of the parties to a jury note asking whether it could sentence him to life without parole." He contends that "by disposing of the jury's question during a critical phase of [his] trial without even notifying the parties, much less consulting them, the trial court deprived [him] of the right to counsel, the effective assistance of counsel, the right to due process, and the right to be present at all stages of his trial as guaranteed under the Fifth, Sixth, Eighth[,] and Fourteenth Amendments to the United States Constitution." Because this claim is not part of Pace's certificate of appealability, we do not discuss it further. *See Murray*, 145 F.3d at 1251.

Appendix B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 16-10868

LYNDON FITZGERALD PACE,

Petitioner-Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:09-cv-00467-WBH

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WILSON, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

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

Appendix C

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

LYNDON FITZGERALD PACE,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:09-CV-00467-WBH
HILTON HALL,	:	
Respondent.	:	

ORDER

Petitioner, a prisoner currently under sentence of death by the State of Georgia, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner and Respondent have filed their final briefs, and the matter is now ripe for consideration of Petitioner's claims.

I. Factual Background and Procedural History

In affirming Petitioner's convictions and sentences, the Georgia Supreme Court described the facts of the crime as follows:

> The evidence adduced at trial shows that four women were murdered in their Atlanta homes in 1988 and 1989. On August 28, 1988, a roommate found the nude body of 86-year-old Lula Bell McAfee lying face-down on her bed. She had been sexually assaulted and strangled to death with a strip of cloth. On September 10, 1988, Mattie Mae McLendon, 78 years old, was found lying dead on her bed covered by a sheet. She had been sexually assaulted and strangled to death. No ligature was found. On

February 4, 1989, the police discovered the body of 79-year-old Johnnie Mae Martin lying on her bed nude from the waist down. She had been sexually assaulted and strangled to death with a shoelace. On March 4, 1989, the brother-in-law of 42-year-old Annie Kate Britt found her body lying on her bed. She had been sexually assaulted and strangled to death with a sock that was still knotted around her neck.

The police determined that the killer entered each victim's home by climbing through a window. Each attack occurred in the early morning hours. Vaginal lacerations and the presence of semen indicated that the victims had been raped and two of the women had been anally sodomized. The medical examiner removed spermatozoa from each victim and sent the samples to the FBI lab. DNA testing revealed the same DNA profile for each sperm sample, indicating a common perpetrator.

At 3:00 a.m. on September 24, 1992, 69-year-old Sarah Grogan confronted an intruder in her kitchen. She managed to obtain her gun and fire a shot which forced him to flee. The police discovered that the intruder entered Ms. Grogan's house by climbing through a window. A crime scene technician lifted fingerprints from Ms. Grogan's kitchen. At 2:00 a.m. on September 30, 1992, Susie Sublett, an elderly woman who lived alone, awoke to discover an intruder taking money from her purse in her bedroom. Although the intruder was armed and threatened to "blow [her] brains out," she fought with him and managed to flee to a neighbor's house. The neighbor called the police. The police determined that the intruder entered Ms. Sublett's house by climbing through a window. A crime scene technician lifted fingerprints from Ms. Sublett's window screen.

The fingerprints from the Sublett and Grogan crime scenes matched Pace's fingerprints, which were already on file with the police. Pace was arrested and agreed to give hair and blood samples to the police. Pace's pubic hair was consistent with a pubic hair found on the sweat pants Annie Kate Britt wore on the night she was murdered, and with a pubic hair found on a sheet near Johnnie Mae Martin's body. A DNA expert also determined that Pace's DNA profile matched the DNA profile taken from the sperm in the McAfee, Martin, McLendon, and Britt murders.

> The expert testified that the probability of a coincidental match of this DNA profile is one in 500 million in the McAfee, Martin, and Britt cases, and one in 150 million in the McLendon case.

Pace v. State, 524 S.E.2d 490, 496-97 (Ga. 1999).

After a jury trial, Petitioner was convicted of four counts each of malice murder, felony murder, and rape, and two counts of aggravated sodomy on March 5, 1996. The felony murder convictions were vacated by operation of law. On March 7, 1996, the jury recommended four death sentences for the malice murder convictions. In addition to the death sentences, the trial court sentenced Petitioner to six consecutive life sentences for the rape and aggravated sodomy convictions. Petitioner's motion for new trial was denied on July 8, 1998. The Georgia Supreme Court affirmed Petitioner's convictions and sentences on December 3, 1999. The United States Supreme Court denied certiorari on October 2, 2000. Pace v. Georgia, 531 U.S. 839 (2000).

Petitioner then filed a state habeas corpus petition in the Superior Court of Butts County. After an evidentiary hearing, that court denied relief on July 30, 2007. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas corpus relief on January 12, 2009. Petitioner then initiated the instant proceeding.

II. Abandoned Claims and Combined Claims

In the order of November 30, 2010, this Court set the briefing schedule by requiring that Petitioner file a final brief in which he was required to "raise all claims, issues, and arguments he wishes the Court to consider." [Doc. 25 at 2]. This Court further cautioned Plaintiff that "[i]f a matter is not in the final brief, this Court will not consider it." [Id.]. Having reviewed the Petitioner's final brief, this Court finds that Petitioner failed to argue in favor of, and has thus abandoned, the following thirty-nine of his claims: VII, VIII, IX, X, XI, XII, XIII, XIV, XVII, XVIII, XX, XXI, XXIII, XXIV, XXV, XXVII (both versions), XXVIII, XXX, XXXI, XXXII, XXXIII, XXXVIII, XXXIX, XLI, XLIII, XLIV, XLV, XLVI, XLVII, XLIX, L, LI, LII, LIII. LIV. LV, LVI. LVII. LVIII. LIX, LXII, LXIV. Relief as to those claims is denied.[1]

This Court also notes that Respondent argues that several of Petitioner's claims are procedurally barred. However, Petitioner has abandoned all of those claims except his Claim V regarding the purportedly false testimony of Detective Jacqueline Slaughter and his Claim XIX regarding O.C.G.A. § 17-10-16.

Also, several of Petitioner's claims are sufficiently similar such that they should be combined. As such, this Court will deny Petitioner's Claim XXVI and merge it into

[1] See also *infra* n.2 discussing Petitioner's abandoned ineffective assistance claims.

the very similar Claim XIX. Likewise Claim XXIX is merged into Claim XXXIV, Claim XXXVII is merged into Claim XXXVI, and Claim XLII is merged into Claim LX.

III. Noncognizable Claims

In his Claim VI Petitioner claims that his mental illness and sub-average intellectual functioning render him ineligible for execution. Regarding Petitioner's claim of mental illness, because this claim relates to Petitioner's current mental state and not during his trial or appeal, this Court concludes that the claim is not cognizable under § 2254 and it must be denied without prejudice. "Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh," Tompkins v. Secretary, Dept. of Corrections, 557 F.3d 1257, 1260 (11th Cir. 2009), and this claim is more appropriately brought under 42 U.S.C. § 1983.

In his Claim XVI, Petitioner asserts that Georgia's lethal injection protocols "include inadequate safeguards to insure that the personnel administering the lethal chemicals do so without mutilating his body and causing him conscious suffering or a lingering death." [Doc. 35 at 196]. As with Petitioner's claim regarding mental

illness, claims raising challenges to lethal injection procedures should be brought under § 1983 rather than in a habeas proceeding. 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 is 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 lethal injection protocol will be denied without prejudice to his raising the claim in a § 1983 action.

IV. Discussion and Analysis of Petitioner's Remaining Claims

A. 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 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.

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.").

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 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.

Petitioner argues that this Court should not apply § 2254(e)(1) to his claims because "when a petitioner seeks relief based entirely and exclusively on the state court record, the district court should review the state courts' fact-findings for reasonableness under Section 2254(d)(2) only." [Doc. 35 at 11]. Petitioner's argument is based, of course, on the apparent tension between the "unreasonable determination of the facts" standard in § 2254(d)(2) and the "clear and convincing standard" in § 2254(e)(1). See Wood v. Allen, 558 U.S. 290, 300 (2010) (discussing but declining to decide the relationship between §§ 2254(d)(2) and (e)(1)).

There may not, however, be any tension between the two provisions. Under a plain reading of the statute, § 2254(d)(2) applies only when this Court grants a habeas

corpus petitioner relief on a claim that was adjudicated in the state court. If this Court does not grant relief, it technically cannot run afoul of § 2254(d)(2). On the other hand, § 2254(e)(1) applies to all state court findings under all circumstances. In any event, the Eleventh Circuit has held that § 2254(e)(1) deference applies and "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." Rose v. McNeil, 634 F.3d 1224, 1241 (11th Cir. 2011) (citations omitted).

B. Discussion of Petitioner's Claims

Claim I - Ineffective Assistance of Counsel

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

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

Petitioner's Claims that Trial Counsel was Ineffective in Investigating and Presenting Mitigation Evidence During the Penalty Phase

Petitioner claims that he received ineffective assistance during "all stages of the proceedings against him," [Doc. 35 at 57], but his arguments focus almost exclusively on trial counsel's efforts to investigate and present mitigating evidence during the penalty phase of the trial.[2] According to Petitioner, trial counsel cut short their investigation despite "red flags" that indicated evidence of brain damage, mental illness, and a "turbulent and impoverished background." According to Petitioner a more thorough investigation would have led trial counsel to a wealth of information that they could have used to convince the jury that Petitioner should not be executed. Instead of developing this evidence and using it during the sentencing trial, Petitioner contends that trial counsel erred in relying on residual doubt to convince the jury not to opt for execution, despite the fact that DNA evidence clearly demonstrated that Petitioner was guilty. Petitioner further asserts that trial counsel's lack of professionalism and preparation antagonized the trial court. Petitioner points in particular to the fact that co-counsel, Nancy Mau, who had planned to present

[2] Petitioner also raises a claim that his trial counsel was ineffective for failing to object to certain of the prosecutions closing arguments during the penalty phase of the trial. That claim is addressed below. The remainder of Petitioner's ineffective assistance claims raised in the petition but not addressed in his final brief are deemed abandoned.

Petitioner's case in mitigation, got flustered during her opening statement and was "unable" to continue. As a result, Petitioner claims that the trial court and the prosecution embarrassed his counsel in front of the jury.

The state habeas corpus court, in denying relief with regard to Petitioner's ineffective assistance of counsel claims, first correctly identified the Strickland standard set forth above. [Doc. 17-19 at 18-19]. In weighing Petitioner's claim that trial counsel failed to properly investigate Petitioner's history and mental illness, the state court found and held as follows.

> [Petitioner] was represented at trial by [lead counsel] Michael Mears, [co-counsel] Nancy Mau, and Bruce Harvey . . . . All three were experienced criminal defense attorneys who [had] defended capital cases at the time of [Petitioner]'s trial. They each handled different trial responsibilities.
>
> . . . .
>
> The record shows that counsel's investigation spanned a wide range of information, including [Petitioner]'s mental health. Early in the case, Mau spoke with [Petitioner]'s mother, several of his siblings, and his ex-girlfriend Trina [sic] Todd. Counsel inspected voluminous amounts of discovery received from the State and obtained the services of an experienced investigator, a forensic fingerprint expert, a hair analysis expert, and DNA experts to assist with countering the evidence that the prosecution intended to use. Also, counsel had [Petitioner] evaluated by psychologist Martin Shapiro[3] and by Dr. Dennis Herendeen, a clinical psychologist. On August 21, 1995, Pamela Blume Leonard, a mitigation specialist assigned to [Petitioner]'s case, requested that Dr. Herendeen

[3] Petitioner strenuously argues that Dr. Shapiro was not a psychologist or psychiatrist. Rather, he was a statistician working on DNA evidence for the defense.

conduct an IQ screen, a neuro screen, and an academic screen to determine which additional tests to administer. Leonard, however, did not expect [Petitioner] to do well on any personality test.

Prior to performing the initial screenings, Leonard provided Dr. Herendeen with memos from her meetings with family, friends, and teachers as well as an incomplete time line of pertinent events in [Petitioner]'s life. She also alerted Dr. Herendeen to [Petitioner]'s lack of coordination, history of machinery safety problems (including the partial loss of a thumb), tendency to fall and hit his head, history of headaches that started around age 14 to 15, and poor school performance. Leonard specifically mentioned that [Petitioner] had fallen out of the window of a parked car and landed on his head when he was about six years old. His mother had not taken him to the hospital until a week later, whereupon [Petitioner]'s head was lanced and packed with gauze.

After reviewing the information provided by Leonard and conducting a psychological evaluation of [Petitioner], Dr. Herendeen determined that [Petitioner] had an estimated IQ of 78, could read at approximately a fifth-grade level, was elevated on paranoia and mania scales, was slightly elevated on the schizophrenia scale, and exhibited signs of delusions and hallucinations. Possible diagnoses included ruling out organicity and bipolar disorder, but the tests indicated that [Petitioner] suffered from organic impairment and frontal lobe damage. Dr. Herendeen did not believe that a mental retardation claim with an IQ score of 78 was promising. Mears ultimately decided not to present Dr. Herendeen at [Petitioner]'s trial because the mental evaluation "did not sum up anything to change their approach."

[Petitioner]'s counsel chose not to put any witnesses on the stand or to present any evidence during the guilt-innocence phase. Instead, counsel used what they had learned from their investigation to aggressively cross-examine the State's witnesses and probe the evidence offered by the State. To support the defense theory of reasonable doubt, counsel attempted to paint a picture of a police department under intense political pressure to find the criminal responsible for the notorious series of rape/murders in Vine City and an overzealous prosecution. Counsel also tried to establish that DNA testing, specifically the procedure used in

[Petitioner]'s case, was an unreliable science. Mears explained the trial strategy as follows:

> [Petitioner] asserted his innocence, that he did not do this, and that we were attempting to present a defense that was consistent with his plea of not guilty. You know, there was nothing that we had in the way of a traditional defense other than he didn't do it, and sometimes that's the only defense you have and you try to attack the credibility of the State's evidence. You try to point out flaws in the State's evidence in an attempt to convince the jurors that the State hasn't proven its case beyond a reasonable doubt.

Counsel decided to pursue a residual doubt defense in the sentencing phase to avoid inconsistency with the defense theory of innocence they had presented and maintained in the guilt-innocence phase. Mears elaborated at his deposition:

> Well, once you've raised that type of defense during the guilt/innocence phase, you have to be very careful during the sentencing phase not to do a 180-degree turn in front of the jury and say, oh, you got us, now don't sentence him to death. Because the jurors resent, in my opinion, jurors resent the defense attorneys who for two or three weeks say my client is innocent, he didn't do it, you don't have enough evidence, and then you come back in the sentencing phase, well, he did it so let's be merciful.
>
> You have to be consistent in the defense that you raise at guilt/innocence with the way you present mitigation. One of the ways that you do that in a not guilty, my client didn't do it, is to continue to argue residual doubt as a possible mitigating factor, and residual doubt being, look, there might have been enough evidence beyond a reasonable doubt and you the jurors have found that, but is that enough proof to sentence this person to death.

> And I think that was part of what we were doing in [Petitioner]'s case was to try to continue the residual doubt, along with the other mitigating evidence that we attempted to present.

Counsel relied on the testimony of family members and friends who described [Petitioner]'s good nature, relayed anecdotes of his helpfulness and care for the elderly, and pleaded for mercy. Despite evidence of counsel's conscientious defense preparation, [Petitioner] claims that they should have investigated his mental health and presented a mental-state theory of defense.

To support his claim, [Petitioner]'s current counsel has formulated an alternate narrative which he contends would probably have changed the jury's verdict. Instead of presenting [Petitioner] as a person from a large and loving family who became the unfortunate focus of a politically driven criminal investigation and of an overzealous prosecution, current counsel argue that he should have been portrayed as the product of an appalling home life and as an illiterate loner who had a family history of mental illness. To demonstrate what counsel allegedly should have investigated and presented to the jury, [Petitioner] has supplied over 31 affidavits. Two key affidavits are from mental health experts, Dr. Richard G. Dudley and Dr. Paul Nestor, and other affidavits were provided by Dr. Herendeen, Mears, Mau, Harvey, and Leonard. The remaining affidavits are from family, friends, a former teacher, former roommates, and jail acquaintances, testifying about [Petitioner]'s bleak childhood and unstable mental state, including evidence that his maternal grandmother suffered from "spells" and his uncle possibly suffered from schizophrenia.

Dr. Dudley opines that the prison doctors at Jackson [State Prison] have misdiagnosed [Petitioner] and that [Petitioner] "to a reasonable degree of medical and scientific certainty . . . suffers from a major mental illness, schizophrenia, which has been present for many years, including the time of the crimes of which he is convicted and during his trial on these charges." Dr. Nestor, after conducting a six-hour evaluation of [Petitioner], concurred with Dr. Dudley's conclusion that [Petitioner] is schizophrenic. Dr. Nestor states that a review of the tests performed on

[Petitioner] prior to trial "seriously raise the question, if not establish a diagnosis, of schizophrenia [during the period that the crimes occurred]." In his deposition, however, Dr. Nestor admitted that he did not explore whether [Petitioner] was mentally ill at the time of the crimes.

> The piece of evidence that would raise the question of that - I did not do the diagnosis around - I did not do the evaluation around the idea that I wanted to establish whether he was mentally ill at the time of the crimes because I would have done other kinds of things with him. I do those a lot. Those are essentially criminal responsibility evaluations. That was not part of my charge here.

In an affidavit prepared for this habeas case, Dr. Herendeen states that "[t]he diagnosis of schizophrenia is entirely consistent with the results of the screening tests [he] conducted in 1995, and [Petitioner]'s endorsement of critical items on the PAI regarding delusions and hallucinations." He further claims that the records and affidavits obtained by current counsel are far more comprehensive than those he was provided in 1995, especially concerning the genetic component of [Petitioner]'s mental illness. He believes "the defense of schizophrenia would have been an available and appropriate diagnosis at the time [he] evaluated Mr. [Petitioner], had [he] been provided with the background and historical materials on [Petitioner] and his family and been given the opportunity to further evaluate [Petitioner].

The State contends that the conclusions of the doctors are unreliable because of the difficulty of conducting a retrospective evaluation spanning several years. In a 1998 habeas case, Dunn v. Johnson, [162 F.3d 302, 306 (5th Cir. 1998)], Dr. Dudley testified that the defendant suffered from "paranoid delusional disorder" and "borderline personality disorder" that "rendered [him] incompetent to stand trial in 1988." The [Fifth Circuit] found that the affidavits offered by Dunn were not credible because "they failed to acknowledge the difficulty of conducting a retrospective evaluation spanning several years, are either not based on an actual interview or did not recite the date of that interview, and conflicted with the findings of the mental health experts at the Texas

Department of Criminal Justice, Institutional Division, who observed and examined Dunn on numerous occasions between 1980 and 1988.

In the case sub judice, neither of the doctors who interviewed [Petitioner] acknowledged the difficulty of conducting a retrospective evaluation spanning back to 1988, the year of the first murder. Additionally, their findings conflict with the mental health experts at the Georgia Diagnostic Center at Jackson. The prison psychologists performed a mental health screen upon [Petitioner]'s admission to the prison and determined that [Petitioner] required no additional mental health treatment; that he was oriented to time, place, person, and situation; and that no hallucinations, delusional thinking, depression, or mania were evident. Although [Petitioner] was diagnosed with delusional disorder in March 2001, the prison psychologists determined he was no longer in need of further mental health services after three months of counseling.

The affidavits of [Petitioner]'s family and friends detail [Petitioner]'s neglected and abusive childhood, poor school performance, severe headaches, drug use, mental problems, and decline around the time he committed the crimes. Much of the testimony contained in the affidavits from family and friends is cumulative of testimony presented at trial, and all the information contained in the affidavits was known to counsel. A review of the affidavits reveals that they contain information both helpful and damaging to [Petitioner]'s contentions. For instance, Jerry Johnson, [Petitioner]'s roommate and lover, offered to testify to [Petitioner]'s erratic behavior during their relationship. However, as the State points out, his testimony would have demonstrated [Petitioner]'s deceitfulness with his girlfriend, Trina [sic] Todd, whom [Petitioner] was also dating at the time. At the habeas hearing, Johnson testified about physical fights he had with [Petitioner]. Johnson also believed that [Petitioner] had vandalized his car and had broken into and vandalized his apartment after they broke up. Furthermore, Johnson testified he and [Petitioner] regularly used crack cocaine during their relationship. Renee Shaw, a paralegal from the Attorney General's Office who had been present during Johnson's pre-hearing interview, testified that Johnson admitted that [Petitioner] used crack cocaine alone while Johnson was at work and that Johnson assumed [Petitioner] committed burglaries during the day because the apartment they shared would often have new property when

Johnson returned from work. Johnson's testimony in [Petitioner]'s capital case would have seriously undermined defense counsels' efforts, and their decision to not call him as a witness cannot be faulted as deficient performance. The State addresses in detail the potential problems inherent in the other information [Petitioner] cites by way of affidavits. Without going into such detail here, this Court acknowledges the judiciousness of counsel's choice to avoid such risks.

The record shows that counsel chose the trial strategies after reasonable efforts to investigate other, alternative strategies. The Georgia Supreme Court explained:

> Given the finite resources of time and money that face a defense attorney, it simply is not realistic to expect counsel to investigate substantially all plausible lines of defense. A reasonably competent attorney often must rely on his own experience and judgment, without the benefit of a substantial investigation, when deciding whether or not to forego a particular line of defense without substantial investigation so long as the decision was reasonable under the circumstances.

Here, counsel effectively utilized the available information and resources and was not unreasonable in choosing to present a reasonable doubt defense during the guilt-innocence phase. Nor were they unreasonable in maintaining a consistent defense of residual doubt. As the Eleventh Circuit has explained,

> In cases like this, when guilt is in fact denied and counsel reasonably employs a lingering doubt strategy at sentencing, a "lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase." Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but "is perhaps the most effective strategy to employ at sentencing.

[Parker v. Sec'y Dep't of Corr., 331 F.3d 764, 787-88 (11th Cir. 2003) (citations, punctuation, and footnote omitted).]

> The record shows that counsel's strategy "fell within a wide range of reasonable professional conduct and . . . their significant decisions were made in the exercise of reasonable professional judgment.

[Doc. 17-19 at 21-30 (footnotes omitted)].

It is clear that the state habeas corpus court performed a searching review of the record regarding Petitioner's ineffective assistance claim, and the court's reasoning effectively refutes Petitioner's arguments. As is discussed above, this Court must presume that the state court's findings of fact are correct unless Petitioner presents clear and convincing evidence to the contrary. Petitioner further bears the burden under § 2254(d) of demonstrating that the state court's conclusions were contrary to constitutional law determined by the Supreme Court or were based on unreasonable factual determinations.

In attempting to establish that the state habeas corpus court's findings of fact were wrong, Petitioner first asserts that the state court erred in finding that the potential mitigation evidence that he presented in the state habeas corpus proceeding was cumulative of testimony presented at the criminal trial or was known to trial counsel. According to Petitioner, trial counsel never talked to witnesses who could have testified regarding Petitioner's impoverished background, dysfunctional family, manifestations of mental illness, and family history of mental illness.

However, even if this Court concedes Plaintiff's point that trial counsel was not generally aware of certain of the evidence that he presented to the state habeas corpus court,

> [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. But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. . . . That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.

Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (citation and alteration omitted); see also Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987) ("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.").

The "principal concern in deciding whether [trial counsel] exercised reasonable professional judgment is not whether counsel should have presented certain evidence in mitigation. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Petitioner]'s background was itself reasonable." Wiggins v. Smith, 539 U.S. 510, 522-23 (2003) (citations, internal

quotations, alterations and emphasis omitted); see Strickland, 466 U.S. at 699. In order to do that, he must show that his counsel "failed to act while potentially powerful mitigating evidence stared them in the face or would have been apparent from documents any reasonable attorney would have obtained." Bobby v. Van Hook, 558 U.S. 4, 11 (2009) (citations omitted). Petitioner has failed to meet that threshold.

As found by the state habeas corpus court, the record demonstrates that counsel and the mitigation specialist mounted an exhaustive investigation effort to uncover evidence for the sentencing phase of Petitioner's trial. They repeatedly met with Petitioner, and they interviewed Petitioner's mother, several of his siblings, his ex-girlfriend, three of Petitioner's former teachers, Petitioner's friends, friends of Petitioner's mother, and neighbors from Petitioner's childhood. Counsel and the mitigation specialist also collected extensive documentary evidence regarding Petitioner, such as birth records, childhood health records, social security records, employment records from approximately ten different employers, medical records from several hospitals, personal injury claim records, worker's compensation records, school records, criminal records, Pardons and Paroles records, and Department of Corrections records. They also obtained records for Petitioner's parents and conducted a criminal and civil records search on Petitioner and his family. Using this information, they were able to create a social history dating from the late Nineteenth Century.

Regarding Petitioner's mental health and intellectual capabilities, counsel had a psychologist interview and evaluate Petitioner. Lead counsel testified that while he did not specifically remember his interactions with the psychologist, it would have been his practice "to make sure that the psychologist or psychiatrist has as much information as we have that is relevant to a person's background, social history, prior mental health records, school records . . . ." [Doc. 17-1 at 11].

The psychologist's tests indicated that Petitioner was not retarded. Petitioner had some psychological issues but the psychologist did not inform counsel that Petitioner suffered from a serious or major psychosis. While the psychologist did state that further evaluation might be indicated, it is clear that trial counsel was reasonably weary of delving too deeply into Petitioner's psyche. For example, counsel did not want the psychologist to perform a Minnesota Multiphasic Personality Inventory or MMPI on Petitioner. The MMPI is a psychological test that assesses personality traits and psychopathology. Trial counsel did not want their expert to administer such a test because of the possibility that it would paint Petitioner as a sociopath, [Doc. 14-5 at 42], and give prosecutors another argument in favor of execution. See Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001) (noting that MMPI test results can be harmful to the defendant in a death penalty sentencing proceeding). Accordingly, in light of Petitioner's extensive criminal history that could well have been an indicator

of sociopathic tendencies, trial counsel instructed the psychologist to "take a measured approach to psychological testing," and the psychologist agreed to this approach. [Doc. 14-5 at 42].

The record further demonstrates that nothing that counsel discovered would be considered to be "potentially powerful mitigating evidence star[ing] them in the face." Bobby, 558 U.S. at 11. Three members of the defense team spent some considerable time with Petitioner and a psychologist evaluated him. If Petitioner had suffered from psychosis at that time, it is reasonable to assume that his behavior would have been strange enough for someone to notice. Moreover, none of the family members, friends or neighbors that the trial counsel team interviewed indicated that Petitioner had serious mental problems. Petitioner did not tell counsel about, and they did not know about, the homosexual lover that provided affidavit testimony to post conviction counsel regarding Petitioner's mental state.

With respect to Petitioner's claims of his purported dysfunctional family life, impoverished background, and abusive childhood history, the record indicates that Petitioner told trial counsel that he got along well with his father and described his family life as fun. None of the family members interviewed told anyone on the defense team about alleged abuse or neglect, and Petitioner's siblings, appeared, for the most part, to be well-adjusted individuals.

As discussed above, Petitioner also raises an ineffectiveness claim directed at co-counsel Nancy Mau's problems presenting Petitioner's penalty phase case. Without going into too much detail, the defense team's plan was for Ms. Mau to present all of Petitioner's witnesses during the penalty phase. However, she apparently got rattled during her opening statement, possibly because she had been surprised by the jury's guilty verdict. Lead counsel also felt that the trial judge had a feeling of animosity towards Ms. Mau, and they decided that lead counsel would take over the presentation of Petitioner's penalty phase case after Ms. Mau completed her opening statement.

Although Ms. Mau's problems may not have been ideal for Petitioner, the circumstance of her becoming flustered does not constitute ineffective assistance unless Petitioner is able to demonstrate that it prejudiced him in some concrete way. Other than describing Ms. Mau's difficulties in decidedly hyperbolic terms and noting that the defense team was embarrassed in front of the jury, nowhere in his final brief does Petitioner explain how this episode might have caused him prejudice under Strickland so as to undermine this Court's confidence in the outcome of Petitioner's trial.

For the purpose of this discussion, this Court will concede that Petitioner has identified certain logical inconsistencies in the state habeas corpus court's order. However, those inconsistencies are not material to the ultimate conclusion that

Petitioner failed to establish his ineffective assistance claim. Even if they were, in its own careful review of the record, this Court discovered nothing that undermines confidence in the outcome of Petitioner's trial.

Post hoc mental diagnoses in death penalty cases are common and notoriously unreliable. See Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[W]e have held more than once that the mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). As there was scant evidence that Petitioner suffered from a serious mental illness prior to his trial, this Court is not convinced by the experts who now claim that Petitioner is schizophrenic.

This Court likewise concludes that the remaining post-conviction evidence that Petitioner presented is not sufficiently compelling to raise significant concern regarding the reliability of his death sentence. 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' troubled childhood during the penalty phase of the trial. However, the facts presented in both cases were much more extreme than that here presented by Petitioner. 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 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 is, when compared to the facts of Williams and Wiggins, fairly mundane and does not evoke the same level of uncertainty with respect to the reliability of the jury's decision that Petitioner should be executed. Moreover, as was correctly pointed out by the state habeas corpus court, much of Petitioner's "new" evidence is quite prejudicial to him.

This Court further notes that the truly horrific nature of Petitioner's crimes overcome the mitigating nature of any evidence that trial counsel could have presented such that Petitioner cannot demonstrate prejudice even if counsel was ineffective. In Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001), the Eleventh Circuit confronted a § 2254 death penalty case where Grayson's crimes were quite similar to Petitioner's but only involved a single victim as opposed to Petitioner's four. Grayson and his co-defendant entered his 86-year-old victim's home with the intent to rob her. When it turned out that she did not have as much money as the two thought she should, they put a pillow case over her head, taped it around her neck, beat her, raped her, and left, after which she died of asphyxiation. In response to Grayson's claim that his trial counsel had failed to properly investigate and present mitigating evidence regarding "(1) Grayson's impoverished and dysfunctional family background; (2) Grayson's

history of alcoholism; (3) Grayson's intoxication at the time of the offense; (4) Grayson's domination by his co-defendant; (5) Grayson's remorse over Mrs. Orr's death; and (6) Grayson's family's desire that his life be spared," id. at 1225, the Eleventh Circuit held as follows:

> Even assuming arguendo ineffective assistance in the mitigating case at sentencing, there is no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty in this case would have been different had counsel introduced the evidence compiled and presented in Grayson's state habeas proceedings. Two aggravating circumstances were found during the sentencing phase: (1) that the murder was committed during the commission of a rape, robbery, and burglary and (2) that the murder was especially heinous, atrocious, and cruel, especially when compared to other capital felonies.
>
> Based upon these factual findings, the sentencing judge found that "the actions of the Defendant were completely barbaric, showing a complete and utter disregard for not only human life, but human dignity. The Court cannot think of a case it has seen, heard, or even read, that would equal the cruelty shown in this case by the Defendant to Mrs. Orr. Indeed, the Court has some difficulty i[n] imagining what more the Defendants could have done to make this crime any more heinous, atrocious, or cruel."
>
> > The sentence of death is unquestionably proper for Grayson who burglarized, beat, terrorized, raped, and suffocated to death a helpless 86-year-old lady. Both Kennedy's and Grayson's crimes are more characteristic of the actions of wild ravaging dogs of hell rather than even the lowest and most depraved level of humanity.

Grayson v. State, 479 So. 2d 69, 75-76 (Ala. Crim. App. 1984).

> In light of the brutal nature of this crime against an elderly victim and the specific findings made by the court that sentenced Grayson to death, we find no reasonable probability that the mitigating circumstances gathered and presented in connection with Grayson's state habeas proceedings would have altered the balance of aggravating and mitigating factors in this case. . . . [N]one of the evidence developed in connection with the state habeas proceedings served to alter in any way the aggravating circumstance of a heinous and atrocious crime that supported the imposition of the death penalty in this case.
>
> . . . .
>
> In sum, we find no reasonable probability that the balance of aggravating and mitigating circumstances underlying Grayson's death sentence would have been different if the judge and jury had heard the state habeas evidence. "We note that '[m]any death penalty cases involve murders that are carefully planned, or accompanied by torture, rape or kidnapping.' " Dobbs v. Turpin, 142 F.3d 1383, 1390 (11th Cir. 1998) (emphasis added) (quoting Jackson v. Herring, 42 F.3d 1350, 1369 (11th Cir. 1995)). "In these types of cases, this court has found that the aggravating circumstances of the crime outweigh any prejudice caused when a lawyer fails to present mitigating evidence." Id. (citing Francis v. Dugger, 908 F.2d 696, 703-04 (11th Cir. 1990) (finding that the failure to present mitigating evidence of a deprived and abusive childhood did not prejudice capital defendant at trial for torture-murder of government informant) and Thompson v. Wainwright, 787 F.2d 1447, 1453 (11th Cir. 1986)).

Grayson, 257 F.3d at 1226-28; see id. at 1228-29 (discussing similar cases where courts reject claim of ineffective assistance of counsel in sentencing phase under prejudice prong where aggravating circumstances of murders and direct evidence of guilt outweighed the relatively weak mitigating evidence available).

Petitioner did essentially what Grayson did, only Petitioner did it four times, and it is clear that he attempted to do it on other occasions. The jury heard in significant and grisly detail exactly what Petitioner did to each of his elderly female victims, defenseless women who spent their last moments in abject terror. The evidence further indicated that, while he ransacked his victim's homes, he did not take much in the way of valuables. The sole inference from the evidence is that Petitioner terrorized, raped, sodomized and killed elderly women for his own enjoyment, and this Court can conceive of very little evidence that would serve to mitigate that level of depravity. Certainly, the evidence amassed by post-conviction counsel is not sufficient to do so.

In summary, this Court concludes that Petitioner has failed to establish that his trial counsel was constitutionally ineffective in investigating and presenting mitigating evidence during the penalty phase of Petitioner's trial. Moreover, even if counsel should have presented certain evidence during the sentencing phase, given the horrific nature of Petitioner's crimes, he cannot demonstrate that counsel's failure was prejudicial.

Petitioner's Claim that Trial Counsel Failed to Object to the Prosecutor's Improper Closing Arguments During the Penalty Phase

In his Claim II, Petitioner claims that the prosecutor made certain improper closing arguments during the penalty phase of Petitioner's trial. As those closing arguments are discussed extensively below in relation to Claim II, this Court will not repeat them here. In that discussion, this Court ultimately determines that Petitioner has failed to establish error of constitutional magnitude with respect to the purportedly improper arguments.

Petitioner also contends that his trial counsel failed to object to certain of those improper arguments, notably the "golden rule" arguments where the prosecutor asks the jury to view a criminal defendant's crimes from the perspective of the defendant's victims. Petitioner contends that, because trial counsel failed to object to the arguments, trial counsel lost the opportunity to move for a mistrial and the Georgia Supreme Court applied a stricter standard in reviewing the claims than it otherwise would have.

Missing from Petitioner's discussion, however, is citation to authority for the proposition that the trial court would have, or should have, granted a motion for a mistrial in response to an objection to the prosecution's arguments. In rejecting an identical argument, the Georgia Supreme Court stated:

> Whether to grant a mistrial for improper argument is a matter largely within the trial court's discretion. The trial court has other options, including the rebuke of counsel and providing curative instructions. Moreover, even when an objection to improper argument is sustained but

> a mistrial is denied, other action, including the giving of curative instructions, is not mandatory.

Lloyd v. State, 625 S.E.2d 771, 776 (Ga. 2006).

Petitioner bears the burden with this claim, and he has failed to present argument that might tend to establish that it is more likely that the trial court would have granted a mistrial or that the Georgia Supreme Court would have viewed the trial court's refusal to grant a mistrial as reversible error. Accordingly, this Court concludes that he has failed to demonstrate that he is entitled to relief with respect to this claim.

Claim II - Improper Closing Argument by Prosecution During Penalty Phase

As just noted, Petitioner asserts that the prosecution made improper closing arguments during the penalty phase of the trial. In order to obtain relief under § 2254 pursuant to a claim of improper closing argument, Petitioner must demonstrate that the statements had the effect of denying him due process. According to the Eleventh Circuit,

> Under . . . well-settled law, habeas relief is due to be granted for improper prosecutorial argument at sentencing only where there has been a violation of due process, and that occurs if, but only if, the improper argument rendered the sentencing stage trial fundamentally unfair. An improper prosecutorial argument has rendered a capital sentencing proceeding fundamentally unfair if there is a reasonable probability that the argument changed the outcome, which is to say that absent the argument the defendant would not have received a death sentence. A

> reasonable probability is one that is sufficient to undermine confidence in the outcome.
>
> The first step in analyzing any sentence stage prosecutorial argument is to determine if it is improper, because no matter how outcome-determinative it is[,] a proper argument cannot render the proceedings fundamentally unfair and therefore cannot be the basis for a constitutional violation.

Romine v. Head, 253 F.3d 1349, 1366 (11th Cir. 2001) (citations omitted).

According to Petitioner, the prosecutor made the following objectionable arguments: he compared Petitioner with the serial killers Jeffrey Dahmer, Ted Bundy, and John Wayne Gacy, and discussed what had happened in their cases. [See Doc. 12-19 at 46-47 (Bates 5580-81)]. Petitioner's trial counsel objected, and the judge agreed that discussing what had happened in other cases was improper and gave the curative instruction to the jury that they should not concern themselves "with the verdicts in those other cases."

The prosecutor also argued: "Family circumstances. What were his family circumstances? Well, its been implied to you that he grew up in a poor area. That he somehow comes from a disadvantaged background." [Doc. 12-19 at 55 (Bates 5589)]. According to Petitioner, the defense had presented evidence that Petitioner came from "a normal and loving, albeit poor, family. The defense did not 'blame his family background for what he did' as claimed by the prosecutor." [Doc. 35 at 144]. Petitioner asserts that the prosecutor's motive in making this statement was a "ploy"

to introduce "an incredibly offensive cartoon," [id at 145], that apparently depicted a jury finding a defendant "not guilty by virtue of insanity, ethnic rage, sexual abuse, and you name it." [Doc. 12-19 at 57 (Bates 5591)].

Petitioner also contends that the prosecutor directed jurors to place themselves in the position of the victims when he argued:

> Now, come with me to that scene of the crime. Imagine that night. Ms. McAfee is laying in bed asleep. She is violently awakened by somebody standing over her. Somebody grabbing at her. If you could imagine being asleep, and you wake up to hands tearing off your clothes. You wake up to hands grappling your body. And just as you wake up and realize what's going on, your clothes are ripped from you. Something is tied around your neck, and you are strangled.
>
> The doctor told you that there were only ten to 15 seconds when you are being strangled before you lose consciousness. Imagine what Ms. MacAfee thought and felt.

[Doc. 12-19 at 59-60 (Bates 5593-94)].

> And:
>
> So come with me and think about [the next] crime scene. How would you feel in Ms. McClendon's situation? Again, to wake up with some man standing up over you choking the life out of you and pulling on your clothes.

[Doc. 12-19 at 62 (Bates 5596)].

> And:
>
> Come with me to the crime scene where we have Johnnie Mae Martin, who was 79 years old . . . Once again, what do you think went through her mind as she was brutally awakened with someone choking the life out

> of her? And then come with me to the crime scene of Annie Kate Britt . . . imagine her frame of mind as she fought for her life for the few minutes that she was trying to preserve her life. What was she thinking about? The terror, the shock, the trauma that she went through. And, once again, the rape and the anal sodomy.

[Doc. 12-19 at 62-63 (Bates 5596-97)].

The prosecutor further stated that, because Petitioner was homeless, sending him to prison would have been doing him a favor and that "if anal sodomy is your thing, prison isn't a bad place to be." [Doc. 12-19 at 64-65 (Bates 5598-99)].

The prosecutor made repeated references to the jurors' duty to impose the death penalty, the need to send a message with their verdict, and their role as the "conscience of the community," [e.g., Doc. 12-19 at 69 (Bates 5603)], which, Petitioner argues, was improper because it encouraged the jurors to base their decision on something other than the evidence presented during the penalty phase of the trial.

Additionally, the prosecutor addressed the concept of mercy by citing a passage from the New Testament in which Jesus takes a repentant sinner with him to Heaven but leaves the unrepentant sinner behind. The prosecutor noted that Petitioner had not shown any remorse for the things that he had done and that he had not said that he was sorry for what had happened. [Doc. 12-19 at 72 (Bates 5606)]. Petitioner contends that beyond the impropriety of the religious allusion, these arguments were impermissible comments on Petitioner's right to remain silent.

Finally, in his closing argument, the prosecutor told the jurors, essentially, that if they opted for a life sentence, it would have the effect of removing the death penalty from the Georgia Code because Petitioner's crimes were so appalling that only the death penalty would be appropriate. According to Petitioner, this argument had the effect of informing the jury that the law required a death verdict.

Petitioner raised these claims before the Georgia Supreme Court, and that court ruled as follows:

> (a) Use of a cartoon. The prosecutor used a cartoon as a visual aid during his argument. The cartoon depicted a jury returning a verdict of "not guilty by reason of insanity, ethnic rage, sexual abuse, you name it." The prosecutor argued, with regard to the cartoon, that [Petitioner] was going to use his upbringing to claim that "it's everybody else's fault that he turned into a serial killer but his own." The prosecutor told the jury "not to go for that." [Petitioner] objected that the cartoon injected extrinsic, prejudicial matters into the trial, such as the defendant's race and social status, and moved for a mistrial. The trial court denied the motion for mistrial, after noting that one of [Petitioner]'s witnesses, a minister, had testified that [Petitioner]'s community is a poor, African-American community where people "know how the death penalty has been used." We find no error. The permissible range of closing argument is wide and counsel's illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination. What counsel may not do is inject extrinsic, prejudicial matters that have no basis in the evidence, but [Petitioner] did present evidence about his childhood and community. We also will not assume that the prosecutor intended his remarks to have their most damaging (and erroneous) meaning. After reviewing the use of the cartoon in context, we conclude that the prosecutor did not exceed the permissible range of argument by using it to briefly urge the jury to hold [Petitioner] solely responsible for his crimes, and to not be swayed by excuses for his behavior.

(b) Comparison to other serial killers. The prosecutor compared [Petitioner] to serial killers like Bundy and Dahmer when arguing that the families of these serial killers would have also said nice things about them when they were children. Under these circumstances, this is not an improper argument. The trial court sustained [Petitioner]'s objection to the mention of the sentences received by these other killers, and the trial court issued curative instructions which cured any error that could result from that comment.

. . . .

(d) Easy life in prison. The State's argument that [Petitioner] should not be spared so he could get free room and board and a television in prison is not improper. The prosecutor's gratuitous remark that "if anal sodomy is your thing, prison isn't a bad place to be" was unprofessional. However, [Petitioner] did not object to this comment and there is no reasonable probability that this improper, isolated comment changed the result of the sentencing phase.

(e) Comment on [Petitioner]'s right to silence. The prosecutor frequently asked mitigation witnesses who had spoken or corresponded with [Petitioner] after his arrest whether he had ever expressed remorse or said he was sorry. The prosecutor then argued in closing that [Petitioner] had never repented or said he was sorry. [Petitioner] objected, but the trial court found that this argument was not a comment on [Petitioner]'s right to remain silent. Under these circumstances, we conclude that the trial court did not err.

(f) Deterrence. It was not improper for the prosecutor to argue that a death sentence would "send a message" and deter other killers.

(g) Religious reference. The prosecutor told the jury that he anticipated that [Petitioner]'s counsel would tell a New Testament parable about forgiveness and mercy, and he argued that there should not be forgiveness unless there is remorse. The prosecutor also stated in a different part of his argument that some of the jurors had said they believed in an "eye for an eye" during voir dire and that the State was now asking for an eye for an eye. [Petitioner] did not object to any religious references by the

prosecutor, and the prosecutor did not argue that divine law called for a death sentence. The religious references in this case do not rise to the level of the inflammatory argument made in Hammond v. State, 452 S.E.2d 745 (Ga. 1995). Therefore, after reviewing the entire argument and sentencing phase of trial, we conclude that these comments did not change the jury's exercise of discretion from life imprisonment to a death sentence.

(h) Putting jury in the victims' shoes. The prosecutor told the jury to "imagine being asleep, and you wake up to hands tearing off your clothes. You wake up to hands grappling your body . . . . Something is tied around your neck and you are strangled." It is well settled that it is improper to ask the jury to imagine themselves in the victim's place. However, [Petitioner] did not object to this improper argument and, given the amount of evidence in aggravation, we do not conclude that this argument changed the result of the sentencing phase.

(i) Simulated tearing of a Georgia law book. At the conclusion of his argument, the prosecutor picked up a book, apparently Title 17 of the Official Code of Georgia Annotated, and said: "This is a Georgia law book which has the punishments and the crimes in it. If based on the evidence in this case, you don't return a death penalty verdict, you have snatched that section of the book about the death penalty out." The prosecutor then simulated tearing out a section of the book. [Petitioner] objected, claiming that the law provides how and why the death penalty may be imposed, that the jury would be instructed on the law, and that the prosecutor's argument comes close to "reading the law." The trial court overruled the objection. We find no error. Viewed in context, the prosecutor was arguing that if this severe case does not result in a death sentence, no case could possibly result in a death sentence. It is not improper for the State to argue that the defendant deserves the harshest penalty, and the prosecutor's argument cannot be reasonably construed as "reading the law." Prosecutors are afforded considerable latitude in imagery and illustration when making their arguments.

Pace, 524 S.E.2d at 505-07 (case citations and quotations omitted).

Petitioner makes the conclusory assertion that the Georgia Supreme Court failed to apply federal constitutional law in analyzing Petitioner's various claims regarding the prosecution's closing argument. This Court disagrees as it is evident from the state court's repeated conclusions that the various arguments did not change the result of the penalty phase or change the jury's discretion. While the state court may not have specifically spelled out the constitutional standard, it is clear that the court applied it.

This Court further disagrees with Petitioner's assertion that the state court's conclusion was contrary to and an unreasonable application of federal law. Petitioner bases his argument on the proposition that the prosecutor's misconduct was "pronounced and persistent," the cumulative effect of which purportedly altered the outcome. 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.

The state court identified possible error with respect to the prosecutor's comparison of Petitioner to other serial killers, but noted that the trial judge's curative instruction cured any error that might have resulted. The court further considered that the prosecutor's comment about anal sodomy in prison was unprofessional but did not

attach error to the comment. Indeed, the anal sodomy comment was not prejudicial to Petitioner and may have even benefitted Petitioner to the degree that jurors found the comment offensive. Accordingly, the only closing argument that the Georgia Supreme Court found improper were the statements which "put the jury in the victims' shoes," and cumulative error analysis is simply not available.

This Court further points out that "Golden Rule arguments" – the name for arguments that tend to encourage jurors to imagine if they were the victims of a criminal defendant's crimes – are constitutionally acceptable during the penalty phase of a death penalty trial. In establishing the heinousness of a capital defendant's crime,

> [t]he victim's fear, pain, and emotional strain before her death are all relevant to the heinous nature of a murder. "The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Payne v. Tennessee, 501 U.S. 808, 825 (1991) (internal quotation marks omitted).

Reese v. Secretary, Florida Dept. of Corrections, 675 F.3d 1277, 1292 (11th Cir. 2012). The Eleventh Circuit has thus held that Golden Rule arguments are permissible during the sentencing phase of a capital trial. See id. (giving examples of the types of Golden Rule arguments that the Eleventh Circuit has approved in other cases).

Having reviewed the prosecutor's sentencing phase arguments in light of Petitioner's assertions and in context with the evidence presented at the sentencing

phase of the trial, it is clear that the prosecutor did not manipulate or misstate the evidence, and he did not implicate other of Petitioner's specific rights. See Darden v. Wainwright, 477 U.S. 168, 181-82 (1986). Moreover, the trial court repeatedly instructed the jurors that their decision was to be made on the basis of the evidence alone and that the arguments of counsel were not evidence. Most importantly, as was discussed at length in relation to Petitioner's ineffective assistance claim, the weight of the aggravating evidence against Petitioner, particularly the heinousness of his crimes, was heavy such that this Court's confidence in the outcome of the sentencing phase of Petitioner's trial is not shaken by the prosecution's closing argument. Accordingly, this Court concludes that Petitioner has failed to establish that he is entitled to relief based on the claims raised in his Claim II.

Claim III -Prosecution's Improper Closing Argument at Guilt Phase

In his Claim III, which Petitioner mentions only in a footnote of his final brief, he claims that the prosecutor also violated his rights during his closing arguments at the conclusion of the guilt phase of the trial. Petitioner cites the following statements as having violated his rights: the prosecutor called Petitioner a "misogynistic, woman hating demon of the devil." [Doc. 12-15 at 59 (Bates 4988)]. Trial counsel moved for a mistrial which the judge denied, whereupon the prosecutor stated, "I didn't promise

you to deliver any celestial or heavenly bodies. It was a fight in Hell with the devil to get [Petitioner] here, but you got him here, Satan's lap dog, sitting there." [Doc. 12-15 at 59 (Bates 4988)]. Later, the prosecutor referred to Petitioner as an "unhuman, deviant, pathological killer." [Doc. 12-15 at 66 (Bates 4995)].

As is discussed above, this Court is authorized to grant habeas corpus relief based on an improper closing argument only when the improper argument rendered the sentencing stage trial fundamentally unfair, meaning that there is a reasonable probability that the argument changed the outcome. The evidence of Petitioner's guilt presented at his trial was overwhelming, and there is thus very little likelihood, if any, that the prosecutor's statements, to the degree that they were improper, had any effect on the jury's verdict of guilt. Accordingly, Petitioner is not entitled to relief with respect to his Claim III.

Claim IV - The State Withheld Exculpatory Evidence in Violation of *Brady*

Plaintiff next claims that prosecutors withheld material exculpatory evidence.

> In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court enunciated the now well-established principle that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The duty to disclose exculpatory evidence is applicable even in the absence of a request by the defendant, and it encompasses impeachment material as well as exculpatory evidence. See Strickler v.

> Greene, 527 U.S. 263, 280 (1999). . . . The Supreme Court has condensed these basic principles into three components, each of which is necessary to establish a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." [Id. at 281-82.

Maharaj v. Sec'y, Dep't of Corr., 432 F.3d 1292, 1309 (11th Cir. 2005).

According to Petitioner, prosecutors "evaded" trial counsel's requests for documents and failed to turn over files to which Petitioner was entitled. However, these assertions appear to be contrary to the record and based on suspicion and supposition because prosecutors contended that a portion of their file was privileged and because the state has purportedly produced little to Petitioner's post-conviction counsel. Indeed, a significant portion of Petitioner's argument on this claim relates to the state's anemic production of documents during the state habeas corpus proceedings, which, Petitioner claims, "strongly suggests that the State's compliance with Brady has systemic and substantive irregularities that have violated Mr. Pace's Sixth and Fourteenth Amendment rights." [Doc. 35 at 172].

Petitioner admits in his brief, however, that he has no idea what material was withheld,[4] and his only basis for claiming that anything was withheld is his expectation

[4] In his state habeas corpus petition, Petitioner mentioned specific evidence that he claims was withheld. He now appears to have abandoned those claims.

that the State should have turned over more material and the changing nature of the State's disclosures to post-conviction counsel. Petitioner seems to assert the argument that, because he is so sure that there must be Brady material among the withheld documents, the State has an affirmative duty to "set the record straight." [Id. at 173].

This Court disagrees and finds that Petitioner's claims are overblown for a variety of reasons. First, what the state produced or failed to produce in post-conviction proceedings has nothing to do with a Brady claim. Second, the state habeas corpus court performed an in camera inspection of the documents that Respondent claims were privileged and found no Brady material, and Petitioner has failed to assert a sufficient basis for this Court to find error in the state court's determination.

Moreover, in the absence of pointing to specific evidence that was withheld and demonstrating that he suffered prejudice as a result, Petitioner essentially asks this Court to presume a Brady violation whenever it is possible that the state failed to turn over certain documents, when the correct "presumption, well established by tradition and experience, [is] that prosecutors have fully discharged their official duties." Strickler v. Greene, 527 U.S. 263, 286 (1999).

Finally, much of Petitioner's argument is based on a highly selective view of the record. For example, Petitioner points to an isolated memorandum to file from trial

co-counsel written on August 16, 1994 – over seventeen months prior to Petitioner's trial – complaining that prosecutors failed to provide the defense team with a copy of the file. [Doc. 14-5 at Bates 453]. Petitioner, however, fails to provide a citation to the prosecution's statement to the trial court that the defense "was given a copy of the entire file that was in my possession in September of 1994 [– one month after co-counsel wrote her memorandum –] when it was turned over to them including copies of every photograph, every slip of paper that [the prosecutor] had . . . ." [Doc. 12-6 at 3908]. Indeed, the record reflects that the state provided trial counsel with a great wealth of material from its files. In a pretrial hearing, trial counsel informed the judge that the state had provided, "a pickup truckload of documents. An investigator from the District Attorney's office backed up to [his] office one day with box after box after box of papers." [Doc. 9-31 at 15 (transcript page 14)]. Clearly, if prosecutors had turned over what was obviously only a small portion of its file, trial counsel would have protested loudly with the court.

Because Petitioner has failed to point to material exculpatory evidence that the prosecution failed to produce, he cannot establish his Brady claim. Obviously realizing that he has no evidence to support a Brady claim, Petitioner contends that he is entitled to discovery and a hearing to seek evidence to support his Brady claim.

"A habeas petitioner, unlike the usual civil litigant, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, Petitioner is entitled to discovery only if this Court "in the exercise of [its] discretion and for good cause shown grants leave" to conduct discovery. Rule 6, Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254. In order to establish "good cause" for discovery, Petitioner must demonstrate that the requested discovery will develop facts which will enable him to show that he is entitled to relief. See Bracy, 520 U.S. at 908-09. Further, under Rule 6(b), "[a] party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents."

In considering whether Petitioner is entitled to an evidentiary hearing, this Court determines "whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000) (citing Cardwell v. Greene, 152 F.3d 331,

338 (4th Cir. 1998)); cf. Townsend v. Sain, 372 U.S. 293, 312-13 (1963).[5] According to the Supreme Court:

> In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.
>
> It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.

Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (citations and footnote omitted).

In the Eleventh Circuit, the standard for granting leave to conduct discovery in a habeas corpus action is essentially the same as that for granting an evidentiary hearing, see Crawford v . Head, 311 F .3d 1288, 1328-29 (11th Cir. 2002); accord Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1987).

Having reviewed Petitioner's arguments, this Court concludes that he has not established that he is entitled to discovery or a hearing. Again, Petitioner has no evidence that a Brady violation occurred. He merely points to irregularities with the

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[5] For the sake of simplicity, this Court analyzes whether Petitioner is entitled to discovery and/or a hearing under the more lenient standard that applied before 28 U.S.C. § 2254(e)(2) was enacted. Section 2254(e)(2) does not apply in every case, and if Petitioner is not entitled to discovery or a hearing under pre-2254(e)(2) law, he certainly would not be entitled to it under that provision.

file produced to his post-conviction counsel and attributes to those irregularities "smoking-gun" type qualities that they do not merit. As far as meeting his burden under Rule 6(b) and this Court's Order of November 30, 2010, [Doc. 25 at 3], Petitioner has not even hinted at the type of evidence he would seek to discover or present at a hearing.

In response to Petitioner's contention that the fact that he "cannot know what materials he does not have underscores the necessity of the State's compliance with Brady and its progeny," [Doc. 35 at 174], this Court responds that Petitioner has failed to present a sufficiently compelling case that the irregularities point to a sinister motive on the part of the prosecutor or even to overcome the presumption that prosecutors have acted in line with their duties. At most, Petitioner has established the mundane fact that large bureaucratic organizations like the Atlanta Police Department and the Fulton County District Attorney's Office can sometimes be disorganized.

Put another way, nothing that Petitioner has said in his brief has given this Court any confidence that discovery or a hearing would produce any evidence that might tend to establish his Brady claim. Accordingly, Petitioner has failed to demonstrate that he is entitled to discovery or a hearing with respect to his Brady claim.

Claim V - The State Knowingly Presented False Testimony

In his Claim V, Petitioner avers that prosecutors knowingly presented the false testimony of Atlanta Police Detective Jacqueline Slaughter, who arrested Petitioner for burglarizing the home of Coretta Scott King. Detective Slaughter testified about the burglary during the penalty phase of Petitioner's trial. Petitioner indicates that prosecutors engaged in misconduct by presenting the testimony even though they knew that the evidence against Petitioner regarding the burglary had been illegally obtained. Petitioner further claims that Detective Slaughter falsely testified that she had read Miranda warnings to Petitioner, that Petitioner described the burglary and described seeing Ms. King to her, and that Christopher Robinson shared a room with Petitioner at the time of the burglary and that he had authority to allow police to search the room.

In Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. See also Napue v. Illinois, 360 U.S. 264 (1959). The problem, however, with this claim is that the most Petitioner does is provide support for the proposition that Detective Slaughter's testimony was unreliable. As Respondent points out in a well-argued passage that this Court will not repeat here, [Doc. 37 at 155-58], Petitioner presents nothing in the way of evidence to

establish that the testimony was untrue. Accordingly, this Court concludes that Petitioner has failed to assert a Napue/Giglio claim, and he is not entitled to relief for his Claim V.

Claim VI - Petitioner's Subaverage Intelligence and Mental Illness Render Petitioner Ineligible for Execution

In his Claim VI, Petitioner claims that his mental illness and sub-average intellectual functioning render him ineligible for a death sentence. As noted above, this Court has concluded that claims regarding Petitioner's mental illness are not ripe for consideration at this stage. As to his claim of mental retardation, in Atkins v. Virginia, 536 U.S. 304, 318 (2002), the Supreme Court held that the mentally retarded cannot be executed. However, Petitioner has presented no evidence to support a claim that he is retarded. The closest he comes in presenting such evidence is his statement in his brief that "Dr. [Paul] Nestor's tests . . . showed that [Petitioner] is borderline mentally retarded . . . ." [Doc. 35 at 92]. However, Petitioner provided no citation to the record for this statement, and in his deposition for Petitioner's state habeas corpus proceeding, Dr. Nestor was asked if he had made any determination that Petitioner was mentally retarded, and he responded: "I did check that out, and my assessment was that he was not mentally retarded." [Doc. 17-4 at 27-28 (Bates 6543-44)]. In a June 5,

2003, affidavit, Dr. Nestor stated that Petitioner attained a full scale IQ of 80 on the WAIS-III neuropsychological measures of intellectual abilities. Also, as Respondent and the state habeas corpus have pointed out, on September 9, 1995, Dr. Herendeen administered the Shipley Institute of Living Scale, which revealed an estimated IQ of 78. [Doc. 15-21 at 26-27 (Bates 4224-25)]. Accordingly, there is no evidence that might indicate that Petitioner is mentally retarded, and this Court concludes that Petitioner has failed to state a claim under Atkins.

Claim XV - Penalty Phase of the Trial was Rendered Unfair Because of the Admission of Evidence Regarding the Burglary of the King Residence

According to the record, prior to his arrest for the crimes that form the basis of this proceeding, Petitioner had pled guilty to two charges of burglary and had one unadjudicated burglary charge outstanding. The State initially sought to introduce these crimes as similar transactions during the guilt phase of the trial, but the trial court concluded that the offenses did not rise to the comparative level of similar transactions and excluded them from that phase. [Doc. 9-33 at 55-56 (Bates 325-26)]. However, the trial court later concluded that the burglaries were admissible during the sentencing phase and further concluded that Steve Purvis, the attorney representing Petitioner at the time, was not ineffective in counseling Petitioner prior to his guilty pleas. [Doc. 12-

18 at 125 (Bates 5499); Doc. 12-17 at 121 (Bates 5334)]. Prosecutors also agreed not to introduce the fact that Petitioner entered guilty pleas to two of the burglaries, and it did not present the jury with the certified copies of the judgments in those cases. Rather, they presented testimony sufficient to establish Petitioner's guilt.

Thereafter, on direct appeal, Petitioner raised the claim that the trial court erred in allowing the convictions into evidence at trial as it was not a voluntary plea based on the alleged ineffectiveness of trial counsel. [Doc. 12-26 at 59]. In denying this claim, the Georgia Supreme Court held:

> In the sentencing phase, the admission of non-statutory aggravating evidence about several previous burglaries and other offenses committed by [Petitioner] was not error. Jefferson v. State, 353 S.E.2d 468 (Ga. 1987) (evidence of prior crimes, even if non-adjudicated, is admissible in the sentencing phase). The State presented reliable evidence about these offenses and there is no requirement that other crime evidence in the sentencing phase be proven beyond a reasonable doubt. Ross v. State, 326 S.E.2d 194 (Ga. 1985).

Pace, 524 S.E.2d at 505.

One of the homes that Petitioner burglarized was the home of Coretta Scott King, the widow of civil rights icon, Dr. Martin Luther King, Jr., and according to the evidence presented at Petitioner's trial, it was apparent that Ms. King was at the home at the time of the burglary.

In his Claim XV, Petitioner contends that presenting evidence of this particular burglary was inflammatory and prejudicial so as to constitute a violation of Petitioner's constitutional rights. According to Petitioner:

> Any juror – particularly an Atlanta juror – would necessarily conclude that anyone who would rob so noble a figure must himself be utterly depraved. Indeed, the jurors would feel personally violated and insulted by the victimization of this civil rights icon. Moreover, when viewed in the context of the charges against Mr. Pace, the introduction of this evidence raised the specter that Mrs. King had narrowly escaped her rape and murder. This would have been more than any juror could bear.

[Doc. 35 at 194].

Petitioner's Claim XV differs from the claim that he raised on appeal regarding the burglaries. Petitioner did raise this claim in his state habeas corpus petition, yet the state court denied the claim as *res judicata*, apparently believing that the claim was the same as the one Petitioner raised on appeal. The state court should have concluded that the claim was procedurally defaulted because Petitioner had never raised it before. Accordingly, the claim is procedurally barred before this Court. Collier v. Jones, 910 F.2d 770 (11th Cir. 1990) (when petitioner fails to present claim to the state court and under a state procedural rule the claim is procedurally defaulted, the claim should be considered defaulted in federal court even though the state court did not apply the procedural rule); see also Lindsey v. Smith, 820 F.2d 1137, 1143 (11th Cir. 1987).

Plaintiff, of course, contends that his counsel's ineffectiveness in failing to raise the claim constitutes cause and prejudice to lift the procedural bar in this Court. This Court disagrees because the claim is without merit, and he thus cannot demonstrate prejudice.

This Court reviews state court evidentiary rulings in a habeas corpus proceeding to determine only "'whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial.'" Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (quoting Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir. 1983)). Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a "'crucial, critical, highly significant factor'" in the outcome of the proceeding. Williams v. Kemp, 846 F.2d 1276, 1281 (11th Cir. 1988) (quoting Jameson v. Wainwright, 719 F.2d 1125, 1126-27 (11th Cir. 1983)). The evidence must be inflammatory or gruesome and so critical that its introduction denied petitioner a fundamentally fair trial. Futch v. Dugger, 874 F.2d at 1487; see also Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) ("An evidentiary error does not justify habeas relief unless the violation results in a denial of fundamental fairness.").

This Court once again notes the utter brutality and depravity of Petitioner's crimes as discussed in relation to Petitioner's ineffective assistance claim. While this Court agrees that Ms. King is a celebrity with a highly positive image in the

community and that someone who committed a crime against her would be viewed negatively, the Petitioner's burglary of Ms. King's home was minor when compared to his crimes against Lula Bell McAfee, Mattie Mae McLendon, Johnnie Mae Martin, and Annie Kate Britt. In that light, Petitioner's contention that his entering Ms. King's home and stealing a radio, food, and a few items of clothing would tip the balance in a juror's mind toward execution strains credulity.

Moreover, the limits placed on the admission of evidence during the guilt phase of a criminal trial are significantly relaxed during sentencing. United States v. Watts, 519 U.S. 148, 151 (1997).

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. People of State of N.Y., 337 U.S. 241, 246 (1949) (footnotes omitted).

> Highly relevant – if not essential – to [a sentencer's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id. at 247.

The Supreme Court has made it clear that in order to achieve required "heightened reliability[ ]" during the penalty phase of a capital case, more evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors." Gregg v. Georgia, 428 U.S. 153, 203-04 (1976). The Supreme Court has further stated that "consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a person's probable future conduct when it engages in the process of determining what punishment to impose.' " Skipper v. South Carolina, 476 U.S. 1, 5 (1986) quoting Jurek v. Texas, 428 U.S. 262, 275 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The fact is that Petitioner did, in fact, burglarize Coretta Scott King's home, and that fact is clearly the type of information that a sentencing tribunal should take into consideration when weighing the appropriate sentence to impose. Accordingly, this Court concludes that Petitioner is not entitled to relief with respect to his Claim XV.

Claim XIX - O.C.G.A. § 17-10-16 (Georgia's Life Without Parole Statute) is Unconstitutional[6]

[6] Despite the fact that Petitioner's Claim XIX is likely procedurally barred before this Court, [see Doc. 17-19 at 13], this Court will, for the sake of simplicity, review the merits of the claim.

The Georgia life without parole statute, O.C.G.A. § 17-10-16, was enacted in 1993. Petitioner's crimes were committed in 1988 and 1989. By its terms, the statute applies only to those crimes committed after its effective date unless the defendant requests that the statute apply and the prosecution provides consent. In Petitioner's case, his counsel requested that the statute apply, but the prosecuting attorney refused to consent.

Petitioner contends that § 17-10-16 is unconstitutional because

> it denies those criminal defendants charged with crimes that occurred prior to 1993 the right to a reliable sentencing proceeding by allowing the prosecutor arbitrarily to curtail the jury from its consideration of the sentencing option that is the single most significant factor in persuading them to exercise mercy. . . . The statute further skews a process already predisposed to produce a sentence of death . . . .

[Doc. 35 at 201].

As to how this relates to the Constitution, Petitioner states in decidedly conclusory fashion that § 17-10-16 violated his rights under "the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." [Doc. 35 at 202]. He then cites to Johnson v. Mississippi, 486 U.S. 578 (1988), but he otherwise fails to make a convincing argument that his constitutional rights were violated. Petitioner's non-pinpoint citation to the Johnson case is, at best, confusing as the case is wholly unrelated to the issue that Petitioner attempts to raise in his Claim XIX.

As to the purported constitutional issue, this Court surmises that Petitioner might contend that the statute violates his Equal Protection rights because it treats similarly situated criminal defendants differently based merely on when they committed their crimes or based on prosecutorial discretion. However, legislators routinely change the length of sentences such that two individuals who committed the same offense are serving dramatically different terms of imprisonment without violating the Equal Protection Clause. Moreover, in Freeman v. State, 440 S.E.2d 181, 183-84 (Ga. 1994), the Georgia Supreme Court held that the prosecutorial discretion permitted under § 17-10-16 does not violate the Equal Protection Clause because it is no different from prosecutorial discretion in other contexts, and this Court is not convinced by Petitioner's brief argument otherwise.

Surmising further, Petitioner may contend that the statute violates his Eighth Amendment rights by increasing his chances for receiving the death penalty. However, that argument fails because the statute as applied to Petitioner actually made Petitioner *better* off then he otherwise would have been. At the time that Petitioner committed his crimes, there was no life-without-parole statute. The legislature might have done nothing or it might have passed the statute and applied it to only crimes committed after the effective date. Instead, what the legislature did was to make it possible that it would apply to Petitioner. The fact that the prosecution opted not to

make a life-without-parole sentence available to Petitioner made him no worse off than he otherwise would have been.

In summary, this Court concludes that Petitioner is not entitled to relief with respect to his Claim XIX.

Claim XXII - Cumulative Error

In his Claim XXII, Petitioner argues that "[t]he cumulative effect of the statutory and constitutional errors which occurred at Mr. Pace's trial, sentencing, and direct appeal deprived him of due process, a fair trial, and a reliable determination of punishment, in violation of his rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." [Doc. 35 at 203]. Rather than specifying the errors, however, Petitioner simply points this Court to every assertion of error that he has ever raised at every proceeding relating to his convictions and sentences.

As discussed above in relation to Petitioner's claims regarding improper closing argument, under cumulative error doctrine, reversal of a conviction or sentence is appropriate when an aggregation of errors deemed to be harmless individually renders a trial constitutionally unfair when viewed collectively. United States v. Capers, 708 F.3d 1286, 1299 (11th Cir. 2013). "The harmlessness of cumulative error is

determined by conducting the same inquiry as for individual error – courts look to see whether the defendant's substantial rights were affected." Id. However, in order for this Court to perform a cumulative error analysis, there first must be multiple errors to analyze. See id. The only harmless error identified by any court in relation to Petitioner's convictions and sentences was the Prosecutor's characterizations of defendant, discussed above, as a "misogynistic, woman hating demon of the devil" and "Satan's lap dog," during closing argument. As only one such error occurred, cumulative error analysis is not available, and Petitioner is not entitled to relief with respect to his Claim XXII.

Claim XXXIV - Trial Court Improperly Refused to Excuse Certain Jurors Because of Their Views on the Death Penalty

In his Claim XXXIV, Petitioner argues that the trial court failed to excuse for cause certain jurors whose views indicated that they would automatically vote in favor of the death penalty. In evaluating a claim that a particular juror should have been excused for cause on "reverse Witherspoon" grounds, the standard is the same as that for jurors opposed to the death penalty: whether the individual's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Morgan v. Illinois, 504 U.S. 719, 728 (1992).

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. at 729.

This Court stresses that the trial judge, who has the opportunity to view and interact with the jury venire, is accorded great discretion in determining whether a particular individual should be excused from the jury for cause. Uttecht v. Brown, 551 U.S. 1, 7 (2007).

Petitioner raised this claim on direct appeal. In denying this claim, the Georgia Supreme Court held:

> "The death qualification of prospective jurors is not unconstitutional." Cromartie v. State, 270 Ga. 780 (5) (514 S.E.2d 205) (1999). [Petitioner] complains that 18 prospective jurors were biased in favor of the death penalty and were erroneously qualified to serve by the trial court. "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.'" Greene v. State, 268 Ga. 47, 48 (485 S.E.2d 741) (1997), quoting Wainwright v. Witt, 469 U.S. 412, 424 (II) (105 S. Ct. 844, 83 L. Ed. 2d 841) (1985). Our review of the trial court's qualification of the prospective jurors is based upon a consideration of the voir dire as a whole, and we must afford deference

> to the trial court's resolution of any equivocations and conflicts in the prospective jurors' responses. Greene, supra at 49. A prospective juror is not subject to excusal for cause for merely leaning for or against a death sentence. Id. at 53; Jarrell v. State, 261 Ga. 880 (1) (413 S.E.2d 710) (1992). After reviewing the voir dire transcript, we conclude that the trial court did not err by denying [Petitioner]'s motions to disqualify prospective jurors who were allegedly predisposed to a death sentence.

Pace, 524 S.E.2d at 499.

Petitioner generally fails to establish that the state court's conclusion is not entitled to deference under § 2254(d), noting without further elaboration "that the jurors' replies during voir dire demonstrate that their 'views would prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath.'" [Doc. 35 at 212 (quoting Wainwright, 469 U.S. at 424) (alterations in original)].

As to Petitioner's claims regarding specific jurors who should have been excused by the trial court, Petitioner describes the voir dire testimony of eighteen venirepersons and argues that they should have been excused by the trial court. This Court first notes that fifteen members of the jury panel named by Petitioner did not serve on the jury, and Petitioner cannot have been prejudiced by the trial court's refusal to strike those individuals for cause. This is true even though Petitioner was required to use his peremptory strikes to avoid having some of those panel members serve. "[I]f [a] defendant elects to cure [a trial judge's erroneous for-cause ruling] by

exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat," the Supreme Court has held that the criminal defendant "has not been deprived of any . . . constitutional right." United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000). Indeed, the "use [of] a peremptory challenge to effect an instantaneous cure of the error" demonstrates "a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury." Id. at 316.

As to the three jurors named by Petitioner who served on the jury, Willie Ingram, Michelle Sloan, and Christian McCurdy,[7] this Court concludes that Petitioner has failed to establish that they should have been excused.

Ms. Willie Ingram at first testified that she could fairly consider both life in prison and the death penalty as punishment and that not everyone deserves the death penalty. [Doc. 10-8 at 938-39]. In response to a rather convoluted question from Petitioner's counsel, Ms. Ingram indicated that she would always vote for the death penalty if the defendant were found guilty of murder. However, when she better understood the question, she said, "If he is guilty of taking someone else's life, I wouldn't vote for the death penalty every time. I didn't quite understand." Id. at 944. Then through extensive questioning from defense counsel, Ms. Ingram made it clear

[7] Cristselma Smith was selected to serve on the jury but was replaced by an alternate before the end of the trial and did not take part in the verdict. Bernard Hopkins was selected as the fourth alternate juror and did not take part in the verdict.

that she would not automatically opt for the death penalty, and that she would consider the evidence before choosing a punishment.

Michelle Sloan, in her voir dire testimony, initially stated that she had no feelings one way or the other about the death penalty. [Id. at 1017]. This was because after some of her family members were killed, she was asked whether she would want the death penalty for the perpetrator, and she could not answer the question. She then said that she would not automatically vote for or against the death penalty without hearing the evidence and the law. [Id. at 1018].

Finally, prospective juror Christian McCurdy testified that he was not automatically in favor of or opposed to the death penalty. [Doc. 10-20 at 1918]. He further stated that he would vote in favor of the death penalty if it was a "particular [sic] heinous crime and there was overwhelming evidence," but that he would listen to the evidence and the law before he decided on a verdict. [Id. at 1919]. He also stated that "[i]f there was overwhelming evidence of guilt, [he would] be able to presume that life is the appropriate sentence as opposed to death, unless there was some aggravating circumstance," [id. at 1933], and that he "wouldn't automatically discount a life sentence as an appropriate punishment if someone were convicted of one or more murders," [id. at 1937].

This Court carefully reviewed the entire voir dire testimony of the three jurors cited by Petitioner and found nothing concerning about their views on the death penalty. Based on that review, this Court has no basis upon which to find that these jurors would be unable to properly perform their duties as jurors in accordance with their oath and the instructions given by the trial court. Accordingly, this Court concludes that Petitioner has failed to establish that he is entitled to relief regarding his Claim XXXIV.

Claims XXXV and XXXVI - The Trial Court Improperly Refused to Excuse Certain Jurors Who Were Biased or Exposed to Pre-trial Publicity

In his Claim XXXV, Petitioner contends that the trial court erred in failing to excuse certain potential jurors who had been exposed to media reports about Petitioner's crimes.[8] In his Claim XXXVI, Petitioner contends that the trial court should have excused potential jurors who indicated that they were biased against Petitioner. However, of the seven jurors Petitioner mentions in these two claims, the only one to actually serve on the jury was Christian McCurdy who Petitioner contends

[8] In his final brief, Petitioner states that he raises his Claim XXXV with respect to four jurors, but he mentions by name and discusses only three. To the degree that there is a fourth such juror, this Court deems Petitioner's claim as to that juror to have been abandoned.

was exposed to pretrial media reports. As the others Petitioner mentions were not on the jury that convicted and sentenced Petitioner, he cannot have been prejudiced by their biases or exposure to media reports, and, as with his Claim XXXIV, his possible use of peremptory strikes to remove these jurors is not cause for relief under § 2254. See Martinez-Salazar, 528 U.S. at 307.

Petitioner raised these claims in his appeal, and, in affirming Petitioner's convictions, the Georgia Supreme Court held as follows:

> The trial court did not err by failing to excuse several prospective jurors for cause due to exposure to pretrial publicity and alleged bias against Pace. In order to disqualify a juror for cause, it must be established that the juror's opinion was so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence. The record shows that these jurors could set their opinions aside and decide the case based on the evidence presented at trial and the trial court's instructions. See id.

Pace, 524 S.E.2d at 499.

Petitioner's arguments that the state court's conclusion is not entitled to deference under § 2254(d) are entirely conclusory. Moreover, as was noted with respect to Petitioner's Claim XXXIV, this Court has reviewed Mr. McCurdy's entire voir dire testimony. Regarding his exposure to pretrial publicity, Mr. McCurdy stated that he did not "know anything about this case. I remember seeing news reports on television when . . . these murders were happening. They didn't know anything. . . . They didn't have any suspects. They made no arrests, and that's all I remember about

it." [Doc. 10-20 at 1935-36]. Mr. McCurdy also stated that he would be able to set aside those memories and base his decision only on what he heard in the courtroom. [Id. at 1939].

According to the Supreme Court,

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722 (1961).

As Mr. McCurdy assured the court that he would be able to set aside his memories of the news reports and render a verdict based on the evidence he heard, it is clear that there was no basis upon which to disqualify him as a juror. As such, Petitioner has failed to establish he is entitled to relief with respect to his Claim XXXV.

Claim XL - Denial of Challenge to State's Use of Peremptory Challenges in a Discriminatory Manner

During jury selection at Petitioner's trial, the state used eight of its ten peremptory strikes to remove women from the jury venire, and he claims that the trial court erred in denying his challenge regarding five of those strikes. In Batson v.Kentucky, 476 U.S. 79 (1986), the Supreme Court held that parties cannot use peremptory strikes in a manner that discriminates based on the juror's race. In J.E.B. v. Alabama, 511 U.S. 127 (1994), the Court extended that holding to prohibit using peremptory strikes based on gender. To mount a challenge under J.E.B., the Eleventh Circuit advocates following the three step approach prescribed by Batson. First, the criminal defendant must make a *prima facie* showing that prosecutors discriminated on the basis of gender in making a peremptory strike. If a prima facie case is established, prosecutors must present a gender-neutral explanation for the strike. Then, the court determines whether the explanation given is a pretextual justification for purposeful discrimination. E.g., United States v. Gamory, 635 F.3d 480, 495 (11th Cir. 2011); United States v. Walker, 490 F.3d 1282, 1291 (11th Cir. 2007); United States v. Ochoa–Vasquez, 428 F.3d 1015, 1038–39 (11th Cir. 2005).

Petitioner raised this claim in his appeal, and in affirming Petitioner's convictions and sentences, the Georgia Supreme Court held:

> [Petitioner] claims that the State improperly struck female prospective jurors based on their gender. J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); Tedder v. State, 265 Ga. 900(2), 463 S.E.2d 697 (1995). The State used eight of ten peremptory strikes to

> remove females from the jury. [Petitioner] made a J.E.B. motion regarding five of the women struck by the State and the trial court required the State to give reasons for these strikes. The main reason given for striking these five jurors was that each had expressed reservations about the imposition of the death penalty; the record supports this reason and the other reasons given by the State. Therefore, we conclude that the State adequately explained each strike "on a basis which was 'gender-neutral, reasonably specific, and related to the case.'" Berry v. State, 268 Ga. 437(2), 490 S.E.2d 389 (1997), quoting Tedder, supra. See also Tharpe v. State, 262 Ga. 110(6), 416 S.E.2d 78 (1992) (a prospective juror's aversion to the imposition of a death sentence is an adequate reason to justify a peremptory strike). We find no error with the trial court's denial of [Petitioner]'s J.E.B. motion.

Pace, 524 S.E. 2d at 500.

Petitioner contends that the trial and appellate courts failed to take the third step in the analysis and conclude that the state's gender neutral reasons for excusing the jurors was a pretense in order to remove women from Petitioner's jury. However, Petitioner has failed to present any support for this argument.

When challenged about his use of peremptory strikes on mostly women, the prosecutor provided the court with gender-neutral reasons for striking each of the women about which Petitioner raised a challenge. Each of those reasons was supported in the record and each was a valid reason for not wanting a juror on the panel. Put simply, given the record, there is no basis to determine that state's use of peremptory strikes was discriminatory, and this Court concludes that Petitioner is not entitled to relief with respect to his Claim XL.

Claim XLVIII - The Trial Court Improperly Failed to Grant a Mistrial Because of a Prosecution Witness's False Testimony

During the trial, a former City of Atlanta police detective testified that Petitioner had been arrested on a warrant that had been drawn up based on a crime laboratory report on Lula Bell McAfee, one of the murder victims. [Doc. 12-3 at 3541]. In fact, Petitioner was arrested on a warrant related to a burglary that was not related to any of the murders. Petitioner's trial counsel immediately objected and sought a mistrial. The trial court denied the motion for a mistrial and directed the prosecutor to cure the misconception with further testimony. [Id. at 3543]. When the prosecutor's efforts to cure were not sufficient, the Judge took it upon herself to cure, and got the former detective to testify that no warrant for Petitioner was ever drawn as a result of the crime laboratory report on Ms. McAfee's murder.

The Georgia Supreme Court concluded that this claim was meritless, concluding:

> [Petitioner]'s claim that a State's witness provided false testimony is without merit. A police detective testified that Pace was arrested pursuant to an arrest warrant for the murder of Ms. McAfee. After [Petitioner] objected, the witness corrected himself and stated that [Petitioner] was not originally arrested for Ms. McAfee's murder. We find no error.

Pace, 524 S.E.2d at 502-03.

Having examined the record in relation to this claim, this Court concludes that this claim entirely lacks substance. A witness uttered an immaterial factual mistake, and, upon trial counsel's objection, the judge insured that curative testimony was given. Even without the curative testimony, this Court is not convinced that Petitioner would have suffered material prejudice based on the statement. Petitioner was arrested based on a warrant, and he was ultimately charged with murdering Ms. McAfee. The fact that the jury heard that the original arrest warrant was for that murder cannot have increased Petitioner's apparent culpability. Accordingly, this Court likewise concludes that Petitioner's Claim XLVIII lacks merit.

Claim LX - Trial Court Erred in Limiting Evidence Regarding Petitioner's Eligibility for Parole

During his trial, Petitioner sought in a variety of ways to let the jury know about his eligibility for parole if he received a life sentence. Petitioner contends in his Claim LX that the trial court's denial of these requests violated his constitutional rights, because jurors had either no information or incorrect information about the consequences of the sentencing options before it. Petitioner relies on Simmons v. South Carolina, 512 U.S. 154 (1994), in which the Supreme Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's

release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." id. at 156 (plurality opinion); see also id. at 178 (O'Connor, J., concurring) ("Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible.").

The problem, however, is that Plaintiff was, in fact, parole eligible, and where that is the case, the Constitution does not require that the jury be told anything about parole. In Bates v. Secretary, Florida Dept. of Corrections, 768 F.3d 1278 (11th Cir. 2014), a § 2254 petitioner on death row in Florida raised a claim similar to that here raised by Petitioner. Bates "had agreed to waive parole eligibility under the pre-amendment version of that statute" and "had already been sentenced to two life terms plus fifteen years on his other counts of conviction, all of which would run consecutively to any sentence he received for murder." Id. at 1300. Bates raised a claim under Simmons, arguing that the criminal trial court violated his rights when it refused to inform the jury about his parole status. The Eleventh Circuit disagreed, noting that the Supreme Court in Simmons, after announcing the rule that a state may not mislead a jury about a defendant's future dangerousness by concealing that defendant's ineligibility for parole, went on to

> endorse[] the general proposition that where "parole is available" as a matter of state law, courts should "defer to a State's determination as to what a jury should and should not be told about sentencing" because "how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative." [Simmons, 512 U.S.] at 168 (plurality opinion); see also id. at 176 (O'Connor, J., concurring) ("The decision whether or not to inform the jury of the possibility of early release is generally left to the States. In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact.") (citation omitted).
>
> Since Simmons was decided, the Supreme Court has declined to extend its holding to cases where parole ineligibility has not been conclusively established as a matter of state law. See Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion). In Ramdass, the Court explained that the Simmons rule applies only "when a defendant is, as a matter of state law, parole ineligible at the time of his trial," and it refused to adopt a "functional approach" to parole ineligibility – one dependent on whether a defendant "would, at some point, be released from prison" – because that approach would require courts and juries to examine too many theoretical possibilities, which "might well" distract them "from the other vital issues in the case." Id. at 168-69.

Bates v. Secretary, Florida Dept. of Corrections, 768 F.3d 1278, 1301-02 (11th Cir. 2014).

Based on the foregoing, because Petitioner would have been eligible for parole if he had received a life sentence, the Constitution makes no requirement regarding how the jury is informed on the topic of parole. As such, Petitioner's Claim LX does not raise a cognizable § 2254 claim.

Claim LXI - Petitioner's Death Sentence was Disproportionate in Comparison With Others who Have not Received the Death Penalty

In his Claim LXI, Petitioner asserts that the Georgia Supreme Court has failed to properly apply the proportionality review required of every death sentence under O.C.G.A. § 17-10-35(c)(3). Respondent argues that Claim LXI is unexhausted because he has raised it here for the first time. This Court only partially agrees.

To the degree that this Court reads Petitioner's claim as an assertion that Petitioner's sentence is disproportionate, the claim is obviously exhausted because it was decided by Georgia's highest court. See Pope v. Secretary for Dept. of Corrections, 680 F.3d 1271, 1284 (11th Cir. 2012) (claim is exhausted under § 2254 if presented to state's highest court, either on direct appeal or on collateral review). The claim is not exhausted, however, to the degree that Petitioner complains that the state court denied him a due process right in failing to properly apply its mandatory proportionality review because no state court has had an opportunity to adjudicate that claim.

With respect to the exhausted portion of Petitioner's claim – that his death sentence is disproportional when compared with the sentence received by other convicted murderers in Georgia – the claim fails. Petitioner is a serial killer who killed mostly elderly women for sexual gratification and financial gain. As such, this Court

cannot conceive of a metric under which Petitioner would not get the death penalty when his crimes are compared to those of other capital defendants. This reasoning also applies to Petitioner's unexhausted claim that the state court has not properly applied the proportionality review. Even if this Court were to concede that the Georgia Supreme Court has a constitutional obligation to apply the proportionality review in a certain manner, and further that the court failed in that duty, Petitioner cannot demonstrate that he suffered prejudice given the nature of his crimes.

This Court further stresses 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 failure to properly carry out its statutory mandate. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) ("[W]e refuse to mandate as a matter of federal constitutional law that where, as here, state law requires [proportionality]

review, courts must make an explicit, detailed account of their comparisons."). Petitioner's Claim LXI thus fails.

D. Conclusion

For the reasons stated above, this Court concludes that Petitioner has failed to establish that he is entitled to relief under 28 U.S.C. § 2254. As such, the instant habeas corpus petition is hereby **DENIED** with prejudice except with respect to Petitioner's Claims VI and XVI which are **DENIED** without prejudice to his raising them in a § 1983 action. The Clerk is **DIRECTED** to **CLOSE** this action.

IT IS SO ORDERED, this 24th day of August, 2015.

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

Appendix D

H

Supreme Court of Georgia.

PACE
v.
The STATE.
No. S99P0647.

Dec. 3, 1999.
Reconsideration Denied Dec. 20, 1999.

Defendant was convicted in the Superior Court, Fulton County, Elizabeth E. Long, J., of four counts of malice murder, four counts of rape, and two counts of aggravated sodomy, and was sentenced to death. Defendant appealed. The Supreme Court, Hines, J., held that: (1) convictions and presence of statutory aggravating circumstances were supported by sufficient evidence; (2) defendant's consent to drawing of his blood and collection of his hair for use in investigation of murders for which he was convicted was voluntary; (3) defendant was not entitled to severance of murder counts; (4) alleged predisposition of eighteen prospective jurors in favor of death penalty did not require that jurors be disqualified for cause; (5) defendant failed to show that disclosure of psychological profile during guilt-innocence phase came so late as to deny him a fair trial; and (6) reversal of death sentences was not warranted based on improper comments of prosecutor during closing arguments.

Affirmed.

Sears, J., filed separate opinion, concurring in part and dissenting in part.

Hunstein, J., filed separate opinion, dissenting in part, in which Fletcher, P.J., joined.

West Headnotes

[1] **Homicide 203** 1184

203 Homicide
203IX Evidence
203IX(G) Weight and Sufficiency
203k1176 Commission of or Participation in Act by Accused; Identity
203k1184 k. Miscellaneous particular circumstances. Most Cited Cases
(Formerly 203k234(8))
Sentencing and Punishment 350H 1661

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 k. Determinations based on multiple factors. Most Cited Cases
(Formerly 203k357(7))
Sentencing and Punishment 350H 1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k357(7))

Convictions for four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy, and presence of 19 statutory aggravating circumstances supporting death sentences for murders, were supported by evidence that four female victims were found dead in their homes, perpetrator gained access to victims' respective homes by climbing through window, each attack occurred in early morning hours, all victims had been strangled, vaginal lacerations and presence of semen indicated that the victims had been raped and two had been anally sodomized, spermatozoa removed from each victim revealed the same DNA profile for each sperm sample, indicating a common perpetrator, and defendant's DNA profile matched the DNA profile taken from sperm in the four murders. O.C.G.A. §

17-10-35(c)(2).

[2] Searches and Seizures 349 181

349 Searches and Seizures

349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular concrete applications. Most Cited Cases

Defendant's consent to drawing of his blood and collection of his hair for use in investigation of four murders for which he was convicted was voluntary, though defendant was told that samples were being taken for purposes of investigating a different murder, where consent form signed by defendant stated that his blood and hair would be used against him in court of law and that he was suspected of murder, consent form did not limit use of blood or hair to investigation of murder listed in form or to any particular purpose, there was no evidence that defendant placed any limits on scope of his consent, defendant was twenty-eight years old when he gave consent, defendant was advised of and waived his rights, defendant was not threatened or coerced, defendant was not under influence of drugs, and defendant was not handcuffed; police were not required to explain to defendant that his blood or hair could be used in prosecutions involving other victims, or that he had a right to refuse consent.

[3] Criminal Law 110 620(6)

110 Criminal Law

110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(3) Severance, Relief from Joinder, and Separate Trial in General
110k620(6) k. Particular cases. Most Cited Cases

Defendant charged with malice murder of four women who were raped and strangled within seven-month period was not entitled to severance of murder counts; even if severed, evidence of all four murders would have been admissible in same trial to show identity.

[4] Indictment and Information 210 117

210 Indictment and Information

210V Requisites and Sufficiency of Accusation
210k117 k. Construction in general. Most Cited Cases

Two or more offenses may be joined in one charge when the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan and where it would be almost impossible to present to a jury evidence of one of the crimes without permitting evidence of the other.

[5] Criminal Law 110 29(14)

110 Criminal Law

110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(14) k. Homicide. Most Cited Cases

Convictions for both malice murder and felony murder of same victim were not error, where defendant was not sentenced for felony murder convictions.

[6] Criminal Law 110 29(14)

110 Criminal Law

110I Nature and Elements of Crime
110k29 Different Offenses in Same Transaction
110k29(5) Particular Offenses
110k29(14) k. Homicide. Most Cited Cases

The state is permitted to charge a defendant with malice murder and felony murder for the same homicide and proceed to trial and obtain convictions on both murder counts.

[7] Criminal Law 110 852

110 Criminal Law

110XX Trial
110XX(J) Issues Relating to Jury Trial
110k852 k. Admonition to jury or officer. Most

Cited Cases

Defendant was not entitled to an order limiting conversations between bailiffs and jury, absent allegation of improper conduct between bailiffs and jury.

[8] Criminal Law 110 632(5)

110 Criminal Law

110XX Trial
110XX(A) Preliminary Proceedings
110k632 Dockets and Pretrial Procedure
110k632(5) k. Pretrial conference or hearing; order. Most Cited Cases

Defendant was not entitled to evidentiary hearing on each of his pretrial motions, where defendant was given opportunity to be heard on every motion and defendant did not make evidentiary proffers for some motions.

[9] Criminal Law 110 632(5)

110 Criminal Law

110XX Trial
110XX(A) Preliminary Proceedings
110k632 Dockets and Pretrial Procedure
110k632(5) k. Pretrial conference or hearing; order. Most Cited Cases

The trial court is not required by the to hold an evidentiary hearing on every motion but is required to hold a hearing where each motion previously filed is heard. Unified Appeal Procedure Rule II(B).

[10] Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

Alleged predisposition of eighteen prospective jurors in favor of death penalty did not require that jurors be disqualified for cause from serving on jury in capital murder trial.

[11] Jury 230 33(2.15)

230 Jury

230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of capital punishment. Most Cited Cases

The death qualification of prospective jurors is not unconstitutional.

[12] Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

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.

[13] Criminal Law 110 1134.7

110 Criminal Law

110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.7 k. Summoning, impaneling, or selection of jury. Most Cited Cases
(Formerly 110k1134(5))

Criminal Law 110 1158.17

110 Criminal Law

110XXIV Review
110XXIV(O) Questions of Fact and Findings

110k1158.17 k. Jury selection. Most Cited Cases
(Formerly 110k1158(3))
Appellate court's review of the trial court's qualification of the prospective jurors is based upon a consideration of the voir dire as a whole, and appellate court must afford deference to the trial court's resolution of any equivocations and conflicts in the prospective jurors' responses.

[14] Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases
A prospective juror is not subject to excusal for cause for merely leaning for or against a death sentence.

[15] Jury 230 103(14)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k98 Formation and Expression of Opinion as to Cause
230k103 Influence of Opinion on Verdict
230k103(11) Opinion Founded on Rumor or Newspaper Reports
230k103(14) k. Opinion which will yield to evidence. Most Cited Cases
Exposure of prospective jurors to pretrial publicity did not require that jurors be disqualified for cause from serving on jury in capital murder trial, where prospective jurors indicated that they could set their opinions aside and decide case based on evidence presented and trial court's instruction.

[16] Jury 230 97(1)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(1) k. In general. Most Cited Cases
(Formerly 230k97(4))
In order to disqualify a juror for cause, it must be established that the juror's opinion was so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence.

[17] Jury 230 90

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k90 k. Relationship to party or person interested. Most Cited Cases
Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases
Prospective jurors were properly disqualified for cause from serving on jury in capital murder trial based on their testimony that they knew defendant when he was a boy, that they could not be impartial, and that they could never vote for the death penalty.

[18] Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases
Prospective juror was properly disqualified for cause from serving on jury in capital murder trial based on her testimony that she was opposed to the death penalty, that

she had no doubt she would always vote for life sentence, and that her views against death penalty would impair her consideration of the guilt-innocence phase evidence.

[19] Jury 230 83(1)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k83 Competency for Trial of Issues in General
230k83(1) k. In general. Most Cited Cases

Prospective juror was properly disqualified for cause from serving on jury in capital murder trial based on his testimony that he suffered anxiety attacks, that he got "fatigued out" during attacks and his thinking became confused and "off," that he had stopped taking medication against doctor's orders, that things happening in society, such as killing, contributed to his anxiety attacks, and that defendant's case scared him and he did not think he could be fair and impartial because he would start getting nervous.

[20] Jury 230 97(2)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(2) k. Personal relations in general. Most Cited Cases

Prospective jurors' ties to law enforcement did not require that they be disqualified for cause from serving on jury in capital murder trial, where jurors were not sworn police officers with arrest power.

[21] Jury 230 33(5.15)

230 Jury

230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Finding that state's exercise of peremptory strikes against five female prospective jurors was based on their views with respect to the death penalty, and not based on their gender, was supported by prospective jurors' testimony, in which they each expressed reservations about imposition of death penalty.

[22] Jury 230 133

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k133 k. Trial and determination. Most Cited Cases

Entire jury panel did not have to be disqualified from serving on jury in capital murder trial based on remark of one prospective juror in response to judge's question during voir dire as to whether any prospective jurors had formed or expressed an opinion with respect to defendant's guilt or innocence, where prospective juror was stopped by court before she said anything prejudicial.

[23] Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases
(Formerly 203k311)

Instructing jury in capital murder trial that death penalty cases were conducted in two phases, with second phase conditional on guilty verdict in first phase, did not direct prospective jurors that they were expected to convict defendant and proceed to second phase of trial.

[24] Jury 230 131(8)

230 Jury

230V Competency of Jurors, Challenges, and Objections

230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and conscientious scruples. Most Cited Cases

Defendant was not entitled to question prospective jurors during voir dire about bumper stickers they had on their cars, in capital murder trial.

[25] Jury 230 131(2)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(2) k. Discretion of court. Most Cited Cases

The scope of voir dire and the propriety of particular questions is left to the sound discretion of the trial court.

[26] Jury 230 75(1)

230 Jury

230IV Summoning, Attendance, Discharge, and Compensation
230k75 Excusing and Discharging Jurors from Attendance
230k75(1) k. In general. Most Cited Cases

Defendant was not denied a fair trial by the trial court's refusal to pay the child care costs of prospective jurors who were primary care givers.

[27] Constitutional Law 92 1420

92 Constitutional Law

92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1420 k. Jury. Most Cited Cases
(Formerly 92k84.5(1))

Jury 230 33(2.15)

230 Jury

230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(2) Competence for Trial of Cause
230k33(2.15) k. View of capital punishment. Most Cited Cases

Disqualification of prospective jurors from serving on jury in capital murder trial based on their religious opposition to death penalty did not violate state and federal constitutions. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 1, Par. 4.

[28] Jury 230 108

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment prescribed for offense. Most Cited Cases

The standard for excusing a prospective juror based upon the prospective juror's views on the death penalty draws no religious or secular distinction.

[29] Criminal Law 110 2007

110 Criminal Law

110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2007 k. Time and manner of required disclosure. Most Cited Cases
(Formerly 110k700(5))

Defendant failed to show that disclosure of psychological profile prepared by state Bureau of Investigation agents during guilt-innocence phase of capital murder trial came so late as to deny him a fair trial, where profile was provided when defendant still could have used it to cross-examine state's expert and state's expert did testify to potentially exculpatory evidence contained in profile.

[30] Criminal Law 110 2007

110 Criminal Law

110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2007 k. Time and manner of required disclosure. Most Cited Cases
(Formerly 110k700(5))

Defendant failed to show that late disclosure of potentially exculpatory evidence that neighbor of murder victim overheard an argument on night of murder denied him a fair trial, where defendant knew about information at trial and used it to cross-examine police witness.

[31] Criminal Law 110 419(1.5)

110 Criminal Law

110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1.5) k. Particular determinations, hearsay inadmissible. Most Cited Cases
Homicide 203 1034

203 Homicide

203IX Evidence
203IX(D) Admissibility in General
203k1033 Incriminating Others
203k1034 k. In general. Most Cited Cases
(Formerly 203k178(1))

Limiting capital murder defendant's questions regarding other suspects did not deprive defendant of fair trial, where defendant was able to ask witnesses about other suspects without objection, answers to those questions failed to show that anyone else was connected to murders, defendant made no proffer that another person was reasonably connected to any of the murders, and defendant was prevented from asking about suspects on some occasions because he sought to elicit inadmissible hearsay.

[32] Criminal Law 110 359

110 Criminal Law

110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k359 k. Incriminating others. Most Cited Cases

A defendant is entitled to introduce relevant and admissible testimony tending to show that someone else committed the crimes for which he is being tried; however, the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the corpus delicti, or show that the other person has recently committed a crime of the same or similar nature.

[33] Criminal Law 110 2008

110 Criminal Law

110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2008 k. Sanctions for failure to disclose. Most Cited Cases
(Formerly 110k700(8))

Capital murder defendant was not entitled to continuance based on prosecution's disclosure of hair comparison crime lab report only three days before trial, where trial court noted that voir dire was expected to last four to six weeks, and trial court stated that it would provide funds for defendant to hire his own hair comparison expert, require that crime lab's microanalyst meet with defense ex parte, and conduct a separate hearing during trial to allow defense to question crime lab's microanalyst about reliability of hair comparison evidence before it was admitted. O.C.G.A. § 17-8-22.

[34] Criminal Law 110 388.2

110 Criminal Law

110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.2 k. Particular tests or experiments. Most Cited Cases

Hair comparison evidence satisfied constitutional standard of reliability to permit its admission into evidence in capital murder trial.

[35] Sentencing and Punishment 350H 1780(3)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) k. Instructions. Most Cited Cases
(Formerly 203k311)

The trial court in capital murder trial is not required to identify specific mitigating circumstances in its sentencing phase jury instruction as long as the jury is instructed that it could return a life sentence for any reason or no reason.

[36] Criminal Law 110 806(1)

110 Criminal Law

110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k806 Repetition
110k806(1) k. In general. Most Cited Cases

Trial court was not required to re-instruct jury that robbery and burglary were underlying felonies for felony murder counts when jury requested re-instruction on definitions of robbery and burglary.

[37] Criminal Law 110 663

110 Criminal Law

110XX Trial
110XX(C) Reception of Evidence
110k663 k. Introduction of documentary and demonstrative evidence. Most Cited Cases

Use of screen to enlarge photographs of crime scenes and murder victims was not improper, absent evidence of distortion.

[38] Criminal Law 110 404.36

110 Criminal Law

110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.36 k. In general. Most Cited Cases

Criminal Law 110 404.70

110 Criminal Law

110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.70 k. Clothing. Most Cited Cases

State was not required to prove chain of custody for one of murder victim's sweat pants and pillow, as they were non-fungible items that could be recognized by observation and witnesses identified items as evidence found at crime scene.

[39] Criminal Law 110 1171.1(6)

110 Criminal Law

110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(6) k. Appeals to sympathy or prejudice; argument as to punishment. Most Cited Cases

Criminal Law 110 2152

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2152 k. Attacks on accused. Most Cited Cases
(Formerly 110k724(1))

Prosecutor's characterizations of defendant as a

"misogynistic, woman hating demon of the devil" and "Satan's lap dog," while improper, did not warrant reversal of convictions for four counts of malice murder, four counts of rape, and two counts of aggravated sodomy in light of overwhelming evidence of defendant's guilt.

[40] Witnesses 410 255(11)

410 Witnesses

410III Examination
410III(A) Taking Testimony in General
410k253 Refreshing Memory
410k255 Memoranda or Other Writings Which May Be Used
410k255(11) k. Time of making memoranda. Most Cited Cases

Investigator for medical examiner's office could refresh his recollection as to whom he delivered crime scene evidence based on report generated seven years after investigator delivered evidence, in felony murder trial. O.C.G.A. § 24-9-69.

[41] Criminal Law 110 388.3

110 Criminal Law

110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.3 k. Foundation or authentication in general. Most Cited Cases

Chain of custody for crime scene evidence delivered by investigator to crime lab was established by testimony of crime lab employee that she received evidence from investigator, even though investigator did not remember to whom he delivered evidence.

[42] Homicide 203 877

203 Homicide

203VIII Indictment and Information
203k871 Variance Between Accusation and Proof
203k877 k. Means, instrument, or device, and use thereof. Most Cited Cases
(Formerly 203k142(7))

Variance between state's allegation in indictment that defendant choked victim to death with his hands and evidence at trial showing that victim was choked with a ligature was not fatal.

[43] Sentencing and Punishment 350H 1789(3)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and reservation in lower court of grounds of review. Most Cited Cases
(Formerly 203k325)

Whether trial court erred in excluding on hearsay grounds testimony of defense witness during sentencing phase of capital murder trial regarding the content of letters she had received from defendant was not preserved for review, absent proffer by defendant that would enable court to determine whether mitigating influence of excluded testimony outweighed harm from violation of hearsay rule.

[44] Sentencing and Punishment 350H 1762

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 k. Other offenses, charges, or misconduct. Most Cited Cases
(Formerly 203k358(1))

Non-statutory aggravating evidence about several previous burglaries and other offenses committed by defendant was properly admitted during sentencing phase of capital murder trial, where state presented reliable evidence about offenses.

[45] Sentencing and Punishment 350H 1771

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of proof. Most Cited Cases
(Formerly 203k358(1))

There is no requirement that other crime evidence in the sentencing phase of capital murder trial be proven beyond a reasonable doubt.

[46] Criminal Law 110 2079

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2076 Statements as to Facts and Arguments
110k2079 k. Exhibits and illustrations. Most Cited Cases
(Formerly 110k715)

Prosecutor did not exceed permissible range of closing argument by briefly using cartoon, which depicted a jury returning verdict of "not guilty by reason of insanity, ethnic rage, sexual abuse, you name in," in order to urge jury to hold defendant solely responsible for his crimes, in sentencing phase of capital murder trial, where defendant offered testimony of minister that defendant's community was a poor, African-American community where people knew how the death penalty had been used.

[47] Criminal Law 110 2072

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2071 Scope of and Effect of Summing Up
110k2072 k. In general. Most Cited Cases
(Formerly 110k708.1)

The permissible range of closing argument is wide and counsel's illustrations may be as various as the resources of his genius, his argumentation as full and profound as his learning can make it, and he may, if he will, give play to his wit, or wing to his imagination.

[48] Criminal Law 110 2089

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In general. Most Cited Cases
(Formerly 110k719(1))

Counsel may not inject extrinsic, prejudicial matters that have no basis in the evidence in his or her closing argument.

[49] Criminal Law 110 1144.10

110 Criminal Law

110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.10 k. Conduct of trial in general. Most Cited Cases

When reviewing propriety of prosecutor's closing argument, appellate court will not assume that the prosecutor intended his remarks to have their most damaging and erroneous meaning.

[50] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases
(Formerly 110k723(1))

Comparing defendant to other infamous serial killers when arguing that families of those killers would also have said nice things about them when they were children did not exceed proper scope of closing argument, in sentencing phase of capital murder trial.

[51] Criminal Law 110 2210

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2191 Action of Court in Response to Comments or Conduct
110k2210 k. Sentencing phase arguments. Most Cited Cases
(Formerly 110k730(14))

Defendant was not entitled to reversal of death sentence based on prosecutor's mention of sentences received by other infamous serial killers during closing argument, in sentencing phase of capital murder trial, where trial court sustained defendant's objection to mention of sentences, and trial court issued curative instruction.

[52] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases
(Formerly 110k723(1))

Prosecution's comments during closing argument that defendant should not be spared death penalty so that he could get free room and board and a television in prison were not improper, in sentencing phase of capital murder trial.

[53] Criminal Law 110 1037.1(2)

110 Criminal Law

110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Unprofessional remark of prosecutor during closing argument that "if anal sodomy is your thing, prison isn't a bad place to be," did not warrant reversal of death sentence imposed in on defendant convicted of four counts of malice murder, four counts of rape, and two counts of aggravated sodomy; defendant did not object to remark and there was no reasonable probability that isolated remark changed result of sentencing phase.

[54] Criminal Law 110 2163

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2161 Sentencing Phase Arguments
110k2163 k. In particular prosecutions. Most Cited Cases
(Formerly 110k720(1))

Prosecutor's argument that defendant never repented or said he was sorry, made during closing argument in sentencing phase of capital murder trial, was not comment on defendant's right to remain silent, where prosecutor had asked mitigating witnesses who had spoken or corresponded with defendant after his arrest whether he had ever expressed remorse or said he was sorry. U.S.C.A. Const.Amend. 5.

[55] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases
(Formerly 110k723(1))

It was not improper for prosecutor to argue that a death sentence would send a message and deter other killers, in sentencing phase of capital murder trial.

[56] Criminal Law 110 1037.1(2)

110 Criminal Law

110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Unobjected to religious references made by prosecution during closing argument in capital murder trial were not so inflammatory as to require reversal of death sentence, where prosecutor did not argue that divine law called for death sentence.

[57] Criminal Law 110 1037.1(2)

110 Criminal Law

110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular statements, arguments, and comments. Most Cited Cases

Prosecutor's improper argument asking jurors to put themselves in victims' place, to which defendant did not object, did not warrant reversal of death sentence, given amount of evidence in aggravation.

[58] Criminal Law 110 2151

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2145 Appeals to Sympathy or Prejudice
110k2151 k. Putting jurors in place of victim; "golden rule" arguments. Most Cited Cases
(Formerly 110k723(1))

It is improper to ask the jury to imagine themselves in the victim's place.

[59] Criminal Law 110 2079

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2076 Statements as to Facts and Arguments
110k2079 k. Exhibits and illustrations. Most Cited Cases
(Formerly 110k715)

Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases
(Formerly 110k723(1))

Simulated tearing of Georgia law book by prosecutor during closing argument in sentencing phase of capital murder trial did not constitute improper reading of the law to jury, where prosecutor was arguing that if this case did not result in death sentence, then no case could possibly result in death sentence.

[60] Sentencing and Punishment 350H 1780(2)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and conduct of counsel. Most Cited Cases
(Formerly 110k723(1))

It is not improper for the state to argue that the defendant deserves the harshest penalty, in sentencing

phase of capital murder trial.

[61] Criminal Law 110 2077

110 Criminal Law

110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2076 Statements as to Facts and Arguments
110k2077 k. In general. Most Cited Cases
(Formerly 110k713)

Prosecutors are afforded considerable latitude in imagery and illustration when making their arguments.

[62] Sentencing and Punishment 350H 1667

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1666 Nature or Degree of Offense
350Hk1667 k. In general. Most Cited Cases
(Formerly 110k1213.8(8))

The death penalty for rape is not unconstitutional when the victim is killed.

[63] Sentencing and Punishment 350H 1659

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1659 k. Effect of applying invalid factor. Most Cited Cases
(Formerly 203k357(7))

If the aggravating circumstances found by the jury in support of a death sentence for rape are eliminated because they allegedly overlap with the aggravating circumstances supporting the death sentence for the murder, there are still sufficient statutory aggravating circumstances to support death sentence.

[64] Jury 230 131(8)

230 Jury

230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal opinions and conscientious scruples. Most Cited Cases

Capital murder defendant was not entitled to ask prospective jurors about parole during voir dire or to present evidence about defendant's parole eligibility, where life imprisonment without parole was not a sentencing opinion at defendant's trial. O.C.G.A. § 17-10-16(a).

[65] Sentencing and Punishment 350H 1758(4)

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1758 Death Penalty
350Hk1758(4) k. Execution of death sentence. Most Cited Cases
(Formerly 203k358(1))

Evidence on the nature of execution by electrocution is not admissible in the sentencing phase of capital murder trial.

[66] Sentencing and Punishment 350H 1681

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing while committing other offense or in course of criminal conduct. Most Cited Cases

(Formerly 203k357(7))

Sentencing and Punishment 350H 1683

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More than one killing in same

transaction or scheme. Most Cited Cases
(Formerly 203k357(7))

Death sentences imposed on defendant convicted of four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy were not imposed under influence of passion, prejudice, or other arbitrary factor and were not excessive or disproportionate to penalty imposed in similar cases. O.C.G.A. § 17-10-35(c)(1, 3).

****496 *849** Michael Mears,Charlotta Norby, Atlanta, for appellant.

Paul L. Howard, Jr., District Attorney, Bettieanne C. Hart, Peggy R. Katz, Assistant District Attorneys, Thurbert E. Baker, Attorney General, Susan V. Boleyn, Senior Assistant Attorney General, Allison B. Goldberg, Assistant Attorney General, for appellee.

***829** HINES, Justice.

A jury convicted Lyndon Fitzgerald Pace of four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy. The jury recommended a death sentence for each malice murder conviction after finding beyond a reasonable doubt the existence of 19 statutory aggravating circumstances. OCGA § 17-10-30(b)(2), (7). Pace appeals and we affirm.[FN1]

FN1. Pace was indicted on June 22, 1993, for malice murder (four counts), felony murder (four counts), rape (four counts), and aggravated sodomy (two counts). The State filed a notice to seek the death penalty on August 13, 1993. Pace's trial took place from January 22 to March 7, 1996. Pace was convicted of all counts on March 5, 1996, and the jury recommended four death sentences for the malice murder convictions on March 7, 1996. In addition to the death sentences, the trial court sentenced Pace to six consecutive life sentences for the rape and aggravated sodomy convictions. The felony murder convictions were vacated by operation of law. *Malcolm v. State,* 263 Ga. 369(4), 434 S.E.2d 479 (1993). Pace filed a motion for new trial on March 14, 1996, which was amended on August 12, 1997, and denied by the trial court on July 8, 1998. Pace filed a notice of appeal on August 7, 1998, and this case was docketed in this Court on February 2, 1999. This case was orally argued on May 5, 1999.

[1] 1. The evidence adduced at trial shows that four women were murdered in their Atlanta homes in 1988 and 1989. On August 28, 1988, a roommate found the nude body of 86-year-old Lula Bell McAfee lying face-down on her bed. She had been sexually assaulted and strangled to death with a strip of cloth. On September 10, 1988, Mattie Mae McLendon, 78 years old, was found lying dead on her bed covered by a sheet. She had been sexually assaulted and strangled to death. No ligature was found. On February 4, 1989, the police discovered the body of 79-year-old Johnnie Mae Martin lying on her bed nude from the waist down. She had been sexually assaulted and ***830** strangled to death with a shoelace. On March 4, 1989, the brother-in-law of 42-year-old Annie Kate Britt found her body lying on her bed. She had been sexually assaulted and strangled****497** to death with a sock that was still knotted around her neck.

The police determined that the killer entered each victim's home by climbing through a window. Each attack occurred in the early morning hours. Vaginal lacerations and the presence of semen indicated that the victims had been raped and two of the women had been anally sodomized. The medical examiner removed spermatozoa from each victim and sent the samples to the FBI lab. DNA testing revealed the same DNA profile for each sperm sample, indicating a common perpetrator.

At 3:00 a.m. on September 24, 1992, 69-year-old Sarah Grogan confronted an intruder in her kitchen. She managed to obtain her gun and fire a shot which forced him to flee. The police discovered that the intruder entered Ms. Grogan's house by climbing through a window. A crime scene technician lifted fingerprints from Ms. Grogan's kitchen. At 2:00 a.m. on September 30, 1992, Susie Sublett, an elderly woman who lived alone, awoke to discover an intruder taking money from her purse in her bedroom. Although the intruder was armed and threatened to "blow [her] brains out," she fought with him and managed to flee to a neighbor's house. The neighbor called

the police. The police determined that the intruder entered Ms. Sublett's house by climbing through a window. A crime scene technician lifted fingerprints from Ms. Sublett's window screen.

The fingerprints from the Sublett and Grogan crime scenes matched Pace's fingerprints, which were already on file with the police. Pace was arrested and agreed to give hair and blood samples to the police. Pace's pubic hair was consistent with a pubic hair found on the sweat pants Annie Kate Britt wore on the night she was murdered, and with a pubic hair found on a sheet near Johnnie Mae Martin's body. A DNA expert also determined that Pace's DNA profile matched the DNA profile taken from the sperm in the McAfee, Martin, McLendon, and Britt murders. The expert testified that the probability of a coincidental match of this DNA profile is one in 500 million in the McAfee, Martin, and Britt cases, and one in 150 million in the McLendon case.[FN2]

> FN2. The expert obtained six-probe matches in the McAfee, Martin, and Britt cases, and a four-probe match in the McLendon case.

The evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt proof of Pace's guilt of four counts of malice murder, four counts of felony murder, four counts of rape, and two counts of aggravated sodomy. ***831***Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence was also sufficient to authorize the jury to find beyond a reasonable doubt the 19 statutory aggravating circumstances which support his death sentences for the murders. *Jackson v. Virginia,* supra; OCGA § 17-10-35(c)(2).

[2]2. Pace was arrested for the crimes against Ms. Sublett on October 2, 1992. At that time, the police were investigating the September 1992 murder of an elderly woman named Mary Hudson that they believed might be connected to the murders of McAfee, McLendon, Martin, and Britt. Because of the similarities between the Sublett robbery and the Hudson murder, the police sought Pace's consent to obtain hair and blood samples. The consent form that Pace signed states, in part: "I fully understand that these hair and bodily fluid samples are to be used against me in a court of law and I am in agreement to give these hair samples for further use in this particular investigation." The form further stated that Pace was a suspect in a murder which occurred on September 17 and the "name of the murder victim in this case is Mary Hudson." There was no mention of the other four murders. The FBI and GBI crime labs were subsequently unable to match Pace's DNA or hair to any evidence from the Hudson murder, but were able to obtain matches with evidence from the McAfee, McLendon, Martin, and Britt cases.

Pace claims that he did not voluntarily consent to the drawing of his blood and the collection of his hair for use in the investigation of the four murders for which he was convicted. He argues that the police exceeded****498** the bounds of his consent by using his blood and hair in investigations of murders other than the Hudson murder, and that the police obtained his consent through deceit because he believed that his hair and blood would be used only in the Hudson investigation. See *State v. Long,* 232 Ga.App. 445, 502 S.E.2d 298 (1998); *State v. Jewell,* 228 Ga.App. 825, 492 S.E.2d 706 (1997); *State v. Gerace,* 210 Ga.App. 874, 437 S.E.2d 862 (1993); *Beasley v. State,* 204 Ga.App. 214(1), 419 S.E.2d 92 (1992). After a suppression hearing, the trial court found that Pace's consent was voluntary, and we agree with the trial court. Most of the cases cited by Pace in support of his argument involve the giving of consent under the implied consent statute to test blood for the presence of alcohol or drugs while operating a motor vehicle. See OCGA § 40-5-55; *Long,* supra (defendant charged with possession of cocaine after consenting to blood test upon receiving implied consent warning); *Gerace,* supra (defendant charged with rape and aggravated sodomy based on DNA obtained from blood sample drawn after consent under implied consent statute). The implied consent warning specifically limits the purpose of the testing to a determination of whether the driver is under the influence of alcohol or drugs. OCGA § 40-5-67.1.

Pace's situation is distinguishable from an implied consent case. ***832** See *Bickley v. State,* 227 Ga.App. 413(1)(b), 489 S.E.2d 167 (1997); *Gadson v. State,* 223 Ga.App. 342(4), 477 S.E.2d 598 (1996). The consent form signed by Pace states that his blood and hair will be used against

him in a court of law and that he was a suspect in the Hudson murder. However, unlike an implied consent warning, the form does not limit the use of the blood or hair to only the Hudson murder investigation or to any particular purpose, and there is no evidence that Pace placed any limits on the scope of his consent. See *Gadson,* supra. Compare *Beasley,* 204 Ga.App. at 214-217(1), 419 S.E.2d 92 (defendant's consent involuntary because he was told his urine sample would be used to determine bond eligibility, not for criminal prosecution). The police were not required to explain to Pace that his blood or hair could be used in prosecutions involving other victims, or that he had a right to refuse consent. *Gadson,* supra; *Woodruff v. State,* 233 Ga. 840(3), 213 S.E.2d 689 (1975). Further, like a fingerprint, DNA remains the same no matter how many times blood is drawn and tested and a DNA profile can be used to inculpate or exculpate suspects in other investigations without additional invasive procedures. It would not be reasonable to require law enforcement personnel to obtain additional consent or another search warrant every time a validly-obtained DNA profile is used for comparison in another investigation. See *Bickley,* supra.

Additional evidence at the suppression hearing shows that when Pace gave his consent he was 28 years old, was advised of and waived his rights, was not coerced or threatened, was not under the influence of drugs or alcohol, and was not handcuffed. The evidence does not support Pace's claim that there was deceit involved in obtaining his consent. Upon viewing the totality of the circumstances, we conclude that the trial court did not err in finding Pace's consent to be voluntary. See *Raulerson v. State,* 268 Ga. 623(2)(a), 491 S.E.2d 791 (1997). In addition, Pace was arrested pursuant to a valid arrest warrant for the armed robbery of Ms. Sublett. We find no error with the trial court's rulings regarding Pace's consent to the police obtaining samples of his hair and blood.

[3][4] 3. The trial court did not abuse its discretion by denying Pace's motion to sever the murder counts.

> Two or more offenses may be joined in one charge when the offenses are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan and where it would be almost impossible to present to a jury evidence of one of the crimes without permitting evidence of the other.

Bright v. State, 265 Ga. 265(7), 455 S.E.2d 37 (1995). See also ***833***Williams v. State,* 251 Ga. 749(16), 312 S.E.2d 40 (1983); *Dingler v. State,* 233 Ga. 462, 211 S.E.2d 752 (1975). Even if severed, evidence of all four murders would have been admissible in the same trial to show identity. *Williams v. State,* 261 Ga. 640(2)(b), 409 S.E.2d 649 (1991).

****499** [5][6] 4. The State is permitted to charge a defendant with malice murder and felony murder for the same homicide and proceed to trial and obtain convictions on both murder counts. *Malcolm v. State,* 263 Ga. 369(4), 434 S.E.2d 479 (1993); *Dunn v. State,* 251 Ga. 731(5), 309 S.E.2d 370 (1983). Since Pace was not sentenced for his felony murder convictions, there is no error. *Malcolm,* supra.

[7] 5. Pace claims that the trial court failed to grant an order limiting conversations between the bailiffs and the jury. However, there is no allegation of any improper conduct between the bailiffs and the jury. Therefore, this contention presents no error.

[8][9] 6. Pace argues that 27 of his pretrial motions were denied without an evidentiary hearing, and that the failure of the trial court to hold an evidentiary hearing on each motion abridged his "right to be heard." The record shows that Pace was allowed to file any motions he desired accompanied by supporting briefs. The trial court also held hearings at which Pace's counsel was afforded the opportunity to argue each motion. Contrary to Pace's assertion, the trial court is not required by the Unified Appeal Procedure to hold an evidentiary hearing on every motion but is required to hold a hearing where each motion previously filed is heard. Unified Appeal Procedure Rule II(B). The trial court complied with the Unified Appeal Procedure and Pace was given the opportunity to be heard on every motion. Also, Pace could have made an evidentiary proffer with regard to each motion and did make proffers for some of these motions. See *Mincey v. State,* 251 Ga. 255(2), 304 S.E.2d 882 (1983). We further note, as did the trial court, that most of these motions have been repeatedly decided adversely to

similarly situated defendants by this Court.[FN3] Id. We find no error.

FN3. The 27 pretrial motions decided without an evidentiary hearing include: a motion to bar execution by electrocution, several motions challenging the constitutionality of the death penalty, a motion to require the district attorney to respond to Pace's motions in writing, a motion to require the judge to reveal any basis for recusal, a motion to remove the Georgia flag from the courtroom, a motion to bar victim-impact evidence, a motion to make the Georgia statutes providing for victim-impact evidence non-retroactive, a motion to pay current wages and day care costs to jurors who are primary caregivers, motions to strike the murder, rape and aggravated sodomy statutes as unconstitutional, and a motion to make the jurors' notes part of the record.

[10][11][12][13][14] 7. "The death qualification of prospective jurors is not unconstitutional." *Cromartie v. State,* 270 Ga. 780(5), 514 S.E.2d 205 (1999). Pace complains that 18 prospective jurors were biased in favor of the ***834** death penalty and were erroneously qualified to serve by the trial court. "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.' " *Greene v. State,* 268 Ga. 47, 48, 485 S.E.2d 741 (1997), quoting *Wainwright v. Witt,* 469 U.S. 412, 424(II), 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Our review of the trial court's qualification of the prospective jurors is based upon a consideration of the voir dire as a whole, and we must afford deference to the trial court's resolution of any equivocations and conflicts in the prospective jurors' responses. *Greene,* supra at 49, 485 S.E.2d 741. A prospective juror is not subject to excusal for cause for merely leaning for or against a death sentence. Id. at 53, 485 S.E.2d 741; *Jarrell v. State,* 261 Ga. 880(1), 413 S.E.2d 710 (1992). After reviewing the voir dire transcript, we conclude that the trial court did not err by denying Pace's motions to disqualify prospective jurors who were allegedly predisposed to a death sentence.

[15][16] 8. The trial court did not err by failing to excuse several prospective jurors for cause due to exposure to pretrial publicity and alleged bias against Pace. " 'In order to disqualify a juror for cause, it must be established that the juror's opinion was so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence.' " *DeYoung v. State,* 268 Ga. 780(4), 493 S.E.2d 157 (1997), quoting *Chancey v. State,* 256 Ga. 415(3)(B), 349 S.E.2d 717 (1986). The record shows ****500** that these jurors could set their opinions aside and decide the case based on the evidence presented at trial and the trial court's instructions. See id.

[17][18][19] 9. Pace claims that the trial court erred by excusing four prospective jurors for cause. Prospective jurors Williams and Oldham knew Pace when he was a boy, could not be impartial, and could never vote for the death penalty. The trial court was authorized to excuse them for cause. *Wainwright,* 469 U.S. at 424(II), 105 S.Ct. 844; *Greene,* 268 Ga. at 48-50, 485 S.E.2d 741. Prospective juror Holland was also properly removed for cause after she stated she was opposed to the death penalty, had no doubt she would always vote for a life sentence, and her views against the death penalty would impair her consideration of the guilt-innocence phase evidence. Id. Prospective juror Russell claimed a hardship due to anxiety attacks. He said that during these attacks he gets "fatigued out," his thinking becomes confused and "off," and he once passed out. Against doctor's orders, he had stopped taking his medication because he did not want it to affect his mind. When asked what contributes to his anxiety attacks, he mentioned "things happening in society" like "killing." He stated that Pace's case scared him and he did not think he could be fair and impartial because he would "start getting nervous." The trial court was authorized to remove this ***835** juror for cause. See *Brown v. State,* 268 Ga. 354(3), 490 S.E.2d 75 (1997) (whether to strike a juror for cause lies within the trial court's discretion).

[20] 10. Pace contends that the trial court erred by failing to excuse for cause two prospective jurors with ties to law enforcement. Prospective juror Gholston was a corrections officer and prospective juror Jester was a security guard who had applied to join the Atlanta Police Department.

However, since neither prospective juror was a sworn police officer with arrest power, they were not subject to an excusal for cause on this basis. *Barnes v. State,* 269 Ga. 345(8), 496 S.E.2d 674 (1998); *Thompson v. State,* 212 Ga.App. 175(1), 442 S.E.2d 771 (1994) (corrections officers without arrest power are not automatically excused for cause); *Dixon v. State,* 180 Ga.App. 222(5), 348 S.E.2d 742 (1986) (private security guard not subject to automatic excusal for cause).

[21] 11. Pace claims that the State improperly struck female prospective jurors based on their gender. *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Tedder v. State,* 265 Ga. 900(2), 463 S.E.2d 697 (1995). The State used eight of ten peremptory strikes to remove females from the jury. Pace made a *J.E.B.* motion regarding five of the women struck by the State and the trial court required the State to give reasons for these strikes. The main reason given for striking these five jurors was that each had expressed reservations about the imposition of the death penalty; the record supports this reason and the other reasons given by the State. Therefore, we conclude that the State adequately explained each strike "on a basis which was 'gender-neutral, reasonably specific, and related to the case.' " *Berry v. State,* 268 Ga. 437(2), 490 S.E.2d 389 (1997), quoting *Tedder,* supra. See also *Tharpe v. State,* 262 Ga. 110(6), 416 S.E.2d 78 (1992) (a prospective juror's aversion to the imposition of a death sentence is an adequate reason to justify a peremptory strike). We find no error with the trial court's denial of Pace's *J.E.B.* motion.

[22] 12. Bruce Harvey, a well-known attorney, was one of the lawyers representing Pace at trial. During general voir dire of all the prospective jurors, the trial court asked if anyone had formed or expressed an opinion regarding Pace's guilt or innocence. A juror responded in a manner that Pace claims should have disqualified the entire panel. The colloquy went as follows:

TRIAL COURT: Just have a seat and we'll come back to you. Anyone else?

PROSPECTIVE JUROR: Juror number 7.

TRIAL COURT: You have formed and expressed an opinion?

PROSPECTIVE JUROR: When I saw Mr. Harvey in the room, I said most of his clients-

***836** TRIAL COURT: No. I just wanted to know have you expressed an opinion?

PROSPECTIVE JUROR: Yes, I have.

****501** Pace moved to disqualify the entire panel based on these remarks, but the trial court denied the motion. We conclude that Pace shows no harm from this ruling because the prospective juror was stopped before she said anything prejudicial, if she was planning to say anything prejudicial. See *Robinson v. State,* 229 Ga. 14(1), 189 S.E.2d 53 (1972) (harm as well as error must be shown to authorize a reversal).

[23] 13. Contrary to Pace's assertion, the trial court did not tell the prospective jurors that they were expected to convict Pace and proceed to the second phase of the trial. Informing prospective jurors that death penalty trials are conducted in two phases, with the second phase conditional on a guilty verdict in the first phase, is not improper.

[24][25] 14. The trial court did not abuse its discretion by refusing to permit Pace to question prospective jurors about bumper stickers they had on their cars. *Alderman v. State,* 254 Ga. 206(3), 327 S.E.2d 168 (1985). The trial court also did not impermissibly restrict the scope of Pace's voir dire of prospective jurors. The scope of voir dire and the propriety of particular questions are left to the sound discretion of the trial court, and the voir dire in this case was sufficient to ascertain any bias held by a prospective juror. See *Waldrip v. State,* 267 Ga. 739(9), 482 S.E.2d 299 (1997).

[26]15. Pace was not denied a fair trial by the trial court's refusal to pay the child care costs of prospective jurors who were primary caregivers. *McMichen v. State,* 265 Ga. 598(33), 458 S.E.2d 833 (1995).

[27][28]16. Pace claims the trial court erred by excusing for cause 19 prospective jurors because they would never

vote to impose the death penalty for religious reasons. He contends that the removal of a juror due to religious opposition to the death penalty violates the State and Federal Constitutions. This argument has been decided adversely to Pace. *Cromartie v. State,* supra. "The standard for excusing a prospective juror based upon the prospective juror's views on the death penalty draws no religious or secular distinction." Id. The record shows that the trial court did not erroneously excuse any prospective jurors who were biased against the death penalty. See *Wainwright,* 469 U.S. at 424(II), 105 S.Ct. 844; *Greene,* 268 Ga. at 48-50, 485 S.E.2d 741.

[29] 17. Pace claims that the State failed to provide exculpatory evidence to him in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). During the guilt-innocence phase of the trial, a medical examiner testified about the autopsies of the four victims, three of which he had personally performed or supervised. He ***837** testified about the fourth autopsy pursuant to a stipulation by Pace. After the medical examiner completed his testimony, while the State was still presenting its case, a prosecutor noticed a report that she had not seen before about the murders in the notebook of a State's witness. Completed before Pace's arrest, the report is a psychological profile prepared by GBI agents about the killer of the four women. It appears to summarize what was known about the circumstances of the murders and speculates about the killer's characteristics and the manner in which the crimes were committed. The prosecutor immediately provided the report to Pace's counsel.

After receiving the report, Pace moved for a mistrial on *Brady* grounds. Pace claimed that some of the information in the report was exculpatory and that the report differed significantly from the medical examiner's testimony. The report contains information supposedly provided by medical examiners that two of the women had been vaginally penetrated by an object other than a penis (possibly a hand) and that the anal sodomy had occurred postmortem. Pace also moved to strike the medical examiner's testimony and withdraw his stipulation. Pace moved for a continuance to contact the authors of the report, which was granted.

The record shows that the medical examiners who performed the autopsies and the GBI agents who authored the report were contacted. The medical examiners denied supplying any reports to law enforcement personnel in addition to the autopsy reports, which were provided to Pace before trial. ****502** They maintained that they had never said the victims were not raped. One of the GBI agents who authored the report said there was nothing in his notes indicating that he had spoken with the medical examiners. In addition, the transcript of the medical examiner's trial testimony shows that he did in fact testify before the jury that anal trauma to one of the victims probably occurred postmortem. The trial court ruled that Pace had obtained all the information regarding the report and denied the motions for a further continuance, a strike of the medical examiner's testimony, and a mistrial. The State had not rested in the guilt-innocence phase, and the trial court informed Pace that he could recall the medical examiner for additional cross-examination. Pace declined.

[30] We find no error with the trial court's rulings regarding the psychological profile. The information that Pace alleges was exculpatory (the possibility that the vaginal penetration of two of the victims was by an object other than a penis and that the anal sodomy had been postmortem) was in the report provided to Pace during the trial when he could still have used it to cross-examine the medical examiner. See *Dennard v. State,* 263 Ga. 453(4), 435 S.E.2d 26 (1993) (there is no *Brady* violation when the alleged exculpatory evidence is available to the accused at trial); ***838***Castell v. State,* 250 Ga. 776(2)(b), 301 S.E.2d 234 (1983). Moreover, the medical examiner did testify that the anal sodomy of one of the victims may have been postmortem. See *Davis v. State,* 261 Ga. 382(8)(b), 405 S.E.2d 648 (1991) (there is no *Brady* violation when the alleged exculpatory evidence is presented to the jury at trial). Pace has failed to show that the disclosure of the psychological profile came so late as to deny him a fair trial. See *Dennard,* supra; *Blankenship v. State,* 258 Ga. 43(4), 365 S.E.2d 265 (1988). Pace's additional *Brady* claim, that the State suppressed information that a neighbor of Annie Kate Britt heard an argument on the night of her murder, is without merit for the same reason; Pace knew this information at trial and used it to cross-examine a police witness. See *Dennard,* supra; *Davis,* supra.

[31][32] 18. Several times during the guilt-innocence phase, Pace attempted to cross-examine witnesses about other suspects in the murders and the trial court sustained the State's objections to the questions. Pace claims the repeated interference with defense questioning about other suspects violated his right to a fair trial. A defendant is entitled to introduce relevant and admissible testimony tending to show that someone else committed the crimes for which he is being tried. *Klinect v. State,* 269 Ga. 570(3), 501 S.E.2d 810 (1998). "However, the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the corpus delicti, or show that the other person has recently committed a crime of the same or similar nature." Id. The record shows that Pace was sometimes able to ask witnesses about other suspects without objection, and that the answers to these questions failed to show that anyone else was connected to the murders. With regard to the questions that Pace was prevented from asking, there is no defense proffer that shows another person was reasonably connected to any of the murders. See id.; *Croom v. State,* 217 Ga.App. 596(3), 458 S.E.2d 679 (1995) (evidence that only casts a bare suspicion on another or raises only a conjectural inference of another's guilt is not admissible). In addition, Pace was often prevented from asking about other suspects because he sought to elicit inadmissible hearsay. After review of the record, we conclude that the trial court did not abuse its discretion by limiting Pace's questions regarding other suspects. *Klinect,* supra.

19. The burglaries of Ms. Sublett's and Ms. Grogan's homes were properly admitted as similar transactions to show identity, scheme, and course of conduct. See *Freeman v. State,* 264 Ga. 27(1), 440 S.E.2d 181 (1994); *Williams v. State,* 261 Ga. at 640(2), 409 S.E.2d 649.

20. Pace's claim that a State's witness provided false testimony is without merit. A police detective testified that Pace was arrested pursuant to an arrest warrant for the murder of Ms. McAfee. After Pace objected, the witness corrected himself and stated that ****503** Pace was ***839** not originally arrested for Ms. McAfee's murder. We find no error.

21. Pace argues two errors with regard to the State's use of hair comparison evidence.

[33] (a) *Denial of the motion for continuance.* At a hearing in September 1995, a prosecutor stated that he would not introduce hair comparison evidence. However, on January 19, 1996, three days before the start of trial, the State served a copy of a Crime Lab report on Pace showing that Pace's pubic hair was microscopically similar to pubic hairs found at two of the murder scenes. Pace moved for a continuance to prepare to counter this evidence. The prosecutor stated that he had wanted the Crime Lab to examine the hairs much earlier, but that the Crime Lab had refused because it was their policy not to further test "trace evidence" when they already had a DNA match. The prosecutor managed to prevail on the Crime Lab to conduct the hair testing in January 1996, and the prosecutor gave the report to the defense as soon as it was received. The trial court denied Pace's motion for a continuance after noting that voir dire was expected to last four-six weeks (the guilt-innocence phase did not start until February 20). The trial court also stated that it would provide funds for Pace to hire his own hair comparison expert, require the Crime Lab's microanalyst to meet with the defense ex parte, and conduct a separate hearing during the trial to allow the defense to question the Crime Lab's microanalyst about the reliability of hair comparison evidence before it was admitted. We find no error. The remedy for late notice of a scientific report is a continuance at the trial court's discretion. See OCGA § 17-8-22; *Wade v. State,* 258 Ga. 324(6), 368 S.E.2d 482 (1988); *Wilburn v. State,* 199 Ga.App. 667(3), 405 S.E.2d 889 (1991). Because of the time remaining before the presentation of the State's case and the measures taken to permit the defense to prepare for the State's anticipated hair comparison evidence, we find that the trial court did not abuse its discretion in denying the motion for a continuance. See OCGA § 17-8-22; *Johnson v. State,* 209 Ga.App. 395(1), 433 S.E.2d 638 (1993).

[34] (b) *The scientific reliability of hair comparison evidence.* Pace claims that hair comparison evidence does not satisfy a constitutional standard of reliability to permit its admission in this case. See *Harper v. State,* 249 Ga. 519(1), 292 S.E.2d 389 (1982). After voir dire of her training and experience, the trial court found that the

Crime Lab's microanalyst was an expert in the field of hair comparison; we find no abuse of discretion in her acceptance as an expert. See *Carr v. State,* 267 Ga. 701(6), 482 S.E.2d 314 (1997). A hearing on the admissibility of hair comparison evidence was conducted and the trial court found this type of evidence had reached a scientific stage of reliability sufficient to satisfy the standard in *Harper.* See *Harper,* supra. Further, hair comparison evidence is not novel and has been widely ***840** accepted in Georgia courts. *Whatley v. State,* 270 Ga. 296(6), 509 S.E.2d 45 (1998); *Pye v. State,* 269 Ga. 779 (13), 505 S.E.2d 4 (1998). "Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature." *Harper,* supra. We find no error with the trial court's determination that the hair comparison evidence was admissible. See *Williams v. State,* 251 Ga. at 749(1), 312 S.E.2d 40; *Harper,* supra.

[35]22. We find no error in the denial of several of Pace's requests to charge in both phases of the trial. The trial court is not required to identify specific mitigating circumstances in its sentencing phase jury charge as long as the jury is charged that it could return a life sentence for any reason or no reason. See *Jenkins v. State,* 269 Ga. 282(24), (25), 498 S.E.2d 502 (1998).

[36] 23. The guilt-innocence phase jury charge on the consideration of hair comparison and DNA evidence was not improper. OCGA § 24-4-6. During the guilt-innocence phase deliberations, the jury requested a recharge on the definitions of robbery and burglary, which were underlying felonies for the felony murder counts, and the trial court complied. Pace claims that the recharge unduly emphasized robbery and burglary because****504** the trial court did not re-instruct the jury that these were only supporting felonies for felony murder. We find no error. See *Williams v. State,* 263 Ga. 135(4), 429 S.E.2d 512 (1993) (trial court does not err by limiting recharge to the specific question raised by the jury). Further, this claim is unsupported by the record, which shows that the trial court ensured that the jury understood at the beginning of the recharge that these felonies were underlying felonies for felony murder.

24. The FBI DNA analyst was properly qualified as a forensic DNA analysis expert. See *Carr,* 267 Ga. at 708(6), 482 S.E.2d 314. Pace's claim that the DNA expert should have been prevented from testifying about DNA test materials which were not in evidence is without merit. See *Cook v. State,* 270 Ga. 820(7), 514 S.E.2d 657 (1999). The DNA expert testified that he supervised the technicians who performed the testing and he performed the analysis of the results himself. Id. The trial court also did not improperly curtail cross-examination about criticism of the FBI laboratory.

[37]25. Photographs of the crime scenes and the victims were relevant and admissible. See *Jenkins,* 269 Ga. at 293(20), 498 S.E.2d 502. The use of a screen to enlarge the photographs was not improper because there is no evidence of distortion. *Smith v. State,* 270 Ga. 240(9), 510 S.E.2d 1 (1998).

[38] 26. The State did not need to prove a chain of custody for Ms. Britt's sweat pants and a pillow that were admitted into evidence ***841** because they are non-fungible items that can be recognized by observation. See *Mize v. State,* 269 Ga. 646(5), 501 S.E.2d 219 (1998). Witnesses identified these items as evidence found at the crime scenes and this testimony is sufficient to authorize the jury to consider them. See *Harper v. State,* 251 Ga. 183(1), 304 S.E.2d 693 (1983).

[39] 27. The State's closing argument in the guilt-innocence phase was not reversible error. See *Conner v. State,* 251 Ga. 113(6), 303 S.E.2d 266 (1983) (the permissible range of closing argument is very wide). The argument that the Crime Lab microanalyst's work had been "peer-reviewed" was proper because the microanalyst testified that her work had been peer-reviewed. The comment that Pace's hair "matched" crime scene hairs was a permissible inference, see *Todd v. State,* 261 Ga. 766(2)(a), 410 S.E.2d 725 (1991); in addition, after Pace's objection, the prosecutor clarified that the hairs were "microscopically similar, such as to have a common origin." The "send a message" argument is permissible in the guilt-innocence phase. See *Philmore v. State,* 263 Ga. 67(3), 428 S.E.2d 329 (1993). Lastly, Pace complains that the prosecutor committed misconduct

by characterizing Pace as a "misogynistic, woman hating demon of the devil" and "Satan's lap dog." He moved for a mistrial, which was denied by the trial court. We find that these characterizations of the defendant were unprofessional and should not have been made. See *Simmons v. State,* 266 Ga. 223(6)(b), 466 S.E.2d 205 (1996); *Bell v. State,* 263 Ga. 776, 778, n. 1, 439 S.E.2d 480 (1994). However, the grant of a mistrial for improper argument is a matter largely within the trial court's discretion, *Jordan v. State,* 247 Ga. 328(11), 276 S.E.2d 224 (1981), and we do not conclude that this single portion of the closing argument warrants a reversal of the convictions in light of the overwhelming evidence of Pace's guilt. See *Kyler v. State,* 270 Ga. 81(10), 508 S.E.2d 152 (1998); *Carter v. State,* 269 Ga. 891(5), 506 S.E.2d 124 (1998); *Miller v. State,* 226 Ga. 730(5), 177 S.E.2d 253 (1970). We also evaluate the possible prejudicial effect of these remarks with regard to the death sentences in enumeration 36, as part of our review to ensure that the death sentences were not improperly rendered due to the influence of passion, prejudice, and other arbitrary factors. OCGA § 17-10-35(c)(1); *Spivey v. State,* 253 Ga. 187(4), 319 S.E.2d 420 (1984) (this Court reviews the entire record to ensure that the death penalty is not arbitrarily imposed).

[40][41] 28. An investigator for the medical examiner's office testified that he transported some evidence from the murders to the Crime Lab in a sealed paper bag. However, he could not remember to whom he delivered the bag at the Crime Lab, and the trial court allowed the State to refresh his ****505** memory with a Crime Lab report generated in 1996. Pace claims that this was error because the document was created seven years after the investigator delivered the evidence. We ***842** disagree. Any document may be used to refresh the recollection of a witness, including documents not prepared by the witness. OCGA § 24-9-69; *Woods v. State,* 269 Ga. 60(3), 495 S.E.2d 282 (1998). Additionally, although the investigator still could not remember to whom he gave the bag, the chain of custody was established because an employee of the Crime Lab testified she received it from the investigator. See *Stephens v. State,* 259 Ga. 820(3), 388 S.E.2d 519 (1990).

[42] 29. There is no fatal variance resulting from the indictment alleging that Pace choked Ms. McAfee to death with his hands and the evidence at trial showing that she was choked with a ligature. See *Battles v. State,* 262 Ga. 415(5), 420 S.E.2d 303 (1992). There are no fatal variances with regard to any of the other counts in the indictment. See id.

[43] 30. In the sentencing phase, Pace presented Mary Booker, a family friend, who testified that she had received several inspiring letters from Pace while he was in jail awaiting trial. One of the letters was admitted into evidence; Ms. Booker said that she had thrown out the other letters. When Pace's counsel asked her what was in the letters she had thrown out, the State objected on hearsay grounds. The trial court sustained the objection. Pace claims that the trial court erred because the rules of evidence are relaxed in the sentencing phase of a capital trial. See *Barnes,* 269 Ga. at 357(27), 496 S.E.2d 674. However, the hearsay rule is not suspended in the sentencing phase, and the defense made no proffer to enable this Court to determine if the mitigating influence of the excluded testimony outweighed the harm from a violation of the hearsay rule. See *Smith,* 270 Ga. at 248-249(12), 510 S.E.2d 1. Under these circumstances, we find no error.

[44][45] 31. In the sentencing phase, the admission of non-statutory aggravating evidence about several previous burglaries and other offenses committed by Pace was not error. *Jefferson v. State,* 256 Ga. 821(8), 353 S.E.2d 468 (1987) (evidence of prior crimes, even if non-adjudicated, is admissible in the sentencing phase). The State presented reliable evidence about these offenses and there is no requirement that other crime evidence in the sentencing phase be proven beyond a reasonable doubt. *Ross v. State,* 254 Ga. 22(5)(d), 326 S.E.2d 194 (1985).

32. Pace complains that several parts of the prosecutor's sentencing phase closing argument were reversible error.

[46][47][48][49] (a) *Use of a cartoon.* The prosecutor used a cartoon as a visual aid during his argument. The cartoon depicted a jury returning a verdict of "not guilty by reason of insanity, ethnic rage, sexual abuse, you name it." The prosecutor argued, with regard to the cartoon, that

Pace was going to use his upbringing to claim that "it's everybody else's fault that he turned into a serial killer but his own." The prosecutor told the jury "not to go for that." Pace objected that the cartoon ***843** injected extrinsic, prejudicial matters into the trial, such as the defendant's race and social status, and moved for a mistrial. The trial court denied the motion for mistrial, after noting that one of Pace's witnesses, a minister, had testified that Pace's community is a poor, African-American community where people "know how the death penalty has been used." We find no error. The permissible range of closing argument is wide and counsel's " 'illustrations may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination.' " *Conner,* 251 Ga. at 122(6), 303 S.E.2d 266, quoting *Mitchum v. State,* 11 Ga. 615, 631 (1852). What counsel may not do is inject extrinsic, prejudicial matters that have no basis in the evidence, but Pace did present evidence about his childhood and community. See *Conner,* supra. We also will not assume that the prosecutor intended his remarks to have their most damaging (and erroneous) meaning. See *Donnelly v. DeChristoforo,* 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). After reviewing the use of the cartoon in context, we conclude ****506** that the prosecutor did not exceed the permissible range of argument by using it to briefly urge the jury to hold Pace solely responsible for his crimes, and to not be swayed by excuses for his behavior. See *Conner,* supra.

[50][51] (b) *Comparison to other serial killers.* The prosecutor compared Pace to serial killers like Bundy and Dahmer when arguing that the families of these serial killers would have also said nice things about them when they were children. Under these circumstances, this is not an improper argument. See *Robinson v. State,* 257 Ga. 194(4), 357 S.E.2d 74 (1987). The trial court sustained Pace's objection to the mention of the sentences received by these other killers, and the trial court issued curative instructions which cured any error that could result from that comment. See *Mobley v. State,* 265 Ga. 292(19), 455 S.E.2d 61 (1995).

(c) *Intent to rape a girl.* The State presented aggravating evidence that Pace had previously broken into a home and, armed with a knife, told a 15-year-old girl to take her clothes off. No sexual assault occurred because the girl faked an asthma attack. It was a reasonable inference that he intended to rape her. See *Todd,* 261 Ga. at 768(3)(a), 410 S.E.2d 725.

[52][53] (d) *Easy life in prison.* The State's argument that Pace should not be spared so he could get free room and board and a television in prison is not improper. See *Williams v. State,* 258 Ga. 281(7), 368 S.E.2d 742 (1988). The prosecutor's gratuitous remark that "if anal sodomy is your thing, prison isn't a bad place to be" was unprofessional. However, Pace did not object to this comment and there is no reasonable probability that this improper, isolated comment changed the result of the sentencing phase. See ***844***Hicks v. State,* 256 Ga. 715(23), 352 S.E.2d 762 (1987).

[54] (e) *Comment on Pace's right to silence.* The prosecutor frequently asked mitigation witnesses who had spoken or corresponded with Pace after his arrest whether he had ever expressed remorse or said he was sorry. The prosecutor then argued in closing that Pace had never repented or said he was sorry. Pace objected, but the trial court found that this argument was not a comment on Pace's right to remain silent. Under these circumstances, we conclude that the trial court did not err. See *Ledford v. State,* 264 Ga. 60(18)(b), 439 S.E.2d 917 (1994); *Ranger v. State,* 249 Ga. 315(3), 290 S.E.2d 63 (1982).

[55](f) *Deterrence.* It was not improper for the prosecutor to argue that a death sentence would "send a message" and deter other killers. See *McClain v. State,* 267 Ga. 378(4)(a), 477 S.E.2d 814 (1996).

[56] (g) *Religious reference.* The prosecutor told the jury that he anticipated that Pace's counsel would tell a New Testament parable about forgiveness and mercy, and he argued that there should not be forgiveness unless there is remorse. The prosecutor also stated in a different part of his argument that some of the jurors had said they believed in an "eye for an eye" during voir dire and that the State was now asking for an eye for an eye. Pace did not object to any religious references by the prosecutor, and the prosecutor did not argue that divine law called for a death sentence. The religious references in this case do not rise to the level of the inflammatory argument made in

Hammond v. State, 264 Ga. 879(8)(c), 452 S.E.2d 745 (1995). Therefore, after reviewing the entire argument and sentencing phase of trial, we conclude that these comments did not change the jury's exercise of discretion from life imprisonment to a death sentence. *Hammond,* supra; *Hicks,* supra.

[57][58] (h) *Putting jury in the victims' shoes.* The prosecutor told the jury to "imagine being asleep, and you wake up to hands tearing off your clothes. You wake up to hands grappling your body.... Something is tied around your neck and you are strangled." It is well settled that it is improper to ask the jury to imagine themselves in the victim's place. See *Greene v. State,* 266 Ga. 439(19)(c), 469 S.E.2d 129 (1996); *Burgess v. State,* 264 Ga. 777(20), 450 S.E.2d 680 (1994). However, Pace did not object to this improper argument and, given the amount of evidence in aggravation, we do not ****507** conclude that this argument changed the result of the sentencing phase. *Hicks,* supra.

[59][60][61] (i) *Simulated tearing of a Georgia law book.* At the conclusion of his argument, the prosecutor picked up a book, apparently Title 17 of the Official Code of Georgia Annotated, and said: "This is a Georgia law book which has the punishments and the crimes in it. If based on the evidence in this case, you don't return a death penalty verdict, you have snatched that section of the book about the death penalty out." The prosecutor then simulated tearing out a section of the book. ***845** Pace objected, claiming that the law provides how and why the death penalty may be imposed, that the jury would be instructed on the law, and that the prosecutor's argument comes close to "reading the law." The trial court overruled the objection. We find no error. Viewed in context, the prosecutor was arguing that if this severe case does not result in a death sentence, no case could possibly result in a death sentence. It is not improper for the State to argue that the defendant deserves the harshest penalty, see *Carr v. State,* 267 Ga. 547(8)(b), 480 S.E.2d 583 (1997), and the prosecutor's argument cannot be reasonably construed as "reading the law." See *Conklin v. State,* 254 Ga. 558(10), 331 S.E.2d 532 (1985). Prosecutors are afforded considerable latitude in imagery and illustration when making their arguments. See *McClain,* 267 Ga. at 385(4)(a), 477 S.E.2d 814.

[62][63]33. The trial court's sentencing phase jury charge was not improper. OCGA § 17-10-30(b)(2), (4), (7); *West v. State,* 252 Ga. 156(2), 313 S.E.2d 67 (1984). The death penalty for rape is not unconstitutional when the victim is killed. *Moore v. State,* 240 Ga. 807, 822, 243 S.E.2d 1 (1978). If the aggravating circumstances found by the jury in support of a death sentence for rape are eliminated because they allegedly overlap with the aggravating circumstances supporting the death sentences for the murders, there are still sufficient statutory aggravating circumstances to support all four death sentences. See id. We further note that the trial court sentenced Pace to life imprisonment for each rape count.

[64] 34. Life imprisonment without parole was not a sentencing option at Pace's trial. OCGA § 17-10-16(a). Therefore, it was not error for the trial court to prevent Pace from asking questions about parole during voir dire, *Burgess v. State,* 264 Ga. 777(3), 450 S.E.2d 680 (1994), and to deny argument or the presentation of evidence about Pace's parole eligibility. See *Jenkins,* 269 Ga. at 293-294(21), 498 S.E.2d 502. The trial court's response to a jury note about whether life without parole was a possible sentence was appropriate and not error. See *Potts v. State,* 261 Ga. 716(24), 410 S.E.2d 89 (1991); *Quick v. State,* 256 Ga. 780(9), 353 S.E.2d 497 (1987). The transcript contains no colloquy between the parties and the trial judge about the note, but the trial court's written (and correct) response to the jury is in the record and we therefore conclude that Pace shows no harm from the failure to transcribe the colloquy. See *Carr,* 267 Ga. at 551(2), 480 S.E.2d 583.

[65] 35. Evidence on the nature of execution by electrocution is not admissible in the sentencing phase. *Smith,* 270 Ga. at 250-251(16), 510 S.E.2d 1.

[66]36. Although the prosecutor made several improper comments during closing argument in both phases of the trial, we conclude, given the overwhelming evidence of Pace's guilt and the enormous amount of evidence in aggravation, that the death sentences in his case were not imposed under the influence of passion, prejudice, or ***846** any other arbitrary factor. OCGA § 17-10-35(c)(1). The death sentences are also not excessive or disproportionate

to the penalty imposed in similar cases, considering both the crimes and the defendant. OCGA § 17-10-35(c)(3). The cases listed in the Appendix support the imposition of the death penalty in this case as they all involve the murder of more than one person or a murder committed during the commission of a rape or burglary.

Judgment affirmed.

All the Justices concur, except BENHAM, C.J., who concurs in the judgment and in all **508 Divisions except 35, and FLETCHER, P.J., SEARS, J., and HUNSTEIN, J., who concur in part and dissent in part.

SEARS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of appellant's adjudication of guilt. However, for the reasons explained in my partial concurrence and partial dissent in *Wilson v. State*,[FN4] I would stay ruling on the constitutionality of appellant's sentence of death by electrocution until receiving guidance from the United States Supreme Court on that issue.[FN5]

FN4. 271 Ga. 811, 824, 525 S.E.2d 339 (1999).

FN5. In all capital cases, this Court is obligated to undertake a *sua sponte* review of the death sentence to determine, among other things, whether the penalty is excessive. OCGA § 17-10-35. "This penalty question is one of cruel and unusual punishment, and is for the court to decide" in all cases. *Blake v. State*, 239 Ga. 292, 297, 236 S.E.2d 637 (1977).

HUNSTEIN, Justice, dissenting in part.

> Now, come with me to that scene of the crime. Imagine that night. Ms. McAfee is laying in bed asleep. She is violently awakened by somebody standing over her. Somebody grabbing at her. If you could imagine being asleep, and you wake up to hands tearing off your clothes. You wake up to hands grappling your body. And just as you wake up and realize what's going on, your clothes are ripped from you. Something is tied around your neck, and you are strangled.
>
> This is the argument the prosecution used to persuade the jury to sentence Pace to death. The prosecutor did not stop with Ms. McAfee but continued this argument when he invited the jury to imagine themselves in the place of the next victim:
>
> So come with me and think about [the next] crime scene. How would you feel in Ms. McClendon's situation? Again, to wake up with some man standing up over you choking the life out of you and pulling on your clothes.

**847 Any argument "which importunes the jury to place itself in the position of the victim for any purpose must be carefully scrutinized to ensure that no infringement of the accused's fair trial rights has occurred." (Citations and punctuation omitted.) *McClain v. State*, 267 Ga. 378, 383(3)(a), 477 S.E.2d 814 (1996). "The 'Golden Rule' argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75A AmJur2d, Trial, § 650, p. 260. See also *Hayes v. State*, 236 Ga.App. 617(3), 512 S.E.2d 294 (1999); *Horne v. State*, 192 Ga.App. 528(2), 385 S.E.2d 704 (1989). Georgia law has clearly and repeatedly disapproved the use of the golden rule argument by prosecutors in criminal cases. See, e.g., *Greene v. State*, 266 Ga. 439(19)(c), 469 S.E.2d 129 (1996); *McClain*, supra; *Burgess v. State*, 264 Ga. 777 (20), 450 S.E.2d 680 (1994); *Hayes*, supra; *Heller v. State*, 234 Ga.App. 630(4), 507 S.E.2d 518 (1998).

Where, as here, no objection was made to the prosecutor's golden rule argument, this Court must "determine whether there is a reasonable probability the improper argument changed the outcome of the sentencing proceeding. [Cit.]" *Carr v. State*, 267 Ga. 547, 556(8)(a), 480 S.E.2d 583 (1997). The majority dismisses this issue by peremptorily holding that "given the amount of evidence in aggravation, we do not conclude that this argument changed the result of the sentencing phase. [Cit.]" Majority opinion, Division 32(h). The problem with this conclusion, however, is that the jury was not contemplating whether to find Pace guilty or innocent, but whether to sentence Pace to death or impose a life sentence. While the amount of evidence of guilt may be so overwhelming that no reasonable probability exists that the use of a golden rule argument affected the outcome in the guilt-innocence phase, *Greene*,

Burgess, supra, the jury in the sentencing phase has moved beyond weighing evidence into weighing imponderables. When faced with the effect of an impermissible argument, the "amount of evidence" may ensure that confidence in the outcome of the ****509** guilt-innocence phase was not undermined; however, the impact of improper argument on a jury's consideration of mercy cannot be as easily quantified. "[T]he 'exercise of mercy ... can never be a wholly rational, calculated, and logical process. [Cit.]' " *Conner v. State,* 251 Ga. 113, 121, 303 S.E.2d 266 (1983).

In order to determine whether there is a reasonable probability that, but for an improper argument, a death verdict would not have been given, the reviewing court must evaluate the improper remarks in the context of the entire proceeding. *Brooks v. Kemp,* 762 F.2d 1383, 1413(V) (11th Cir.1985). In this case, the prosecutor deliberately***848** used an argument which was prohibited by well-established Georgia case law. The argument was neither isolated nor unintentional. The argument unambiguously invited the jurors to imagine themselves in the place of two crime victims. The improper argument was not mitigated by other arguments made by the State or by any instruction by the court. Compare *Ford v. State,* 255 Ga. 81(8)(i), 335 S.E.2d 567 (1985); *Brooks v. Kemp,* supra. Furthermore, the record in this case establishes that the jury was not so appalled by the crimes committed by Pace that they rejected out of hand any sentence other than death. Rather, the record establishes that the jury remained open to the possibility of a life sentence, as evidenced by the question they sent to the trial court during their sentencing deliberations regarding the possibility of a sentence of life without parole. See Majority opinion, Division 34.

The prosecutor's golden rule argument was dramatic in its details and was uttered for the purpose of prejudicing the jury against exercising mercy in its sentencing decision. See OCGA § 17-10-35(c)(1). While I support giving prosecutors wide latitude in their choice of style, tactics and language used in closing argument, Georgia law clearly prohibits prosecutors from urging jurors to imagine themselves in the victim's place. "Wide latitude" does not justify the prosecutor's impermissible use of the golden rule argument under the facts of this case.

Based on the State's deliberate and extensive introduction of a prohibited argument into the closing of Pace's capital sentencing hearing, the absence of any factors to mitigate that impermissible argument, and indicators that the evidence of Pace's guilt did not automatically predispose the jury to consider only a death sentence, I would hold that the prosecutor's use of the golden rule argument here undermined confidence in the outcome of the sentencing proceeding, i.e., that there is a " 'reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death.' [Cit.]" *Ford,* supra, 255 Ga. at 94, 335 S.E.2d 567. I would therefore conclude that the improper argument rendered Pace's capital sentencing hearing fundamentally unfair. *Brooks v. Kemp,* supra, 762 F.2d at 1416. Accordingly, I must respectfully dissent to the majority's affirmance of Pace's death sentence. I concur in the affirmance of Pace's convictions.

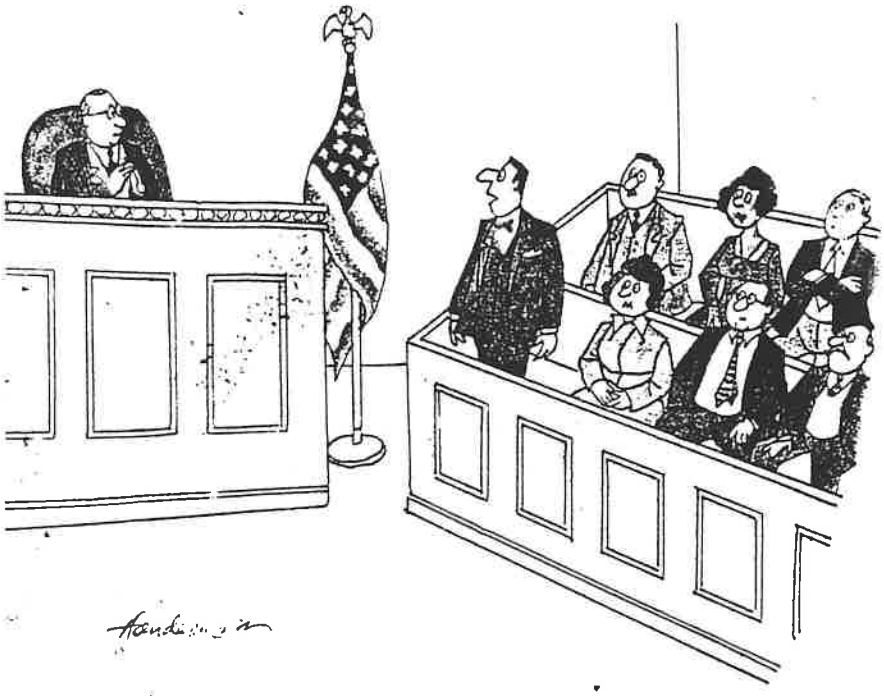
I am authorized to state that Presiding Justice FLETCHER joins this dissent.

APPENDIX

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); *DeYoung v. State,* 268 Ga. 780, 493 S.E.2d 157 (1997); *Raulerson v. State,* 268 Ga. 623, 491 S.E.2d 791 (1997); *Wellons v. State,* 266 Ga. 77, 463 S.E.2d 868 (1995); *Gary v. State,* 260 Ga. 38, 389 S.E.2d 218 (1990); *Pitts v. State,* 259 Ga. 745, 386 S.E.2d 351 (1989); *Isaacs v. State,* 259 Ga. 717, 386 S.E.2d 316 (1989); *Foster v. State,* 258 Ga. 736, 374 S.E.2d 188 (1988); *Blankenship v. State,* 258 Ga. 43, 365 S.E.2d 265 (1988); *Ross v. State,* 254 Ga. 22, 326 S.E.2d 194 (1985); *Devier v. State,* 253 Ga. 604, 323 S.E.2d 150 (1984); *Allen v. State,* 253 Ga. 390, 321 S.E.2d 710 (1984); *Waters v. State,* 248 Ga. 355, 283 S.E.2d 238 (1981).
Ga.,1999.

Pace v. State
271 Ga. 829, 524 S.E.2d 490
END OF DOCUMENT

Appendix E



"We find the defendant not guilty by virtue of insanity, ethnic rage, sexual abuse and you name it."

150

Appendix F

march 7, 1996

Judge Long,

Is it possible for a life sentence to be given eliminating any possibility of parole?

Linda C Provost
Jury Foreperson

Court Exhibit #7

Appendix G

733 Fed.Appx. 490
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Levi Jessie MEDINA, a.k.a.
Juan Perez, Petitioner-Appellant,
v.
SECRETARY, DEPARTMENT OF
CORRECTIONS, Respondent-Appellee.

No. 16-10332
|
Non-Argument Calendar
|
(May 7, 2018)

Synopsis

Background: Defendant petitioned for writ of habeas corpus claiming that state prosecutor's comments in closing argument denied his constitutional right to a fair trial under the Due Process Clause. The United States District Court for the Southern District of Florida denied the petition. Defendant appealed.

[Holding:] The Court of Appeals held that state prosecutor's characterization of defendant's story as being based on racial stereotype did not violate his right to a fair trial and entitle him to habeas relief.

Affirmed.

West Headnotes (2)

[1] **Criminal Law** Appeals to racial or other prejudice

State prosecutor did not err in closing argument by characterizing defendant's made-up story that murder victim drove away with a black man with gold teeth and braided hair as being based on a racial stereotype, and thus, defendant's due process right to a fair trial was not violated so as to entitle him to writ of habeas corpus. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

[2] **Habeas Corpus** Prosecutorial and police misconduct; argument

Assuming state prosecutor's remarks in closing argument that defendant's made-up story involving murder victim driving away with an unknown black man was based on a racial stereotype were improper, there was no evidence that they so infected the trial with unfairness as to make the resulting convictions a denial of due process as would entitle defendant to writ of habeas corpus; the two isolated comments were insufficient to render defendant's convictions fundamentally unfair or to justify a new trial, and defense counsel was able to directly rebut the contentions during his closing argument. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254.

2 Cases that cite this headnote

Attorneys and Law Firms

Levi Jessie Medina, Pro Se

Jill Kramer, Pam Bondi, Attorney General's Office, Miami, FL, for Respondent-Appellee

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:11-cv-20907-MGC

Before WILSON, JORDAN, and HULL, Circuit Judges.

Opinion

PER CURIAM:

Levi Jessie Medina, a Florida prisoner, appeals pro se the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. After a jury trial, Medina was convicted of: (1) attempted first-degree murder without discharging a firearm; (2) criminal mischief over $1,000.00; (3) tampering with physical evidence; and (4) display, use, threat, or attempted use of a firearm while committing a felony. Based on the prosecution's closing arguments at his trial, Medina

moved for a new trial, which the state court denied. In his § 2254 petition, Medina claims the prosecution's comments in closing argument denied his ***491** constitutional right to a fair trial under the Due Process Clause.

After careful review, we conclude that the state trial court's denial of Medina's claim that he was denied a fair trial was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. Accordingly, we must affirm the district court's denial of Medina's § 2254 petition.

I. BACKGROUND

A. Offense Conduct

This case involves the murder of a young man named Victor Espejo. After work on April 10, 2001, Espejo left his grandmother's house with plans to go to a birthday party for a girl who petitioner Levi Medina knew. Driving his 1998 white Pontiac Sunfire, Espejo met up with petitioner Medina and another man, Floyd Ruel, at Medina's house.

Espejo drove for the group. On their way to the party, they picked up a fourth man, Modesto Guzman—who brought along a .22 caliber pistol in a black purse—and the four purchased some alcohol.

The party ended just after midnight, and the group proceeded to Miami Beach. They parked in South Beach, met some girls, and stayed until 2:00 or 3:00 a.m. As they left the beach, Medina complained that there were too many people in Espejo's Pontiac car, pulled out the .22 caliber pistol from underneath his seat, and fired four or five shots out of his window. Ruel asked to be taken home and was dropped off around 3:30 a.m.

The next morning, Espejo's grandmother, Graciela Garcia, noticed that Espejo had not come home and decided to call the police. In an effort to find her grandson, Garcia contacted several of Espejo's friends and acquaintances, including Medina. Medina admitted that he was out with Espejo that night. Medina told Garcia that, at the end of the night, Espejo went to the Homestead neighborhood with "some little black guy" and that "they stayed on 27th Avenue and 14th or something like that."

Also the next morning, Ruel called Medina to talk about the girls they had met at the beach. Ruel later drove to Medina's house and noticed that Medina was acting strangely. When questioned about his behavior, Medina asked Ruel if he was wearing a wire and then admitted that he had done something bad.

A few days later, Medina confided in Ruel that Espejo was missing and that police found Espejo's car, which had been set on fire. Medina claimed that he learned this information from the news. Medina also told Ruel that after dropping him off, Medina, Guzman, and Espejo were at a gas station when "some black guy approached the car and was asking [Espejo] for a ride" in exchange for $40. Medina claimed that Espejo "sold him out" and decided to give the "black guy" a ride, while Medina and Guzman were left to walk home. In a conversation about two weeks later, Medina told Ruel that police were looking for Espejo and that, when they contacted him, Ruel should tell the "black guy story" but not mention the firearm they had in the vehicle that night.

When Medina was interviewed by police, he gave three different stories of what happened on the evening that Espejo disappeared.

In the first story, consistent with what he told Ruel and Garcia, Medina claimed that he and Guzman went into a gas station and that an unknown black male approached Espejo at the pump for a ride. Medina described this black man to police as 18–19 years old with two or three gold teeth, of average height, a thin build, and ***492** braided hair. In this first story, Medina and Guzman were forced to walk home.

In a second story, the three still went to a gas station, but Medina and Guzman showed the .22 caliber pistol to the unknown black male, who then stole the firearm and ran away with it. Medina claimed that, after buying gas, Espejo dropped Medina off at home and left with Guzman. Guzman came over to Medina's house the next morning and was driving Espejo's car. Presumably, Guzman had killed Espejo the night before, and so Medina and Guzman drove to the Everglades to retrieve Espejo's body.

As the police interview continued, Medina told a third story, where he confessed and admitted that the first and second stories involving an unknown black male were lies. In his verbal confession, Medina said that he, Guzman, and Espejo were headed to Miccosukee, Florida and stopped off to urinate. At this time, Medina pointed the .22 caliber pistol

gun at Espejo's head and squeezed the trigger twice. The gun jammed, so Guzman took it, cleared the chamber, and Guzman then shot Espejo in the head two times. Medina and Guzman later discarded Espejo's body in a dumpster and lit his car on fire. Espejo's body was never found.

B. Indictment

A Florida grand jury charged Medina with (1) first degree murder (Count 1), (2) criminal mischief over $1,000.00 (Count 2), (3) tampering with physical evidence (Count 3), and (4) display, use, threat, or attempted use of a firearm while committing a felony (Count 4). [1] The case proceeded to trial on November 28, 2007.

C. Closing Argument, the Jury's Verdict, and Sentencing

During closing arguments, the prosecution walked through what occurred on the night of April 10, 2001 and the events that followed, eventually arriving at the story told initially by Medina. The prosecutor recounted Medina's initial story about "this black guy," stating:

> He's got that story that he made up. That we went to this Amoco station and this black guy came out and he needed a ride and something about 40 dollars and I got dropped off and I had to walk home. First of all, it's an ugly story because it's sort of a racist—.

Defense counsel objected to this characterization, and the state trial court overruled the objection. The prosecution continued that Medina had made up an initial story that involved racial stereotyping:

> So it's a racist stereotype, maybe that's why he said, you know, some young black guy, and eventually gets a full description, body height, gold teeth, all sorts of stuff. But he admits that the same story is a complete, complete lie when the cops talk to him. He tells them I made that all up, it never happened, there was no such stuff. But that's the story he sort of weaves through all of his conversations with everybody.

In his closing argument, Medina's defense counsel later responded that there was nothing racial about the fact that his client had initially referred to a black guy:

> But one thing we do know, ladies and gentlemen, that [Espejo] was the driver of the vehicle and [Espejo] dropped [Ruel] at home. But once [Espejo] left the gas station, there was nothing racial about the fact that there was a black guy. There was nothing racial. I'm black. ***493** I'm his lawyer, so there's no big deal there ladies and gentlemen, but that black guy left after that. So who did it, that guy who left with [Espejo].

Defense counsel also moved for a new trial based on the prosecution's comments, which the state trial court denied. After deliberations, the jury returned a verdict finding Medina guilty on all four counts, but as to Count 1 only for a lesser-included offense of attempted first degree murder without discharging a firearm. The state trial court imposed concurrent prison sentences of 30 years on Count 1, 5 years on Counts 2 and 3, and 15 years on Count 4.

D. Procedural History

Medina appealed his convictions to the District Court of Appeal of Florida, Third District ("Third DCA"), which summarily affirmed on May 13, 2009. See Medina v. State, 8 So.3d 1275 (Fla. Dist. Ct. App. 2009). Medina did not raise the present issue in his direct criminal appeal.

On May 25, 2010, Medina filed with the Third DCA a petition alleging ineffective assistance of his appellate counsel under Florida Rule of Appellate Procedure 9.141(d), which the Third DCA later denied in an unpublished summary disposition. See Medina v. State, 51 So.3d 469 (Fla. Dist. Ct. App. 2010). On January 4, 2011, Medina filed a petition for rehearing, which was denied. On March 16, 2011, Medina filed the present § 2254 petition.

In his § 2254 petition, Medina argued inter alia that "the State inappropriately referred to [him] as a 'racist' by elaborating to the jury the story that he had originally presented to the authorities regarding the 'black male' involved in the possible offense."[2] The district court held an evidentiary hearing on Medina's § 2254 petition. At that hearing, Medina's counsel argued that, although the prosecution's comment did not "outright call [Medina] a racist," it inferred that Medina's story involved stereotyping a black male and that this prejudiced Medina. The government argued that the comment was appropriate to rebut Medina's defense that an unknown black male killed Espejo and that defense counsel cured any prejudice by arguing that Medina could not be racist because his counsel was also a black male.

After the hearing, the district court issued an order denying Medina's § 2254 petition in its entirety and declining to grant a certificate of appealability ("COA") on any of Medina's claims. As to the prosecution's comments characterizing Medina's story as racist, the district court found that they "were [not] made with the intent of categorizing [Medina] as a racist" and that "any damage that may have resulted ... was ameliorated soon thereafter by defense counsel's closing statement, wherein he directly addressed the issue." The district court concluded that the state trial court's decision to deny Medina a new trial was not contrary to, or an unreasonable application of, clearly established law and that it did not involve an unreasonable determination of the facts in light of the evidence.

Medina appealed. This Court issued a COA as to the single issue of whether, during closing arguments, the prosecutor improperly inferred that Medina was a racist and thereby prejudiced Medina's substantial rights.

*494 II. DISCUSSION

A. § 2254 Review

Under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts may only grant habeas relief on claims previously adjudicated in state court if the adjudication:

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

28 U.S.C. § 2254(d). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Lockyer v. Andrade, 538 U.S. 63, 71, 123 S.Ct. 1166, 1172, 155 L.Ed.2d 144 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 1499, 146 L.Ed.2d 389 (2000)); see Parker v. Matthews, 567 U.S. 37, 47–49, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) (holding that the Sixth Circuit erred by applying its precedent on prosecutorial misconduct instead of the Supreme Court's standard in Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986)).

We review de novo the district court's decisions about whether the state court acted contrary to clearly established law, unreasonably applied federal law, or made an unreasonable determination of fact. Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1107 (11th Cir. 2012). However, AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Id. (quoting Hardy v. Cross, 565 U.S. 65, 66, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011) (per curiam)).

B. Clearly Established Law on Prosecutorial Misconduct

The "clearly established Federal law" for purposes of prosecutorial misconduct was set forth in Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). See Parker v. Matthews, 567 U.S. 37, 45–49, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32 (2012) (stating that Darden was the "clearly established Federal law" for purposes of prosecutorial misconduct). In Darden, the Supreme Court held that improper comments by a prosecutor require a new trial only if they "so infected the [original]

trial with unfairness as to make the resulting conviction a denial of due process." 477 U.S. at 181, 106 S.Ct. at 2471 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); see Parker, 567 U.S. at 48–49, 132 S.Ct. at 2155 (noting that Darden provides a "highly generalized" approach to be applied flexibly on a case-by-case basis). It is not enough that the prosecutor's comments were "improper," "offensive," "undesirable[,] or even universally condemned." Darden, 477 U.S. at 181, 106 S.Ct. at 2471. Rather, the prosecutor's misconduct must render the defendant's conviction "fundamentally unfair." Id. at 183, 106 S.Ct. at 2472.

C. Arguments and Analysis

[1] On appeal, as he did before the district court, Medina argues that his constitutional right to a fair trial was violated when, during closing argument, the prosecution twice characterized Medina's story about "some black guy" driving away with Espejo as "racist" or based on a "racist stereotype." Medina argues that these ***495** comments were improper to the point of justifying a new trial because they effectively inferred that Medina himself was a racist and race was not an issue.

The problem for Medina is that when quoted in context, the prosecutor was recounting how Medina had first told a complete lie that was an ugly, made-up story about victim Espejo in his car at the gas station leaving with an unknown black man with gold teeth and braided hair and making Medina walk. Furthermore, the prosecution did not call Medina a racist during closing arguments but fairly characterized Medina's made-up story as based on a "racial stereotype" to imply that this "black guy" was the one who left with Espejo, and thus must be who killed him, not Medina. The prosecution did not err in characterizing Medina's lie about who left with Espejo at the gas station.

[2] Even assuming that the remarks were improper, there is no evidence that they "so infected the trial with unfairness as to make the resulting conviction[s] a denial of due process." Darden, 477 U.S. at 181, 106 S.Ct. at 2471. These two isolated comments made during closing argument were insufficient to render Medina's convictions "fundamentally unfair" or to justify a new trial. Id. at 183, 106 S.Ct. at 2472. Moreover, defense counsel was able to, and did, directly rebut these contentions during his closing argument. In any event, Medina points to no Supreme Court authority indicating that the prosecution's arguments based on Medina's made-up story warrant relief under § 2254. [3]

In light of these considerations, Medina has not shown that the state trial court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or that it was based on an unreasonable determination of the facts in light of the evidence presented to the state court.

III. CONCLUSION

For all of these reasons, we affirm the district court's denial of Medina's § 2254 petition.

AFFIRMED.

All Citations

733 Fed.Appx. 490

Footnotes

1 Co-defendant Modesto Guzman was charged in Counts 2 and 3 of this indictment, which also charged Guzman alone in a fifth count.

2 Medina's petition asserted five claims: (1) due process violations for failure to prove that Espejo's disappearance was the result of murder; (2) prosecutorial misconduct for appealing to the sympathy of the jury; (3) Sixth Amendment violations for the introduction of an arrest form containing hearsay statements

about Guzman's involvement in the crime; (4) prosecutorial misconduct for shifting the burden during closing argument; and (5) prosecutorial misconduct for allegedly calling Medina a racist during closing argument.

3 In his brief, Medina also argues that the state trial court should have given a curative jury instruction, but we cannot find in the record where Medina's defense counsel requested one. Rather, Medina's counsel asked for a mistrial. Even so, Medina has not shown the state trial court's denial of his motion for a new trial was an unreasonable application of clearly established federal law, and thus no curative instruction was required.

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Appendix H

2022 WL 18935854
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Rickey L. MCGEE, Petitioner—Appellant,
v.
Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

No. 22-10188
|
FILED September 8, 2022

Application for Certificate of Appealability from the United States District Court for the Northern District of Texas, USDC No. 3:20-CV-1415, Brantley David Starr, U.S. District Judge

Attorneys and Law Firms

Rickey L. McGee, Huntsville, TX, Pro Se.

Georgette Dudly Hogarth, Office of the Attorney General, Austin, TX, for Respondent—Appellee.

Opinion

Andrew S. Oldham, United States Circuit Judge

***1** ORDER:

A Texas jury convicted Rickey L. McGee of two counts of aggravated robbery after he pulled a gun on two people and took their wallets. A jury sentenced McGee to 60 years in prison. An intermediate Texas court affirmed his conviction and sentence on direct appeal. The Texas Court of Criminal Appeals ("TCCA") subsequently denied discretionary review. McGee then sought state habeas relief, which was denied by the TCCA without written opinion. Afterward, McGee filed a federal habeas petition in the Northern District of Texas. The district court denied relief in February 2022. McGee seeks a certificate of appealability ("COA") under 28 U.S.C. § 2253(c) so that he may challenge the judgment of the district court.

McGee's federal habeas petition alleges, *inter alia*, Fourth Amendment violations; insufficient evidence; violation of his speedy trial right; violation of *Brady v. Maryland*, 373 U.S. 83 (1963); other prosecutorial misconduct; and ineffective assistance of trial and direct appellate counsel. In a 43-page memorandum later accepted by the district court, the magistrate judge found that many of McGee's claims were procedurally defaulted. In that same memorandum, the magistrate found that McGee's Fourth Amendment claim was barred by *Stone v. Powell*, 428 U.S. 465 (1976), and that the remaining claims could not clear the relitigation bar enacted by the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d).

To obtain a COA, McGee must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Where the district court denies relief on the merits, § 2253(c)(2) requires the applicant to show that reasonable jurists "would find the district court's assessment of the constitutional claim[ ] debatable or wrong." *Slack*, 529 U.S. at 484. It is not enough to show that the underlying claim in a vacuum is debatable; rather, the prisoner must show that the district court's application of § 2254(d)'s relitigation bar to that claim was debatable or wrong. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where the district court denies relief on procedural grounds, § 2253(c)(2) requires the applicant to show that jurists of reason would debate *both* the procedural ground *and* the underlying constitutional ground. *Slack*, 529 U.S. at 484.

McGee fails to make the required showing. For example, he argues the jury would not have convicted him if certain evidence had been excluded—which purportedly constitutes "actual innocence" and excuses his procedural default. But even ignoring the ample evidence supporting McGee's guilt, the actual innocence excuse for procedural default requires "factual innocence," not "mere legal insufficiency." *Bousley v. U.S.*, 523 U.S. 614, 623 (1998). For further example, when discussing claims governed by *Brady v. Maryland*, 373 U.S. 83 (1963), *Barker v. Wingo*, 407 U.S. 514 (1972) or by *Strickland v. Washington*, 466 U.S. 668 (1984), McGee focuses on how a court could have plausibly found for him. But the relevant inquiry is whether jurists of reason could debate the district court's application of § 2254(d)'s relitigation bar. *Miller-El*, 537 U.S. at 336; 28 U.S.C. § 2254(d).

***2** Finally, McGee argues that inflammatory remarks from the prosecution in McGee's *sentencing phase* entitle him to relief. McGee disputes the magistrate's conclusion that this claim was procedurally defaulted due to McGee's failure to make a contemporaneous objection when the disputed remarks were made. Jurists of reason could not debate this procedural problem. But even if they could, jurists of reason could not debate the claim on the merits. *See* *Slack*, 529 U.S. at 483. The Supreme Court has suggested that derogatory remarks by prosecutors may infringe a defendant's due process and fair trial rights. *See* *Darden v. Wainwright*, 477 U.S. 168, 180–83 (1986) (denying relief when a defendant was called an "animal" during the guilt phase). *Darden*'s dicta of course cannot clearly establish the law under § 2254(d). *See* *White v. Woodall*, 572 U.S. 415, 419 (2014) ("Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." (quotations and alteration omitted)). And in any event, McGee does not explain why *Darden*'s dicta —which focused on whether inflammatory remarks could prejudice the way the jury evaluated the defendant's guilt —would apply with equal force after the jury convicts the defendant and proceeds to sentencing. And even if *Darden* extends past conviction, it is not enough to point to colorful remarks and demand relief, even if those remarks could be "universally condemned." *Id.* at 181. Instead, a defendant must show that the proceeding was "infected with unfairness." *Ibid.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). And even if McGee could show all of that, he would also have to show that the Supreme Court somehow so clearly established the law that every fairminded jurist would know that the state court erred in rejecting McGee's claim, *see* 28 U.S.C. § 2254(d), and that the district court's contrary application of § 2254(d) was debatable. McGee cannot come close to making these showings.

IT IS THEREFORE ORDERED that Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion to proceed in forma pauperis is DENIED AS MOOT.

All Citations

Not Reported in Fed. Rptr., 2022 WL 18935854